NORTH CAROLINA REPORTS

VOL. 38

CASES IN EQUITY ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

NORTH CAROLINA

FROM DECEMBER TERM, 1843, TO JUNE TERM, 1845, BOTH INCLUSIVE

REPORTED BY

JAMES IREDELL

(3 Ire. Eq.)

ANNOTATED BY

WALTER CLARK

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JUDGES

OF THE

SUPREME COURT OF NORTH CAROLINA,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. THOMAS RUFFIN, CHIEF JUSTICE.
HON. JOSEPH J. DANIEL.
HON. WILLIAM GASTON.*
HON. FREDERIC NASH.†

ATTORNEY-GENERAL:

SPIER WHITAKER, ESQ.

SOLICITOR-GENERAL:

CADWALLADER JONES.

REPORTER:

JAMES IREDELL.

CLERK:

EDMUND B. FREEMAN, ESQ.

* Died January, 1844.
† Appointed June, 1844.

JUDGES OF THE SUPERIOR COURTS.

HON. THOMAS SETTLE.....Rockingham County.
HON. JOHN M. DICK.....Guilford County.
HON. JOHN L. BAILEY.....Orange County.
*HON. FREDERIC NASH.....Orange County.
HON. RICHMOND M. PEARSON.....Davie County.
HON. WILLIAM H. BATTLE.....Orange County.
HON. MATTHIAS E. MANLY.....Craven County.
†HON. DAVID F. CALDWELL.....Rowan County.

SOLICITORS.

DAVID OUTLAW..... First Circuit..... Bertie County.
HENRY S. CLARK.....Second Circuit..... Beaufort County.
SPIER WHITAKER..... Third Circuit.....Halifax County.
CAD. JONES.....Fourth Circuit..... Orange County.
ROBERT STRANGE.....Fifth Circuit.....Cumberland County.
HAMILTON C. JONES.....Sixth Circuit.....Rowan County.
JNO. G. BYNUM.....Seventh Circuit.....Rutherford County.

* Until after the Spring Circuit, 1844.
† After the Spring Circuit, 1844.

CASES REPORTED.

The letter v follows the name of the plaintiff in each case.

CASES CITED.

W

EQUITY CASES

ARGUED AND DETERMINED IN

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1843

BENNETT HESTER, Admr., Etc., *v.* HAMILTON HESTER and others.*

1. Where an account is ordered to be taken of the administration of an estate, the commissioner should make a statement of the bonds, notes or other securities for debts exhibited by the administrator as part of the estate; and the administrator, unless some special cause be shown to the contrary, has a right to deliver over these to the parties interested, with a proper endorsement or other authority to collect them, as part of the assets in his hands.
2. The court will not charge an administrator with interest on moneys *bona fide* collected and kept for the benefit of his *cestuis que trust*, unless there be plain proof of misconduct in such collection and custody.
3. Nor will the court make a test of the account, so as to charge interest on both the principal and interest, found to be a balance due from the administrator upon an account taken, when the suit was afterwards continued for the purpose of making new parties.
4. An administrator with the will annexed, in his account with the residuary legatees, is entitled to charge interest from the probate of the will on a legacy *then* payable, and interest after two years on a legacy, where no time is prescribed for its payment.
5. Where in a suit by an administrator with the will annexed, against the legatees for a settlement of the estate, it is stated in the bill and admitted by the answer, that the widow of the testator had dissented from the will, and, under a decree of a competent court, had received her full share of the estate, the administrator can not be allowed a credit for any alleged balance due the widow beyond the amount specified in that decree.
6. Counsel fees paid by an administrator fairly and on account of the estate, are to be allowed him in his settlement.

The bill in this case was filed by the administrator, with the will annexed, of Benjamin Hester against the children of several brothers and sisters of the testator, claiming (10) under a particular bequest in the will, and the children

*NOTE.—The opinion in this case was delivered at June Term, 1843.

of the deceased's brother Francis, who were the residuary legatees and devisees of the testator; and thereby it was prayed that the Court would settle the construction of the will, declare the rights of these conflicting claimants, and have the accounts of the estate and the administration thereof taken, the plaintiff offering to pay unto the persons declared entitled whatever might be found due to them. At December Term, 1842, (see the report of the case, *Hester v. Hester*, 37 N. C., 330), an interlocutory decree was made, whereby the construction of the will was settled, the nephews and nieces claiming under the particular bequest declared entitled to but the sum of £100, to be equally divided among them, and the children of Francis Hester, deceased, entitled as residuary legatees and devisees, to the great bulk of the estate; and whereby it was further ordered that the cause be referred to Mr. Commissioner Freeman to take the accounts of the estate and the administration thereof. The report of the commissioner was made at this term, and to that report both the parties, that is to say, the administrator and the residuary legatees and devisees, filed exceptions, which now came on to be heard.

Exceptions on the part of the plaintiff:

The administrator excepts to the report of Mr. Commissioner Freeman, and for cause of exception showeth the following errors, to wit:

1st. Because the administrator is not credited by the amount of judgments, bonds, notes, etc., referred to in his affidavit filed in this cause. (Note.—The affidavit stated that these judgments, bonds, notes, etc., which were particularly specified, constituted a part of the assets in his hands.)

2d. Because the exceptor is erroneously charged with interest upon the sums of $1,662 and $3,130 deposited in the Bank of the State in June and July, 1841, after the said sums were received by the administrator, although no profits were
(11) made thereon, and no use made of the said sums pending this suit.

3d. (As to the allowance of commissions by the commissioner, which the Court overruled, believing the allowance to be reasonable.)

4th. (As to a charge of interest. Disallowed because the exception was not founded in fact.)

5th. Because in crediting the exceptor for the amount of a legacy paid to William Eaton for Mr. Hudgins, the interest is omitted, which Hudgins claims to be due to him, and which ought to be deducted from the residuum.

6th. Because there are sundry special legacies in the said will

not credited, though the exceptor will be obliged to pay the same, especially a legacy to ——— Worral, and a legacy of £100 to the testator's brothers' and sisters' children.

7th. Because the commissioner hath adopted an erroneous rule for ascertaining the share of Mary D. Hester, (widow of the testator) in the said estate—and, secondly, after adopting the rule, he doth make great mistakes in the application. The exceptor hath no interest in this beyond his liability to the said Mary's estate.

Exceptions on the part of the defendants, the residuary legatees and devisees.

The defendants Garland Hester, etc., except to the report of Mr. Commissioner Freeman, and for cause of exception show,

First. That the commissioner has credited the administrator with the sum of $2,002.33, as now due and owing from the said administrator to the personal representatives of Mary D. Hester, deceased, the late widow of the testator, Benjamin Hester, deceased: Whereas, it is alleged in the bill and admitted by the answer of these defendants, that before the filing of the bill the said widow had dissented from the will, had been allowed her dower and had her share of the personal estate allotted to her, as upon an intestacy—that the administrator, the plaintiff, had settled with her accordingly, and at the filing of the bill held all the remaining property for the benefit of other legatees and devisees named in the will—and, therefore, the said (12) defendants humbly insist that the said credit is altogether erroneous.

Second. That the said allowance of $2,002.33, if not altogether erroneous, is certainly erroneous for about the sum of $1,800, parcel thereof, because so much thereof is made up by allowing to the widow a share of the rents of the lands, hires of the slaves and interest and increase of the other effects, accrued after the widow's share of the whole estate had been assigned, allotted and put into her possession.

Third. That the commissioner has not made a rest in his account, as of 1 May, 1841, or about that time, and has not charged the plaintiff with interest on the whole amount of principal and interest due the estate on that day, after deducting therefrom the legacies which that amount was liable to pay; which rest and charge, under the circumstances of the case, the said commissioner ought, as the defendants humbly submit, to have made.

Fourth. That the commissioner has allowed the plaintiff out of the residue, in accounts with these defendants, the sum of $56, paid to W. H. H. Esquire, his counsel—which sum, how-

ever reasonable, and even inadequate as between the plaintiff and his said counsel, is not a proper charge against these defendants, full counsel fees previously paid out having been also allowed by the said commissioner to the plaintiff, and the plaintiff being not a mere trustee asking advice of the court in the settlement of his accounts, but also a party in interest, claiming for himself beneficially and against these defendants.

Fifth. (This exception relates to the commissions allowed the administrator and was overruled, the court deeming the commissions allowed reasonable.)

W. H. Haywood, Jr., for the plaintiff.
Badger and *Iredell* for the defendants.

GASTON, J. The commissioner finds a large balance to be due from the plaintiff, but states "that the administrator
(13) filed with the clerk a large amount of bonds belonging to the estate, and required of the commissioner that he should list them and calculate the interest due on each, and that this has been declined as not coming within the order of the Court," and the *first* of the plaintiff's exceptions is, for that the commissioner hath given the plaintiff no credit for these bonds and other securities for debt in the account. We think the commissioner has erred in supposing that the order of the Court does not require a statement of the bonds, notes or other securities for debts, which constitute a part of the estate. The administrator, unless there be some special cause shown to the contrary, has a right to deliver over these to the defendants, with a proper endorsement or other authority to collect them, as a part of the assets in his hands. This exception is therefore allowed, so far as to recommit the report to the commissioner for the purpose of examining the securities, and with instructions to give the plaintiff a credit for such of them as belong to the estate, upon their being delivered as aforesaid, unless some valid objection be shown to them on the part of the defendants.

The *second* exception of the plaintiff and the *third* exception of the defendants relate to the same matter and will be considered together. It is stated in the report, that the account was heretofore made up to 1 May, 1841, at which time it was expected by the parties that a final decree would be rendered at the approaching June Term of this court—that at that term the cause was remanded, on the motion of the plaintiff, to the Court of Equity for the county of Granville, where it remained until the last term (December Term, 1842) of this court—that the commissioner, believing that no necessity existed for a

rest in the account, carried the balance into the statement commencing May 1st, 1841, but calculated interest on the principal money only. The commissioner further states, that the administrator deposited in bank on 5 June, 1841, $1,652, and on 1 July, 1841, $3,130, and that, on taking the account he claimed that interest on these sums should not be charged against him, alleging that he collected them, expecting that the (14) account would be finally closed at June Term, 1841— that the agent of the defendants insisted that these sums were unnecessarily and wantonly collected, and that interest ought to be charged thereon—and that the commissioner, being of opinion with the defendants, hath not noticed these deposits in his account. The plaintiff excepts to this part of the report, because the plaintiff is charged with interest on these sums, and the defendants except to it also, because the commissioner did not make a rest in his account, as of 1 May, 1841, or about that time, and has not charged the plaintiff with interest on the whole amount of principal and interest, then stated as due. The Court is of opinion, that the exception so taken by the plaintiff ought to be allowed, and, of course, the exception of the defendants disallowed. It does not appear to the Court, upon the examination of the affidavits, that these collections and deposits were not made in perfect good faith and in the full expectation that the cause would be definitely settled during the term of the Court, when the deposits were made, and it is positively sworn by the plaintiff, and this statement is not denied on the part of the defendants, that the deposits were made to the credit of the plaintiff as administrator, and have never since been used by him. The Court knows, that the remanding of the cause was made at the suggestion of the Court, and because the Court deemed it advisable that the pleadings should be amended and the widow be also made a party defendant to the cause. Wherefore the cause was retained so long in the court below, or wherefore the suggested amendments were not then made, does not appear to the Court, except that on the hearing of the cause it was admitted by the counsel on both sides, as is set forth in the decree of the last term, that the widow had in the meantime died. It was in the power of either of the parties, after the cause was remanded, to quicken the proceedings therein, to or have a special order made in relation to the money so deposited in Bank; and it is not the usage of the Court to charge a trustee with interest on moneys *bona fide* collected and kept for the benefit of his *cestuis que trust,* unless there (15) be plain proof of misconduct in such collection and custody.

The *third* exception of the plaintiff and the *fifth* exception of the defendants are both disallowed, because the Court is satisfied that the amount allowed by the commissioner to the plaintiff as commissions is, on the whole, reasonable and just.

The *fourth* exception of the plaintiff, for that the interest after May, 1841, was computed upon a mistaken amount of principal, is disallowed, as unfounded in fact. The only instances, in which any interest has been converted into principal, are where such interest has been paid to the administrator. After it was so paid, it became principal in his hands.

The *fifth* exception of the plaintiff is allowed. It appears from the receipt of Mr. Hudgins, given on account of his legacy, that there was an express reservation made of his claim to interest thereon. The claim is well founded, for the testator directs the legacy to be paid upon the probate of his will, and therefore the legacy draws interest from that time.

The *sixth* exception is allowed also. The administrator, if he has not paid, is bound to pay the legacy to Mr. Worrall and the legacy of £100 to the testator's nephews and nieces, with interest on the first from the probate of the will, because it was *then* payable, and on the other from the end of two years thereafter.

The *seventh* of the plaintiff's exceptions it becomes unnecessary to examine, for the reasons stated in considering the *first* exception taken by the defendants. That exception is, for that the commissioner has credited the administrator with the sum of $2,002.33, as now due and owing from the said administrator to the personal representatives of Mary D. Hester deceased, the widow of the testator, whereas it is alleged in the bill and admitted by the answers of the defendants, that, before the filing of the bill, the said widow had dissented from the will, had been allowed her dower and had her share of
(16) the personal estate allotted to her as upon an intestacy; that the administrator had settled with her accordingly, and, at the filing of the bill, held all the remaining property for the benefit of the other devisees and legatees under the will. The pleadings do, as set forth in this exception, contain the allegations and admissions as above set forth; and, therefore, in this state of the pleadings, it can not be admitted to the plaintiff to allege, that, besides what has been so allotted to the widow and paid to her for her interest in the estate of her deceased husband, a further sum is due, which ought to have been allotted to her. It is alleged, indeed, that the allotment so made was *partial* only, and included the widow's dower and her share of the negroes of her deceased husband, but no part

of his money, choses in action and perishable property. Were we at liberty to indulge in conjecture, we might think this allegation correct; for it does seem very extraordinary, if the allotment were intended to be a complete one, that in it not a cent of money, not a note or bond, nor any other article of personal property is set apart for the widow, but only negroes. But it was made in pursuance of a decree upon the petition of the widow to allot unto her her dower and her share of the personal estate of her deceased husband; it purported to be such an allotment, and it has been accepted and confirmed by the Court as such. It was because of the difficulties thus presented in the way of ascertaining what ought to have been allotted to the widow, that the Court, when the cause was heretofore brought on for hearing, suggested that it should be remanded, the proper amendment made in the pleadings, and the widow made a party to the cause. But the cause was brought back without any amendment to the pleadings or addition of parties and so heard. The objections now made by this exception to the credit allowed to the administrator, for this *additional* sum to complete the widow's share of her husband's estate, must be sustained as valid. The *first* exception of the defendants is therefore allowed.

The *second* of their exceptions it becomes unnecessary to consider, as it goes but to a part of the item embraced in the former exception.

The *fourth* of the exceptions on the part of the de- (17) fendants is disallowed, because the disbursements therein and thereby excepted to were made fairly and on account of the estate.

The report, so far as the same has not been excepted to, and in respect to the matters embraced in the exceptions which have not been allowed, is confirmed. It is recommitted to the commissioner to be revised and corrected, in respect to the matters wherein the exceptions of either party have been allowed, and to complete the account.

PER CURIAM. ORDERED ACCORDINGLY.

Cited: Fairbairn v. Fisher, 58 N. C., 387; *Whitford v. Foy,* 65 N. C., 276; *Pickens v. Miller,* 83 N. C., 548; *Young v. Kennedy,* 95 N. C., 267; *Kelly v. Odum,* 139 N. C., 280.

WILLIAM ARNOLD *v.* BISHOP HICKS.*

The sureties for the purchase-money of land, sold by a clerk and master under a decree of a Court of Equity, where the title is retained until the purchase-money is paid, have a right, upon the insolvency of the principal and their own payment of the money, to have the land sold for their reimbursement.

This cause was removed from Randolph Court of Equity at Fall Term, 1842, to the Supreme Court on the affidavit of the plaintiff.

The bill, which was filed in February, 1839, stated that in the year 1836, upon the petition of the heirs of one Smitherman, a decree was made by the Court of Equity for the County of Randolph for the sale of a certain parcel of land situate in that county, for the purpose of partition; and that, at the sale made by the Clerk and master in conformity to the decree, the defendant Hicks became the purchaser on twelve months' credit at the price of $174.75, upon the payment of which
(18) the Clerk and Master was to make him a conveyance—that for the purchase-money the defendant gave his bond to the Clerk and Master, and the plaintiff, Arnold, was his surety therein—that, at the expiration of the credit, and upon the failure of the defendant to pay the debt and the demand of the Clerk and Master, the plaintiff discharged the bond and took it up. The bill further charges, that when the plaintiff became surety, as before stated, the defendant Hicks was in doubtful circumstances, and, that as an inducement to the plaintiff to become his surety, he agreed, that if he, Hicks, should not pay the bond at its maturity, then the plaintiff, upon making the payment, might take the land and receive a conveyance from the Clerk and Master. And the bill prays, that accordingly the Clerk and Master may be decreed to convey the legal title to the plaintiff, or, if not, that the land may again be sold, and out of the proceeds of sale the sum paid by the plaintiff be reimbursed to him, together with interest and the costs of this suit.

The Clerk and Master, as well as Hicks, (was made a party defendant, and in his answer admits the payment of the bond by the plaintiff and submits to any decree the Court may make. The answer of Hicks admits all the allegations of the bill except as to his insolvency and the special agreement charged

*NOTE.—The opinion in this case was delivered at December Term, 1842.

by the plaintiff, which he expressly denies. This answer further alleges that the land is of greater value than the purchase-money and interest; and insists, that the plaintiff is entitled to nothing more than to have the money paid to him. To this answer there was a replication. Depositions were taken and the cause set down for hearing upon the bill, answers, proofs and exhibits.

Mendenhall for the plaintiff.
No counsel for the defendant.

RUFFIN, C. J. The proofs do not establish any distinct agreement, respecting the conveyance of the land by the Clerk and Master. It rather appears, that there was a conversation, that the purchase should be made for these (19) two parties jointly. But it does not appear clearly, that even that was concluded on; and if it had been, it is a different contract from that stated in the bill, and could not be enforced in this proceeding. But, although the Court can not decree a conveyance to the plaintiff, upon the footing of an agreement to that effect, yet he is entitled to have a resale of the premises, unless the defendant shall, within a reasonable period, pay the debt, interest and costs. *Green v. Crockett*, 22 N. C., 390. There must accordingly be an account ordered of what is due to the plaintiff in the premises, and a declaration that he is entitled to have the same raised out of the land by a sale.

PER CURIAM. REFERENCE ORDERED.

LEWIS SASSER *v.* ALLEY JONES, Admx. of ARTHUR JONES.

1. On a bill for an injunction and relief against a judgment at law, when a fact in issue between the parties, as, for instance, the delivery of a deed has been determined by the verdict of a jury and judgment of the court of law between the same parties, the Court of Equity will not, unless under peculiar circumstances, retry it.
2. A father, having a number of children, by deed conveys more than half of his estate to his son A. Afterwards the father makes, by deed of settlement, an equal division of all his estate (including what had been conveyed to A) among all his children, at the execution of which A, whose deed was not known to the other children, is present, and he assents thereto, as well as to the actual division sub-

sequently made by trustees appointed by the deed of settlement for that purpose: *Held*, that A could not in equity set up his prior deed in opposition to the settlement so made by his assent. Especially could he not do so, when, at the time of such settlement, he purposely concealed the existence of the prior deed to himself.

This cause was transmitted by consent of parties from Wayne Court of Equity at Fall Term, 1842, to the Supreme Court for hearing. The facts are fully stated in the opinion delivered in this Court.

(20) *Henry* for the plaintiff.
J. H. Bryan and *Mordecai* for the defendant.

GASTON, J. This bill was filed on 20 February, 1838, and in it the plaintiff, Lewis Sasser, sets forth that Arthur Jones, senior, of the county of Wayne, was in his lifetime possessed of a large real and personal estate, and that, being old and extremely infirm, he was desirous to make a settlement of all his estate, whereby, after securing a provision to himself for a comfortable support during the residue of his life, he might, subject to that provision, divide the whole in equal portions between his five children, viz, Arthur Jones, Jr., Lydia Jernagan, wife of Richard Jernagan; Sarah Langley, wife of Bryan Langley; Nancey Howell, wife of Cullen Howell; and Charlotte Smith, wife of Saunders Smith, and his granddaughter, Polly Sasser, the wife of the plaintiff, for and during the life of said Arthur, and from and after his death it might be equally divided between his said children and grandchild absolutely and forever. The plaintiff further sets forth that, for the purpose of carrying this intention into execution, the said Arthur Jones, Sr., Arthur Jones, Jr., Richard Jernagan, Bryan Langley, Cullen Howell, Saunders Smith and Lewis Sasser, did, on 11 August, 1829, execute a certain deed (whereof a copy is annexed to and made part of the bill of complaint), of which the material provisions are as follows:

The instrument begins thus: "I, Arthur Jones, Sr., do agree and make the following propositions, viz: to divide my estate between my five children, namely, Arthur Jones, Jr., Lydia Jernagan, Sally Langley, Nancy Howell and Charlotte Smith, and my granddaughter, Polly Sasser, in the following manner, divided by Sampson Lane, Micajah Cox, William Raiford, John Kennedy and John Wright, in equal lots, viz: I lend to my son Arthur Jones, Jr., the following property, his equal proportion in the division made by said committee, that may be attached to his drawn number, consisting of the

articles as follows." The articles so lent are then set forth and described, and consist of several fields called (21) by their respective names, and the following negroes: "Raiford, Milley and Mitchell, my grey mare and cripple mare, and the crop on the James Jones field and my Island field." In the same language the instrument proceeds to set forth the loan to the said Arthur Jones's, Sr., daughter, Lydia Jernagan, "consisting of the articles as follows," mentioning several fields by their names and "the following negroes: Martin, Amie, Guilford, Hannah, Dave, my horse mule for which *he* pays Cullen Howell five dollars on 1 January, 1831, and the crop on the Rye patch and crib field at said Fellows place. Next follows in the same words the loan to the daughter, Sally Langley, consisting of certain fields therein named, and "the following negroes: Luke, Phillis, Patsy, and Isaiah, and my Musgrove mare and the crop on the Coor place, for which *he* pays five barrels of corn to Cullen Howell out of the present crop, and five barrels to Arthur Jones, Jr." Next is the loan in the same words, except that it is described as her equal proportion in the division made by said committee that *is* "attached," not that may be attached, "to her drawn number, consisting of the following articles." These are described in certain fields by particular names and "the following negroes: Ben, Chaney and William, and my old horse and my crop on the house field as the Fellows place, and the Tom Coor orchard." The loan to Charlotte Smith, the youngest daughter, then follows in the same words as the last, "consisting of the following articles: the Sharper new ground, the lower field and Island field at the Fellows place, and the following negroes: Leah, Esther, Jack and Rose, and my big mare for which *he* pays Cullen Howell two dollars 1 January, 1831, and the crop on the corner field and the Sharper new ground for which he pays five barrels of corn to Arthur Jones, Sr." Then follows the loan to the granddaughter, the plaintiff's wife, Polly Sasser, in the same language, consisting of the following articles: "certain fields by name, and "the following negroes: Sam, Eliza and Nathan, and my grey mule for which *he* pays Cullen Howell five dollars on 1 January, 1831, and the crop on his own land and the broke up field." This instrument proceeds to declare the condition of the above loans (22) as follows: "that each of my children or their husbands, that is willing and will comply with the following terms, shall have and receive as above loaned, on condition that they pay me, Arthur Jones, Sr., annually what said committee think sufficient to support me, and that property I have secured for my

own use during my life, and to pay a note I, Arthur Jones, Sr., owe to Saunders Smith, he, Smith, discounting his proportion of said note and delivering it to said Arthur Jones, Sr., at or before the signing of this transcript; keep up all my fences on their aforesaid loaned parts of my lands, pay the tax of the negroes they have in possession, and equally the tax of all my lands; and if either of my children fail to comply with these terms or attempt in any way to conceal or make away of any of the above named property, it is and shall be in the power of said committee to investigate said offense; and if, on full investigation, should find him or her guilty of said offense, shall, two or more of said committee, take possession of such property loaned to him or her aforesaid, and dispose of it as I, Arthur Jones, Sr., direct; and I further promise and agree that this agreement shall continue in full force from year to year or until a majority of said committee shall find it advisable to alter or do away said agreement; and I further wish the above named committee to divide my property, both real and personal if I should not live to see the expiration of said loan, which loan is to stand in full force until 1 January, 1831, and as much longer as said committee, or a majority, think it advisable as above stated—all power resting, and forever to rest, in a majority of said committee—and I further enjoin it on my grandson-in-law, Lewis Sasser and his wife, Polly, to come and live with and cherish me in my old age, and see that the property which I reserve for my own use is properly managed, I being old and infirm and not able to attend to it myself." This instrument is sealed by Arthur Jones, Sr., Arthur Jones, Jr., Richard Jernagan, Bryan Langley, Cullen Howell,
(23) Saunders Smith and Lewis Sasser, and its execution attested by Calvin Coor and John Coor Pender. The plaintiff further sets forth in his bill that the parties who had executed the foregoing instrument, and the persons therein named as the committee, apprehending that the same might not fully carry into effect the wishes and intentions of the said Arthur Jones, Sr., agreed that a more perfect instrument should be prepared, which should vest the title of the property in the persons constituting the committee, and agreed to meet on the 15th of said month, when the more perfect instrument was to be ready, and then to execute the same and finish the division of what remained undivided of the property; and that, in pursuance of this agreement, such an instrument was prepared, and all the parties privy to the foregoing agreement met together, and that instrument so prepared was executed by the

said Arthur Jones, Sr., and Sampson Lane, Micajah Cox, William Raiford, John Kenneday and John Wright.

A copy of this instrument is annexed to the bill as a part thereof. The instrument purports to be an indenture executed between the said Arthur Jones, Sr., on the one hand, and the said Sampson Lane, Micajah Cox, William Raiford, John Kenneday and John Wright, "trustees of Arthur Jones, Sr., Lydia, wife of Richard Jernagan; Sally, wife of Bryan Langley; Nancy, wife of Cullen Howell; Charlotte, wife of Saunders Smith; and Polly Sasser, daughter of Polly, wife of Asa Jernagan, deceased"; it recites the inability of Arthur Jones, Sr., by reason of age and infirmity, to attend to his estate as formerly, and his agreement, for the advancement of his said children, to make over his property to the said trustees, so that they shall pay his debts and afford him a maintenance as thereinafter mentioned, and then witnesseth "that the said Arthur Jones, Sr., in order to carry said agreement into effect, and in consideration of the natural love and affection which he hath for and towards his above mentioned children, and of the provisions, covenants and agreements thereinafter mentioned by the trustees of the said children to be observed and performed, hath given, granted and assigned, and doth give, grant and assign all the property which he (24) now possesses ("which I now possess"), both real and personal; to have and to hold the said property unto the said trustees, their executors, administrators and assigns forever, without rendering any account or being therefor in any way accountable to the said Arthur Jones, Sr., for the same, and the said trustees for themselves, their heirs, executors and administrators, do (doth) covenant, promise, grant and agree to and with the said Arthur Jones, Sr., in manner and form following, that is to say: that they, the trustees of said children, their heirs, executors and administrators shall and will settle, pay, discharge and satisfy, or cause to be settled, paid, discharged and satisfied, all accounts, debts, judgments and demands of every nature and kind whatsoever now outstanding against or due from or payable by said Arthur Jones, Sr., or for the payment of which the said Arthur Jones, Sr., is or shall be liable or be held liable, either at law or equity, on account of anything hereafter had or done, and at all times hereafter to keep harmless and indemnified the said Arthur Jones, Sr., from all such accounts, debts, judgments and demands, and from all actions, suits and damages, that may to him or them arise by the reason of the nonpayment thereof; and moreover they, the said trustees of said children, shall and will annually during

the term of the natural life of the said Arthur Jones, Sr., pay to him whatever may be sufficient for his support or maintenance during life in a comfortable manner; the right and title of all my property to be vested in my trustees during my natural life, empowering my trustees to loan to each of my children an equal part of all my estate for such times as they may think best, and after my death to make an equal division of all my property, both real and personal, to my children as aforesaid; provided always, and upon these considerations, that if the trustees of said children, their heirs, executors or administrators shall neglect or refuse to pay said accounts, debts, judgments and all demands according to the covenants aforesaid, or shall suffer the said Arthur Jones, Sr., to be put to any cost, charge, trouble or expense on account of the same, or
(25) shall refuse to support him in a decent and comfortable like manner, that then, in all, or any or either of the cases aforesaid, it shall be lawful to and for the said Arthur Jones, Sr., all the premises hereby granted to take, repossess and enjoy as in his former estate." This instrument, sealed with the seals of the said Arthur Jones, Sr., and of the several trustees therein named is, like the former, attested by Calvin Coor and John C. Pender.

The plaintiff expressly charges that Arthur Jones, Jr., had notice of the agreement to meet for the purpose of executing the last mentioned instrument on 15 August, 1829, did meet with the other persons and parties accordingly, was present at the execution, and declared his approval thereof. He further sheweth, that among the negroes owned by Arthur Jones, Sr., before and at the time of the execution of this last mentioned instrument, was a boy named Shepard, that before and at the time aforesaid there was an enumeration and a list made of all the property intended to be conveyed, settled and assured by the said instrument; that Arthur Jones, Jr., being better acquainted than any one else with the state of his father's property, aided in this enumeration; that the said boy Shepard was named by him in the presence of his said father and the trustee, as one of the negroes to be embraced in said settlement, and was one of the negroes mentioned in said list; that the said boy was, by the arrangement of the trustees under the said instrument, assigned as one to wait upon the said Arthur Jones, Sr., and did, continually thereafter up to the day of the said Arthur's death, remain in the possession of the said Arthur, who notoriously claimed and held him as his, the said Arthur's property; and he avers distinctly that Shepard was one of the negroes, which the said Arthur, previous to the execution of

either of the instruments, did, with the full knowledge of the said Arthur Jones, Jr., declare and claim to be a part of the property by the said instrument to be settled and secured for the benefit of his children and grandchild, as is therein done, reserving to the said Arthur, Sr., the use of the said Shepard and some others during his life, giving the use of the residue during his life unto the said children and grandchild, and providing for an absolute division among (26) them after his death; and insists that the instruments aforesaid, whereby such settlement was made, were executed upon valuable and good considerations; and sheweth that the said instruments were on 30 December, 1829, duly proved and immediately thereafter registered. The plaintiff also saith that Arthur Jones, the elder, at and before the execution of the said deeds on 11 and 15 August, 1829, was indebted to Saunders Smith, one of his sons-in-law therein mentioned, in the note which is stated in the first of the said deeds. The bill then states that Arthur Jones, Sr., died on 4 April, 1830; that upon his death the trustees hired out the slaves, including the said Shepard, until 1 January, 1831; and that, on that day, they proceeded to make the final division of all the property of the deceased among their *cestuis que trust*, and, in this division, allotted to the plaintiff, the husband of Polly Sasser, the negro boy Shepard. It also sets forth, that after the execution of the aforesaid deeds of 11 and 15, August, 1829, that is to say, at the February term, 1830, of the County Court of Wayne, Arthur Jones, Jr., fraudulently prevailed upon his father Arthur Jones, Sr., to acknowledge in open court an instrument, purporting to be a deed of gift from Arthur Jones, Sr., to Arthur Jones, Jr., to bear date 5 April, 1827, and to convey, among other property, to the said Arthur, Jr., the said negro boy Shepard; and that, subsequently to the death of his father and to the division so made by the trustees as aforesaid, he has instituted an action of detinue against the plaintiff for the said negro, which action, originally brought in the County Court of Wayne, has been carried by appeal to the Superior Court of said county, and thence removed to the Superior Court of Lenoir, where it is still pending; that several other actions at law have been instituted, and are pending between the said Arthur, claiming title to negroes under the said alleged deed of gift, and others claiming under the deeds of 11 and 15 August, 1829, and the division so as aforesaid made by the trustees under the said deeds: and that the parties in these last mentioned suits have entered into an agrement, by (27) which their claims are to be determined by the division

which may be made in this suit between the said Arthur and the plaintiff.

The plaintiff charges that the said pretended deed of gift was not executed as a deed previously to the acknowledgment thereof in February, 1830, but alleges that in fact one Calvin Coor, having been requested by Arthur Jones, Sr., some time before the day on which it bears date, to draft an instrument for the conveyance of a portion of his estate to his son, wrote the said instrument and presented it for execution; that the said Arthur refused to execute it, because it contained more property than he was willing to convey; that the said Arthur, on consultation with a friend, Ludowick Alford, was informed that the instrument would not be binding unless it was delivered; that he might sign it, and afterwards, upon due deliberation, might either deliver it, whereby it would become binding, or destroy it; that in pursuance of this advice, he did sign the instrument, and, without a delivery thereof caused it to be deposited with other papers in his chest; that afterwards having determined to destroy it, he directed his said son to go to his chest and get it for him, handing to his son the key to his chest for that purpose; that his son opened his chest and took it out, and then delivered to his old father another paper, which the latter supposed to be the instrument aforesaid, threw into the fire and burnt.

The plaintiff in his said bill insists further, that, even if the said alleged deed of gift was *bona fide* executed before the said deeds of 11 and 15 August, 1829, yet that the defendant, having deliberately and with a full knowledge of the objects and purposes of the said deeds, and that the said negro was part of the property thereby intended to be limited and secured, actually executed the one as a party thereto and assented to the execution of the other by his trustees, is concluded thereby from asserting his title at law to the said negro, to the injury of the plaintiff, also a party in like manner, to the said
(28) deeds. The plaintiff prays that the defendant may be enjoined from prosecuting his said claim at law and for general relief. Upon the filing of this bill a special writ of injunction was ordered to issue, whereby the defendant was restrained from prosecuting his said suit further than unto judgment. The defendant put in his answer on 5 July, 1838. Therein the defendant admits that, at the time of the transactions mentioned in his bill, his father, the late Arthur Jones, Sr., was aged and infirm, having attained at the time of his death the age of 72 years, and having the ordinary infirmities, but no more than the ordinary infirmities, incident to that age;

that his said father was illiterate; that he was possessed of property (including therein what was given to the defendant) to the amount of $35,000, and saith that all this property his father had accumulated in the course of a very laborious life; and that in making this accumulation has father was greatly assisted by this defendant, who lived with his father until after he had attained 45 years of age, and from the moment he was able to labor, had worked for his father most diligently and faithfully as a laborer and overseer, and had never received any compensation for his services, except between three and four months schooling. The defendant further saith that his father being conscious and having often so declared, that the defendant by his faithful labors and services made in fact a large part of the property so accumulated, had deliberately resolved greatly to prefer this defendant to his other children in the distribution of his property; and, to carry that resolution into effect, executed in the year 1826 his last will and testament, whereby he devised unto this defendant the same land, which is contained in the deed of gift hereafter particularly mentioned, and the negroes with the exception of one or two changes which were made to keep families together, and that, to the best of this defendant's recollection, Shepard was one of the negroes so bequeathed; that after the execution of the will it was reported to the testator that Bryan Jernagan, one of his sons-in-law, had complained of the dispositions therein made, and had said that a will was not a firm conveyance and might be set aside; and that in consequence thereof (29) he determined to make the provision, which he intended for this defendant by deed; that in pursuance of this purpose the instrument of 5 April, 1827, wherein the negro boy Shepard, with other parts of the property of defendant's father, constituting in value about one-half of what he was worth, was conveyed to this defendant, was prepared and executed, that defendant was not present at the execution, being at that time out at work, but has learned and believes that it was executed at the house of his father, in the presence of Lodowick Alford, a highly respectable man and neighbor of his father, of Calvin Coor and the plaintiff's wife, the defendant's sister, Polly; that on defendant's return to the house his father told him that Calvin (meaning Calvin Coor) had brought "the deed," "or your deed"; that defendant asked where it was, the old man pulled it out of his pocket and handed it to him, and stated that he had got Lodowick Alford and Calvin Coor to witness it, that they would do as well as John and Blaney (meaning John Coor Pender and Blaney Coor, whom he had

intended to get as witnesses), and the defendant put the deed in his pocket; that in a day or two thereafter Calvin Coor passed the house of said Arthur, Sr., on his return home, and the old man seeing him, told him to get down and come in; that the said Calvin accordingly came in, whereupon the old man told him he had given defendant his deed, and by direction of his father this defendant handed Coor the said deed for the purpose of being read, and accordingly Coor read it aloud two or three times in the presence and hearing of the old man and this defendant; after reading the deed the said Coor threw it on the table, towards the old man, who pushed it towards this defendant, and defendant took it and put it in his pocket, and the defendant has said deed ready to be produced, and annexes a copy thereof to his answer, and prays that it may be taken as a part thereof. This instrument bears date 5 April, 1827, purports to be sealed by Arthur Jones, Sr., whose mark is attached instead of signature, and is attested by Calvin Coor and Lodowick Alford in these words: "Signed and ac-
(30) knowledged in the presence of us, who were present at the time of assigning"; and declares that in consideration of the natural love and affection which the donor bears to his son Arthur, and for the advancement and preferment of the latter in life, he doth give unto his said son, several certain tracts and parcels of land situate as follows: Being, as well as can be ascertained from the deed, six distinct tracts or parcels, also the following eleven negroes: Luke, Ben, Raiford, Martin, Tener, Milly, Esther, Shepard, Mason, Lewis and Chaney, also two-thirds of the negroes which fell to the donor by the death of his son Willis, the negroes named Daniel, Penny and Bill after the death of said Willis' widow; also "three thousand dollars in money to be paid him by my executors twelve months after my death, I also give him four horses and two mules to be distinguished as follows: the mare called his, named Peg, and her mule; also an one-eyed horse called Boston, and the gray mare and her mule, and the young Truxton horse named Radnor, I also give him my farming tools, and blacksmith's tools and Dutch fan, I also give him fifty barrels of corn to be delivered him by my executors at the Fellows place crib, and twenty-five at the old place, to be delivered at the said crib, also three blade stacks of fodder, his choice at the Fellows place, and two his choice at the old place," with a formal *habendum* of all the things given and their appurtenances, and the deeds, evidences, and writings concerning the same unto his said son, his heirs and assigns for ever, and a covenant of warranty against all former gifts, grants, bargains and sales by the said

donor heretofore made, and all persons claiming or to claim under him. The answer states that in June, 1827, in consequence of some disagreement between his father and his wife, he moved away from his father and has not since lived with him; that upon his moving away Saunders Smith and his wife went to live with his father, and, upon their moving away, the plaintiff, Lewis Sasser, and his wife took up their abode with him. The defendant also saith that there was an understanding and agreement between him and his father, that, notwithstanding the deed of gift, his father was to retain possession of all the property thereby conveyed as long as he lived, (31) and that the defendant should, whenever called upon, execute a bond to secure to his father the use and possession thereof; that the defendant was never required to give, and therefore did not give such a bond, but in the true spirit of his said agreement he left the use and possession of all the said property with his said father. He further saith that he is an illiterate man, unacquainted with the legal operation of instruments, and that, having been requested by one of the trustees, Mr. Wright he believes, to sign the deed of 11 August, 1829, before complying therewith he sought an interview with his father, and represented to him that they both were ignorant men and that defendant was afraid, if he signed any writing about the property, it might hurt *his*, defendant's, deed of April, 1827; upon which his father assured him that he was not to be injured thereby, that signing the said deed would not hurt his right, that the object of the instrument prepared was to loan out his property until January, 1831, and, if then satisfied therewith, to continue it from year to year as long as he lived; that he did not wish any of his property to go to pay the debts of Jernagan and Langley; and that thereupon and upon faith in his father's assurances, the defendant did affix his signature to that deed. He further saith that, having learned by consulting a person in whom he had confidence, that *his* deed was a good one, and that it was not essential that it should be put upon record immediately, and knowing that his father preferred his not making the same public, lest he should be harassed by his other children and their husbands, he rested content therewith until the transactions of August, 1829, having only shown the same to a few particular friends, among whom was Calvin Blackman now deceased, but then sheriff of the county of Wayne, and who was examined as a witness on the trial of this suit in the county court; but on 11 August, "being jealous and apprehensive, he did inform some of the trustees, or one of them (either John Kennedy or

John Wright), that he had a deed for a considerable
(32) portion of said property, and that at a proper time would show it—"that nevertheless he did no more, because he felt himself bound not to interfere with any disposition which his father might make of his property for *his lifetime* on account of his agreement that his father might retain a life estate therein, and because he thought nothing more necessary to be done by him by reason of the assurances so received from his father. The defendant admits the execution of the deeds of 11 and 15 August, 1829, but insists that no more was intended thereby on the part of his father than an arrangement to continue in force from year to year so long as he lived, whereby a comfortable support might be assured to him during the remainder of his days, his debts paid out of the proceeds or income of his property; and at his death such property as he then owned might be so secured to his daughters as to prevent its being taken to pay the debts of their husbands, two of whom, Langley and Jernagan, were insolvent and indebted, among other creditors, to Lane, Wright and Kennedy, three of the trustees, one of whom, Wright, was active in drawing and persuading the old man to sign said deeds; and that he is confirmed in this belief of the intention and object of his father, in having the said deeds prepared and executed by information which he has received from both the subscribing witnesses thereto. He admits that his father did retain possession of Shepard during his life, but avers that he held said Shepard under the agreement with this defendant as aforesaid, and therefore as the bailee of this defendant, and therefore insists that, as the deed of 15 August does not *specify* any property, it does not, under its general term, "all the property whereof I am possessed," embrace the said negroes; he also admits that his father died at the time alleged in the bill, and that after his death the trustees, professing to act under the deed of 15 August, undertook to divide all the property whereof the deceased was possessed, including that whereof he was so possessed as the bailee of this defendant, and under that division allotted the negro Shepard to the plaintiff. He says he has no recollection of having furnished a list of the
(33) negroes of his father, including Shepard to be inserted in the deed of 15 August, admits that his father was indebted to Saunders Smith as stated in the deed, and owed some other small debts not exceeding in the whole $50, which he states were paid off equally by the children and grandchild, *he* paying his part; and denies that he ever heard any declaration of his father or direction given, that his whole estate

including Shepard should be conveyed and assured to the purposes set forth in the deeds. The defendant denies that he fraudulently procured the deed of gift of 5 April, 1827, to be acknowledged by his father, but declares that the facts in relation thereto are as follows: "After the execution of the deeds of the 11 and 15 August, 1829, the said Arthur, Sr., understood that the trustees had sent the said deeds to Raleigh to be proved before one of the Judges of the Supreme Court, and expressed great uneasiness and dissatisfaction at having signed the same, particularly as he had understood that he could not revoke or alter the same; he went so far as to employ counsel and pay a fee to have a bill filed against the trustees to annul the said deeds, and, but for his death so soon thereafter, this defendant believes he would have done so; and at or about this time he, of his own accord, requested this defendant to bring his deed to the next court (February term, 1830), which he did, and his father having received said deed from him, went into court unattended, and acknowledged the execution thereof, and afterwards declared that he had never done any act with greater satisfaction. The defendant further saith that at the last March term of Lenoir Superior Court he recovered a judgment against the plaintiff in the action stated in the bill to be therein pending; and he admits the several other actions named in the bill to be yet undetermined, awaiting the final decision of this cause. He denies that he obtained possession of his deed in the manner charged by the plaintiff, but avers that he received it directly from his father; denies that to his knowledge or information his father objected, as charged, to the execution of that deed when presented to him for that purpose, or that Lodowick Alford gave his father the advice, as charged in the bill, to sign it, and either (34) deliver or destroy it as he should afterwards determine, but avers that he hath understood and believes that, upon stating to said Alford the motives which prompted him to make the deed, said Alford highly approved thereof, and advised him to execute the deed. He further saith that he and his father kept their papers in the same chest as a common place of deposit, and that, upon one occasion, when he came to his father's house, while Polly, the wife of the plaintiff, lived there, he learned from her that his father had been to the chest, taken out some papers and burned them, became uneasy, lest his father, who was then displeased with him, might have burned this deed, but, upon examination, finding that this had not been done, and that another paper of his of little consequence was missing, expressed an opinion, which was conjectural only,

that he had burned this, mistaking it for the deed; and declares that his father never did ask him for the deed for the purpose of destroying it, or of depriving him of his property therein. He denies that he made any agreement or gave any assent to the making of any deed, either on 15 August or any other time, whereby his right to any of the property conveyed in the deed of gift to him was to be impaired or divested, and while he admits that he knew of the previous agreement to meet on that day, with a view to an arrangement of his father's affairs, denies that he had any knowledge of the nature of the deed or settlement, which the trustees had concluded to prepare, further than the wishes, which he understood his father wanted to have carried into effect, and which he believes were not carried into execution by that instrument; denies also that he was privy to the consultations in relation to said instrument, and avers that when he heard it read, which he admits he did after its execution, he did not understand, nor does he now understand it; but this he knows, that if it has the operation claimed for it by the plaintiff, his father did not intend to execute such a deed.

Upon the coming in of this answer, it was moved by the defendant's counsel to dissolve the injunction, which
(35) had issued upon the filing of the bill. This motion was granted; and the plaintiff entered a general replication to the answer. At the same time, upon an affidavit of the plaintiff, a special order was made for securing the negro after he should be delivered by the plaintiff, and the amount of hire recovered as damages, so as to await the final decision of this cause. In the meantime the original defendant died intestate, and the cause was revived against Alley Jones, his administratrix, and, the parties having taken all their proofs, the cause was set down for hearing and transmitted to this Court.

The first question of fact, upon which the parties are at issue, is in relation to the execution of the deed of gift to the defendant. Its attestation in the special manner therein stated, we have seen, is by two witnesses, Calvin Coor and Lodowick Alford, the latter of whom is dead. The former has been examined for the defendant, and his testimony is precise and circumstantial. He states that about the last of March or first of April, 1827, passing by the house of Arthur Jones, Sr., he called in, and was requested by Mr. Jones to write a deed of gift from him to his son Arthur; that, it being too late to do the business then, the witness requested the old man to give him the boundaries of the land and the names of the negroes, and he would write it at home. The old man did so, and requested the

witness, when he had written the deed, to bring Blaney Coor and John Coor Pender to witness it; that, having written the deed on 5 April, 1827, he left home to visit one of his aunts, and on his way called in at Mr. Jones and told him that he had brought the deed, but had not seen Blaney Coor or John Coor Pender; that he read the deed to Mr. Jones, and while they were talking upon the subject Lodowick Alford came in, and he said that Mr. Alford would witnesse it, to which the witness assented; that the old man explained to Alford what he was about to do, to give some property to his son who had worked very hard for him and had never received anything; said that he had made a will some time before, and Bryan Langley and Richard Jernagan had laughed and (36) talked about upsetting it; that he wished his son to have the property, and they might pick a flaw in the will; that the property was about the same given to his son in a will made in December, 1826; that Arthur was his only son, and had made nearly all the property, and that he thought he ought to do more for Arthur than any of the rest of his children; that the witness thereupon read over the deed to him again, and thereupon he made his mark in the presence of witness and Alford, who then attested it at his request. Witness left the deed with him and went on his journey. No other persons were present but the old man himself and Alford. On the next day but one, the witness was returning, and saw the old man and his son in the piazza, when one of them, as he thinks, the son, called him, and he went in. After being seated there some time, the father told witness that he had given his son his deed, and witness asked young Arthur how he liked it, to which the latter answered that he did not know, for he could not read it; the old man then told his son to get the deed and let the witness read it to him, whereupon young Arthur took it out of his breast coat pocket, handed it to witness, and witness read it to him once or twice and then threw it on the table, and the old man pushed it towards Arthur. In answer to a cross-interrogatory he adds, that he *thinks* young Arthur then took it. Witness, both then and before, was requested by the old man not to say anything about it while he lived, for it might offend the rest of his children; said further that he had intended to reserve a life estate in the property by the deed, but understood that it would not stand in law. "Arthur then promised to let him keep the property his lifetime, and told him he would give him a bond to that effect, and witness left them and saw no more of the deed until after it was proved."

The defendant has also examined Isaac Wise, who deposes, that

in the year 1827, old Arthur Jones told the witness that he had made a deed of gift to his son Arthur for the Fellows place and several negroes, (of which he remembers Shepard and Esther,) but that the old man was to have the use during his life; (37) that Arthur Jones, the son, has often told him that he had a deed of gift for the Fellows plantation and a part of the negroes, and further told witness that at one time he thought the old man had destroyed the deed, but that he afterwards found it, put it in a handkerchief and carried it tied to his back for several months. When cross-examined, the witness says, when he had the conversation with the old man, young Arthur lived a part of the year with Mr. Raiford, and a part with James Rhodes; and on being asked whether he had never told any person that Arthur Jones, Jr., had often been at him to become a witness, and that he had said he knew nothing about the affairs, he replies that if he ever did he does not now recollect it. On the part of the plaintiff has been examined Sampson Lane, whose testimony in relation to the fact of the execution of the deed is very much at variance with that of the principal witness of the defendant. This witness testifies that at the Spring term, 1830, of Greene Superior Court, which court must have taken place very soon after the death of Arthur Jones, the elder, Calvin Coor asked the witness what he thought of Arthur Jones's (young Arthur's) deed; to which the defendant said he could not answer unless he knew one thing, and even then he might not be lawyer enough to answer; Coor asked what that was, and witness said it was the delivery of the deed from old Arthur to young Arthur; Coor then said he wrote the deed at his own home, and going to his aunt Jones's he took the deed in his pocket, and when he got opposite the old man's house he alighted and said, uncle Arthur I have brought the deed, and that old Arthur said to him, Calvin, read it; that the old man said to him, Calvin, I can't sign it, it gives too much, it gives most half of what I've got; that Calvin then told him that he wrote it agreeably to instructions; that the old man then said to him, Calvin, read it slow; that he then read it a second time, and the old man made the same reply, I can not sign such a deed; that at that time Lodowick Alford passing by, he said to the old man, yonder is Alford; that the old man said tell him to stop and come in, (38) and that Alford came into the piazza; that then himself or old Arthur said, here was a deed, and the old man was unwilling to sign it; that Alford asked to have the deed read; that after it was read, the old man said "in the name of God I can't sign it, it gives too much"; that Alford

then said, Uncle Arthur, you know young Arthur has done a good deal for you, you might as well sign it; that the old man said it was too much; that Alford then observed to the old man, you can keep the deed, and if you think proper you can destroy it and make another at any other time; and that, upon that statement, the old man signed it; that Coor further told this witness that no one was present but old Arthur, Alford and himself, and that after the old man had signed the writing he, Coor, "folded it up and gave it to the old man, and that he, Coor, never saw the deed more till it was brought into court and acknowledged," and that from conversations, which occurred afterwards, he thought the deed was destroyed; that the witness said to Coor he thought delivery was necessary, and Coor replied that delivery was never made in his presence.

It is further testified by a number of witnesses, who concur in the same account, that on the week before this conversation with the preceding witness, which was that of Wayne Superior Court, the trustees of Arthur Jones had become alarmed at a report that young Arthur was about to run away the negroes, and applied to a gentleman of the bar for advice; that this gentleman inquired if Jones or any confidential friend of his were at court; and on being informed that Calvin Coor was there, he was sent for and inquiry was made of him respecting the deed of gift under which Jones set up title, and Coor was asked whether he could prove the deed, and he declared that "he could not prove the deed," "he could not prove the delivery." William Thompson testifies that about the time that he, as sheriff, served the writs in the several suits brought on account of these negroes, which must have been early in 1831, he and Calvin Coor were conversing together on the subject of the great costs which would attend such a litigation, and this witness remarked that he understood that *he* (Coor) was to be a witness in the case, to which the latter replied (39) "yes, he should be a witness on both sides; that Arthur would have him a witness to prove the execution of the deed, and the heirs would have him a witness to prove that it was not delivered"; and in answer to a question from witness, what he thought would be the issue of the suits, Coor replied, "inasmuch as Arthur will not be able to prove the delivery of his deed, I should think his case doubtful." William Turletan, a witness for the plaintiff, testifies that he was living with Arthur Jones, Sr., when the deed of gift was said to have been made, but never, while there, knew or heard that there was such a deed. He states that young Arthur Jones, since his father's death, had insisted on his going to court to prove delivery

of the deed, and in the course of the conversation on the subject, informed the witness that Calvin Coor had said that the witness need not be afraid to go, for *he* was present with the witness when the deed was delivered; that witness told Jones he had never seen the deed, and would not go; that a few days afterwards witness saw Coor and told him what Jones had said about his being present with the witness when the deed was delivered, and Coor said, "Arthur had told him a lie, for that he, Coor, never saw it delivered himself."

William K. Lane testifies, that, in the latter part of the year 1830, he heard Isaac Wise state in a conversation between them, respecting the deed from Arthur Jones, deceased, to his son, that Arthur (the son) wished him to be a witness, and had asked him if he did not know something about the matter, upon which he told Jones that he did not know anything about it, and Wise then added, with an oath, that he would never swear to anything respecting it. There is some other testimony, but less pointed on the side of the plaintiff, which is also relied on to contradict or discredit the testimony, by which the complete execution of the deed of gift is endeavored to be established. But we deem it unnecessary to mention it minutely, for, whatever conclusion upon the proofs we might feel it our duty to pronounce, we do not regard this disputed fact as one
(40) now to be determined upon the proofs. The fact of the execution of this instrument as a *deed*, and of its execution as such previously to the deed of the 15 August, 1829, was directly put in issue between these parties in the suit at law. The verdict of the jury upon that issue and the judgment of the Court thereon have established that fact, and nothing has been shown which would authorize this Court to retry it. We hold, therefore, that the deed of gift was *delivered* prior to the execution of the deed of trust of the 15th of August, 1829. The recapitulation, however, which has been made of the evidence directly bearing upon the point, will be found not without its use in considering other matters, which we are obliged to decide.

The next part of the transactions to which our attention is directed, is to the execution of the deeds of 11 and 15 August, 1829, of the circumstances attending the execution of these instruments, their object, purpose, and effect. The *factum* of execution is not disputed, but the defendant's answer has set up specific allegations, wherefore he ought not to be bound thereby. He alleges that he was induced to execute, as a party, the first of these deeds, and to yield a passive assent to the execution of the other, by persons professing to act as trustees for him, because of assurances from his father, in which he confided, that

the purpose of the instruments was *merely* to make a temporary arrangement in regard to the property so long as his father should live, and that they were not intended to impair and should not impair his vested rights under the deed of gift; and further, that he gave notice to one of the trustees at the time of his claim to the property. Here again this defense rests on the testimony of Calvin Coor, which is in these words: "On the 11 August, 1829, old Arthur Jones sent for me in the morning; I went; he stated to me what he wanted; he said Arthur was not willing to come and live with him, and that he could not attend to his business and was going to loan his property to his children for one year, perhaps by that time he should be able to attend to his business himself, and wished me if I saw that he was going to do anything that I thought wrong (41) to tell him of it; the committee, as I think they are called in the loan, were all there; John Wright, I think, was writing the loan out of doors in the yard; I went into the house to the old man and was sitting talking with him; young Arthur came in and said, "Father, I am unlearned, and so are you; I fear this business will have an effect on *my right.*" He said, "No, it should or would not, that it was to prevent the property being taken to pay Richard Jernagan and Bryan Langley's debts." Arthur then stated in public, that he had a right for a part of the property, and that some of them were not getting so rich as they expected, some of them told him if he had a right to show it; he said it was time enough to do that yet or that he would do it at a proper time; I then witnessed the loan; I went home." Now it seems scarcely possible to doubt, from the manner in which these occurrences are related by the witness, in connection with the transaction respecting the execution of the deed of gift of 5 April, 1827, that he means to represent that the impression, made on his mind by the answer of the father to his son's expressions of fear respecting the operations of the acts about to be done upon his right, was that the father thereby assured the son that they should not prejudice "his right" *under that deed;* and this we are obliged to say is the impression, which the testimony of the witness obviously conveys to all who read it. Yet, nothing is more certain, if faith can be put in testimony, than that at this time, young Arthur Jones knew, and Coor knew, that the old man believed, beyond doubt, that the deed of 5 April had been destroyed. Brittain Hood testifies, that, at the May Term, 1830, of Wayne County Court (which was after the death of his father) Arthur Jones asked the witness his opinion about the deed, when the witness told him that he had heard that the deed was destroyed, or that the

old man believed it was destroyed, when Jones told him that his father did think the deed was burnt; that his father, on one occasion previous to the acknowledgment of the deed, asked him to hand him the deed from among his (old Arthur's) papers, and that *he* handed from among his father's papers a
(42) stud horse list of mares purposely, instead of the deed of gift; his father took the paper, threw it into the fire and destroyed it, believing it to be the deed of gift; and that he (young Arthur) at the same time took the deed from his father's papers without his father's knowledge, and kept it, and that when his father executed the deeds of 11 and 15 August, 1829, his father was under the belief that the deed of gift was destroyed; and that he never let his father know he was in possesion of said deed, until a short time before the preceding term, when his father acknowledged it in court. Micajah Cox testifies, that, on the day after the deed of gift was acknowledged in court, young Arthur Jones showed it to him, and upon the witness expressing his indignation that the old man had not apprised the trustees of the fact of such a deed, while they were aiding in the arrangement about his property, young Arthur told him not to blame his father, for his father did not know that *he* had the deed. On a subsequent occasion, this witness declares, that Arthur told him that the old man thought he had burnt the deed of gift, but instead thereof had burnt a stud horse paper, and that "he (the son) had taken care of the deed." The witness, Calvin Coor, in answer to a cross interrogatory on the part of the plaintiff, whether he ever heard the old man say the deed of gift was destroyed, and, if so, whether he heard him say so before the execution of the deeds of the 11 and 15 August, answers, "that he did hear the old man say he thought it was destroyed before the loan and deed of trust of the 11 and 15 August, 1829, but some time after the signing of the deed of gift." Micajah Cox testifies further, that, after seeing the deed of gift, which was shown to him, as before stated, by young Arthur, and noticing that Calvin Coor was one of the attesting witnesses thereto, he complained to Coor of his uncandid conduct in not making the fact of this deed known when the transactions of the 11 and 15 August, 1829, took place, when Coor told him that he did not know that Arthur had this deed.

The same witness deposes, that the old man made a will
(43) in June or July, 1829, in the presence of his son, Arthur; that by this will he gave his son property, equal in value to about a third of that contained in the deed of gift, and a part of it some of the negroes contained in it; that this witness was entrusted with the keeping of this will, and that, shortly before

the division made in August following, he re-delivered the will to the old man, who destroyed it. It is proved by several witnesses, particularly by John Kennedy and Sampson Lane, that in consequence of vague threats uttered by young Arthur Jones, on the evening of 11 August, after the deed of that date was executed and the division made, that he would play the mischief with the estate after the old man's death, he was asked if he had any right to any part of the estate, and, if he had, was requested to produce it, and he answered, surely he would do so at another time or at a fit time, or it was time enough yet; that some suspicion being thus excited, that perhaps he had a concealed deed of some sort, these suspicions were communicated to the old man, who positively denied that he had any deed, asseverating "in the name of God if there ever was one, there is none now, it has been destroyed long ago, and if he has one it is a forgery." John Kennedy testifies particularly, that on 15 August, 1829, the day when the second deed was executed, Arthur Jones, the elder, spoke to William Raiford of the threats so thrown out by his son on the day of the 11th, and specifically enjoined it upon Raiford to require of his son to surrender any paper which he might have affecting the title to the property, and, if he refused, to file a bill against him. Besides, Calvin Coor was, according to his own account, particularly relied on by the old man to apprise him, if he were about to do anything wrong in the matters then to be transacted. He, at least, was perfectly aware that the instruments about to be executed did profess, not only to dispose of all the property in the old man's possession during his life, but provided for an equal division of it after his death. He knew, if the deed of 4 April, 1829, was in existence, that these instruments were absolutely repugnant there- (44) to, and it would have been in him an act of grossest perfidy to his trusting friend, as well as of injustice to all the parties concerned, not to suggest his repugnance, not to prevent this wrong, instead of concurring therein by attesting these instruments. We have no hesitation, therefore, in pronouncing, that, if, in the private conversation to which the witness, Coor, deposes, the words were used to which he deposes, they were intended by old Arthur Jones, and this was known to young Arthur and the witness, Coor, to refer, not to the right under the deed of gift, believed by *him* to be destroyed, but to some other claim or right. Possibly for this purpose they may have been spoken, and, if so, probably the reference was to a claim for a horse or part of the stock, which is admitted on all hands was afterwards allowed by the old man, the trustees and the persons beneficially interested. The Court is also well satisfied,

that no notice was given, either publicly or privately, by Arthur Jones, Jun., to the parties or any of them, of a claim to the property under his deed of gift, or under any other deed which can exempt him from the obligations fairly imposed upon him by the concurrence in the transactions of 11 and 15 August, 1829. The excuse alleged for not giving notice of the deed of gift, is, we are compelled to say, untrue. Notice of it was not forborne, because his father wished that its existence should be kept a secret from the other members of the family, but because he knew that his father believed it no longer in existence, and he wished his father not to be undeceived. Indeed, it may be remarked, that, according to the statement given in the answer of the circumstances attending the execution of this deed, all the pretenses assigned for delaying its registration and withholding the knowledge of it, except from a few trusted and trustworthy friends, seem to be very flimsy. The great end, it seems, of this mysterious deportment, was to provide that no one of those interested in the disposition of the old man's fortune should perchance hear of the transaction, lest they might be offended thereat; and yet, according to the defendant's statement,
(45) derived indeed from information, but from information which he believes to be true, one of these very persons, Polly Jernagan, the only child of the old man's deceased daughter, and the present wife of the plaintiff, was present *in propria persona*, at the very transaction. No one, on examining the narrative in the deposition of Calvin Coor of the occurrence attending the execution of the deed and the statement thereof in the answer, can avoid being struck by the general coincidence between them. It is such as to leave no doubt, but that the information, on which the statement in the answer professes to be founded, was sought from this witness with great care, and meant to be most accurately set forth. How it happened, that, in stating this information, the defendant should misrepresent it in regard to the important part of Polly Jernagan being present with the witness and Alford, when the deed was read over several times, signed by the donor and attested by the witness and Alford, or, if the information so received was correctly set forth in the answer, how it happened that the witness afterwards discovered that he had given wrong information, and that no one was present thereat but the old man, Alford and himself, is not accounted for, and perhaps can not be fairly accounted for. It is very obvious, however, that the statement in the deposition furnishes a more suitable or at all events a more plausible cause for secrecy, than that which was made in the answer.

But it is also insisted in the answer, that these instruments did not conform to the wishes and instructions of Arthur Jones, Sen., who intended no more thereby than to make a loan of the property for a short time, and provision that, after his death, the shares of the property that might fall to the wives of Langley and Jernagan, should be secured against the creditors of their husbands. In support of this allegation, reliance is placed on the testimony of Calvin Coor and John Coor Pender. We have already noticed all of the deposition of the former; which refers to the transactions of 11 August, from which, it would seem, that he went off immediately after the execution of the deed of that date, and was not privy to any (46) arrangement made for another meeting. He states, that, on 15 August, he was again sent for; and, on arriving there first, had a conversation with John Wright, who showed him the form of an instrument prepared for execution, and wished him to examine it, but say nothing about it to the heirs; and who stated, as a reason for wishing him to examine it, that he knew the old man would not execute it, unless it was approved of by the witness. After reading it once or twice, he was asked by Wright what he thought of it, and answered that if he were the old man he would not sign it; and Wright replied, if Coor told him so he would not. The witness then went into the house, and, at the old man's request, every one else retired, and they were left alone. The witness then proceeds: "I then read the blank deed over to him once or twice, and told him if I was in his situation I should not sign it, I *thought it was too binding an instrument for him;* he said then he would not sign it, had the trustees called in, and told them what I had said to him, and that he could not sign it. John Wright and William Raiford, I think it was, told him I had misconstrued the deed of trust; that the object of it was to secure his property from paying the debts of Richard Jernagan and Bryan Langley; that the other instruments, they doubted, would not secure it. Micajah Cox said it was nothing to him, and he did not care whether he (Jones) signed it or not; but the old man said, if that was the intention of it, he would sign it. John Wright, I think it was, drew one (that is a deed) from the blank copy, and, after promising the old man he should have his property and papers any time when called for, he did sign it, and myself and John Coor Pender witnessed it."

Upon this part of the deposition, it may not be irrelevant to remark, that it removes all doubt, if any of it remained, that this witness did not understand, what is so strongly insinuated in the former part of his deposition, that Arthur Jones, Sen.,

gave any assurance to his son that he should do nothing to prejudice his son's right under the deed of April, 1827. Here he is alone with the old man, acting as a confidential
(47) counsellor. He has read once or twice—he reads over once or twice more—the form of the instrument about to be executed, and sees that it unequivocally purports to make a disposition, not temporarily but perpetual, of all the old man's *property*, and *he says not one* word to him in relation to the deed of gift which he had made to his son for more than half of that property, or the assurance given to his son, but four days before, that nothing should be done which might prejudice the right under that gift. It is exceedingly to be regretted, too, that, instead of stating his objection to the instrument in such general terms, "he thought it too binding an instrument for *him*," the witness had not entered into some explanations, or set forth his objections more in detail; for, as the deed was not yet written, the form might have been pursued with such alterations or modifications as would have accomplished all that was desired, and have left the deed *not* too binding on the old man. But, be this as it may, the deposition is precise in charging, that one of the trustees declared the object of the deed was to secure the old man's property from being taken to pay Langley's and Jernagan's debts, and that Wright promised that the old man should have his property and papers at any time when called for. And this statement is corroborated in some degree by the testimony of John Coor Pender. This witness, after proving the execution of the deed of the 11th, says, that when, on 15 August, the company was called in after the private conference between the old man and the witness, Coor, the old man at first declared that he should not sign the deed, and said "that Calvin Coor had told him that if he signed the deed it would take away his right to the property, and that Wright and Raiford then spoke and told the old man that Coor had misrepresented the thing to him and that it would not take his right, and that he could, if he should be dissatisfied, have his property at any time." And in answer to an interrogatory whether Wright did not say that Langley and Jernagan were in debt and the deed of trust would prevent the property from being taken to pay their debts, he answers that he did, or words to that effect.

(48) On the part of the plaintiff the depositions have been taken of each and every of the trustees, with the exception of Raiford, who is unfortunately dead, and these relate all the transactions connected with the deeds of 11 and 15 August, 1829, in such a manner as to leave no reasonable doubt, if they

be deserving of credit, that the deeds were prepared with an anxious attention to the deliberately formed wishes of the old man, and to the avowed wishes of all the persons interested, and were executed under no misapprehension of their contents or of their operation. It would be oppressively tedious to follow each of the witnesses in his narration, and it will be sufficient to set forth the substance of what they state, which is as follows: In consequence of previous invitation all the children of the late Arthur Jones, and a number of his neighbors, met at his house on 11 August, 1829, to make a division of his property. This had been requested by him to be done, because, as he alleged, he was confined to his bed and not able to see to his business. When they were all assembled, he told his children, in the presence of his neighbors, what was his purpose in language to this effect: that if they would pay a small debt, which he owed to Saunders Smith, and maintain him as long as he lived, he would divide his property equally among them, by lending it to them as long as he lived, and after his death to be equally divided among them by Sampson Lane, Micajah Cox, John Kennedy, William Raiford, and John Wright. This proposition was acceded to by all of them. The old man named every one of his negroes, all the tracts of land, the several crops, and the horses and mules, as afterwards expressed in the deed of that day. The persons selected among the neighbors for making the several allotments went over the fields and examined the crops and then proceeded to make as equal a division as they could, in which they were *particularly* aided by the old man's son, Arthur, and also assisted by the husbands of the daughters and granddaughter; and, after reserving out of the negroes, Tiner, Shepard, Mason, Lewis and Peggy, which it was agreed should remain with the old man to take care of him, the rest were put into lots, and the children and (49) grandchild agreed each to take the lot that might be drawn to hold until 1 January, 1831, at which time they were to be surrendered to the old man, if living, but, if not, all the property to be divided equally by the committee. It was afterwards agreed, upon the suggestion of Charlotte Smith, who wanted a lot in which a particular negro was contained, that they would agree as to their respective allotments without an actual draw, which was done. The deed of 11 August was then written and executed by the old man, his son, his sons-in-law and grand son-in-law. After this was done, a doubt was suggested by Kennedy to Raiford, whether this deed was sufficient in law to transfer the title after the old man's death; and this doubt was communicated to old Mr. Jones, who expressed a strong desire

to have the matter done effectually: it was therefore agreed that all should meet at another day, the division of the stock which was not yet done should be made; and Raiford and Wright were enjoined to get the necessary information, so that a perfect instrument should then be executed. On the appointed day, the 15th, they all met again; the deed of 15 August was then produced by Wright, as one which, according to the injunction on him and Raiford, had been framed and fitted to carry into effect the declared intentions of all concerned. It was read several times to the old man, who then requested all the company to retire, except Calvin Coor, and when they were readmitted, the old man said that Coor had told him the deed was too binding; that Raiford and Wright represented that it was such an instrument as they understood him to want; the property was all for his benefit as long as he lived, and at his death it was to go to his children; that Cox then said he did not care whether the old man signed it or not, it was no benefit to the trustees, but for his children after his death, which he (Cox) understood to be what he wanted; that the old man then said, "that is what I want, Micajah, and I will sign it," and he shortly afterwards did execute it. The trustees and the children then proceeded to divide the stock, when Arthur Jones, the son, claimed a
(50) part as being his own; this was communicated to the father, who directed them to let him have whatever he claimed as his, which was done accordingly. After all was done, Arthur expressed himself perfectly satisfied therewith. John Wright particularly declares, that one object of the deed was to secure the property, so long as the old man lived, from being sold for the debts of his sons-in-law; but that the old man expressly declared that if, after his death, they chose to spend it, let them do it in the name of God. He declares that the deed was drawn conformably to the wishes of the old man; and, if anything was said by any person to induce the belief in him, that it would secure the property against the debts of his children after *his* death, he has no recollection of it. Arthur Jones and *all* the others took the respective shares allotted them, and on a subsequent day the trustees also divided amongst them equally a considerable sum of money belonging to the old man, taking their accountable receipts therefor, and reserving about $100 for his immediate use; and after his death, they hired out the property until 1 January, 1831, when they made a final division among their *cestuis que trust*. It is further proved by James Jones, Edward Sasser and Charles Cogdell, that after all the proceedings which took place on 15 August, 1829, were over, Arthur Jones, the younger, expressed his en-

tire satisfaction therewith. The first represents him as saying that his father had done what he wanted him to do; the second repeats the same expressions in substance, and adds that young Arthur further observed, that his father had said he did not intend to give Langley or his wife anything, for that Langley would spend it; but he was glad his father had given her a fair share, for she had worked as hard as any of the rest, and if Langley did spend it, Sally had no right to complain; and the last of them states that young Arthur went up to the house and asked his father if he was satisfied, and, being answered in the affirmative, replied, "Well, father, if you are satisfied, I am."

It is alleged in the answer, that at the time of the transactions of August, 1829, some of the trustees were creditors of Langley and Jernagan, and it is hinted that they (51) were induced by motives of interest to deceive Arthur Jones, the elder, into such a disposition of his property as might enable them to procure satisfaction of these debts. But no proof has been offered of this allegation, and without proof we can not assume it to be true. It is not pretended that they have not honestly and faithfully performed every trust which was reposed in them, and their testimony is given in a spirit of candor and sincerity, which leaves no room to suspect any purpose to deceive or mislead. We do therefore give full credit to that testimony. It is manifest that they have infinitely better opportunities than any other persons of knowing the *full* mind of old Mr. Jones, in relation to the disposition of his property confided to their legal care, and the *expressed* wishes of all the parties for whom they undertook the trusts. And it would be extremely dangerous to the security of property, were we to hesitate a moment in giving effect to solemn instruments, deliberately executed, which we have been assured by those, who had the best means of knowing and who are worthy of all reliance, have been carefully and advisedly drawn according to the disclosed purposes of the parties thereto, because of parts of conversations, seemingly not consistent therewith, perhaps misunderstood, or imperfectly recollected by bystanders. The deed of 15 August declares that during the life of the old man, the *title* of the property designed for the children shall be in the trustees, permitting them to *lend* an equal part thereof to any of them for such time as they may think proper. This provision is obviously intended to secure this property from being liable for the debts of the children during the old man's life, and its effect is, that, while it declares the title or legal estate to be in the trustees, it leaves in the donor the beneficial ownership (subject to these loans) of all the property during his life.

There is also an express condition, that, on failure of the trustees acting in behalf of the children to perform any of the duties enjoined, the instrument shall become void. These were the provisions, to which the trustee referred in the con-
(52) versation to which Mr. John Coor Pender has deposed, and we have not a suspicion that they misrepresented in any way the character of the instrument.

It is next to be considered, what are the obligations in a court of conscience imposed upon the younger Arthur Jones, in relation to the dispositions of property contained in these deeds. Notwithstanding it has been established that the deed of gift of April, 1827, was delivered before the transactions of August, 1829, so as to convey to the son the legal estate in the negroes therein contained, there is a mystery yet hanging over that instrument which it is not easy to penetrate. It was not *executed* at the time it bears date. The witness, Coor, proves no delivery or acknowledgment of a delivery, and the singular form of attestation annexed shows that the witnesses subscribing did not mean to attest the *execution* of it. The instrument contains some gifts, which are *testamentary* in their character, viz: of the $3,000 in money, and sundry barrels of corn to be paid and delivered by the executors of the donor. The instrument is admitted to be subject to a condition or stipulation not expressed therein, that it was not to take effect in *possession*, until after the death of the donor. No one knows what passed between the father and his son, when the former first put it into the hands of the latter. But one thing is indisputable, that the *former claimed* the right to destroy it at any time while he lived, and the latter, if he did not directly acknowledge that right, cheated his father with the belief that he had exercised it, and with the assent of his son. It is not true, therefore, as stated in the answer of the defendant, that his father held possession of the property mentioned in this deed of April, 1827, as *his bailee;* he knew that his father held it, and claimed to hold it, as his own property. With a full knowledge of the understanding, whatever it was, under which the deed was delivered, of the claim of his father of a right to revoke it, of the trick by which he had induced his father to believe that it was destroyed and destroyed with *his assent*, he deliberately and advisedly enters into a solemn contract, under his hand and seal with his
(53) father and the other members of his father's family, for a distribution of all the father's property, including that which had been given by the deed as *avowedly a part thereof*, between the father, himself and the rest of the family during his father's life, thereby obtaining and receiving valuable im-

mediate interests to himself, and also for an equal division of *all* the property between himself and the other members of the family after his father's death. He then had in his possession the deed of April, 1827, but no other of the parties knew or believed it was in existence. He knew, that, if he disclosed that fact, the contract would not be made, he would not obtain the immediate benefits thereby secured to him, and he had reason to fear that he might be compelled by his father to surrender the deed, and therefore he conceals the deed; but, as a cunning contrivance by which, while he should get the benefits of the settlement, he might be enabled at a future day to upturn it altogether, threw out an ambiguous threat that "they were not getting as rich as they expected." He was bound upon every principle of common honesty and fair dealing, if he meant to claim under the deed, *then* to assert that claim and to produce the deed. If he had done so and had afterwards entered into the contract, had actually executed one of the deeds, concurred in the execution of the other, resumed the property allotted to him, and finally declared his entire satisfaction therewith, undoubtedly the contract would have been upheld in equity as a compromise of disputed rights, a fair, reasonable arrangement made for value and providing for the peace and harmony of the family. And it can not, we think, be for a moment admitted, that the contract is less binding upon him, because of his fraud and deception.

Holding, as we do, that the arrangement made by the deeds of 11 and 15 August, 1829, is one which bound the conscience of the original defendant, and which a Court of Equity will not permit him to contravene, we think it clear that the subsequent acknowledgment by his father of the said deed of gift, in no manner released him from the force of that obligation. We enter not into a consideration of the motives which induced the father, when he unexpectedly discovered that (54) the deed of gift was not destroyed, to acknowledge its execution—except to say that there is *no evidence* on the one side of undue practices on the aged man to seduce him into such an acknowledgment, or on the other of any act, omission or failure of duty on the part of the trustees, which, according to the terms of the deed of 15 August, 1829, enabled him to make it. *That* deed was sufficient to pass the property to the trustees upon the trusts therein declared, and no act, unauthorized thereby, could impair its effect.

It has been suggested on the hearing that the bill was defective, because the trustees ought to have been made parties thereto. We think the objection unfounded. They have executed

all their trusts, and have no longer any interest or concern in the subject matter of the controversy.

It is the opinion of the Court that the plaintiff is entitled to restitution of whatever he *has lost* by reason of the recovery at law against him, and to be quieted in the title and possession of the negro claimed by him.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Devereux v. Burgwyn, 40 N. C., 355; *Brame v. Brame*, 55 N. C., 284; *Sherrill v. Sherrill*, 73 N. C., 13.

MELVIN REDMAN et al. *v.* JOHN B. GREEN et al.*

1. Where a bond has been given on the settlement of an account and the obligor complains of errors in the account stated, he can only be relieved upon a clear exhibition of such errors.
2. If the defendant denies that there is any error, as far as he knows, and avers that the stated account was left in the possession of the plaintiff, the latter must either produce the account, or prove its loss, its contents, and the errors complained of.

This cause, at Spring Term, 1843, of IREDELL Court of
(55) Equity, having been set for hearing, was removed on the affidavit of the defendants to the Supreme Court.

It appeared from the bill, that in May, 1837, the plaintiff, Melvin, and the defendants entered into partnership in a small country store; and, after carrying on the trade for about seven months, they dissolved by the defendants selling out to the said plaintiff, who was to take the debts at their nominal amount, the stock of goods on hand at cost and insurance, and some goods the defendant had at another store; and for the sum that might be found due to the defendants for their stock and advances to the firm, and their share of the profits and other things, the plaintiff, Melvin, was to give his bond to the other party. On the 14th of December, 1837, the parties came to a settlement in the premises, upon which the sum of $1,203.05 appeared to be due from the said plaintiff; and he gave his bond with the other plaintiff as surety therefor. The accounts be-

* NOTE.—The opinion in this cause was delivered at June Term, 1843.

tween the parties, on which the settlement was made, were stated by the defendants, who were supposed to be the more competent accountants; and they were not particularly examined and compared with the books by the plaintiff, Melvin, as alleged in the bill. A few days afterwards, the defendants informed the said plaintiff, that they had discovered errors in the accounts before stated by them, which were in their (the defendants) favor, and offered to correct them. What these errors were, is not stated in the pleadings. But the parties proceeded to make the corrections; and by the second settlement the sum due to the defendants was reduced to $783.59; upon which the former bond was canceled and a new one given for the latter sum. At that time all the books and papers of the firm and the accounts stated between the parties, on which the plaintiff's bonds were founded, were delivered to the plaintiff, Melvin. The defendants afterwards instituted an action on the bond and recovered judgment; and then, in November, 1840, the plaintiffs filed this bill, and therein ask relief, on the ground that the settlement was erroneous, and that the sum, to which the defendants were entitled, was not as large as that for which the bond was given. For the purpose of establish- (56) ing that fact, the bill alleges, that the plaintiff, Melvin, was not skilled in accounts, and adopted the statements of the defendants without understanding them; but that he hath since caused a statement to be made from the books by competent persons, whereby the shares of each partner, for capital and other advances, interest and profits, have been duly ascertained, and whereby the whole sum truly due from the said plaintiff to the defendants appears to have been only $381.52, instead of $783.59. The bill then sets forth a statement of the effects of the firm at the dissolution, and of the accounts of the respective partners with it, as standing in their books; from which that balance of $381.52 is the result; and it states that the plaintiff, Melvin, had applied to the defendants to open the accounts and correct them, and that the latter had refused. The bill further states, that the plaintiffs are unable to point out positively in what manner the error arose, or in what item or items it consisted; but it alleges that the defendants were indebted to the firm in the sum of $478.12; of which $85 were for merchandise and appeared in the books among the general accounts, and $393.12 were charged in a memorandum in the cash book, which latter sum the plaintiffs are convinced was omitted to be charged to the defendants in the account settled, and with some other small mistakes, make an error to the amount of $402.07. The bill then seeks a discovery from the defendants of the items com-

posing the account stated, and whether they did not omit to charge themselves with $478.12, or $393.12, or some other sum, with which they ought to have been charged, and what sum; and, also, whether they did not make improper charges against the plaintiff, Melvin, and what they were. And against the sum of $402.07, the bill prays an injunction and relief.

The answer admits the settlements, and that they were founded on accounts made out by defendants; that there were errors in the first, but that they were discovered and cor-
(57) rected on 19 December, 1837, when the second bond was given. The answer states that there were various other dealings between the parties, and particularly for goods furnished from another store; that the defendants can not recollect the items composing the accounts, as stated by them; but that they were drawn out at length, and connectedly and minutely set forth all the dealings between the parties in partnership and otherwise; and that the same, as the defendants believed and still believe, contained a full, fair and just account between the parties, and was at the time delivered to the plaintiff, Melvin, and no copy kept by the defendants. And the defendants insist on the same as binding and conclusive, unless some error be shown therein. The answer denies that the defendants refused to re-examine the accounts; but, on the contrary, it states that, when the plaintiff, Melvin, sometime after the settlement, suggested that there was an error, the defendants offered, if the said plaintiff would produce the settlement and point out any error in it, either of omission or false charge, that they would correct it; but the said plaintiff declined or omitted to show the accounts, and said they were lost. And they submit now to correct any error that can be established in their settlement.

A witness examined for the plaintiffs, states that he had been a clerk in the store, and was present when the settlement of 14 December was made. He is unable to state the contents of the account then stated between the parties; but he thinks that the account against the defendants in the cash book of about $393.12, as stated in the bill, was not brought into that settlement; and he also states, that some of the cash, which made up that sum, might, probably, have been laid out by the defendants for cattle and other effects for the firm, and not applied to the defendants' own use. This witness also attested the bond given on the last settlement of 19 December; and says it was given for the sum agreed on by the parties, as being due after then correcting all the errors of the previous settlement, as far as then detected; but that those corrections were made on the account by the parties themselves, who communicated to him the result

alone, and did not mention the particular corrections on either side, nor does he know them. (58)

The cause was set for hearing upon the bill, answer and the deposition of this witness.

No counsel for the plaintiffs.
Hoke for the defendants.

RUFFIN, C. J. The plaintiffs must fail for want of the requisite proof of their case. Having given their bond on the settlement of accounts, they can not be relieved from it, but for error in the accounts. If they can show an error, they may surcharge and falsify the account stated. The statement of this bill as to errors are very vague, and not, indeed, very intelligible; and, probably, if the defendants had chosen, the plaintiffs might have been stopped *in limine* for that reason. But the defendants submit to answer, and in the answer submit to correct any error the other party may be able to establish. By the answer the defendants purge themselves of all knowledge or belief of error, though they state themselves to be unable to answer to particular items being or not being charged or credited in the account stated, because one of the plaintiffs himself had the possession of the original settlement, and the defendants had no counterpart thereof; and defendants' memory would not serve him to restate the accounts at the distance of more than three years. The plaintiffs, therefore, gain nothing by the discovery sought from the defendants; and the latter give a reasonable account of their inability to make it more full, and insist that the contents of the account should be made to appear by the production of the account itself. Certainly, like every other writing, the contents must be shown by the instrument itself; and, without being informed what were the matters embraced in the account, it is impossible to determine whether the settlement was right or wrong. Therefore, the plaintiffs should have accounted for the non-production of that document; which they have not done. It is true, the defendants state the plaintiff, Melvin, told them that he had lost it, and, for that reason, urged him to go into a settlement anew, which the defendants declined. But the plaintiffs have not proved (59) the destruction of the instrument, nor stated upon their own oath what has become of it, nor even given secondary evidence of its contents. They have, indeed, examined one witness, to prove that, in a previous settlement, which all parties admit to have been erroneous, a particular debt against the defendants was probably omitted. But the witness, without clearly estab-

lishing even that, informs us that there was a subsequent settlement, of the contents of which he is ignorant, and upon which the bond was given, which gives rise to the present controversy. Now, it may have been, that one of the errors of the first settlement which was corrected in the second, was with respect to the sum of $393.12, which the plaintiffs state was omitted, as they suppose; and this is the more probable, as that sum is so near the amount of the total errors claimed in the bill, namely, $402.07. But, however that may be, it is the plaintiffs' misfortune not to be able, by an admission drawn from the defendants or by other evidence, to show us what was included in the settlement; and, consequently, we can not see that the account embraced any false charge, or omitted any proper credit.

PER CURIAM. BILL DISMISSED WITH COSTS.

PETER BEAM *v.* CHARLES BLANTON and JAMES CLARK.

1. According to the rules of a Court of Equity, an injunction to restrain proceeding with an execution is a mandate to the creditor, not to the officer, and the person to be restrained thereby should be made a party to the proceedings.
2. A vendor of a chattel has no lien upon the chattel for the unpaid purchase-money.
3. Nor has the surety of the vendee of a chattel any such lien.

(60) Cause removed from the Court of Equity of CLEVELAND, at Fall Term, 1843, by consent of parties, to the Supreme Court.

The bill was filed in July, 1842, and its material allegations are, that, at a sale made on the seventh day of the preceding month by Prior McEntire as administrator of Rebecca McEntire, the defendant, Clark, bid off a negro man slave by the name of Brisk at the price of three hundred dollars and five cents, and, according to the terms of the sale, executed his bond jointly with the plaintiff, Beam, for the said sum, payable at twelve months; that, in bidding off the said negro, the said defendant acted, by express agreement with the plaintiff, merely as his, the plaintiff's agent and for his, the plaintiff's benefit; that the said defendant was an utterly insolvent man, and the plaintiff never would have joined the defendant in the said bond, but upon the express agreement and promise of the said defendant, immediately to transfer to the plaintiff the legal title

in the slave so bought for the plaintiff; that as soon as the bond for the price of the negro was executed, the defendant, Blanton, as sheriff, levied an execution or executions upon the slave as the property of Clark, although the said Blanton knew that the slave had been purchased by Clark for the plaintiff; that the defendant, Clark, had refused to convey the slave to the plaintiff, alleging that he purchased for himself and that the plaintiff was to give him one hundred dollars for his bargain, which allegation the plaintiff alleges to be utterly false; and that the said defendant hath sold the said slave to the said Blanton, who claims him as his own property. The prayer of the bill is, that the defendants may be declared trustees for the plaintiff, and be decreed to surrender the said slave to him, and that Clark be decreed to execute a title therefor to the plaintiff, that the said slave be held liable for the payment of the bond aforesaid, and, in the meantime, an injunction may be awarded to restrain the defendant, Blanton, by himself or deputy, from selling the said slave, and for general relief. An injunction was granted according to the prayer of the bill, and, notwithstanding its dissolution was prayed for upon the coming in of the answers of the defendants, it has been continued until the (61) hearing.

The defendant, Clark, denies by his answer that he bid off the slave as the agent of the plaintiff, or at his request, or under any agreement of any kind with him; but declares that he purchased solely for himself and with a view to speculation, and that the plaintiff joined him in the execution of the bond for the purchase money as his surety. He declares further, that, after the levy of certain executions, one by the defendant, Blanton, and the other by a constable, upon the said slave as the property of the defendant, Clark, the plaintiff proposed to the said defendant to take the said negro off his hands, and it was finally agreed between them that the plaintiff should satisfy said executions, substitute his bond with good sureties in the place of that previously given for the price, and the defendant should relinquish the slave to him; that the plaintiff failed to comply with this agreement; that Blanton then took the slave into his possession, and the plaintiff told this defendant to do the best he could with him; that thereupon it was arranged between this defendant and Blanton that, if this defendant could not sell him for a greater price, which he was at liberty to do, the negro should be put up at sale under the execution at the price of $259, and, if no person bid any more, Blanton should take him at that price. This defendant further states, that he has satisfied both the executions levied on the negro, that the bond for

the purchase money is not yet due, and that he will be able to make arrangements to meet it when it shall fall due.

The defendant, Blanton, denies in his answer all knowledge whatever, that the defendant, Clark, had bought the slave in question under any agreement with, or as the agent or at the request of the plaintiff; declares that he levied upon the said slave as the property of his co-defendant, without any suspicion that the plaintiff had or claimed an interest therein; states the subsequent attempts that were made by the plaintiff to make an arrangement with Clark and the final abandonment thereof, as set forth in the answer of his co-defendant; admits that the execution in his hands has been satisfied; and, after setting forth the inchoate and conditional agreement, mentioned
(62) by his co-defendant, for his purchase of the slave, represents the same as having been put an end to by the filing of the bill.

To these answers replication was filed, the parties proceeded to take proofs and the cause was set for hearing.

No counsel for the plaintiff.
Hoke for the defendants.

GASTON, J. As the cause is before us to be heard upon the pleadings and proofs, it is not necessary to express an opinion upon the regularity or propriety of the injunction, which was granted upon the filing of the bill and continued until the hearing, to forbid the sheriff from selling the slave under legal process. But it may not be amiss to suggest, that according to the rules of a Court of Equity an injunction to restrain proceeding with an execution is a mandate to the creditor not to the officer and the person to be restrained thereby should be made a party to the proceedings.

We see no ground for a decree that the slave shall be liable for the payment of the bond given to secure the purchase-money. In England, where the lien of the vendor for the unpaid purchase-money is carried very far, we are not aware that such a lien is recognized in the case of the sale of a chattel; and, still less, that it exists in favor of a surety, who fears that he may be compelled to pay the price.

But we hold that the plaintiff is entitled to relief, upon the proofs that the defendant, Clark, purchased for him and as his agent. It is unnecessary to go through the evidence minutely. One fact is established by the testimony of a number of witnesses, in direct opposition to the answer of Clark, that there was a previous agreement that he should buy for the plaintiff.

It is proved by them, that, when charged by the plaintiff, as soon as the difficulty arose, that he had bid and bought as the plaintiff's agent, he admitted the truth of the allegation. Besides this, one witness (Wellman) declares that he was present with the parties when it was agreed that Clark (63) should bid for the plaintiff as far as $300; that, after that sum had been bid, Clark applied to the plaintiff to know whether he might bid more; that he was told he might bid as far as ten or twenty dollars more; and therefore he bid five cents more and was declared the highest bidder. It may be that he was to receive some price or compensation for performing this agency, but there is no such allegation, nor, if there were, is there any proof to sustain it. We are satisfied, also, upon the testimony, that, after the executions were levied and Clark insisted on claiming the negro, the plaintiff did endeavor to make the arrangements set forth in the answers. But this fact is not inconsistent with the averment that the purchase had been made by Clark as his agent. It is in proof that Clark was insolvent. The purchase had been ostensibly made by him, and he having taken possession of the slave as his property, it was not extraordinary that the plaintiff, who had joined in the bond, should be willing to make some sacrifice to obtain the possession of the slave and to be quieted in his title. It is also proved that when the proposed arrangement had failed, the plaintiff did declare that he would forego his claim and run the risk of being compelled to pay the bond; and if, upon the faith of this declaration, any person had bought from Clark, we should not allow the plaintiff to enforce his equitable title against such purchaser. But no such purchase was made, nor is any title set up, adverse to that of the plaintiff, except the title of his trustee, and this bill was filed to enforce the plaintiff's claim within a few weeks after the transaction.

It does not appear whether the bond for the purchase-money has been paid or not, nor by whom the slave has been held since the filing of the bill. While we declare, therefore, that the slave was purchased by the defendant, Clark, as the agent of the plaintiff, it must be referred to the Clerk of the Court to enquire and report whether the purchase-money has been paid, and, if so, by whom—what is the value of the hire or services of the slave since he has been withheld from the (64) plaintiff—and who has received the benefit of such hire or services.

PER CURIAM. REFERENCE ORDERED ACCORDINGLY.

RODERICK B. GARY et al. *v.* HENRY J. CANNON.

1. Whether a surety to a debtor can or can not *in any case* require the creditor to resort to a collateral security, which he has obtained from the principal debtor, he certainly can not require him to look to such security in the first instance, if it be not plainly a valid security under which the creditor can have speedy, direct and certain redress.
2. The Court will never undertake to dictate to the guardian of a ward to whom he shall lend money, nor how long he shall lend it to a particular person. The investments of the ward's money are in the guardian's discretion, as they are upon his responsibility.

This was an appeal, by permission of the Court, from an interlocutory order of the Court of Equity of NORTHAMPTON, at Spring Term, 1843, his Honor, Judge *Manly*, presiding, dissolving the injunction which had been obtained by the plaintiffs in vacation.

The facts appearing in the pleadings are as follows:

The bill sets forth that Samuel B. Spruill was appointed the guardian of two infants, Robert and William Cannon, and received their estates; that the plaintiff, Jos. J. Exum, and Bryan Randolph, the testator of the other plaintiff, Britton, were Spruill's sureties for the guardianship; that Spruill, after converting to his own use considerable sums of money belonging to his wards, resigned; that Henry J. Cannon, the defendant, was then appointed the guardian, and in behalf of his wards instituted actions on the guardian bonds against Spruill, Exum, and Britton, the executor of Randolph, then deceased; that in the suit brought in behalf of Robert Cannon judgment was given in February, 1842, for $6,211.42, with interest until paid;
(65) and in that in behalf of William, the judgment was for $6,389.31, with interest in like manner. The bill further states that Spruill was much embarrassed, and, indeed, insolvent, when he resigned; and that soon afterwards, to wit, on 16 August, 1841, he executed to Henry J. Cannon a deed and assignment of all his property, in trust to secure certain debts therein specified, and amounting to about $40,000; with authority and directions to the trustees to sell the estates conveyed, and apply the proceeds in satisfaction of the debts *pro rata*, if not sufficient to pay the whole; that among the debts thus secured are those to the two infants, Robert and William Cannon; and that in January, 1842, or within a short time thereafter, the trustees sold the property for the sum of $13,308.20. This bill was filed in November, 1842, and further states that the defendant, Henry J. Cannon, gave his bond to Spruill, while

the latter was guardian, for $2,000 of the money of the wards, lent to him; and that after the judgments Spruill surrendered that bond to the defendant, the succeeding guardian, who accepted it in part payment of the judgments, and who was then, at the filing of the bill, fully able to pay it. The bill further states that the plaintiffs had applied to the defendant for an account of the trust fund, and requested him to apply immediately, in part satisfaction of the judgments, a just dividend of such portion of the fund as might be in hand, and for any residue of the judgments to give a reasonable indulgence, until the trust fund could be entirely got in, and upon a final settlement distributed. The bill also states that the necessities or interests of the infants do not require that these debts should be called in; for that their estates are not involved, and they have other ample means of maintenance, and the debts are perfectly secure; and, moreover, that the plaintiffs had offered to the present guardian, and still offered, any further security he might require, and to advance any sums he might judge proper for the use of the wards, until the true balance of the debts could be ascertained, after the application of their proportion of the trust fund. The bill then charges that the guardian, the defendant, refuses to admit any credit whatever, or (66) to grant any forbearance, and insists on raising the whole amounts of the judgments forthwith, and, to that end, has sued out executions. The prayer of the bill is that, as guardian, Henry J. Cannon may be decreed to acknowledge satisfaction of the judgments or one of them, as to the sum of $2,000, paid to him in his own bond; and also that he may render an account of Spruill's trust estate, and that such part of it shall be applied to these judgments as may be found to be their rateable share; and, in the mean while, for an injunction against further proceedings at law.

On the bill, supported by the usual affidavits, an injunction was awarded in vacation as to the sum of $5,000, part of the judgments.

Henry J. Cannon put in his answer, in which he admits that he was indebted to his wards in the sum of $2,000, and that he gave a bond therefor to Spruill, then the guardian. But he denies that he refused to allow a credit therefor on the judgments; and, on the contrary, he states that he received the bond from Spruill at the time the judgments were rendered, and that he immediately acknowledged satisfaction of record for so much of one of the judgments; and that it is only for the residue, after allowing that credit, that he took out execution. The answer, after admitting the deed of trust made by Spruill,

as charged, further states, that when he was about to sell the property, many judgment creditors of Spruill alleged that the deed was fraudulent in law, and void, and caused the property to be seized by the sheriff on their executions; and, the title being disputed, it was manifest that the property, if sold either by the trustee or the sheriff, would be sacrificed, to the great injury of those creditors, whoever they might be, that were entitled to it; and, therefore, that it was agreed on 7 January, 1842, by both sets of creditors, that a sale should be so made as to convey to the purchaser a good title at all events, and thereby get fair prices; and, in order thereto, that the sheriff should discharge his levies, and the sale be made under the deed and the price received by the defendant, as trustee; but that
(67) a case should be made, or an action at law instituted between the sheriff and the trustee, for the purpose of having the validity of the deed determined; and, as it might be held to be valid or invalid, that the defendant should pay the money to the creditors provided for therein, or to those entitled under the execution; and that, in the meanwhile, the defendant should invest the money in the purchase of such judgments as he might deem secure, so as to be able to raise it upon short notice, when needed for those who might be held entitled to it. As a part of the answer, the defendant exhibited the agreement referred to, which was executed under seal by the sheriff, the creditors by execution, by the defendant and by the present plaintiffs and the other creditors in the deed of trust. The answer then states that the defendant made the sales as before mentioned, and, in conformity to the agreement, invested the proceeds in good judgments, to await the decision as to the right; that, immediately after the agreement, an action was brought and a case made therein by counsel for the two classes of creditors, for the purpose of getting the judgment of the highest legal tribunal of the State upon the point, whether the deed was good or not; and that the same has been diligently pursued on both sides, but has not yet been determined; whereupon it is uncertain, and, as the defendant is advised, doubtful, whether the deed will be supported or not, and, consequently, whether anything will be derived from that source, applicable to these debts. The answer further states, that some money is needed to discharge claims upon the estates of the wards, which their former guardian left unpaid, and to defray the expenses of their education at the University where they are students. But the defendant admits that the plaintiffs offered to make advances for those purposes, and to give further security for the debt; and that he declined the offer, because he did not con-

sider his wards or himself under any obligation to do so, and it was the interest of his wards, as he thought, as well as more convenient to himself, to have the business of the former guardianship closed, and the funds invested in other hands.

Upon the answer, the defendant moved for a dissolu- (68) tion of the injunction, which was decreed; and the plaintiffs were then allowed to appeal.

Whitaker for the plaintiffs.
Bragg for the defendant.

RUFFIN, C. J. All the statements of the bill, on which an equity might be raised, are so directly denied or effectually avoided in the answer, as to leave no doubt of the correctness of his Honor's decree. With respect to the debt, which the present guardian owed his wards, it appears that the bill proceeds on an entire mistake of fact. The answer admits that it ought to have been credited on the judgments, but it states that it was so credited at the time of taking the judgments.

With respect to the transactions connected with Spruill's assignment, without admitting that a creditor has not the choice of remedies, either upon a security obtained from the principal debtor, or against a surety—leaving to the latter the benefit of the security by way of reimbursing him; and, particularly, without admitting that infant creditors can be restricted to such a security on property as the debtor may have thought proper to provide, we hold that, at all events, the surety can not require the creditor to look to such a security in the first instance, if it be not plainly a valid security, under which the creditor can have speedy, direct and certain redress—as much so as that which the law gives him against the surety himself. The debtor and the surety have no power to embarrass the creditor in any such manner. And we hold this the more especially when the supposed security can not be enforced, but is suspended in its operation indefinitely by a litigation, instituted to determine its validity, under an arrangement between the sureties themselves and those who contest the deal. The trustee might have sold for cash such title as he had under the deed; and, after applying the proceeds, whether little or much, there could be no objection to the creditors then raising the balance from the sureties. But to avoid a loss to themselves from such a sale, the sureties interposed and had a sale in (69) another manner, by which better prices were to be realized, and for their benefit, in case the deed should be held good; but that question is yet to be determined at law. It would be

unreasonable that the creditor should be compelled to await the decision, and suspend proceedings on a judgment already obtained at law against the principal and the sureties.

As to the allegations that the debt is or will be made secure, and that the situation of the infants creates no necessity for calling it in, it is sufficient to say that, if true, it constitutes no equity in bar of the execution. It is the duty of a guardian to keep the ward's money at interest and on good security; and that, under the penalty of being answerable for compound interest, if he will not reasonably endeavor to make it, and for the debt, if he allows it to remain on insufficient security. The Court, therefore, never undertakes to dictate to whom a guardian shall lend money, nor how long he shall lend it to a particular person. The investments are in the guardian's discretion, as they are upon his responsibility.

It must, accordingly, be certified that there is no error in the decree, and the plaintiffs must pay the costs in this Court.

PER CURIAM. ORDERED ACCORDINGLY.

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(70)

JOHN LUNN, Administrator of A. Griffin, *v.* JAMES F. JOHNSON, Administrator of B. Johnson.

1. Silence in an answer as to any matter charged in the bill does not amount to an admission of the fact.
2. When an answer is believed to be designedly defective, for the purpose of imposing on the plaintiff the burthen of proving what the defendant is, in conscience, bound to admit, the proper course is to except to the answer and compel the defendant to put in a complete one.
3. When in justification of conduct, not equitable, charged in the plaintiff's bill, the defendant alleges that the plaintiff had improperly pleaded at law the statute of limitations to some of his claims, it is incumbent on him to show that it was unconscientious in the plaintiff to avail himself of such a plea.

This cause was removed by consent from the Court of Equity of DAVIE at Spring Term, 1843, to the Supreme Court.

The plaintiff's bill was filed in January, 1840, and therein he alleged that he was the administrator of Anderson Griffin, who departed this life in 1834 intestate—that the said intestate and one Baker Johnson had carried on various dealings with each other—that the said Griffin held various notes of said Johnson payable to different persons, which, at the request of the said Johnson and upon an understanding that the amount

thereof should be credited to the said Griffin upon a settlement he had purchased, without taking an assignment thereof—that Griffin had also paid off a bond, in which he had been the surety of Johnson, executed to one Josiah Cox in February 1833—that, since the death of Griffin, the plaintiff, with the funds and for the benefit of the estate of his intestate, had purchased two notes executed by Johnson to Foster, Turner & Co., but had taken no assignment thereof—that in a conversation between the plaintiff and the said Johnson, the latter admitted all the above claims to be good, and agreed that they should be allowed in the settlement of the dealings between himself and the plaintiff's intestate, and on 18 April, 1839, confessed judgment for all of them, except the claim for money paid as his surety on the note to Josiah Cox, and that (71) for the two notes purchased from Turner & Co. The plaintiff further alleged that a suit having been instituted against him as the administrator of Andrew Griffin by the said Baker Johnson, on account of certain demands of the said Johnson against the said Griffin, arising out of their dealings aforesaid, the cause came on to be tried at the Fall term, 1839, of Davie Superior Court, and on the trial the plaintiff claimed a credit for the respective items hereinbefore mentioned, but the said Johnson utterly refused to allow them, and they were rejected—that the said Johnson obtained a judgment, excluding these credits, for the sum of $271 and costs, and issued an execution to compel the payment thereof, and that shortly thereafter the said Johnson died intestate and insolvent to a large amount. The prayer of the bill was for an injunction and for general relief.

The defendant, the administrator of the said Johnson answered the bill and admitted that there had been many dealings between the said Johnson and the plaintiff's intestate—that a suit had been brought to ascertain the balance due upon such dealings, and judgment obtained at the time and for the sum set forth in the plaintiff's bill. By the answer it was further admitted that the plaintiff claimed on the trial, as set-offs or credits against the demands of the defendant's intestate, the same credits as are claimed in his bill, and that they were all rejected; but the answer insisted that thereby no injustice was done to the plaintiff or to the estate which he represents, because just demands of the defendant's intestate to an amount exceeding that of all these offered set-offs or credits, especially one for $300 with nine years' interest, and one for $170 with six years' interest, and which demands were sought to be recovered in that action were held to be barred by the statute of

limitations, whereof the plaintiff unconscientiously availed himself. The answer was entirely silent as to the agreement charged in the bill, to allow as credits the claims now brought forward by the plaintiff and, in regard to the insolvency of the estate of the defendant's testator, distinctly charged in the
(72) bill, uses this language, "the defendant *admits* that his intestate had very little property at the time of his death, except the judgment against the plaintiff's intestate."

Upon the coming in of the answer, a motion was made to dissolve the injunction which had issued upon the filing of the bill. This motion was refused and the injunction held over until the hearing, and the plaintiff replied generally to the answer. The parties having taken their proofs, the cause was set down for hearing and removed to this Court.

No counsel appeared for the plaintiff.
Boyden for the defendant.

GASTON, J. The ground on which the plaintiff rests his title to relief here, is the breach of good faith on the part of the defendant's intestate in refusing to allow the credits claimed, as he was bound to do by his agreement. The silence in the answer as to that agreement is a suspicious circumstance; but, according to the rules of a court of equity, it does not amount to an admission of the matter charged. When an answer is believed to be designedly defective for the purpose of imposing on the plaintiff the burthen of proving what the defendant is in conscience bound to admit the proper course is to except to the answer and compel the defendant to put in a complete one. The agreement being neither admitted nor denied, the plaintiff is put to proof of it, and the only evidence tending to establish it is that of Tennison Cheshire. This witness deposes, that on 18 April, 1839, the defendant's intestate confessed before him as a magistrate, and upon that confession the witness rendered nine judgments, which he particularizes by their respective amounts—that the said intestate requested the plaintiff not to press their collection, and assured him that they should all be allowed in the settlement of whatever recovery the said intestate make in the suit then pending. No proof is offered of an agreement extending to the other claims of the plaintiff, nor does he prove at all the liability of or a payment by his intestate, because of the note alleged to
(73) have been executed by him as surety for the defendant's intestate. To the extent of the agreement thus proved, we think the plaintiff is entitled to relief. He could not set

up these claims as set-offs at law, for the judgments were rendered since the death of his intestate, and therefore were not due in the same right as the demands sought to be enforced by the plaintiff in the suit at law—and besides, the judgments were not rendered until after the suit at law had been brought and the cause put to issue.

The breach of the agreement to allow these judgments as credits is sought to be excused, because the plaintiff unconscientiously availed himself of the statute of limitations to bar some of the demands against his intestate sought to be recovered in that action. The alleged *fact* is not shewn by any proof, and it were shewn there is no matter in equity alleged or established, rendering it unconscientious to plead that statute.

The Court directs a reference to ascertain what will be the true balance due to the defendant as administrator of Baker Johnson upon the judgment rendered in favor of his intestate after deducting the amount of the several judgments confessed by the said intestate before the magistrate, and reserves the case for further directions upon the coming in of the answer.

PER CURIAM. REFERENCE ORDERED ACCORDINGLY.

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(74)

JAMES DALRYMPLE et al. *v.* ANDREW SHEPPARD et al.

A, having a judgment at law against B, a contract was made between them, by which, as B understood it, he was to pay the amount on a note or bond due by A to another person. B accordingly so paid the amount and had a credit endorsed on the note of A for the amount of the said judgment. But A, declaring his understanding to be that B was to pay the whole amount of the note, which was greater than that of the judgment, and alleging that he claimed no benefit from the credit which had been placed on the note, issued an execution on his judgment, whereupon B obtained an injunction: *Held*, upon these facts appearing in the bill and answer, that the court would not dissolve the injunction upon motion, but would continue it until the hearing.

APPEAL from an interlocutory order dissolving the injunction at Fall Term, 1833, at MOORE Superior Court of Equity, his Honor, Judge *Battle* presiding.

The plaintiffs state in their bill that two judgments were recovered by the defendant Sheppard to the use of the defendant Curry in Moore County Court against the plaintiffs Dalrymple and Cox, in which Dalrymple was the principal debtor—that Curry was indebted at the time to one McNeill's executors in

a sum of more than $600; a sum much larger than the amount of the two judgments—and that it was agreed between Curry and Dalrymple, that, if Dalrymple would procure a credit to the amount of the two judgments to be endorsed on Curry's note in the hands of McNeill's executors, it should be a satisfaction of the two judgments—that the plaintiffs did procure the said credit to be endorsed on Curry's note by McNeill's executors—and that they gave the said executors their own note for the amount thus endorsed on Curry's note. The bill further sets forth that Curry, when informed of what had been done, refused to enter satisfaction on the judgments, alleging that the plaintiffs were, by the agreement, to pay off and extinguish his entire note in the hands of McNeill's executors, before he was to enter satisfaction or release the said judgments; which allegation the plaintiffs say is not true—
(75) and that Curry has since issued executions on the judgments, and caused them to be levied on two tracts of land, and threatens to have them sold. The bill then prays for an injunction.

The defendant Curry put in his answer, and therein he admits all the material charges of the bill; except that he says he offered to Dalrymple that, if he would take up the note which McNeill's executors held against him, Curry (which he admits was larger than the judgments), and surrender the said note to him, he would then cause satisfaction to be entered on the said two judgments. Whereupon he says Dalrymple left him, without saying anything more on the subject—and that, afterwards, instead of taking up his note the plaintiffs, without his knowledge, made an arrangement with McNeill's executors, whereby a credit of five hundred dollars was entered on his, Curry's note in their hands. The defendant Curry further says that he now claims no benefit of this credit; and that if he is bound to admit it, the amount of his two judgments, costs and sheriff's commissions was five hundred and thirty dollars—that thirty dollars are still due him on the said judgments. The said defendant denies that he ever made the agreement set forth in the bill, or any other agreement, except as above stated.

On this answer coming in the Court, on the motion of the defendant, dissolved the injunction *in toto;* and the plaintiffs, by permission of the Court, appealed to the Supreme Court.

Winston for the plaintiffs.
Strange for the defendants.

DANIEL, J. The defendant, Curry, has got credit for $500 on his note to McNeill. In his answer he says, indeed, that he does not claim the benefit of that credit. But he has not caused the endorsement of that credit on his note to be expunged, nor has he procured the plaintiff's note to McNeill's executors to be given up: he has as yet the benefit of the said credit. And it seems to us that it would be improper, in the present state of the case, to permit him (76) to collect the whole of the money on his two judgments.

The defendant, Curry, contends that the arrangement made by Dalrymple with McNeill's executors was voluntary and without his request or authority; and, therefore, if the plaintiffs should be placed in any difficulty in consequence of the issuing of his executions on the two judgments, that difficulty will have been brought about by the improper conduct of Dalyrmple himself. But the answer admits there was a communication between the parties, whereby Dalrymple might satisfy the judgments against himself by discharging Curry from his debt to McNeill, either *pro tanto* or entirely. Whether the agreement was for the one or the other, is a question upon which the parties are at issue. But admit that, in fact, it was the latter. It is yet clear that Curry ought not to avail himself of Dalrymple's mistake of the agreement, or his inability to comply literally with it, by taking the benefit of what Dalrymple has done toward the performance of the agreement, and at the same time to raise the sum from Dalyrmple a second time on execution. Curry has a credit with McNeill for $500, paid for him by Dalrymple, and, therefore, the latter is entitled to credit therefor on his debts. But it is said that Dalrymple was to pay $30 or $40 more before the judgments against him were to be deemed satisfied. If that be so, it will form a good reason why he should yet be decreed so to do, when the agreement shall have been established by proofs, and, as established, appear to be fair and legal. But until the case can be heard upon the proofs, the injunction should stand as a necessary protection to the plaintiffs from being compelled to pay again what they have already paid for Curry. Against this, it is said that the answer disclaims the benefit of the payment to McNeill. But that is manifestly a subterfuge; since, as has already been stated, he actually has the credit, and the plaintiffs, in his stead, are actually bound to McNeill for the money. The contract must either be rescinded or executed, *in toto;* and, as that has not been done by the parties, it can now only be done by the Court on the hearing—to which time the injunction should be (77)

kept up, except as to the sum of thirty dollars. The decree was therefore erroneous, and must be certified; and the defendants must pay the costs in this Court.

PER CURIAM. ORDERED ACCORDINGLY.

JOHN KING *v.* WILLIAM P. LINDSAY et al.

1. Where A covenanted to deliver to B a quantity of corn, and B in consideration thereof, by a separate covenant, executed at the same time, contracted to deliver to A a quantity of bacon, and A having failed to perform his covenant, sued B at law upon his (B's) covenant: *Held*, that the two covenants growing out of the same contract, and executed at the same time, are to be taken together and regarded as one instrument; and B not being able to defend himself at law was entitled to relief against his covenant in Equity. *Held further*, that one who had purchased B's covenant and taken an assignment of it from A, without notice of B's equitable defence, was still bound by the same equities to which A was subject.
2. It is the duty of an assignee of an unnegotiable paper to make enquiries of the obligor, and, if he does not, he takes it subject to all the equities against the assignor.
3. If the obligor, upon such enquiry being made, misinform the assignee, or if he acquiesce in the assignment, and delay for a long time to bring forward his equity, such conduct might relieve the assignee from such equity.

APPEAL from an interlocutory order of the Court of Equity for GUILFORD County, at Fall Term, 1843, his Honor, Judge *Manly* presiding.

The bill in this case, which was filed in September, 1841, sets forth that on 21 February, 1840, the defendant Lindsay contracted with the plaintiff to sell him 400 bushels of corn, to be delivered the next day, for 1,280 pounds of bacon, to be delivered by the plaintiff on 15 April following; that the plaintiff then gave his covenant to Lindsay for the de-
(78) livery of that quantity of bacon on the day mentioned, and at the same time Lindsay executed to the plaintiff a covenant for the delivery of the corn; that this occurred in Guilford, where the plaintiff resides; that Lindsay also gave the plaintiff a letter to a person, in whose care he alleged he had corn, directing him to deliver 400 bushels to the plaintiff. The bill further states that, immediately thereafter, Lindsay went to Madison, Rockingham County, where the defendant Black resided, and there, in satisfaction of a previous debt of $75 and for the further sum of $55 then advanced, he sold

to Black the covenant given by the plaintiff and delivered it to him—that Lindsay's agent did not deliver to the plaintiff any corn; but informed him, when he applied for the corn (and such was the fact), that, whatever there was, it had been seized by attachments against Lindsay, who did not return to Guilford, but, being insolvent, immediately absconded. The bill further stated that, when the plaintiff's covenant fell due, Black caused a suit to be instituted in the name of Lindsay, and recovered judgment for the value of the bacon, interest and costs; and the plaintiff prayed for an injunction and relief.

In the answers of the defendants the agreements stated in the bill are admitted, and it is alleged that the plaintiff did receive some corn from Lindsay's agent; but no quantity is mentioned; and the defendants further state that, by diligence, the plaintiff might have obtained the whole quantity contracted for, before the levy of the attachments. Black also answers that he had no knowledge of the consideration, on which the plaintiff gave his covenant, which expressed no consideration nor condition, but is absolute on its face, for the delivery of the bacon; and that on the faith thereof he purchased it for a full price—and he insists that, being a purchaser for a valuable consideration, and without any knowledge or suspicion of an equity on the part of the plaintiff, he has a right to raise the money on the judgment to his use.

Upon the answers the defendants moved to dissolve the injunction; but the Court refused the motion and continued the injunction to the hearing; from which the (79) defendant Black appealed.

Graham for the plaintiff.
Morehead for the defendant.

RUFFIN, C. J. In the view of this Court the two covenants, growing out of the same contract and executed at one and the same time, are to be taken together and regarded as one instrument; and although at law, from the forms of pleading, the present plaintiff could not avail himself of the default of Lindsay in not performing the agreement on his part, but was obliged to submit to a judgment for the value of the articles, which he contracted to deliver, yet there is no principle of equity better settled, than that a person shall not insist upon the execution of a contract by another, when he, himself, has failed and is unable to fulfill the stipulations on his part, which formed the inducement to the other party to enter into the contract. It is a case in which the consideration wholly

fails; but as that can not be shewn at law, when the contract is in the form of independent covenants in separate instruments, the plaintiff is under the necessity of coming here to restrain the other party from the unconscientious use of that legal advantage. There is a clear equity in favor of the plaintiff against Lindsay, who can not be allowed to make the plaintiff pay for what he never got and can not get. That equity, indeed, was but feebly questioned at the bar; but the case was put on another point.

It was said that an equal or superior equity arises in favor of the other defendant, Black, as a purchaser for value and without notice of the plaintiff's equity. But that is contrary to settled principles. For the advantage of trade and the credit of negotiable paper, the assignees of such instruments, before their dishonor, held them as absolute owners, both at law and in equity, without any regard to the state of the dealings between the original parties, unless the assignee have notice that his assignor ought not to pass off the paper. That is by force of the law merchant, or the statutes which (80) authorize and encourage the negotiation of those instruments, and consequently should protect those who innocently take them. But for that reason it is clear that an assignee could have only the rights of the assignor; since the latter can pass no more than he has. And such, therefore, is the rule of equity in respect to the assignment of *choses in action* or instruments not legally negotiable. The rule has been often laid down and never disputed. In *Coles v. Jones*, 2 Ver., 692, it is said that the assignee, though he comes in upon full and valuable consideration, takes a bond (not negotiable) subject to the same equity, as it was in the obligee's hands. In *Tuston v. Benson*, 2 Vern., 764, it is again said that the assignment to the creditors did not alter the case: a bond, being assignable only in equity, is still liable to and attended with the same equity, as if remaining with the obligee. And in the same case, as reported in 1 Pr. Wms. 496, the doctrine and the reasons for it are yet more fully stated. It is there declared that the assignee is in no better condition than the assignor; for suppose one should assign over a satisfied bond as a security for a just debt, the assignee could not set it up in equity, as it receives no new force from the assignment. And it was laid down that it was incumbent on any one who took an assignment of a bond to be informed by the obligor concerning the *quantum* due upon it; which if he neglected to do, it was his own fault, and he should not take advantage of his own *laches*. In truth, the assignee of a

chose in action gets no title to it, properly speaking, and can not be said to be a purchaser without notice. He gets only the right to use the assignor's name to enforce the claim, and therefore to recover what the assignor might; and the very nature of the subject warns him of the necessity of enquiring respecting the obligor's equity; and, therefore, amounts to notice of such equity. If, upon inquiry, the obligor misinformed him, or if the obligor acquisce in the assignment, and delay for a long time to bring forward his equity, such conduct might vary the rule and give the assignee rights, which the assignment itself would not. The general principle has also been long recognized in this State; *Welch v. Watkins*, 2 N. C., 369, and was recently acted on by this Court (81) in *Moody v. Sitton*, 37 N. C., 381. The present plaintiff has by no conduct of his impaired his equity, as between him and Black; and, therefore, the latter stands merely in the place of Lindsay, and the plaintiff has a right to have deducted from the judgment against him the value of such part of the corn as he did not receive and the interest thereon. What that was will, of course, be the subject of inquiry in a future stage of the cause, and in the meantime the injunction was properly continued.

It will therefore be certified to the Court of equity that there is no error in the decree appealed from; and the appellant must pay the costs of this Court.

PER CURIAM. ORDERED ACCORDINGLY.

Cited: Smith v. Brittain, post, 355; *Miller v. Tharel*, 75 N. C.

EDMUND B. FREEMAN *v.* ALSEY EATMAN.

1. A voluntary conveyance of land, before our Statute of 1840, ch. 28, though for the meritorious purpose of providing for a wife or children, was, by the Statute 27 Eliz. c. 4, fraudulent and void against a subsequent purchaser for a fair price, whether the purchaser had notice or not of the prior conveyance.
2. Even where the contract of purchase is executory and the purchaser is informed of the prior meritorious settlement, that settlement is a nullity as against the purchaser, who has a right to call for the legal title.

This cause was transmitted by consent of parties from the Court of Equity of WAKE, at Fall Term, 1843, to the Supreme Court.

The plaintiff set forth in his bill that on 13 March, 1843, he contracted to sell to the defendant, at and for the price of three dollars per acre, a certain tract of land in Wake
(82) County, and the defendant then executed under his hand and seal a memorandum of the said contract of sale, which was annexed to the said bill and prayed to be taken as part thereof—that immediately after the said contract was made the defendant took possession of the premises under the said contract, and had ever since continued to occupy the same—that sometime in August, 1843, he applied to the defendant to complete the contract, offering on his part to have the land surveyed according to the contract and to make a proper deed for assuring the title to the defendant, and desiring the defendant to pay for the same or give his bond according to the contract, so soon as by a satisfactory survey the number of acres, and thereby the amount of the purchase-money should be ascertained. But that the defendant declined to take any steps for executing the said contract, alleging that the plaintiff was not in a condition to make him a good title to the premises. The bill then further stated that one Merchen Morris was the owner of the premises, and on 8 November, 1833, by deed conveyed or attempted to convey the same for the consideration of love and affection and of one dollar to his sons Hilliard, Henry, William and Rufus, after his death—that on 6 February, 1834, the said Merchen Morris sold the said premises to one Lott Harrell for the sum of $700 paid by the said Harrell, and by a deed of that date, in consideration of that payment, bargained and sold the same to the said Lott Harrell and his heirs—that the said sum of $700 was a full and valuable consideration for the said land—that the said Harrell was, at the time of his said purchase, payment and taking the said deed, entirely ignorant of the said voluntary conveyance to the said Morris' sons, and had no notice thereof, either actual or constructive—and that the said Harrell, immediately after his purchase, took possession of the premises, and continued to hold the same until 1 November, 1838, when he sold, and by deed duly conveyed the same to the plaintiff for the consideration of five hundred and ninety-one dollars, the plaintiff having no notice whatever of the said voluntary conveyance—and that the plaintiff, immediately after his purchase, went into possession, and so
(83) continued until his contract of sale with the defendant and his going into possession as before stated. The bill further set forth that the defendant, not disputing any of the facts here stated as to the title and conveyances, yet insisted

that, in consequence of the said conveyance to the sons of the said Morris, the plaintiff had not himself, and of course could not convey a good title to the said premises. And the plaintiff then prayed for a specific performance of his said contract, alleging that he could convey a good and valid title.

The defendant, in his answer, admitted the facts stated in the bill, and averred his willingness to complete the contract of purchase, provided the plaintiff could, under these circumstances, convey to him a good, legal title, a question which he submitted to the Court.

Badger for the plaintiff.
Whitaker for the defendant.

RUFFIN, C. J. The parties are agreed as to the state of the title, as respects the facts, and it is particularly set forth in the pleadings. The defendant's objection to carrying into effect his contract of purchase is, that in point of law the plaintiff can not make him a good title. That depends upon the operation of the deed made in November, 1833, by Mr. Morris to his four sons, as against the plaintiff and his vendor, Harrell; who were both purchasers for full value paid and took conveyances in fee, without any notice of the deed to the sons. That deed is expressed to be made for love and affection, and one dollar, and purports to convey the land to the sons at the death of the father. The pecuniary part of the consideration is so obviously nominal and colorable, that the deed must be regarded as founded on blood only, and the instrument is, therefore, really a voluntary covenant of the father to stand seized to his own use during his life and afterward to the use of his sons. The opinion of the Court is, that as a conveyance to the sons, it is void as against the subsequent purchasers for a valuable consideration, without notice; and, therefore, (84) that the plaintiff is able to make to the defendant a good title.

Whatever doubt may be entertained, whether the purposes or the language of the act of the 27 Eliz., c. 4, authorized the construction, we conceive that, before our Act of 1840, c. 28, it was settled so firmly as not to be shaken by any authority but that of the Legislature, that a voluntary conveyance, though for the meritorious purpose of providing for a wife or children, is, by that statute, made fraudulent and void against a subsequent purchaser for a fair price, though with notice of the prior conveyance. It was held that notice made no difference; because, if the purchaser knows of the deed, he knows also that

by law it is void. *Gooch's Case*, 5 Rep., 60. The doctrine has in more recent periods been several times much discussed and confirmed. At law there are the cases of *Doe v. Martyr*, 1 New Rep., 332; *Doe v. Manning*, 9 East, 59; and *Hill v. Bishop of Exeter*, 2 Taunt., 69. It never has been doubted that a purchaser without notice was within the meaning of the act, for upon such a purchaser the fraud is actual. The struggle was, whether one, who had notice of a prior deed before he bought, could or should be also said to be defrauded by it. As it has been just remarked, it was held at law in the cases cited and others, that notice did not prevent the operation of the statute. To the same effect there are also many cases in equity. *Evelyn v. Templar*, 2 Bro. C. C., 148; *Taylor v. Stile*, stated in 2 Sugden Vend., 160. In *Purvertoft v. Purvertoft*, 18 Ves., 84, *Lord Eldon* held, that a husband, who after marriage made a fair settlement on his wife, could not at her instance be restrained from selling the estate; because under the act the purchaser, though with notice, would get a good title, and, consequently, it could not be against conscience to do what the statute sanctioned. And afterwards the purchaser of the estate in controversy in that suit, who bought and took his conveyance *pendente lite* and who was under the necessity of going into equity, because the wife had the possession of the land and title deeds, and was threatening to fell timber, was relieved (85) by *Lord Eldon* by having a receiver appointed before answer, which his Lordship put expressly on the ground that the voluntary settlement gave no title whatsoever against the purchaser. *Metcalfe v. Purvertoft*, 1 Ves. & Bra., 180. In his judgment *Lord Eldon* relied on, and must be considered as approving, the previous decision of *Sir William Grant* in *Buckle v. Mitchell*, 18 Ves., 100, which is a very strong case indeed. It was there decided that a voluntary settlement is void, not only as against a purchaser who is so by conveyance, but also as to one whose purchase rests in articles; and such a purchaser had, upon his bill, a decree for specific performance against his vendor, and those claiming beneficially under the settlement, and the trustees in whom the legal estate was vested. *Sir William Grant* said, the construction of the statute was settled at law, and that it must receive the same construction and produce the same effect in a Court of Equity as in a Court of Law. Therefore the purchaser of an equitable estate ought no more to be affected by a voluntary settlement than the purchaser of the legal estate, for the party having the equitable title is in equity to most purposes considered as the complete

owner of the estate. The same doctrine has been held by this Court. *Clanton v. Burgess*, 17 N. C., 13.

The foregoing cases, most of them, need not have been cited for the purposes of the question now before the Court, since there are here both an innocent purchaser, without notice, for full value, and an actual conveyance from the former owner, who was still in possession. But those cases have been adverted to as clearly showing that even when the contract is executory and the purchaser is informed of a prior meritorious settlement, that settlement is made a nullity as against the purchaser, who has a right to call for the legal title. It follows, of necessity, that there can be no question of the title now under consideration, even if no actual fraud were contemplated by Morris and his sons. There must therefore be the usual decree for specific performance of the contract.

PER CURIAM. DECREE ACCORDINGLY.

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(86)

MALCOLM and GAUL and others *v.* T. B. PURNELL, Trustee, Etc., and others.

A makes a deed in trust to satisfy his creditors. The deed recites that A owed several debts, which are specified by the names of the creditors and his sureties. It states too that "he is indebted also to other persons whom he can not now specify," and further recites that "he is desirous of saving harmless the above-named sureties and paying all his just debts, as well others as those named above, and of providing for his wife," etc. He then conveys his property in trust, that out of the same the debts above named shall be first paid and the sureties should be saved harmless, and the remainder, etc., shall be applied to the sole use and benefit of his wife: *Held*, that, under the directions of this deed, all the creditors, as well those particularly named as those not named, came in equally.

APPEAL from an interlocutory order of the Court of Equity of HALIFAX, at Fall Term, 1843, his Honor, Judge *Bailey*, presiding.

This was a bill filed in order to have a proper construction of a deed of trust made by James Frazier to the defendant, Purnell, and to have the trust fund applied under the direction of the Court. The material parts of the deed upon which the construction was asked were these: The deed recited "that whereas, Robert C. Bond and M. H. Pettway were sureties for the said Frazier to a note to James Moore for the sum of seven hundred and fifty dollars, and R. C. Bond and R. J. Hawkins

were sureties for the said Frazier to the Bank of the State for $1,100, and S. H. Gee, T. R. Purnell, R. J. Hawkins and Henry M. Purnell were sureties for the said Frazier to certain notes to B. F. Moore for $1,700, and the said Frazier was justly indebted to Michael Ferrall in the sum of $200, and to other persons whom he can not now specify." And it further recited that "whereas, the said Frazier was honestly desirous of saving harmless the above-named sureties, and paying all his just debts, as well others as those named above, and of providing for his wife, Mary." The deed then conveyed the grantor's property to the trustee "in trust and confidence that the debts
(87) above named shall be first paid, and the sureties saved harmless"—and, then, the remainder "shall be applied to the sole use and benefit of the said Mary, wife of the said Frazier."

The matters of account being referred to the Clerk and Master, a report was made, showing the state of the fund, and submitting to the Court whether, according to the construction of the deed, the said fund should be applied in the first place to the satisfaction in full of the debts and liabilities particularly specified and named in the deed, and the residue only to be liable to the satisfaction of the other debts of the said Frazier. Upon consideration whereof, his Honor was of opinion that the said fund was not, according to the true construction of the deed, previously applicable to the said specified debts, but should be applied *pro rata* to and amongst all the debts of the said Frazier provided for by the said deed, and he ordered and directed accordingly. From which order the said M. H. Pettway, R. C. Bond and S. H. Gee prayed an appeal to the Supreme Court; and there remaining in the said cause other matters to be settled before a final decree could pass, his Honor was pleased to allow the said appeal and directed the foregoing statement to be certified unto the Supreme Court, according to the statute regulating appeals from interlocutory orders and decrees.

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

RUFFIN, C. J. We think the intention is unequivocal to put all the debts on the same footing.

The language is express, that it was the purpose to pay *all* the debts—"*as well others* as those named above." It is said, however, that a preference is given to the enumerated debts in that part of the deed, which declares the trusts, and provides

that "the debts *above named* shall be *first* paid." But the expression "above named" is not used in a restricted sense, as meaning the debts particularly specified, as contradistinguished from the debts generally, but is used to signify "all the debts which had been mentioned in the previous part of the deed." (88)

This construction is unavoidable; for unless it be correct, there is no provision for the debts not specifically designated, inasmuch as according to the deed after "the debts above named shall be first paid, *then*" the provision for the wife arises. But to exclude any of the debts is contrary to the declared purpose of the deed; and, according to the obvious intention, all debts are to be discharged before the wife is to get anything. That is the order to which the word "first" applies in the declaration of the trust; which means that the debts, as a whole, are to be paid before the wife can come in. The provision for her shows the expectation of a surplus after satisfying all the creditors. There was, therefore, no motive, at the time of making the deed, for distinguishing between the different debts; and no preference is given. It will be certified to the Court of Equity that there is no error in the decree.

PER CURIAM. ORDERED ACCORDINGLY.

LEMUEL H. MEBANE *v.* ALGERNON S. YANCY et al.

The real estate of a deceased person was sold under our act of Assembly for a division among the heirs. The land was sold and the money put at interest under the direction of the court, and a considerable amount of interest accrued from the investment. One of the heirs became a *feme covert* after the sale and investment: *Held*, that, on her death, without having had issue and under age, her surviving husband was not entitled to any part of the principal, but was entitled to her share of the interest, accrued during the coverture in his own right, and to her share of the interest, accrued before the coverture, as her administrator.

Transmitted by consent of parties from the Court of Equity of CASWELL, at Fall Term, 1843, to the Supreme Court.

From the pleadings and proofs the case appeared to be this: Bartlett Yancey died intestate in the year 1828, seized in fee of lands in Caswell County, and leaving several (89) children, his heirs-at-law; of whom one was Caroline L., who intermarried with the plaintiff, Mebane, in 1841, and died

in December, 1842, without having had issue, and under the age of twenty-one years. Some years anterior to the marriage of Mrs. Mebane, upon a suit instituted between herself and the other heirs for that purpose, the Court of Equity decreed that a part of the land should be sold for a division, and they were sold by the Clerk and Master, and brought about $25,000. The money was subsequently paid into the office of the Master, and he was directed by the Court to lend it out at interest for the benefit of the parties in the cause; and he did so, and received for interest about the sum of $6,000, which he re-invested from time to time as opportunity offered. After the marriage of the plaintiff, to wit, in March, 1842, he took a loan of $2,500, part of the fund, and executed his bond therefor to the Master. In November, 1842, an order was made in the cause, that the Master should pay to the heirs respectively their several shares of the said fund, the payments to be made to the adults in person and to the guardians of the infants respectively; but nothing was done under the same before the death of Mrs. Mebane.

The plaintiff took administration of his late wife's estate, and filed this bill against the surviving heirs and the Clerk and Master, and therein prays his wife's share of the proceeds of the sale of the land and the interest accumulated to be paid to him, or such part thereof as he is entitled to.

The answer of the heirs insists that the whole fund is real estate and descended to them in possession; because there is nothing in the case equivalent to actual seisin, which would have been necessary to give the husband an estate as tenant by the curtesy, and because the wife was supported out of her personal estate, and not at all out of the interest accrued on this fund, which, in truth, was in no manner severed from the principal.

No counsel for the plaintiff.
Graham for the defendant.

(90) RUFFIN, C. J. It is very plain that the plaintiff has no title to his wife's share of the capital; that is, of the original price for which the land sold. As administrator, he can not have it; because the proceeds of sale are, as respects infants and married women, real estate and to be secured accordingly, so that they shall go to the real and not the personal representatives. Rev. St., c. 85, sec. 7. For the same reason, he is not, as husband, entitled to the fund absolutely; nor as tenant by the curtesy, for the want of issue. If it had got into his hands, he would have been obliged to refund it to

his wife's heirs, as things have turned out. *Scull v. Jernigan*, 22 N. C., 144. The decree of November, 1842, makes no difference. Being both an infant and covert, the decree would not have been binding on her, as between her and her husband, they not being opposing parties in the suit. But the decree does not cover her case in terms; for it gives no directions for the payment of the shares of the married women, and no doubt the omission was of purpose, as the act directs such shares to be invested or settled, so as to be secured to the wife and her heirs. As respects a share of the capital, therefore, the bill must be dismissed.

But we hold that the plaintiff is entitled to a decree for all the interest accrued on his wife's share, after defraying her proportion of the expense of those procedings. Regarding the original fund as realty, yet the interest is not, for that is the annual profit; and the general rule is that rents or the profits of real estate, accrued during the seisin of a particular person, go to the executor of that person, and not to the heir, nor even to one who takes by a limitation over on a contingency, which divested the estate of the first taker. Profits of land are not taken in land, but in its produce, money; and that is personalty. The profits during the marriage, vested in the husband, who has survived, and those which accrued before, belong to the plaintiff as administrator. We say they belong to him as administrator, because we can not regard the sum received by him from the Master, for which he gave his bond, as received in his own right, or in any other light than a loan. He exercised no right of ownership over the fund; not even (91) becoming a party in the cause, as far as appears. Consequently, he succeeds to that part of the fund in his representative direction.

PER CURIAM. DECREED ACCORDINGLY.

LETITIA M. A. CRUMP by her guardian *v.* HENRY MORGAN.

1. The marriage of a lunatic, during the period of lunacy, is absolutely void, and may be so declared by a Court of Equity.
2. Upon an application for divorce on that ground, when the fact of incapacity of mind is established, the court has no discretion, but is bound to pronounce a decree of nullity of marriage.
3. In a case of alleged insanity at the time of the marriage, subsequent acquiescence during long or frequent periods of undoubtedly restored reason would be cogent proof of competent understanding at the

time of the marriage; but, if the insanity at that time be established, so that the marriage was void *ipso facto*, *it seems* that neither acquiescence, long cohabitation and issue, nor the desire of the parties to adhere can amend the original defect.

4. The canon and civil law, as administered in the ecclesiastical courts in England, are parts of the common law, were brought here by our ancestors as such, and have been adopted and used here in all cases, to which they were applicable, and whenever there has been a tribunal exercising a jurisdiction to call for their use.

5. A suit for nullity of marriage on the ground of insanity may be brought either in the name of the lunatic by her guardian or in the name of the guardian, though the former is, for some reasons, the preferable course.

Cause transmitted by consent of parties to the Supreme Court from the Court of Equity of MONTGOMERY, at Fall Term, 1843.

This was a suit of nullity of marriage, instituted in August, 1841, by Letitia M. A. Crump, acting by her committee, R. D. Lindsay, against the pretended husband, Henry Morgan, and praying that a marriage *de facto*, celebrated between
(92) those parties in October, 1839, may be pronounced null and void, by reason of the said Letitia being, at the time, of unsound mind, and not capable of assenting to the same.

The bill states that this person was of most respectable parentage in Guilford County, and that she was there well bred and educated, and formed a part of the best society there until her marriage in 1826 with Col. John Crump, who resided in Montgomery County, and was a gentleman of fortune and character; that as his wife this lady conducted herself with prudence and propriety and moved in the best circles until she arrived to about the age of thirty and had five children; that, at the birth of the last of these children, she was attacked with puerperal fever attended by mania; and that she was then partially restored to her reason, but subject to occasional alienations of it; that while in that unsettled state of mind, her husband died in 1836, and that by that event she became entitled to an independent property. The bill then states, that soon afterwards she became a confirmed lunatic, having no intervals perfectly lucid, and generally with but little glimmering of reason; that in July, 1838, she was duly found to be a lunatic and incapable of managing her affairs, and that she had so been continually from April, 1837; and that the Court of Montgomery then appointed her brother, William R. D. Lindsay, the guardian and committee of her person and property. The bill then states that Mr. Lindsay removed his sister among her relations in Guilford, in the hope that the persons and places that had been familiar to her, and the objects of her regard in early life,

might soothe, if not restore her mind; but that, after a trial of some months, it was found rather to exacerbate than to alleviate the malady; that in consequence thereof he took her again to Montgomery and placed her in the family and under the care of Mr. Littleton Harris, a respectable person, and the friend and executor of her late husband. The bill then states, that in October, 1839, Mr. Harris, expecting a large company for some days at his house upon the occasion of the marriage of one of his children, placed Mrs. Crump under the (93) care of a family in his neighborhood, named Palmer, of good reputation, that she might be duly attended to during the festivities in his own family; that on the succeeding Sunday Mrs. Palmer, having occasion to leave home for the day, took Mrs. Crump and her servant to the house of Charles Morgan, the father of the present defendant, who resided near, and requested that she might be received and kept out of harm; and she was accordingly so received by Mrs. Morgan and the family; and that, during the day, the defendant, Henry Morgan, a young man of the age of twenty or a little more, without education, standing, property or expectancy, and with a view to gain the property belonging to the lunatic, availed himself of the opportunity of having her in his power, and with the help of the other members of the family, prevailed on her to agree to marry him; that she was then held under guard until a license could be procured, and the next day they were married by a Justice of the Peace, clandestinely, in a field, at a distance from any house, and without the knowledge of any friend or relation of hers, and in the company only of the family and relations of the defendant; that Morgan resided in the mansion house situate on Mrs. Crump's dower, which he leased from her guardian, and that he and the defendant and the whole family had actual knowledge of the state of this person, and that it was notorious that she was a lunatic and under the care of a guardian. The bill further states that she has continued a lunatic ever since; though she has borne a child since the marriage.

The answer admits previous attacks of derangement, and also that the party has labored under them since the marriage. But it alleges that, during the whole time, there have been frequent lucid intervals; and it avers that she was in a lucid state at the time of the marriage, and understood and assented to it. The defendant denies that she was put under restraint to induce her to agree to the marriage, or that he desired it for the base motive of interest; and he says he was actuated by his attachment to her for her personal attractions, amiable disposition and mental accomplishments. He admits that he (94)

did not regret the favorable opportunity of making a proposal at his father's, and that he availed himself of it. He says that she at first declined it on account of the difference in their ages, but that, upon his pressing his suit with all the ardor of a sincere attachment, she finally yielded, and without any influence from his parents or any other person. He admits that she expressed fears that she might be demanded by Mrs. Harris on behalf of her guardian, and that, when he went for the license, he gave directions that she should not be surrendered to any person while he was gone; and also that he, fearing some such interference, soon after obtaining her consent, went ten miles in the night for the license, and engaged a magistrate to come the next morning to perform the ceremony; and, the justice of the peace having delayed coming longer than he thought he ought, the party set out to get another, when they were overtaken on the road by the one previously engaged and were there married about eleven o'clock in the morning.

The plaintiff entered replication to this answer, many depositions were taken on both sides, and, the cause being set for hearing, was removed to the Supreme Court. It is unnecessary to recite the facts offered in evidence, as they are sufficiently referred to in the opinion delivered in this Court.

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

RUFFIN, C. J. It is not usual for the Court to discuss evidence in detail; and, to every one conversant with the proofs in this cause, the reasons will be obvious, why we should decline it upon this occasion. It is sufficient to state its effect to be fully to sustain, and even more than sustain, the statements in the bill. Upon the question of fact there is not the slightest doubt. There is a vast mass of depositions; and all of them, including even those of the defendant, and we may almost say the answer too, taken as a whole, establish incontestably
(95) the want of capacity in this woman to make any contract, or do any act requiring reason. From the birth of the last child of the first marriage, she was subject to frequent fits of lunacy. The paroxysm became more and more frequent, and more and more violent, until her reason seems almost to have become entirely extinguished, leaving, however, her bodily health good and her sensual appetites inflamed and uncontrolled. Her moral principles and sentiments declined with the decay of her mental faculties. Once a well bred and virtuous young woman and then an exemplary matron, she soon lost,

after these attacks, the characteristic delicacy of her sex, and seemed literally to be possessed with a fury of animal passion. With a view to its gratification, she constantly, forgetful or insensible of the death of her husband, invoked his return. She was considered and treated by all as an insane person, and she acted as if she were always insane. She conducted no household affairs, performed no maternal duties, professed no maternal affections. No one gives the particulars of a single rational and connected conversation sustained for a moderate length of time. The answer states that she had lucid intervals, and that in one of them she was courted and married by the defendant. But no one else thought she was then of sound mind, though not reduced to a state in which her mind was so extinguished as to present to a stranger the idea of never having had any. The courtship and marriage may, under the circumstances, be called acts of madness in themselves, and must satisfy any one that the defendant was fully aware of her state. Not one word appears ever to have been exchanged between these persons, until the hour of their engagement; and their ages and conditions in life were also unsuitable. The subsequent indecent hurry in having the ceremony performed and the reasons for it, as admitted in the answer are perfectly convincing of the views the defendant and his family took of her state. It is true, restraint is denied; but even in that the case is proved to be otherwise. Mrs. Palmer went for Mrs. Crump; but was refused access to her and could only see her through the window of a room in which she was shut up. That lady sent immediately to Mr. Harris to advise him of her sus- (96) picions, and he hastened to the scene of action, but did not arrive until the marriage had been just concluded. But a circumstance then occurred that leaves no doubt of her want of reason at the time. In the moment of taking a second husband, she invoked the return of the first: "I wish"—she said—"the Colonel would come." It is true this person was not always in a frenzy But though sometimes calmer in her passions than at other times, she has never been sound in her mind since 1837, at the nearest. Her reason has never existed in its integrity, for even the shortest intervals, as far as we can discover.

Indeed the case was not much contested on the fact of insanity; but the defense was placed on certain legal positions, which will now be considered. It was contended with much zeal that the relief can not be granted, because the marriage of a lunatic is valid in law. There is no doubt that at one period such a notion of the common law was entertained. Perhaps it was an instance of the absurd rule, that a person

should not be allowed to stultify himself; or, perhaps, according to the conjecture expressed by *Sir William Scott*, in *Turner v. Myers*, 1 Hogg, C. L., 414, it might have been founded on some notion of marriage being a sacrament, and thence deriving a spiritual obligation, independent of the acts of the parties. But, to whatever the rule may have owed its origin, we must at this day feel astonishment that it should ever have existed, and say with the great commentator, "a strange determination! since consent is requisite to matrimony." 1 Bl. Com., 438. This Court has recently held, *Johnson v. Kincade*, 37 N. C., 470, that the marriage of an idiot is void, and gave a sentence of nullity. The principle is equally applicable to the marriage of a lunatic; and we should consider that case a conclusive authority in this, had the question been then argued. Indeed, we then considered the point as one so little open at this day, that we only referred to the passage in Blackstone and the single adjudication of *Sir William Scott*, in sup-
(97) port of the opinion. We have therefore heard the argument of the question in the present case, and, after doing so, our reflections only confirm our first opinion. In *Browning v. Reane*, 2 Phill., 69, *Sir John Nichol* said, "the want of reason must invalidate a contract and the most important contract of life, the very essence of which is consent." It is not material whether the want of consent arises from idiocy or lunacy, or both combined; for, if the incapacity be such, arising from either or both causes, that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her person and property, such a one can not dispose of his or her property by the matrimonial contract, any more than by any other contract. The case of *Turner v. Meyers* was one of lunacy, brought by the husband after his recovery. *Sir William Scott* cited three cases: that of *Morrison*, before the delegates in 1745, which is quoted by Blackstone as his authority; that of *Parker v. Parker*, before the Consistory Court of London in 1757 and since reported in 2 Lee, 382; and *Cloudesley v. Evans*, in the same court in 1763, as having fully determined that marriage, like other civil contracts, is invalidated by want of consent of capable persons. He said, that in those cases all the old *dicta* were brought before the courts; and he took it to be as clear a principle of law at that day (1808) as any could be, and as incapable of being affected by any general *dicta*, which may be found in writers of earlier periods, as any *fundamental maxim*, on which the courts are in the habit of proceeding; and he pronounced the marriage null. A like sentence

was given by *Sir John Nichol* in *Lord Portsmouth's* case; the husband being of weak mind and the weakness being to such a degree that the party was pronounced not of sound mind sufficient to enter into that contract. And in the same case the opinion of the chancellor was given, as it has often been in other cases, in support of the principle, by directing the committee to prosecute proceedings for declaring the marriage void on the ground of the lunacy. *In re Earl of Portsmouth*, 23 August, 1824; Shelford on Lunatics, 449. In the case of *Parker v. Parker* the question was entertained, after (98) the death of one of the parties, upon an application for administration. *Sir George Lee* did not hesitate to go into the inquiry of fact; clearly intending if he found the lunacy, to pronounce the marriage null and refuse administration to the widow. But he found capacity and pronounced for the widow's interest, but the case of *Browning v. Reane*, 2 Phill., 69, is a similar one, in which *Sir John Nichol* found the lunacy, and, after making the observations before quoted, he pronounced against the marriage and refused the administration.

But it was argued that these adjudications grew out of the Act of 15 Geo. II, c. 30. But that is impossible. The act is not alluded to in them. Moreover it has no application to the cases. It does not enact that the marriage of lunatics shall be void. It assumes that they are; and, to prevent mischief from an uncertainty as to the capacity of one, who has been of unsound mind, ascertained judicially by inquisition, it enacts that the marriage of such a person shall be void, though of sound mind at the time, unless he or she may have been so declared by the chancellor and the commission superseded.

Again, it was said that these are the adjudications of the ecclesiastical courts and are founded, not on the common law, but on the canon and civil laws, and therefore not entitled to respect here. But it is an entire mistake to say that the canon and civil laws, as administered in the Ecclesiastical Courts of England, are not parts of the common law. Judge Blackstone, following Lord Hale, classes them among the unwritten laws of England and as parts of the common law, which by custom are adopted and used in peculiar jurisdictions. 1 Bl. Com., 79; Hale's Hist. Com. Law, 27, 32. They were brought here by our ancestors as parts of the common law, and have been adopted and used here in all cases to which they were applicable, and whenever there has been a tribunal exercising a jurisdiction to call for their use. They govern testamentary causes and matrimonial causes. Probate and re-probate of wills stand upon the same grounds here as in England, unless (99)

so far as statutes may have altered it. *Dickinson v. Stewart,* 5 N. C., 99; *Ward v. Vickers,* 3 N. C., 164; *Redmond v. Collins,* 15 N. C., 430. Divorce causes fall within the same category, upon the conferring of the jurisdiction; which must be emphatically true upon the enactment, that the Court should not only grant divorces for certain specified causes, but "for any other just cause," thus giving no guide to our discretion but the lights to be derived from our ancestors in the like cases. We remark, in conclusion, that in not one of the cases cited did the Judge profess to found his sentence of nullity on the civil or canon laws, as distinct from the common law, or that the principle was peculiar to that part of the common law, which owed its origin to those laws. On the contrary, the reasoning throughout is, that marriage is not, as was once supposed, an exception, by force of the canon law to the principle of the common law, which makes contracts invalid for the want of mental capacity. It is the common law itself, which authorizes and requires the modern decisions of the Courts, in opposition to some of the *dicta* of elder text writers. In that light is the subject viewed by *Chancellor Kent* in the case of *Wrightman v. Wrightman,* decided in 1810, 4 Johns., ch. ca., 343. So we also consider it in *Johnson v. Kincade;* and we have no doubt that, by the common law of England as held in that country for a century, as we know, and probably much longer, and not denied by any adjudication by any court, as far as can be traced for four or five centuries, a marriage of a lunatic is void, and must be so pronounced by every court to which, and in every form in which, the subject can be presented. And, besides, a statute gives the general jurisdiction here, and, acting under it, we can not hesitate to say that it is against reason that no one without reason should be held to have made a binding contract.

But it was further said at the bar, that there was evidence, from which lucid intervals, for at least short periods since the marriage, might be inferred, and that amounts to confirmation.

(100) A writer upon the law of marriage lays it down, that when a marriage is void *ipso facto,* acquiescence, long cohabitation and issue, or the desire of the parties to adhere, can not amend the original defect. Paynter on Marriage and Divorce, 157. In a case of alleged insanity at the time of the marriage, subsequent acquiescence, during long or frequent periods of undoubtedly restored reason, would be cogent proof of competent understanding at the time of the marriage; but, assuming lunacy then to have existed, the rule of the author quoted seems to be sustained by the consideration, that marriage

is a peculiar contract, to be celebrated with prescribed ceremonies, and, therefore, subsequent acts, not amounting in themselves to a marriage, will not make that good which was bad in the beginning. But we do not propose to lay down such a rule in this case; for we are clearly of opinion that at no time since this marriage has this person been so in possession of her faculties as to be capable of judging of her rights or interests, or of making or confirming a contract.

The Court was next asked to refuse to annul the marriage as a matter of discretion, as being best for all parties, under existing circumstances. If the Court could treat it as a case of discretion, the present is, certainly, not one for the exercise of the discretion by leaving this person and her property in the power of the defendant, whose motives and conduct from the beginning to the end have been most flagitious. But we have no such discretion as will enable us, on the hearing of the cause, to refuse the decree, if the party can legally demand it. The committee usually apply to the chancellor for directions upon this, as upon other subjects involving the expenditure of the lunatic's estate, and after an inquiry whether it is proper any steps should be taken to avoid the marriage of one found to be a lunatic, it is ordered accordingly. Before the master or before the Chancellor, objection will be heard on this proceeding from any person in interest; and one may be heard on a motion to discharge the order or supersede the commission. The question would thus be made distinctly and decided on the proper evidence and facts. But when the cause has been regularly instituted, the Court can not refuse to entertain it. (101) On the hearing the decree must be granted, if the pleadings and proof authorize it; and the Court can not allow, in this stage of the case, the merits to be embarrassed by having other questions complicated with them. *Parnell v. Parnell,* 2 Phill., 158.

Lastly, objection was taken to the form in which this suit is brought, being in the name of the supposed lunatic by her committee; whereas, it is said it should be in the name of the committee alone. The authority for the position is a passage in a treatise on the law of *non compotes* by Mr. Stock, p. 20; for which is cited *Lord Portsmouth's* case, 1 Hay. Ecc., 356. We do not doubt that a suit for nullity may in England be brought by the committee in his own name alone; for, in the ecclesiastical courts any party in interest, though a third person, as a committee of a lunatic, or one claiming an estate in remainder after failure of issue, may institute such a suit or may intervene in it, as Mr. Chitty states, 2 Genl. Prac., 460.

It may be noticed in passing that he adds, that in general there should, for greater security, whilst the parties and witnesses are living, be a sentence in the ecclesiastical courts, though the marriage be absolutely void, as in the case of lunacy. But to the point under consideration: It appears that, from the nature of the jurisdiction of the ecclesiastical courts, which is *in rem* or on the *status* of the person, the committee alone *may* institute proceedings to annul the marriage of the lunatic. That, we think, is all that is meant, when it is said the committee is a proper party; for it is certain he also often joins the lunatic with himself. That was done in the very case cited by Mr. Stock, as is seen in a report of it in an earlier stage. *Lord Portsmouth's* case, 3 Ald., 63. It there appears to be "a cause of nullity of marriage promoted and brought by John Charles, Earl of Portsmouth, acting by Mr. Fellows, his committee." But, if it were otherwise in the ecclesiastical courts, it would yet be a proper mode of proceeding in a court of equity here:

(102) which may well follow either its own course or that of the ecclesiastical courts in this respect. The usual course in a court of equity, after an inquisition and appointment of a committee is by bill by the committee, joining the lunatic; and, although the object of the suit was to avoid the lunatic's own act, it was held that the joinder was no cause of demurrer, even though then the maxim was that no person could stultify himself; for the joinder was considered a mere formality. *Ridler v. Ridler,* 1 Eq. Cas. Abr., 279; *Brown v. Clark,* 3 Wood. Lec., 378, note, Stock on Non Compotes, 34. In this State we have said it was good either way. *Shaw v. Burney,* 36 N. C., 148. In *Johnson v. Kincade,* 37 N. C., 470, the bill was in the form of the present, and we decreed on it. Indeed, we most approve of it, because upon suspending the commission, *pendente lite,* for the restoration of the party's reason, the case would be proceeded in without the necessity of a supplemental bill by the lunatic to procure the benefit of the proceedings as far as they had gone.

The Court, therefore, pronounces the marriage null; and, after what has been said, of course, with costs against the defendant.

DECREE (*a*). Letitia M. A. Crump, acting by her committee William R. D. Lindsay, against Henry Morgan.

2 March, 1844. This cause coming on to be heard upon the bill, answer, exhibits and proofs, and being debated by

NOTE (*a*).—The reporter has inserted this decree at length, as such cases are novel in this State, and the form of the decree was settled by the Court itself.

counsel on each side, and the whole matter being considered by the Court: It is thereupon declared by the Court, that in October, in 1839, in the county of Montgomery, the ceremony of a marriage between the plaintiff Letitia M. A. Crump and the defendant Henry Morgan, was had and solemnized by and before a justice of the peace for the said county; and that the said plaintiff had been, in July, 1838, duly found to be a lunatic and incapable of managing her affairs, and so to have been continually from April, 1837, and had been duly committed as a lunatic, to the care and guardianship of her brother, the said William R. D. Lindsay, as her committee; and also, that at the time of the fact of the said marriage (103) thus had and performed, the said plaintiff Letitia M. A. was still under the care and custody of her said committee as a lunatic, and was, in fact, then and there a lunatic and person of unsound mind and incapable from mental imbecility of understanding and consenting to any contract, and especially a contract of so high a nature as that of the said marriage; and that the said Henry well knew of such unsoundness of mind of the said plaintiff, and by fraud and imposition, without the knowledge of the said committee or any friend of the said plaintiff, clandestinely, and for the mere purpose of wicked gain, did procure the said marriage, in fact, to be had and celebrated; and the Court doth further declare that the said plaintiff, hath, ever since the said marriage, in fact, continued to be, and is now, lunatic and of unsound mind, and incapable of consenting to the said marriage, and thereby confirming the same, even if such subsequent consent could, in law, confirm and make valid the said marriage. Therefore, the Court doth pronounce and declare the said pretended marriage *de facto*, contracted and celebrated between the said Letitia M. A. Crump and Henry Morgan, to have been and to be utterly null and of no effect; and that the said Letitia was and is, and of right ought to be, free and at liberty from any bond of said pretended marriage *de facto;* and doth pronounce that she ought to be divorced, and doth decree that she, the said Letitia M. A. Crump, be freed and divorced from the said Henry.

And the Court further decrees that the said defendant pay all the costs of this suit, to be taxed by the proper officers.

Cited: Koonce v. Wallace, 52 N. C., 198; *Williamson v. Williams*, 56 N. C., 448; *Smith v. Morehead*, 59 N. C., 363; *Cooke v. Cooke*, 61 N. C., 588; *Webber v. Webber*, 79 N. C., 576; *Reeves v. Reeves*, 82 N. C., 350; *Baity v. Cranfil*, 91 N. C., 298; *Setzer v. Setzer*, 97 N. C., 254; *Moody v. Johnson*, 112 N. C., 801; *Sims v. Sims*, 121 N. C., 299, 300.

(104)
ERASMUS LOVE *v.* RICHMOND LOVE'S Administrator et al.

1. M. became entitled in 1792, under her deceased husband's will, to a life estate in certain slaves, with remainder after her death to her four children, W., A., R. and E. A. died before 1810, leaving surviving her a husband and three children. R. died intestate in 1810, under age and without issue, leaving as his next of kin his mother, his two brothers W. and E. and the three children of his sister A. Soon after the death of R., his mother M. relinquished to her surviving children, and to the husband and children of her daughter A., her life estate in eight of the slaves bequeathed to her by her husband's will—and these eight slaves, together with two others belonging to the estate of R., were then divided between the sons W. and E. and the children of A., the husband of A. assenting, The negroes so divided were always afterwards, from 1810 up to the filing of this bill in 1841, held in severalty by the said parties, according to the said division, and claimed and enjoyed as their own. M., the tenant for life, died in 1839: *Held*, that the children of A., who were then infants, but are now adults, not objecting to the said division, it must, accompanied by the long possession under a claim of several right, be binding upon the parties, although at the time it was made there was no administration on the estate of the intestate R., nor on the estate of A., and that the parties can now, since the death of M., only claim a division of the remainder of the slaves in which she had a life estate.
2. *Held*, further, that if a distributive share in an intestate's estate consisting of slaves, must be assigned by writing in the same manner that the slaves specifically must be, yet after a delivery of the negroes to the donees, their division of them, and the consequent possession by each of the parties in severalty for nearly thirty years, this possession must be held adverse to, and will bar, the donor, or would authorize the presumption of a gift in writing or anything else requisite to support it.

This cause was transmitted to the Supreme Court, by consent, from the Court of Equity of RICHMOND, at Fall Term, 1843.

The following facts appeared from the pleadings and proofs: In 1792, William Love the elder, died, having made his will, and bequeathed to his wife Mary for life four slaves, therein named, with remainder after her death to her four children,
(105) William, Ann, Richmond and the present plaintiff, Erasmus Love. Ann Love married Peter H. Cole and died before 1810, leaving her husband surviving her, and also three children, namely, Ann Jennings, William L. Cole, and Mary, the wife of Walter F. Leake; and Walter F. Leake, shortly before the filing of this bill, administered on the estate of Mrs. Ann Cole. Richmond Cole, one of the legatees, died intestate in 1810, under age and without issue; and his next of kin were his said mother and brothers William and Erasmus, and the said three children of his deceased sister, Mrs. Cole,

as representing her. In 1835, the plaintiff procured letters of administration of the estate of Richmond, deceased. In 1836, Mary Love, the mother, assigned to the plaintiff Erasmus Love, by deed, all her interest or distributive share of the personal estate of her said deceased son, Richmond. In 1839, the said Mary, the widow, died, and the plaintiff administered also on her estate. She left a considerable number of slaves to be divided under her husband's will, among those in remainder being the original stock, or a part of them, and their increase during her long life estate. William Love, the son, died, leaving a will, of which his son Richmond Love is the executor.

The bill was filed on 17 November, 1840, and sets forth the names of thirty or forty slaves as being of that stock, and the persons having possession of them, and also states that there are many others of whose names the plaintiff is ignorant. Among them are three, called by the names of Marshall, Pinkney and Aggy, and stated to be then in the possession of the plaintiff. The bill also sets forth the names of certain other negroes, and states them to be then, and to have been long before the death of the tenant for life, in the possession of the said three children of Mrs. Cole; and that they are of greater value than their mother's share, or one-fourth, under her father's will, and their own fourth part of the said share of their deceased uncle, Richmond; and it insists, thereupon, that no further allotment should be made to them or to Leake as the administrator of Mrs. Cole. The bill then charges that the other negroes (which it states to be in the possession of the plaintiff and of Richmond Love, the younger, the executor of William Love, the younger) are divisible between (106) those two persons only; and that, in such division, the plaintiff is entitled to one-fourth of the whole under his father's will, and one-fourth of the share of Richmond in his own original right as one of Richmond's next of kin, and another fourth as the assignee of his mother as another of his next of kin.

The bill is filed against Richmond Love, the executor, his father, William, the younger, and against Leake, the administrator of Mrs. Cole, and charges that they refused to make the division, as claimed by the plaintiff, under divers unfounded pretenses, among which are these: that a division had already been made of the negroes or some of them, and that the plaintiff obtained his share of those so divided; and that Mary Love, the mother, had relinquished or surrendered to all her children, or their representative, her interest as one of the next of kin of her deceased son Richmond, in and to the

negroes in question, or some of them; whereas, the bill charges that there never was a valid division of any of the negroes, and that Richmond, deceased, never got any part thereof in his lifetime, and that since his death no one had authority to make any division for him until the plaintiff administered on his estate, and that he hath not since made any such division; and further charges that the said Mary, the mother, never did, in any competent way, relinquish said interest. And the bill prays that the parties may be declared to be entitled as before stated, and a division decreed accordingly.

The answers state that Mrs. Love surrendered eight of the slaves, in which she had a life estate, to wit, Bob, Delphia, Leice, Marshall, Pinkney, Tom, Aggy and Isaac; and that Richmond Love was entitled also to two negroes, named Cæsar and Tom, specifically bequeathed to him in his father's will; and that, soon after the death of Richmond, with the knowledge and consent of Mrs. Love, those ten negroes were divided, and in that division one-third part was allotted to William Love, one-third part to the plaintiff Erasmus, consisting of the three negroes, Marshall, Pinkney and Aggy, and the remaining third part to the surviving husband and children of Mrs. Ann Cole, deceased; and that under that (107) division, the said parties have enjoyed in severalty the negroes so allotted to them ever since, and, particularly, that many years ago the plaintiff sold the said slaves, Marshall, Pinkney and Aggy. The answers further state that the other negroes, or most of them, in which Mrs. Love had a life-estate, came to the possession of the plaintiff after her death, and that, shortly after he filed this bill, he removed them or most of them out of the State. And the answers also state that Mrs. Love, at the time she executed to the plaintiff the assignment of her distributive share of her son Richmond's estate, was, from extreme old age and infirmity of body and mind, in a state of dotage, and incapable of making any rational disposition of property or any contract; and, therefore, insist that the assignment is void, and that her share ought to be distributed amongst her next of kin, who are also the next of kin of the intestate Richmond.

Replication was put in to the answers and testimony taken, and the cause being set for hearing, was removed to the Supreme Court.

Strange for the plaintiff.

No counsel in this Court for the defendants.

RUFFIN, C. J. Upon the pleadings there are two material questions, on which the parties desire the judgment of the Court. The first is, what slaves are subject to the division that is sought? And the second is, whether the plaintiff is entitled, as the assignee of his mother, to her share of those negroes that may be allotted as the portion of her son, Richmond? As to the first point, it is to be observed that all the slaves bequeathed to the widow for life, and their increase are of course now to be divided, unless there has already been a division of some of them; and that the division now to be made is, in the first place, into four equal shares—one for the plaintiff in his own right; one to him as administrator of his brother Richmond; one to the executor of William Love, deceased; and the other to the defendant Leake, the administrator of Mrs. Cole. As respects the proportions in which the parties are entitled, as thus stated, there can be no dis- (108) pute. The real controversy appears to be, whether the former division, which is insisted on by the defendant, shall, as far as it went, stand; or whether it shall be annulled, and thus let in the plaintiff to the benefit of the increase of the slaves allotted in that division to the other owners, both in his original right and as the assignee of his mother.

Upon the matter of fact, it appears that in January, 1811, the year after the death of Richmond Love, ten negroes, comprising two, which he had owned in severalty, and eight in which his mother gave up her life-estate to those entitled in remainder, were, as property belonging to the parties, jointly and equally divided into three shares, and one of them assigned to the plaintiff, another to William Love, then living, and the third to Mr. Cole and his three children as representing Mrs. Cole, then deceased. Under that division the parties took immediate possession of the slaves allotted to them severally, and held, used and disposed of them as their own in severalty, without any claim set up by any of the parties to the negroes held by the others, or dissatisfaction expressed, as far as appears, until this litigation was begun. Mrs. Love resided in Richmond County, as did also the other parties, all being members of the same family; so that it can not for an instant be doubted that she was fully aware of what was done, and gave her approbation to it. Indeed, the very substratum of the proceeding was her own act; that is, the surrender of her life-estate in eight of the negroes. The very object of that surrender must have been a division between her children and grandchildren, among whom the division was actually made.

Can it be supposed, then, that she intended to claim, or,

rather, that she did not then disclaim and relinquish her interest or share in that portion of the slaves, which she might have claimed as one of the next of kin of her deceased son? Why surrender all if she meant to claim back a part of those eight? In the same manner, doubtless, she acted in reference to the other two slaves, which Richmond owned in severalty.
(109) They were put with the eight the widow had given up, and all ten divided as one fund, or as forming a common property, divisible beneficially into three parts; that is, one for the two brothers, William and Erasmus, each, and one for Mrs. Cole's children. It is true that was not legally correct; for the division, strictly speaking, should have been into four parts, of which the two surviving brothers were entitled to one each; Cole, as surviving husband, entitled to another; and the fourth was the share of Richmond, deceased, and was again divisible between his mother and brothers, and the children (not the husband) of Mrs. Cole. But it is manifest, if the mother gave up her claim to her distributive share, as she had given up her life-estate, that for every purpose, except that of determining the interest of Mr. Cole and his children as between themselves, the division would be into three parts. The plaintiff, for example, being entitled under his father's will to one-fourth part, and, as one of Richmond's next of kin, to one-third of another fourth part, was thus entitled to get one-third of the whole. That is just what he did get, and what his brother William also got. For the purposes of justice, therefore, to those two persons, the division effected all that the most formal and conclusive partition, through the medium of administrations on the estates of the deceased brother and sister, could have done, excepting only that it might not be valid as between Cole and his children, and, therefore, might at the instance of one of them be disturbed. But it is very plain, that at this distance of time the plaintiff ought not to annul the partition, on the ground merely that other persons, by possibility, may have it in their power to repudiate it. The plaintiff ought to make it appear that some one, who has the power, has rescinded what has been done. But here the contrary is seen to be the case. By the bill it appears that none of the negroes, allotted as the third of Mrs Cole, was taken by Mr. Cole, but that they are all in the possession of the children of his deceased wife; and in consequence of that
(110) fact, the plaintiff seeks to exclude those children from any further share of Richmond's part of the negroes, which are still to be divided. Now, if that be true, the whole difficulty is at once explained, and we see another motive in-

ducing Mrs. Love to give up both her life-estate and her distributive share of Richmond's estate, at least as far as those negroes constituted a part of it. She gave up her interest to her children and grandchildren, and Mr. Cole in return, gave up to his children his interest, which was, in part of the negroes, and which, in addition to what those children got from their grandmother, made their interest also one-third of all those negroes. The Court can not doubt that such was the true nature of that transaction. The deed or instrument of partition itself is not before the Court. But its contents are stated by a witness, without objection to his evidence on the score of the non-production of the paper; and it appears in that manner that Mr. Cole was a party to the division of 1811, in which that share, which he might have claimed for himself, was allotted to his children. Indeed, he became bound to William Love in a heavy penalty, that the present plaintiff, who was nineteen years old, would upon coming of age abide by the division then made. From that time to the present, the plaintiff does not shew the least dissatisfaction on the part of either Cole or his children with what was then done. On the contrary, it is to be collected from the bill, that those persons insist on that transaction as a binding partition *pro tanto;* for it states the children to be in possession of the negroes then allotted to them and their increase, claiming them as their own; and here is nothing to create a suspicion that their father wishes to disturb them if he could. But whatever doubt might have been affected on that point, there is now no room for any; inasmuch as Leake, the administrator of Mrs. Cole, and therefore having the formal and legal right to succeed to her rights, so far from disturbing that division, insists on it in his answer, as having been made and as being obligatory.

The bill does not seek to impeach it on the ground of the plaintiff's infancy at the time it was made. But if it had, the attempt would have been unavailing; for the plaintiff accepted the negroes allotted as his share, kept them (111) ten or fifteen years after his full age, and then sold them as his own in severalty.

To the view that has been thus taken, the bill raises two objections: one is, that Mrs Love did not in "any competent way" relinquish her interest in those negroes, as one of the next of kin of Richmond Love. This we suppose to mean that, as this transaction occurred after 1806, a writing was requisite to the transfer of her right in the slaves. We will not now undertake to determine, whether a distributive share in an intestate's estate consisting of slaves, must be assigned by writ-

ing in the same manner that the slaves specifically must be. If it must be, because it is within the mischief provided for in the Act of 1806, then it will follow, that this case is within the provision to that act, because there was an actual possession by the donees until the death of the donor intestate. If, however, a gift in writing be necessary, yet it would be dispensed with by the delivery of the negroes to the donees, their division of them, and the consequent possession by each of the parties in severalty for nearly thirty years. The possession thus taken and held was adverse to the owners (*Powell v. Powell,* 21 N. C., 319), and, in analogy to the operation of the statute of limitations at law, would bar the donor, or indeed would authorize the presumption of a gift in writing or anything else requisite to support it. And this is more especially proper in this case, since there is so strong probability that the relinquishments of Mrs Love and Mr. Cole were the one the consideration of the other.

The other objection raised in the bill is, that there was not "a valid division," because there was no administrator of the intestate Richmond Love. But we think that circumstance can not in this Court impair the obligation of the division, followed up as it has been by such long possessions in severalty and other acts of ownership and disposition. We need not inquire whether at this day the plaintiff, as administrator of Richmond, could maintain an action at law for the slaves Cæsar and John, who belonged to the intestate exclusively. (112) Admit that he could, and that the other negroes stood, as to that point, on the same ground, yet it would be clearly improper to allow him equity to rip up this partition, which was made by the persons entitled to the property, in the view of the court of equity, and, in truth, according to their respective interests or shares as fixed in the court of equity. The plaintiff did not administer for the purpose of satisfying debts. His intestate owes nothing; it is not pretended. The plaintiff is, therefore, but an administrator purely in trust for the next of kin of his intestate brother. If he were a stranger, he could not disturb the arrangement which his *cestuis que trust* had made; much less can he do so, when, as one of the next of kin, he himself joined in the partition and has enjoyed his share under it. As the case stands, the next of kin—there being no creditors—were the real owners of the property, and the legal title, subsequently got by the administration, but a shell. It may be used to protect, but not to annoy the true owners. It was proper enough to obtain the administration with a view to a division of the other negroes, when the re-

mainder would fall into the possession upon the death of the widow. But as to the ten negroes that were divided in 1811, to wit, Bob, Delphia, Leice, Marshall, Pinkney, Tom, Aggy and Isaac, and Cæsar and another Tom, which two last were bequeathed specifically to Richmond Love by his father, William, the elder, the Court is of opinion, and so declares, that the division thereof then made is binding and conclusive on the parties before the Court. It is true the Court can not pronounce it to be so as aginst the children of Mrs. Cole, because they are not made parties to this cause. But we have no reason to suppose from the bill or from the answer of Leake, who married one of them, that those persons are dissatisfied or wish to disturb what has been done. But they have only a subordinate interest, namely, as representing the sister of Richmond in the division of his estate. As to the primary division, all the necessary parties are made; since, in that, Leake represents his intestate, Mrs. Cole, and his acts conclude the interests of Cole, the surviving husband, and the plaintiff represents (113) his intestate Richmond. It is, therefore, not indispensable to make the children of Mrs. Cole parties to this cause to enable the Court to make any decree, although we can not decide every part of the controversy unless they shall be made parties. The bill seeks, first, a division of the negroes given in remainder, including some that have already been divided; and that in such division a full share or fourth thereof shall be allotted to the plaintiff as administrator of Richmond Love, deceased. Upon that we have declared that the division which was made of ten slaves in 1811, is conclusive on the plaintiff and the defendants in this suit. But as to the other slaves included in the bequest in remainder, and their increase, there is no objection to the division as prayed; and the respective parties must in a reasonable time produce all of said slaves, thus to be divided, before a commissioner of the Court, to be valued and allotted into four equal parts, whereof the plaintiff is entitled to one in his own right and to another as administrator of Richmond Love, deceased, and the defendant Leake, as administrator of Mrs. Cole, and the defendant Richmond Love, as the executor of his father, William Love, is each entitled to one share. And there must also be a reference to ascertain the profits made, and by whom, or the reasonable hires, accruing from those slaves since the tenant for life died.

The bill likewise seeks that the share, that may be thus allotted to the plaintiff as administrator of Richmond Love, may be again divided or distributed; and therein the plaintiff

claims a double share, that is to say, one as brother of the intestate and one under his mother's assignment. The validity of the assignment has been attacked. But from the reading of the depositions, the weight of the evidence seems to us decidedly in favor of her capacity to make the deed of gift, and especially as she might be expected to be naturally inclined to bestow such a bounty on her only surviving child. But the Court can not proceed to a decree on this part of the case, nor make any declaration, because the children of Mrs. Cole, who died before her brother, are some of his next (114) of kin, and are necessary parties to a suit for the distribution of his estate. Therefore, the plaintiff must bring them in, or, as to this part of the case, the bill will, after a reasonable time, be dismissed with costs, and thus let another and proper proceeding be instituted for the distribution of Richmond Love's estate separately.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Filhour v. Gibson, 39 N. C., 460; *Outlaw v. Farmer,* 71 N. C., 35; *McNeill v. Hodges,* 83 N. C., 511; *Baker v. R. R.,* 91 N. C., 310.

JAMES O. HALE and wife *v.* SAMUEL C. GAUSE.

Where a husband intends by a bill in equity to impeach a marriage agreement made between him and his wife before marriage she must be a party defendant to the bill, and not be joined with him as a plaintiff.

This cause was removed on affidavit to the Supreme Court, from the Court of Equity of BRUNSWICK, at Fall Term, 1843.

The bill states that the plaintiff, James O. Hale, married the other plaintiff, Ann C. Hale, who was a sister of the defendant, in 1832—that before the marriage and in consideration of the intended marriage, articles under seal were executed by the plaintiffs, in which they agreed to convey to the defendant, as trustee, all the real estate and the slaves which belonged to the then intended wife, to be held by him in trust for the wife for life, remainder to the heirs of the body of the wife by the said husband to be begotten, remainder to the wife and her heirs and assigns forever. That this marriage settlement was also signed, sealed and executed by the defendant, and a copy

of the same is appended to and made a part of the bill. The bill then alleges that the said deed of covenant was obtained from the said plaintiffs by the artful contrivance and fraudulent management of the defendant and his mother. The prayer of the bill, in this respect, is that the said instrument be decreed to be delivered up, canceled and declared void. And in case that can not be effected, the bill proceeds to (115) state that the defendant, as trustee, has mismanaged the trust fund by selling one of the slaves mentioned in the said deed, and that he has appropriated the money received from the sale to his own use. The bill further states that the defendant is an unfit person to be a trustee, on account of his mental infirmities, and also on account of his misconduct in the management of the trust fund. The bill then prays that the defendant may be decreed to account for the price of the slave so sold; and that he be removed from the office of trustee under the said marriage settlement, and some fit and proper person be by the Court appointed trustee.

The defendant in his answer admits the execution, by himself and the plaintiffs, of the marriage articles, as stated in the bill; but he denies that the said deed of settlement was obtained by any fraudulent contrivance of himself or his mother. He alleges that the said instrument was well understood by the plaintiffs when they executed the same, and that they intended and did execute the same, for the purposes therein mentioned. The defendant then avers that the slave sold by him had belonged to him, and, at the request of his mother, he consented that she might be inserted in the said marriage settlement as being the property of his sister, but that he was to receive one hundred and fifty dollars for her. He admits that he has sold her to a man in South Carolina for $334. He states that he demanded of both the plaintiffs the $150; but that they refused to pay him, and requested him, the defendant, to keep her as his own property, as they were displeased with her. The defendant further insists that, if he should be decreed to account for the said slave, he ought to be allowed in the account the said sum of one hundred and fifty dollars and interest. He denies that, as trustee, he has mismanaged the trust fund, or that he has any design to mismanage it, or that he is mentally or morally incapacitated to act as trustee.

The answer was replied to, depositions were taken, and the cause set for hearing.

Strange for the plaintiffs. (116)

No counsel in this Court for the defendants.

DANIEL, J. First. As to the allegation in the bill, that the marriage articles were obtained by fraud, there is no evidence in the cause to sustain it. And if there was such evidence the Court could not look at it in the manner this bill is framed. If the husband wished to have the aforesaid allegation inquired into, his wife and children, who have an adverse interest, should have been made defendants. As the bill is now framed, we are impelled to see and know that the allegation is only made by the husband, and the wife has no power to gainsay or contradict it if it were false.

Secondly. The defendant admits that the slave Sally was included in the marriage articles as one of the slaves then belonging to his sister. He admits also, that he is the trustee in the said settlement, and executed the same by signing and sealing it. He also admits that he has sold the slave Sally to a man residing out of the State. This conduct on his part was a breach of trust; and he must be decreed to account for the price of the said slave. As to the $150 credit which he demands, he may make what proof he is able before the master; he has as yet filed no proofs in the cause tending that way. As to the allegation in the bill, that the defendant is an unfit person to be a trustee under the said marriage settlement, there are depositions filed in the cause on that question. It must, therefore, be referred to the master, to inquire and report whether the defendant is an unfit person to be continued as trustee, either from his former mismanagement, or from his mental incapacity, and if he is found unfit, the master will report a proper trustee.

PER CURIAM. DECREED ACCORDINGLY.

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(117)

WALTER A. WINBORN et al. *v.* RALPH GORRELL et al.

1. A contracted with B for a tract of land and gave two bonds for the price, one for $1,000 and one for $500, B giving a bond to convey the title to A when the price was paid. B afterwards surrendered the bond for $500 to A and died, the other bond being unpaid and no title conveyed, and transferred the bond for $1,000 to his infant grandchildren, to whom A was appointed guardian, giving the usual guardian bond. A afterwards conveyed this land to a trustee for the purpose of paying certain debts, and died insolvent: *Held*, that the infants were still entitled to hold this land as a security for the bond of $1,000, in preference to the creditors

secured by A's deed of trust, and that it was just and proper they should do so, before resorting to the securities in the guardian bond.

2. Until an actual conveyance, under a contract for the sale of land, the estate is a security for the purchase-money, analogous to a mortgage.

3. An infant's action at law on a bond due to him by his guardian is not even suspended by such guardianship, and the infant may sue on it by his next friend; but, even if suspended, the suspension would not work an extinguishment of the debt, but would cease with the guardianship, as in the case of a debtor administering on his creditor's estate.

4. Certainly in a Court of Equity such an extinguishment would not be permitted, but every security necessary for the satisfaction of the debt would be kept on foot, against any act of the debtor himself.

5. Though a person, claiming land under a contract of sale and not having paid the purchase-money, obtain a decree of a Court of Equity against the heirs of the vendor, who is dead, requiring them to convey the legal title, yet such decree of itself will not convey the legal title.

6. The purchaser of an equitable title takes it subject to prior equities. It is only the purchaser of the legal title, without notice of a prior equity, who can hold against such equity.

This cause was removed by consent from the Court of Equity of GUILFORD to the Supreme Court, at Fall Term, 1843.

The bill set forth, substantially, the following facts: In April, 1836, William Hanner purchased from his father-in-law, Nathan Armfield, a tract of land, which is (118) described, at the price of $1,500; and gave therefor one bond for $1,000, payable 25 December, 1836, and another bond for $500, payable 25 December, 1837. And Armfield gave to Hanner a bond in the penalty of $3,000, with condition to convey the land in fee, upon the payment of the money mentioned in those bonds. In January, 1839, and while very sick, Armfield surrendered to Hanner, as a gift, the bond for $500, to be canceled; and it was done. At the same time, by way of donation and advancement, Armfield gave the bond for $1,000 to his three grandchildren, Alexander, Alfred and John Hanner (who were infant children of the said William Hanner) and endorsed the same to them. In a few days thereafter Armfield died intestate; and William Hanner administered on his estate, and was also appointed the guardian of his three children, and got possession of the bond for $1,000. In 1840, William Hanner filed his bill in the Court of Equity against the heirs-at-law of Nathan Armfield, one of whom was his own wife, who was a daughter of Armfield; and therein he set forth the facts as above stated, and thereupon insisted, that in contemplation of law the whole debt for the purchase-money of

the land was paid or extinguished by his having been appointed administrator of Armfield, and the guardian of his own children, who were the assignees of the bond for $1,000, and prayed that the heirs-at-law might be compelled to perform the contract specifically, and convey the land to him, W. Hanner, forthwith. The heirs entered no appearance, and the bill was taken *pro confesso* and the cause heard *ex parte* in October, 1842, and a decree entered, which, without declaring the payment of any part of the purchase-money, decreed that the defendants therein should execute a conveyance for the land in fee to W. Hanner, and be perpetually enjoined from disturbing his possession. Nothing has ever been done under the decree. In February, 1843, William Hanner died intestate and insolvent. But, five days before his death, he executed to Ralph Gorrell, one of the defendants (who had been his solicitor in the above (119) mentioned suit), a deed of assignment of all his property, as a security for certain debts mentioned therein, and upon trust to sell or dispose of the estates conveyed, and, out of the proceeds, satisfy those debts, or such part thereof as such proceeds would satisfy. In that assignment the land in question is included, and is described therein as follows: "One tract of land, containing 400 acres, more or less, it being the land on which Nathan Armfield formerly lived, and which the said Hanner claims under a title bond executed by the said Armfield to him, and under a decree of the Court of Equity for Guilford County."

The present bill was filed in June, 1843, by Alexander, Alfred and John Hanner, and by Walter A. Winborn, who was the surety of William Hanner for his guardianship of his three sons, against Ralph Gorrell, the trustee, and the creditors provided for in the deed of trust, and, by amendment, also against the heirs-at-law of Nathan Armfield and of William Hanner; and, after setting forth the facts as above stated, it charges that William Hanner never, in fact, paid any part of the debt of $1,000, nor accounted for the same by charging himself therewith in his guardian accounts, nor put out any sum at interest for the wards; and thereupon it prays that the land may be declared to be a security for that debt and interest, and that it may be paid by the trustee, or raised by a sale of the land under the directions of the court, and that all proper parties may be decreed to join therein.

Answers were put in by Mr. Gorrell and the creditors secured by the deed; but they do not materially vary the case as before stated, as to the matters of fact. They insist, that the infant plaintiffs have an adequate security for their demand in

the responsibility of the other plaintiff, Winborn, as surety for the guardianship; that the debts provided for in the deed are just, and will be lost, or a part of them, if the plaintiff should obtain a decree; and that the creditors had no knowledge of the debt now claimed by the plaintiffs, and believed from the decree obtained by William Hanner, that he had thereby become the owner of the land, and could convey it. It (120) is admitted, however, by Mr. Gorrell, that he knew the debt was not, in fact, paid; and he says that he would not have acted as trustee had he been present when the deed was executed, but he was induced afterwards to accept the deed, lest all its provisions might fall through. It is also admitted by Mr. J. Sloan, one of the creditors, that he was the only creditor who was present at the execution of the deed, or was active in its preparation, and that William Hanner then mentioned the debt of $1,000 as still existing.

Replication was taken to the answers and the cause set for hearing, when it was removed to the Supreme Court.

Graham for the plaintiff.
Morehead for the defendant.

RUFFIN, C. J. If the bill were against William Hanner alone, even these defendants would not, at least they do not, question the proposition that the land would be a security for the debt due on the bond given to his children by their grandfather. By the express terms of the sale, the purchase-money was to be paid before Hanner was to have a deed. He did not even pretend in his bill that Armfield meant to discharge him from that provision of the contract, when he gave one of the bonds to him and assigned the other to his children. If there had been such an understanding or intention on the part of Armfield, why did he not convey the land at the same time? The only answer must be, that it was well understood that the legal title was still withheld, as a security for the provision the grandfather was making in his last illness for his grandsons. So Hanner's own bill treated the transaction; for it admits that he was bound to pay the whole purchase-money before he could call for a conveyance, and puts his right to call for it in that suit upon the position that he had paid it—not in fact, but upon a legal principle, by way of extinguishment by means of his being the guardian of the infant proprietors of the bond, and thus being the hand to pay and receive. Therefore, unless that principle were applicable to the case, it stood upon the common doctrine of the court of equity, that until an (121)

actual conveyance, the estate is a security for the purchase-money, analogous to a mortgage. *Oliver v. Dix,* 21 N. C., 605; *Green v. Crockett,* 22 N. C., 390. Now, it was an entire mistake to suppose that the principle of law relied on had anything to do with the case. The action at law on the bond was not even suspended; for, although the debtor was the guardian, yet the action on his bond would not be in his name, but in that of the infants themselves, the assignees of the bond, by a next friend. But even if it were suspended, it would only be during the guardianship; and that being the act of the guardian himself and the law, and not of the infant creditor, the suspension would not work an extinguishment, but be only temporary and cease with the guardianship, as in the case of the debtor administering on the creditor's estate. *Needham's Case,* 8 Rep., 136. But certainly, however it might be at law, a court of equity would never enforce against any person, and much less against infants, any such principle of extinguishment, but would relieve against it, and keep on foot every security necessary to the satisfaction of the debt, against any act of the debtor himself.

It may be true, that the wards might charge their father on his bond for the purchase-money, and also might charge him and his surety on the guardian bond; but that does not preclude them from insisting also on their real security. Indeed it is just and proper, they should have recourse to that in the first instance, as the property of the debtor himself, in exoneration of his surety. *Bunting v. Ricks,* 22 N. C., 130. There was then no satisfaction of the debt in question, as is obvious in Hanner's own bill: and, consequently, he had no right to a conveyance, and upon the bill of his children against him the land would be declared a security for the debt, and disposed of accordingly.

The decree in that cause made no difference. The present plaintiffs were, none of them, parties in that suit, and, therefore, not bound by the decree *proprio vigore.* If a conveyance had been actually made under it, the plaintiffs would
(122) still have been entitled to relief against Hanner himself, because obtained in bad faith towards those creditors, and with the view to defeat them of a security to which they were entitled. But there has been nothing done under the decree, and, therefore, the legal title is still outstanding in the heirs of Armfield, and the plaintiffs may insist upon it as security for their debt, actually subsisting. The decree of a court of equity is not a legal title. It professes only to require the person to convey the title by executing a deed. *Ferebee v. Procter,* 19 N. C., 439. And this brings up for consideration the defense set up by the trustee and creditors claiming under Han-

ner's assignment, as peculiar to themselves, and founded on merits independent of those of Hanner and himself. They claim to be just creditors, who have honestly obtained a security for their debts without a knowledge of the plaintiff's equity; and, therefore, entitled to hold it. But they were mistaken in supposing that they had obtained a conveyance of this land as a security. They say, they relied on the decree as determining the rights of the parties and constituting a title. But we have seen, that is not so. The deed is only an assignment of an equitable title, and then, were these persons purchasers instead of creditors, the estate itself must answer all claims to which it would have been subject in the hands of the assignor. It is only the purchaser of the legal title without notice of a prior equity, who can hold against such equity. *Polk v. Gallant,* 22 N. C., 395. In the case before us, there is not only not a conveyance of the legal title, but there is a plain reference on the face of the deed to the decree and covenant as constituting the only title of Hanner, and those documents would have enabled all these persons to have discovered the true state of the case, not to speak of the actual knowledge of the trustee and the active creditor in getting the deed. But it is useless to consider the particular circumstances, as the defendants are but the assignees of an equity, and get only what the assignor had, which was the right to have this land, when he had paid to his three children the debt which he owed them for the residue of the purchase-money.

The Court takes nothing from the defendants, which they (123) or Hanner ever had; but only say, the defendants can not take from the plaintiffs a security which they honestly had before the defendants got theirs and which they have done nothing to impair. Therefore, the land must be declared to be a security for the sum due on the bond for $1,000, and it must be referred to inquire what that sum is; and, as both sides wish the land sold, when the debt shall be ascertained, a sale will be decreed, and, after paying the plaintiff's debt and interest, and costs, the balance will go to the trustee to be applied under his assignment.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Smith v. Brittain, post, 355; *Long v. Barnett, post,* 637; *Harris v. Harrison,* 78 N. C., 213-215; *Todd v. Outlaw,* 79 N. C., 237; *Ruffin v. Harrison,* 81 N. C., 220; *Mast v. Raper,* 81 N. C., 334; *Wharton v. Moore,* 84 N. C., 481; *Durant v. Crowell,* 97 N. C., 373; *Barnes v. McCullers,* 108 N. C., 52.

JOHN MILLER *v.* HENRY ELLISON et al.

A testator by his last will bequeaths certain slaves to A and B, and devises and bequeaths all the rest of his estate to the said A and B; and then directs his executor to use all lawful ways and means to procure the emancipation of the said slaves—and if they can be emancipated then the said property to go to them, if they can not be emancipated, the property to belong absolutely to A and B. The executor files a bill stating that he is unwilling to give the bond required by law on the emancipation of a slave, and praying the advice of the court as to whether the next of kin and heirs of the testator, or A and B are entitled to the property, and a decree that they may interplead; and making only the said A and B and the said next of kin and heirs parties: *Held*, that the bill must be dismissed because the exectuor has not made the slaves parties defendant, either by the Attorney General or by some relator.

This cause was removed by consent from the Court of Equity of RANDOLPH, at Spring Term, 1843, to the Supreme Court.

The bill was filed by the plaintiff, as executor of Simeon McMasters, decd., and set forth that the said Simeon, after having duly made his last will and testament, of which he ap-
(124) pointed the plaintiff executor, died about 1840. In the *second* clause of this will the testator gave to Henry Ellison and Jessee Kemp a tract of land containing 150 acres. In the *third* clause, he gave to Henry Ellison his slave Creecy, and to Jesse Kemp his slave Aaron. In the *fourth* clause, he bequeaths all the residue of his estate, consisting of "horses, cattle," etc., to Henry Ellison and Jesse Kemp. In the *fifth* clause, the testator enjoins it upon his executor to use all lawful ways and means to emancipate the slaves Creecy and Aaron according to the laws of this State. The will then proceeds, "and if, at any time, their liberation shall be effected according to law, whether they shall continue to reside in this State, or consent to remove as now required by law, that then, on their becoming legally free and emancipated, my will and desire is that all the property and estate, whether real or personal, shall be vested in them, the said Creecy and Aaron, to their own use and behoof forever, so far as they may be capable of holding the same, or so much of the said property and estate as may not have previously been expended by the aforesaid Henry Ellison and Jesse Kemp, who, in the event of such emancipation as aforesaid being effectuated, shall be considered as *trustees* only holding for the uses and intents herein last expressed and set forth; but in case such liberation shall not take place, then and in that case all the devises and bequests herein made to the said Henry Elli-

son and Jessee Kemp are to be absolute, unconditional and forever, as herein expressed in a former part of this my will."

The plaintiff then states, that he is unwilling, and refuses to execute the bond, required by the act of Assembly, in cases where slaves are directed by will to be emancipated, and calls on Kemp and Ellison on the one hand, and, on the other hand, the other defendants, who are the next of kin and heirs at law of the testator, to interplead. And he prays the court to make a decree accordingly; and also to aid him in the construction of the will, and in the execution of the trusts.

The answers of the heirs and next of kin state, that they have never set up any claim to the property. The (125) defendants Ellison and Kemp claim the property, alleging that as the executor refuses to make any attempt to effect the emancipation of the slaves, no one else has a right to do so, and therefore, they, the said defendants are entitled—but they state they are advised that the case stated by the bill does not authorize an order that they should interplead with the other defendants.

The cause was then set for hearing and sent to the Supreme Court.

No counsel for the plaintiff.

Winston and Mendenhall for the defendants.

DANIEL, J. The Court can not make any order in the cause, that the defendant shall interplead. Neither the next of kin nor the heirs at law, according to the plaintiff's own shewing, have any possible interest in the trust fund. If the emancipation of the slaves Creecy and Aaron should fail, then the real and personal estate devised to Ellison and Kemp, in trust for Creecy and Aaron, on the event of their emancipation, is to be no longer held by them in trust; but is to be then the unconditional property of the said Ellison and Kemp. *Secondly;* the two slaves Creecy and Aaron are not before the court, either by the Attorney-General or any relators. We therefore can not, in the present state of the pleadings, pronounce any opinion, whether the executor, by taking on himself the trusts of the will, is or is not compelled to give the bond required by the act of Assembly, in case the slaves are willing on their part to comply with the act.

The bill seems to have been framed to enable the executor to administer the estate, with the apparent sanction of the court to his refusal to take the proper steps to emancipate the slaves, and, at the same time, without putting it in the power of the

court to require him to do it, if it should be deemed his duty. Such a bill cannot be entertained. It must, therefore, be dismissed with costs, as to the defendants, who are the next (126) of kin and heirs. Costs would also be given to Kemp and Ellison, if there were not reason to believe that they assented to this mode of proceeding; since their answer is received without being sworn to, and they would have the benefit of allowing the executor thus to evade the enquiry, whether he had duly endeavored to procure the emancipation of the negroes, or allowed them or other persons for them to do so.

PER CURIAM. BILL DISMISSED.

GEORGE ASTON *v.* THOMAS S. GALLOWAY et al.

1. A testator devised his land to his wife for life, and then devised as follows: "I give and devise the land, after the death of my said wife, to my nephew J. A. and his heirs, he paying to my two other nephews, E. and G. A., as they respectively arrive at the age of twenty-one years, the sum of £100 each. And should it so happen that the said E. and G. should be of age, before my nephew J. A. be in the possession of the said plantation and land, in that case, he, the said J. A., is not bound to pay the aforesaid sums of money finally, until two years from the day of taking possession": *Held*, that these legacies were a charge upon the land.
2. *Held, further*, that, where this land had been sold to one, who had notice of the lien, and he had afterwards sold it to another who had no notice, whatever remedy there might be against the latter, the court would first decree the legacies to be paid by the first vendee, who had the notice.
3. The filing of a bill in equity is the commencement of the suit, and the time, within which presumption of satisfaction is to arise, must be reckoned back from that period.

This cause was removed to the Supreme Court from the Court of Equity of ROCKINGHAM, at Fall Term, 1842.

This bill, which was filed on 2 May, 1835, was brought to recover a legacy of £100 and interest, which it alleges that one William Aston bequeathed to the plaintiff and charged (127) on a tract of land devised in the said will to John Aston. In 1795, William Aston made his will and in it he gave to his wife Rebecca Aston a large legacy of personal property, and in the same clause he proceeded to say; "I also lend to her the use of the rest of my estate, of what nature or kind soever, during her life." The testator, in a subsequent part of his will, devises as follows: "I give and devise the land and plantation, whereon I now live, after the death of my

said wife, to my nephew, John Aston and his heirs, he paying to my two other nephews (his brothers) Edwin and George Aston, as they respectively arrive at the age of twenty one years, the sum of £100 each. And should it so happen, that the said Edwin and George should be of age, before my nephew John should be in possession of the said plantation and land, in that case he, the said John, is not bound to pay the aforesaid sums of money finally, under two years from the day of taking possession." John Aston conveyed his estate in remainder in the land to Marmaduke Williams; and has since died insolvent. Marmaduke Williams conveyed to Robert Williams; and Robert Williams, 10 October, 1804, by deed of bargain and sale, conveyed the said land to Robert Galloway; the said deed reciting that it was the land willed by William Aston to John Aston. On the death of Rebecca, the tenant for life, which happened between 5 and 15 May in 1820, Robert Galloway took possession of the said land, and continued in possession of it up to his death in the year 1832. His executors therefore, on 27 February, 1834, under a power in the will of their testator, sold the said land to William C. Wisdom, who then took possession and is now in possession of it. The bill was filed against the executors of Robert Galloway and against William C. Wisdom; and, after stating that the legacy as the plaintiff was advised, was a charge on the land, averred that Robert Galloway, at the time of his purchase, had express notice, and William C. Wisdom, at the time of his purchase, notice in law, of this lien. The bill then prayed that the defendants might be decreed to pay him the amount of his said legacy and interest.

The defendants in their answers admitted all the ma- (128) terial facts charged in the plaintiff's bill, except the notice of the lien, if there was a lien, and insisted also that there was no lien. They also relied upon the presumption of satisfaction from the lapse of time.

There was a replication to the answer. Depositions taken in the cause, proved that Robert Galloway, at the time of his purchase, had express notice of the lien and had subsequently paid the other legatee Edwin Aston. It was admitted that William C. Wisdom had no actual notice. It was also proved that Rebecca, the tenant for life, died between 5 and 15 May, 1820. The cause was then set for hearing upon the bill, answers and proofs, and sent to the Supreme Court.

Graham for the plaintiff.
Badger for the defendants.

DANIEL, J. *First.* Was the £100 given to the plaintiff as is stated in the case, a charge on the land? We think it was an equitable charge, *that is,* that in this Court the land is to be regarded as a security for it. In the case of *Abrams v. Windup,* 3 Russ., 35, a testator devised lands to Joseph Bulmer, for paying his son Thomas Bulmer £50, when of the age of twenty-one years. The Master of the Rolls was of opinion, that this was a devise of the fee to Joseph Bulmer, charged with the payment of the £50 to his son. In *Miles v. Leagh,* 1 Atk., 573, testator devised lands to his wife for life, remainder to his son R. in fee; and he gave to A. a legacy of £150 to be paid in twelve months after his son R. should come to enjoy the premises. The legacy to A. was held to be a charge, and it was decreed with interest from the death of the testator's wife, against R.'s son and hear. In *Ladd v. Carter,* Prec. Chan., 27, a devise of lands to A for life, remainder to such child or children as should be living at his death and to their heirs, A. paying £40 pounds to R. This was a charge, not only on A.'s estate for life, but also on the remainder. In the case now before us, the words (129) immediately following the devise to John Aston are, "*he paying* to my two nephews £100 each, at their ages of twenty-one years: But if it should so happen, that they should be of age before John shall be in possession of the said plantation and land, in that case he is not bound to pay under two years from the day of his taking possession." It seems to us, that the £100 was not intended by the testator, to be a personal debt on the devisee, in remainder only; but it was to arise out of the land, after the devisee should get into the possession of the same, and he be able to make it out of the rents and profits—therefore it was a charge upon the land. *Secondly.* The executors of Galloway rely on the presumption of payment, or abandonment of the plaintiff's equitable interest in this legacy. Under the statute, (Rev. Stat. c. 65, s. 14) before such a presumption can arise, thirteen years must have run between the time the plaintiff could have filed his bill, and the time he actually did file it. The £100 legacy was not payable, until after the expiration of two years, from the time the remainderman John Aston had a right to enter into the possession, to-wit, two years after the death of the tenant for life. The thirteen years had not run by the space of three days, when this bill was filed, taking the death of the widow to have been at the earliest day mentioned in the evidence. We have heretofore said that the filing of the bill is the commencement of the suit. *McLin v. McNamara,* 22 N. C., 82. The act of Assembly therefore does not bar the plaintiff.

Thirdly. The defendant Wisdom says that he is a purchaser for the full value of the fee simple in possession, and also that he purchased without notice of the plaintiff's demand; and, therefore, that he is not liable at all, or at any rate, that Galloway is liable before him. As the opinion of the Court is with him upon the latter ground, it will not be necessary, at least for the present, to express any upon the first point, inasmuch as the plaintiff is satisfied with a decree against Galloway in the first instance, as there is no doubt of the solvency of his estate. Wisdom purchased without any actual notice, and, as appears both from his answer and that of Galloway, (130) contracted for the unencumbered fee, reserving nothing, but paying the whole purchase-money to Galloway's executors, who still have it. They have therefore the fund which ought to satisfy the plaintiff's demand, and there must be a decree against them for the plaintiff's legacy of £200, with interest thereon from the filing of the bill. The interest can not be carried farther back, because it appears the plaintiff absconded from this State and removed into parts unknown in the Western States before the death of Mrs. Aston. Galloway might not have known that his brother John, the devisee of the land, had not paid him, or that the plaintiff did not look to him. The legacy to the other brother he paid on demand. It was the duty of the plaintiff also to have requested payment, or, at least, given Galloway notice where he might be found. But for the principal and interest from the filing of the bill and for the plaintiff's costs, Galloway's estate is liable. Between the plaintiff and Wilson, neither party is entitled to costs up to this time; but the bill will be retained as against Wisdom, until it be ascertained, whether payment can be had from Galloway.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Ruffin v. Cox, 71 N. C., 256; *Devereux v. Devereux,* 78 N. C., 389; *Rice v. Rice,* 115 N. C., 44; *Hunt* v. *Wheeler,* 116 N. C., 424; *Outland v. Outland,* 118 N. C., 140; *Allen v. Allen,* 121 N. C., 334.

(131) MARY GARRETT *v.* WILLIAM WHITE

1. The sheriff's deed alone for land sold for taxes will not pass the title, but it must appear that the taxes, for which the sale was made, were due, as his authority to sell.
2. In a suit in equity for partition of land, from the very nature of the case, relief can be given, where the titles alleged are legal, only where the title is admitted, or has been established at law, or, at the least, is very clear.
3. But where the title is denied and the defendant sets up a sole and adverse possession, a Court of Equity can not proceed, until the party who asks partition, reestablish at law the unity of possession in himself with the co-tenant. A Court of law can alone decide upon a legal title or an alleged ouster.
4. In such a case the regular course of the court is to retain the bill, allowing the party competent opportunity for trying the title and recovering the possesison of the undivided share in an action of ejectment; and the Court will require the defendant in such action to admit his actual ouster of the plaintiff from the tract alleged to be held in common.

This cause was removed on affidavit of the defendant from WASHINGTON Court of Equity, at Spring Term, 1843, to the Supreme Court.

The bill was filed in August, 1841, for the partition of a tract of land, described in the pleadings. One William White, the defendant's father, being seized of the land in fee, devised it by his will, dated 16 April, 1823, to his wife Asha White for term of her life, with remainder after her death to the testator's two sons, Solomon White and William White, the defendants, equally to be divided between them. The bill states that Solomon White sold and conveyed his undivided moiety in remainder to Joseph Garrett on 16 August, 1831, and that Joseph Garrett devised it to the plaintiff, then the wife of the said Joseph, and died in 1835; that Asha White, the tenant for life, had lately died, and that William White had then entered into the actual possession of the land, and held it in common for himself and the plaintiff; that the plaintiff had applied to him to make an equal partition with her, but
(132) that he refused, on the pretense that Asha White had let the public taxes due upon the land for 1837 be in arrear, and that, during her lifetime, to wit, on 4 July, 1839, the said land was duly set up by the sheriff for sale for the taxes, viz, $6.21, and that the said William became the purchaser of 219 acres, part of the said tract, for the taxes due on the whole, and took a deed therefor. The bill further states that the transactions thus pretended took place without the plaintiff's knowledge, and that, after being informed thereof, she offered to pay the defendant one-half of the sum he had

paid and all the expenses by him incurred, and requested to be let into actual possession with him and that he would release to her one-half of the land; and the bill charges that, if the defendant's purchase for the taxes and the sheriff's deed of conveyance should give him a good title at law, yet that in equity she is entitled equally with him upon a proper indemnity for the moneys he has laid out; and it prays a decree for the partition and conveyances accordingly.

The answer admits the devises by William White, the father, as stated in the bill; and also the conveyance from Solomon White to the plaintiff's husband, Joseph Garrett. But it states that, although the latter is in form an absolute conveyance, yet that there was an understanding between Solomon White and Garrett that the former might redeem; though upon what terms is not stated. The answer further states that the defendant, at a public sale by the sheriff for the taxes due thereon, purchased a portion of the said land and paid the price and took a deed in conformity to the acts of Assembly, in the lifetime of Asha White, and with a view to gain to himself the further title to the same; that the estate of Asha White is sufficient to make good the land to the plaintiff; and that the defendant does not believe the plaintiff was ignorant of the sale for taxes, and that she did not offer to refund to him the money paid by him or any part of it. The answer then denies that the defendant is in law, or ought to be considered in equity, a tenant in common with the plaintiff; and insists that he took possession, under the deed to him from the sheriff, as sole tenant of the land, and claimed so to be (133) when the plaintiff filed his bill and long before, and cultivated the same under his said claim for his own benefit, without being in any manner accountable to the plaintiff.

There was a replication, depositions were taken, and the cause set for hearing and sent to the Supreme Court to be heard.

No counsel for the plaintiff in this Court.

A. Moore for the defendant.

RUFFIN, C. J. The defendant has given some evidence of declarations of Joseph Garrett, expressing a willingness that Solomon White, or either of his brothers, might repurchase the land; but nothing like an obligatory agreement for redemption is established—even if that could be entered into between these parties.

The title to the plaintiff seems, therefore, to be clear as a

legal title, to the undivided moiety of the whole tract, except so far as a title to a part of it may have been lost by the purchase of the defendant for taxes. For the residue of the tract, not sold for taxes, the plaintiff's title is unquestionable; and she has a right to partition at least of that part, since the sole seizin or adverse possession, insisted on by the defendant, extends no farther, as we understand him, than the 219 acres included in the sheriff's deed. But as that residue is only 20 or 30 acres, the Court does not think proper to decree partition of that by itself, until it be seen, whether the plaintiff yet has the right at law, or in equity to a share of the part claimed exclusively by the defendant. Upon that point the *onus* is on the defendant to shew the plaintiff's estate to be divested. If this Court were to pass on his proofs, we could but pronounce them insufficient in the present state of them. They consist only of a plot of survey, dated 22 December, 1840, and purporting to be made by Samuel Newberry, the County Surveyor of Washington, shewing the boundaries of 219 acres of land surveyed for William White, which he purchased for taxes, and taken from the tract of land given in by Asha White, (134) there being in said tract 257 1-2 acres, and a sheriff's deed for the land thus surveyed, dated 25 December, 1840. But the plot is not verified in any manner, nor any proof given whether the land was laid off out of the whole tract, as directed by the statute, nor is there any proof that the land was entered for taxes, nor by whom. We have heretofore more than once held that the sheriff's deed alone for land sold for taxes will not pass the title, but that it must appear that the taxes, for which the sale was made, were due, as his authority to sell. *Avery v. Rose,* 15 N. C., 549. *Pentland v. Stewart,* 20 N. C., 521. We think it extremely probable that no such tax was due, as that mentioned in the sheriff's deed, which is the tax of 1837 on "a certain tract of land containing 257 1-2 acres, it being the land given in by Asha White for the heirs of William White, deceased," inasmuch as the *heirs* of William White were not the persons to pay the tax on this land, nor, indeed, the devisees in remainder, but the tenant for life occupying it. But it is probable the defendant may not have intended to complete his proofs of title, but only to exhibit his deed in support of the allegation in the answer of adverse and exclusive possession in the defendant; and we think that course the correct one. The jurisdiction of the courts of equity to decree partition is conferred in this State by statute. Rev. St. c. 85. But from the nature of the case equity can relieve, when the titles alleged are legal,

only when the title is admitted, or has been established at law, or, at the least, is very clear. But when the legal title is denied, and the defendant sets up a sole and adverse possession, a court of equity can not proceed until the party who asks the partition reestablishes the unity of possession in himself with the co-tenant. For the title and the nature of the possession are questions of law, which belong to a legal tribunal, including a Judge and jury, to decide. There have been few applications in this State to the courts of equity for partition, because, by the statutes, a mode of doing it at law is given more simple and expeditious, and less expensive; which is equally effectual except in cases where the title is equitable, or, like the present, where the plaintiff claims to be a tenant in (135) common, either at law or in equity. Where the title is equitable it must be tried by the chancellor, for a court of law is not competent to determine it. For the like reason, where it is legal and denied, or where the defendant avers that he has ousted the plaintiff, the right must be established at law and the plaintiff get into possession again. Then the decree in equity will follow, as a matter of course. And it seems now to be the regular course of the Court to retain the bill, allowing competent opportunity for trying the title and recovering the possession of the undivided share in ejectment. *Blynman v. Brown,* 2 Vern., 232; *Wilkin v. Wilkin,* 1 John. C. C., 111. So we think proper to direct in this case that the cause stand over for a year that, in the meantime, the plaintiff may bring and try an ejectment for one-half of the tract of 219 acres claimed by the defendant under the deed from the sheriff, and also for the residue of the whole tract of 257 1-2 acres, unless the defendant shall admit the plaintiff to have title to one undivided half of such residue and to be in possession there with him; and if the plaintiff shall bring such action the defendant is to be required to admit on the trial his actual ouster of the plaintiff from the tract of 219 acres, or that of 257 1-2, as the action may be brought for the one or the other, as above mentioned. Upon bringing to our notice the result of the action at law, either party can move for further directions; and in the meanwhile all other equity and questions are reserved.

PER CURIAM. ORDERED ACCORDINGLY.

Cited: Ramsey v. Bell, post, 212; *Weeks v. Weeks,* 40 N. C., 119; *Jordan v. Rouse,* 46 N. C., 122; *Allen v. Allen,* 55 N. C., 237; *Fox v. Stafford,* 90 N. C., 298.

(136)

ROBERT B. JONES et al. *v.* MARY LOFTIN et al.

A testator having a suit pending, which he had instituted to recover certain slaves he had purchased and for which he had partly paid, directed his executor, if the slaves should be recovered, to sell them, and, out of the proceeds, pay the remainder of the purchase-money, and the surplus, if any, be left to his wife and children. The executor suffered the suit, which was against the vendor, to abate, and surrendered all right to the slaves, upon receiving back what had been paid by his testator, and the bonds still remained unpaid for the residue of the purchase-money: *Held*, that, before the legatees could recover the slaves from the executor, or from the vendor, against whom the suit at law had been brought, they must shew that they had been injured by some fraudulent act or improper dealing of the executor with the other party.

This cause was removed by consent from DAVIDSON Court of Equity, at Fall Term, 1843, to the Supreme Court.

The facts, as they appeared from the pleadings, were these: Sarah Loftin, in February, 1818, for $750, sold to Thomas Jones (the father of the plaintiffs and the testator, under whose will they claimed) the slaves Fan and her children Ham and Joe; and she then executed to him a bill of sale for the said slaves. The slaves, being at that time hired out, were not delivered to the vendee, nor was the purchase-money paid, except $150. Thomas Jones, some time after the sale, took the slave Ham into his possession by force, and instituted a suit at law against Sarah Loftin for the recovery of the others. Pending that suit, Jones died in 1819, leaving a will, in which he appointed three executors who qualified. These executors permitted the suit to abate, and compromised the dispute about the slaves with Sarah Loftin. She gave up to the executors the bonds she held against Jones for the purchase-money, and also returned them $150, the sum Jones had before paid her; and the executors surrendered to her the boy Ham and the original bill of sale, intending thereby to rescind the contract and release to her all claim for the slaves. Thomas Jones in

(137) his will directed his executors, that if a recovery of the slaves should be effected in the suit which he had commenced, they should sell the same at public auction on a credit of twelve months, and apply the purchase-money, in the first place, in paying the balance of the debt he owed for their original purchase, and the surplus, if any, with the residue of his property, to go equally to his children and to his widow, who was left an executrix.

The bill was filed by the children of Thomas Jones against their mother, the surviving executrix of Thomas Jones, and

against the representatives of Sarah Lofton, now deceased, who had the said slaves in their possession, and prayed for an account of the hires and profits of the slaves, and that the slaves might be delivered up to the plaintiffs, and their hires, etc., accounted for and paid over, alleging that the present possessors were in equity mere trustees for the plaintiffs.

The answers of the defendants admitted the facts as above stated to be substantially true, and denied any fraud or improper conduct in the compromise, or that the plaintiffs were injured thereby.

The cause was set for hearing and transmitted to the Supreme Court.

Mendenhall for the plaintiffs.

No counsel for the defendants.

DANIEL, J. It is true that, in this Court, the plaintiffs, as legatees of Thomas Jones, had a right to pursue the property in the hands of the defendants, who are only volunteers under Sarah Loftin, if there had been any fraudulent combination between the executors of Jones and the said Sarah Loftin to deprive them of their legacies in the slaves, or any interest they might have in the sale of them under their father's will. But there is no evidence in the cause to shew that the slaves were worth, at the time of the resale, more than the executors obtained for them, or that they would have brought more at public sale at twelve months' credit. There is no pretense that the executors derived to themselves the smallest benefit by the resale of the slaves. Before the plaintiffs could (138) ask of this Court a decree in their favor, it behooves them to shew that they had been injured by some fraudulent act or improper dealing of the executors with Sarah Loftin, respecting the slaves. Nothing of that kind appears in the evidence; and the bill must therefore be dismissed, with costs.

PER CURIAM. BILL DISMISSED.

POLLY ANN BRYSON, by her next friend, *v.* JOHN DOBSON et al.

The act of Assembly of 1842, c. 35, does not give a preference to lapsed entries, made since the 1st January, 1836, over junior entries, on which the time for the payment of the purchase-money had not expired.

This cause was transmitted to this Court, by consent, from the Court of Equity of MACON, at Fall Term, 1843.

The material facts of the case, as exhibited by the bill and admitted by the answer, were these:

On 27 April, 1838, John Dobson, Thomas Milsaps and Seth W. Hyatt, entered 200 acres of vacant land in Macon County, and had it surveyed in August, 1839. By the acts of 1838, C. 19, and C. 20, they had time for paying the purchase-money until 15 December, 1841. But they did not pay it within the extended time; and by the general law, Rev. Stat. C. 42, s. 10 and 11, the entry became void, and any other person might enter and obtain a grant.

On 27 August, 1842, Bryson, the present plaintiff, made an entry of 200 acres, being the same land, or a part of it, before entered by Dobson and others; and had it surveyed on 10 May, 1843, paid the purchase-money into the treasury, and took out a grant on 10 July, 1843.

In 1842, the General Assembly passed an act, C. 34, extending the time to 1 January, 1845, for paying the money
(139) and perfecting the titles on all entries made since 1 January 1839; with a proviso, "that nothing in the act contained shall be so construed as to affect the titles of those who have heretofore obtained grants for said lands, or the rights of junior enterers." At the same session another act was passed, C. 354, "to amend" the preceding act; whereby it is enacted "that all entries made since 1 January, 1836, may be paid for by the enterers at any time previous to 1 January, 1845"; with the proviso, "that the same shall not interfere with any subsequent entry, for which the purchase-money may have been paid."

In June, 1843, Dobson, Milsaps and Hyatt, became informed of the provisions of the acts of the preceding session, and thinking that they revived their entry, and upon their payment of the purchase-money before the plaintiff, gave them the right to a grant in preference to the plaintiff, paid the purchase-money into the treasury and obtained a grant on 4 July, 1843. At that time the plaintiff had a tenant on the land; and, indeed, some of the defendants had actual knowledge of the plaintiff's entry and survey. The persons to whom the grant of 4 July issued, either before or afterwards, made contracts for the sale of certain interests in the land to the other defendants, Jason L. Hyatt, Jesse R. Silver and Joseph W. Dobson; and the answers state that, at the time they were put in, those three last-named persons and Seth W. Hyatt were the sole claimants under this grant.

Soon after obtaining the grant the defendants instituted action of ejectment against the plaintiff's tenant; and, there-

upon the plaintiff filed this bill, praying that hers may be declared the preferable entry, and that the other parties hold the legal title in trust for her, and that they may be decreed to convey it to her, and in the meantime for an injunction.

The cause was set for hearing upon the bill, answers and exhibits, and transferred to this Court.

Badger for the plaintiff.

No counsel for the defendant.

RUFFIN, C. J. The Court thinks that the plaintiff is (140) entitled to a decree. By the law, as it stood before 1842, she would undoubtedly be thus entitled. The entry under which the defendants claim, lost its efficacy on 16 December, 1841, having then finally lapsed. The land, being thus vacant, was entered by the plaintiff in August, 1842. The law allowed her until 31 December, 1844, to pay the purchase-money; and, upon her doing so, it assured her that she should have a grant upon application in due time. The entry, if not a contract with the State, strictly speaking, at least creates an inchoate with valuable interest, sustained by a statute and the guaranty of the public faith. That interest, if the enterer performs the conditions imposed by law, no authority can justly take away or deny. From considerations of indulgence to the citizens, and from motives of policy in having all the land appropriated as soon as possible, the Legislature has often relaxed the strictness of the terms as to the time of payment and in other respects, so as both to prevent subsisting entries from becoming lapsed, and to revive some already lapsed. But it is manifest that there is neither justice nor propriety in reviving an expired entry to the destruction or prejudice of another duly made and subsisting, and in due progress to be consummated into a legal title. It is not to be presumed that the Legislature intended to interfere between entries in those States, because such interference can not be necessary to the public interest, and must be to the prejudice of private right. It requires the strongest language and clearest intent to authorize such a construction of a statute, as would produce such an interference. When a lapsed entry is revived there is a proviso tacitly implied, if not expressed, that another right then subsisting should not be made void or impaired. This is the more reasonable, when a fair and just operation can be given to the law by applying it to the rights of the public and not those of individuals. For example, when the entry lapses and the land reverts to the State, the same person can not reenter it within

twelve months, though other persons may immediately.
(141) A remission of that forfeiture or a dispensation from that disability affords scope enough for the enactment extending the time for completing the title. The State says she will not insist on forfeitures and disabilities, which she imposed for her own policy, and for the like reason relaxes; and, therefore, that a person who entered land and failed to pay for it, and consequently is not entitled to it against the State, may yet pay for it and have it. That is the legislative purpose in the enactments of this character. In waiving those penalties, as a bounty to those who have failed in diligence and punctuality, an intention can not be supposed, in effect to inflict them on another who has been guilty of no *laches*, by depriving the latter of the preference to which, before, he was legally entitled. The lapsed entry is revived; but not so as to make it an entry, as of its date, and thus to postpone to it a junior entry subsisting at the passing of the act. Against another subsisting entry, one that has lapsed is revived as of the date of the statute by which it is revived. The lapsed entry is itself the junior entry in point of equity and a just construction of the law; and an entry in full force at the time of passing the reviving act, if perfected in due time, is the preferable one. Such we should conceive to be the construction, if there was no saving in favor of junior enterers in the acts on this subject.

But the Legislature has been careful that this should not be a matter of labored construction; for in all the acts on this subject, and they are numerous, there are, through abundant caution, provisos, saving existing rights, expressed more or less clearly. There are so many acts of this sort and with such provisos, that the principle may be considered as thoroughly incorporated into our legislation, and, therefore, that there was no intention to abandon it in the acts of 1842. If the language of those acts be not so explicit as those made before them, it would yet be a judicial duty, as far as possible, to interpret them in conformity with the body of the laws upon this subject as conservative of existing rights. The proviso in the 34th chapter expressly protects "the rights of junior enterers";
which includes all junior enterers, whether they had
(142) then paid the purchase-money or not. The next chapter (35) has a proviso somewhat different in point of form. It is, "that the same shall not interfere with any delinquent entry, for which the purchase-money may have been paid." Upon these words the argument for the defendant is, that those entries only are saved on which the purchase-money had been paid at the passing of the act; and that all others, whether

lapsed or not, are put on the same footing, and, therefore, that the enterer who paid first after the act, has the preference. We have already seen that such an enactment would be unjust, as far as it deprived one of the parties of his prior right. And we do not think that there is a necessity for receiving this act in that sense. The argument is just, as applied to two entries, which had both lapsed and were both revived by the act. As neither could get the land but by that act, they stand on the same ground, and then the general principle applies, that priority of time in making payment creates a priority of equity. Perhaps the true construction may be that the proviso in the second act looks only to the cases of two lapsed entries, on one of which, however, the purchase-money had been paid, so as to make the lapse arise from not completing the title by taking a grant. This construction is suggested by several considerations. This chapter is to "amend" and not to "repeal" the preceding chapter in any part; and both were passed at the same session. They are, therefore, to be considered but parts of the same statute, and to be construed so as to render all the provisions consistent. The object of the second act, then, was not to change the enactments of the first, as to any cases within the first. Those were entries made in 1839 or after; as to which the 34th chapter provided, that the rights of junior enterers should be saved, and necessarily meant junior enterers, from whom the purchase-money was not then payable, and who should pay it afterwards in due time. That fully provided for the case of an entry subsisting at the time of passing the act, and no further saving was needful for it. Now, the 35th chapter in the first clause only alters the enactment of the preceding chapter by enlarging the time, not pros- (143) pectively for the payment of the purchase-money, but retrospectively as to the date of the entry. They both fix 1 January, 1845, for the payment of the money; but the first only takes in entries made after 1 January, 1839, while the other goes back to 1 January, 1836. Thus, every case to which the 35th chapter can apply in its first clause, and which is not fully provided for in the other chapter, is a case, in which both of the conflicting entries must necessarily be lapsed; being entries between 1836 and 1839, on which the latest day of payment, according to previous acts, was 15 December, 1841. The proviso of the 35th chapter, must, therefore, in reason be limited to the cases within its own enactments; which, we have seen, are not cases in which one entry was lapsed and the other subsisting, but are cases in which both entries were lapsed. This comports well, too, with the language of the proviso, speaking

of an entry *"for which the purchase-money has been paid,"* which naturally implies that the purchase-money *had become payable.* Now, between lapsed entries, on one of which the purchase-money had been paid, but the enterer neglected to perfect his title, the rule of justice is obvious, which gives to that one a preference. So between lapsed entries, on neither of which the purchase-money had been paid, when the act passed, it is plain that he, who first pays, whether on the younger or older entry, ought to be preferred. There can be no other rule; because they alike owe the privilege to the bounty of the State, and both were revived at the same time as well as by the same means. They stand, therefore, as if made simultaneously; and the right must be determined by the greater or less degree of diligence in completing the title.

But upon an entry, on which the purchase-money had not become payable in 1842, the Legislature could not have meant that the purchase-money should have been paid *at that time,* in order to preserve its preference over a lapsed entry. Hence, at all events, if the proviso to the 35th chapter can be considered as embracing subsisting as well as lapsed entries,
(144) the time referred to in the words, "may have been paid," is not that of passing the statute, but must be that which is limited as the period within which the purchase-money must be paid. A lapsed entry shall not "interfere with a subsequent entry, for which the purchase-money may have been paid"; not may have been paid *now,* but may have been paid *in due time.* If not so paid, then the entry, once lapsed but now revived, is to hold good; but if it shall have been so paid before the expiration of the time given by law for its payment, then the older entry, once extinct, must remain so. Here such payment was made by the plaintiff, and, therefore, she is entitled to the land. Decree a conveyance accordingly, with cost.

PER CURIAM. DECREE FOR THE PLAINTIFF.

Cited: Buchanan v. Fitzgerald, 41 N. C., 124; *Horton v. Cook,* 54 N. C., 273; *Gilchrist v. Middleton,* 107 N. C., 678; *S. c.,* 108 N. C., 717; *Wool v. Saunders, Ib.,* 739; *Barker v. Denton,* 150 N. C., 725.

JOEL F. MOTLEY *v.* ALLEN JONES et al.

Persons who share in the profits of a concern are liable as partners to a third person; but as between themselves they are only liable according to their particular contract.

This cause, having been set for hearing, was, by consent, transferred from CASWELL Court of Equity, at Fall Term, 1843, to the Supreme Court.

The pleadings exhibited the following facts: The defendants, Jones, Anderson & Co., brought an action at law against the plaintiff, Motley, and the defendant Cobb, for a balance due for the price of manufactured tobacco, sold to Motley and Cobb as copartners, and the plaintiffs at law obtained judgment for the sum of $982,29.

Motley then filed his bill against the plaintiffs at law and Cobb, and therein charged that the tobacco was not sold to Motley and Cobb, but was put in as stock by Jones, Anderson & Co., in a partnership, consisting of Jones, Anderson & Co., the plaintiff, Motley, and the other defendant, (145) Cobb, upon these terms: Jones, Anderson & Co., who were manufacturers in Danville in Virginia, were to furnish, at reasonable prices, any quantity of tobacco that could be disposed of, and ship it to Motley and Cobb at Mobile, where it was to be sold by Cobb, and, out of the proceeds of the sale, the prime cost was to be paid by Jones, Anderson & Co., in the first instance, and then, after defraying expenses, the residue was to be divided as profits, one-third to Jones, Anderson & Co., one-third to Motley, and the other third to Cobb. The bill further states that Cobb received and sold the tobacco, sent under the agreement, by Jones, Anderson & Co., and made to them considerable payments, leaving, however, the balance still due of the original price, which was recovered at law by Jones, Anderson & Co., and that Cobb wasted or lost the other effects of the firm, so that the said balance is a clear loss, and, therefore, ought to be borne equally by the partners, in proportion to their said shares of the profits. The bill then states that Cobb is insolvent and has absconded, and that the plaintiffs at law were about to raise the whole amount of the judgment from the present plaintiff. The prayer is, for a discovery of the partnership agreement, that an account may be taken and the loss adjusted between the several parties, and in the meantime for an injunction.

Upon the bill an injunction was granted for one-half of the recovery at law.

Cobb did not answer, and the bill is taken *pro confesso* against him. Jones, Anderson & Co. deny the alleged partnership altogether, and say that the transaction was an ordinary sale to Motley and Cobb at agreed prices, to be paid at particular days named. They admit that, in consequence of Mobley and Cobb, expecting to sell large quantities of tobacco in Mobile, they agreed to let the article go at low prices, in consideration of the agreement, on the part of Motley and Cobb, that, in addition to the invoice prices of the tobacco, those persons were to pay Jones, Anderson & Co. one-third part of the net profit of the adventure, after deducting the cost of the tobacco (146) and all incidental expenses; of which third part of the profits, the defendants say they have received nothing. The answer states positively, that the agreement was, that the price of the tobacco was to be paid to these defendants by Motley and Cobb at all events, and that the only concern they had in the profit and loss on the transaction was that, if there was a profit, they should be entitled to one-third of it, as an addition to the invoice prices of the tobacco sold by them.

Upon the answer, the injunction was dissolved. The plaintiff then replied and proceeded to take proofs; and after these were completed the cause was transferred to this Court.

Morehead for the plaintiff.
No counsel for the defendants.

RUFFIN, C. J. The proofs are all on the side of the plaintiffs, and consist of declarations by one of the firm of Jones, Anderson & Co., as to the terms of the agreement. But they do not vary the case made in the answer, as they are all consistent with the account given therein.

But it has been contended for the plaintiff, that according to the answer itself these parties were partners, and consequently that they must bear the losses equally. They were, no doubt, partners, as they shared in the profits; which gave each an interest in the whole. And each was certainly liable to third persons upon any partnership contract. But as between themselves, though partners, their right to profits, and liability for losses, depend upon the agreement they made. Partners do not necessarily bear losses equally, more than they are entitled to the profits equally; but that is regulated by the contract. Here the plaintiff says the tobacco was to be paid for out of the proceeds of sale; which would make the payment depend on the success of the adventure. But the answer denies that; and says that Motley and Cobb bought it

and were to pay for it at all events, whether it sold for more or less—though, if it sold for more, then Jones, Anderson & Co. would be entitled to one-third of the excess, after paying other expenses. The plaintiff, therefore, has no claim on Jones, Anderson & Co. for contribution to the loss (147) arising from Cobb's mismanagement or unfaithfulness, and the bill must be dismissed as to them with costs, and as the bill does not seek an account of the partnership, as existing between the plaintiff and Cobb alone, it is dismissed as to him also.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Fertilizer v. Reams, 105 N. C., 297.

MARCUS T. C. KENNEDY et al. *v.* ROBERT PICKENS et al.

Where an administrator, being about to leave this State, deposits the assets of the estate with a person, in trust that he will pay the next of kin of the intestate, the sureties of such administrator, against whom recoveries have been effected by any of the next of kin, have a right to call upon this trustee for an account of the assets so received by him, and to be subrogated to the rights of such next of kin, as have made them responsible.

This cause was transmitted for hearing to the Supreme Court from the Court of Equity of MECKLENBURG, at the Fall Term, 1843.

The facts appearing upon the pleadings and proofs are fully set forth in the opinion delivered in this Court.

Alexander for the plaintiff.
Caldwell for the defendant.

DANIEL, J. The bill states that the defendant, Robert Perkins, was appointed administrator of the estate of William Perkins, deceased; that the plaintiff, Dogharty, and the intestate of the other plaintiff, were his sureties to the administration bond; that the administrator received assets to the amount of $1,105.28; that there were no debts owing, or, if any, they were of small amount. The bill further states that the administrator removed to the State of Tennessee in 1829; but, before doing so, he deposited in the hands of Charles W. Har-

(148) ris, the other defendant, the whole of the assets, under the express agreement and in trust, that he should pay the same to the next of kin of the intestate; that the net amount, after deducting the administrator's commissions, was $1,068.30. The bill states that Harris failed to comply with his agreement, and that the plaintiffs were sued on the administration bond by the next of kin of the intestate, and that a judgment was had against them for $661.34. In consequence of some payments which had been before made by Harris to the next of kin, the judgment against the plaintiffs was reduced at April sessions, 1840, of Mecklenburg County Court to $652.83. This sum was paid by the plaintiffs; Dogharty paid $85, and Kennedy the residue of the said judgment. The plaintiffs state that they have called on Harris and demanded payment of him out of the assets left with him as before stated; that he has refused to comply, but he promised to arrange it in some way at a future day; that Harris knew of the suit against them and was notified to attend the Clerk of the county court in taking the accounts. The plaintiffs pray a decree for an account, and that the defendants be decreed to repay them the moneys which, as sureties, they have been compelled to pay.

The defendant Harris answers and admits that the plaintiffs were the sureties to the administration bond of Robert Perkins, as stated in the bill; but he denies that he received of the administrator $1,104.28, nor did he enter into the agreement as alleged. He says that he received notes of the administrator to the amount of about $900, with the understanding that he was to pay certain of the next of kin of the intestate their shares, and that the administrator furnished him with a list of their names, which he has ready to produce. That he has already done and paid more than he obliged himself to do; that there was no trust or agency on his part, to pay more than as aforesaid. He says that the administrator retained of the estate $200, and a negro man named Jack. That to prevent litigation, he has paid four others of the next of kin not mentioned in the aforesaid list, namely, William and Robert
(149) Walkup, and Israel and John Davis. He says, that if he was to pay all of the next of kin, he should considerably exceed the amount of moneys left in his hands by the administrator.

The answer of Harris is replied to, and the bill is taken *pro confesso* as to Robert Perkins.

Two witnesses have been examined by the plaintiffs. Mr. Oats, the Clerk of the County Court of Mecklenburg, states that Harris admitted in his examination before him that he had

received of Robert Perkins, the administrator of William Perkins, all the proceeds of said estate; and that he had agreed to pay to distributees the amount that they each were respectively entitled to; he said that he had gone on paying them until he was tired, and that he had refused to pay any more of them. Robert Walkup deposeth that the defendant Harris requested him to notify all the distributees, who had any demands against the estate of William Perkins to meet him on a particular day at the town of Charlotte to settle with them. From a transcript of the record of the suit against the plaintiffs as the sureties on the administration bond of Robert Perkins, we are satisfied that a judgment was recovered against them for $661.34 and costs, on the relation of the representatives of two of the sisters as next of kin of William Perkins, deceased, namely, Margaret Walkup and Martha Davis; and that executions issued on the said judgments, which have been returned satisfied.

Therefore we are of opinion that in this Court the plaintiffs are subrogated to their rights, and that they are entitled to a decree for an account against the defendants. Upon taking the account the defendant will be charged with the assets he got from Robert Perkins, and credited with such sums as he may have paid to the next of kin.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Wilson v. Bank, 72 N. C., 626.

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(150)

JANE C. WARD *v.* BRYANT H. and JOSEPH B. GRIFFIN.

It is in general no objection to a witness that he is the agent of the party who offers him—more especially is it no objection when the object of his evidence is to prove the payment of money by the principal to himself.

CAUSE transmitted from the Court of Equity of WASHINGTON, at Spring Term, 1843.

It appeared from the bill that, in 1835, the plaintiff by her agent, Thomas S. Armistead, sold to the defendants a tract of land and agreed to convey the same in fee, at the price of $800, payable in three equal installments of $266.66 2-3 on 1 January, 1836, 1837 and 1838. The defendant entered into possession, and in March, 1836, paid $221.18, in part of the

first installment; and, as the plaintiff alleges, the residue of the purchase-money and interest remains unpaid. The bill was filed in August, 1841, and states that the plaintiff had executed a deed and tendered it to the vendees and demanded the payment of the balance due, which they refused and prays a decree for specific performance.

The answers admit the contract and insist that only the last instalment of $266.66 2-3, that fell due in 1838, remaining unpaid; and state that the plaintiff had so admitted repeatedly, and had executed a deed, and offered to deliver it upon payment of that instalment and interest; and the defendants submit to receive the deed and pay that sum and interest.

The only dispute between the parties being as to the payments of parts of the purchase-money, it was referred to the master to inquire what payments had been made and to state the sum due to the plaintiff upon the foot of the contract. And he made a report in conformity to the bill, finding only the one payment of $221.18 in March, 1836, and the amount due the plaintiff for principal and interest up to 1 January, 1844, to be $828.25.

To this report the defendants took several exceptions (151) varying in form, but all in substance insisting that the report is not supported by the proofs, but is against them. The particular grounds for the exceptions will be found in the opinion of this Court.

Iredell for the plaintiff.
J. H. Bryan for the defendants.

RUFFIN, C. J. The Court has examined the evidence and has no hesitation in concurring in the opinion of the master.

It appears that, at the time the sale was made for the plaintiff, Thomas S. Armistead also sold to the defendants a piece of land belonging to himself and Robert Armistead; and that payments were made by the defendants to Thomas S. Armistead as the common agent of all the vendors; and that he divided the sums received from time to time among the vendors, in proportion to the amount of their several debts. In that way the plaintiff received from Mr. Armistead the sums due to her in January, 1836 and 1837. Afterwards a settlement took place between the defendants and Thomas and Robert Armistead, in which the latter gave the Griffins credit on the debts to themselves for only their shares of the several payments, after applying rateable parts thereof to the satisfaction of the plaintiff. But the defendants insisted that the money should not be thus applied, and that they had intended the payments to

be exclusively on the debts to Thomas and Robert Armistead, and not on that to the plaintiff, except as to the first payment of $221.18, before mentioned. And the matter was then so settled by applying all the payments to the debts to the Armisteads; and the present plaintiff accordingly accounted with them and repaid to them the sums she had before received.

While the money was in the plaintiff's hands, as payments to her, and before she knew that the defendants raised an objection to the application of any part to her debts, the plaintiff mentioned, and also upon her examination as a witness stated that she had received the two first installments for the land, and the third was all that remained unpaid; and (152) upon those declarations alone, the defendants rely as evidence of the payments claimed by them.

It is plain that the defense is neither founded in law nor truth. The declarations of the plaintiff were, at the time they were made, perfectly true, as the plaintiff had every reason to think. But subsequent occurrences, and those at the instance of the defendants themselves, changed the state of things altogether, and made those payments, which the plaintiff thought were made to her, payments to other persons; and the plaintiff, in accordance with the directions of the defendants, paid over the money to those persons. Consequently, it is no longer a payment to her.

But it is said that the payments, after having been once applied by the plaintiff, can not be rejected by her. Certainly not by her alone; but all the parties concurred to the new application in this instance.

It has also been objected that Thomas S. Armistead is not competent as a witness, as he was the plaintiff's agent. But that relation does not generally affect the competency, and certainly can not do it here, since the object of his evidence is not to discharge himself by proving a payment by him for or to his principal, but to charge himself by admitting a payment from his principal to himself for and on account of the debt to him from the defendants.

The exceptions must be overruled, and the report confirmed; and decree for the plaintiff, with costs.

PER CURIAM. DECREED ACCORDINGLY.

(153)

JOAB PARKS *v.* JOSEPH SPURGIN, Admr., etc.

1. On a motion to dissolve an injunction, everything is to be presumed against the defendant, in respect to any matter to which he could answer directly and has not so answered.
2. A court of equity will not support an injunction against an undoubted creditor, who has established his debt at law, merely upon the ground that there were other transactions between the parties, on which, possibly, there may be a sum of money coming to the party obtaining the injunction.
3. A strong inference will be drawn against a plaintiff in an injunction bill, from vagueness in its statements, and from suppression on matters peculiarly within the plaintiff's knowledge.

This was an appeal from an interlocutory order, made in the Court of Equity of RANDOLPH at Fall Term, 1843, his Honor, Judge *Manly,* presiding, dissolving the injunction which had been obtained in this case.

The bill states, that George Hoover, in his lifetime instituted four actions at law on bonds and accounts against the present plaintiff; that Hoover died pending the suits, and that Spurgin, as his administrator, revived them, and in February, 1843, obtained judgments; in one of them, for $21; in another, for $199; in the third, for $270; and in the fourth, for $400.

The bill further states, that in 1837 Parks and Hoover were partners in a contract for carrying the mail in coaches between Raleigh and Salisbury; and that they purchased the original stock at $200; of which the plaintiff placed the greater part in the hands of Hoover; that, besides, the plaintiff purchased twelve or fifteen horses for the line, bought harness, paid drivers and other expenses, and in person superintended the line; that Hoover kept a tavern on the route, which was a stage house, and that he received considerable sums of money from passengers for their fare, as shown by way bills; that Hoover was the sheriff of Randolph and collected on execution a debt for $340, which one Love owed the plaintiff, and, by agreement between them, was to apply it to the purposes of the
(154) stage line, out of which the plaintiff was to be reimbursed; that Parks and Hoover borrowed from one of the banks the sum of $2,000, on their joint note, and, received, each, one-half thereof; but that the plaintiff paid at least two-thirds thereof out of his own funds, and was to have credit accordingly in their copartnership accounts.

The bill then states, "that in the course of the year 1838 the plaintiff took the entire stage line to himself; but the matters of said partnership have never been closed or settled; and that

said Hoover, on an account being taken of the partnership, will be largely indebted to the plaintiff, and to an amount equal to the four judgments recovered against him; that the estate of Hoover is insolvent, and that his administrator, notwithstanding, is endeavoring by execution to compel the plaintiff to pay the judgments, and at the same time refuses to come to any settlement of the partnership, although the sum due thereon to the plaintiff will be a total loss, unless he can have the benefit thereof by way of deduction from the judgments at law." The prayer is for an account of the partnership, and that the plaintiff may be allowed the sum due him thereon as a credit to the judgments; and, in the meanwhile, for an injunction.

The answer states that the defendant has no personal knowledge or particular information of the dealings between his intestate and the plaintiff; but that he has been informed and believes that they were at one time partners in transporting the mail, as stated in the bill—but upon what terms, or what sums were received or paid by either, and the true condition of the accounts betwen them, the defendant says he knows nothing of his own knowledge; though, as to his information and belief, he states that he has heard and has good reason to believe, that upon a fair settlement of the said partnership, the plaintiff would be largely indebted to Hoover.

The answer then states that, besides the suits in which the judgments mentioned in the bill were rendered, there were pending between the parties several others; among which was one brought by Parks against Hoover for one-half of the debt of $2,000 to the bank, which Parks alleged he (155) had paid for Hoover, and two others by Parks for money which he alleged Hoover owed him on account of sums received by the latter from passengers or for the proceeds of some of the property belonging to the stage line; that by an agreement between Parks and Spurgin all the suits had been referred to the arbitrament and award of three persons, who had heard the parties and their witnesses, and after a full investigation of all the matters in controversy and allowing all payments, set offs and deductions proved, made their award in favor of Hoover's estate for the several sums, for which the judgments mentioned in the bill were taken, and also for $275.99 more, for which Hoover had not brought suit; and that they awarded, that nothing was due to the present plaintiff in any one of his actions, except the sums for which he had credit on the demands of Hoover against him. The answer states that before the arbitrators it was proved by several witnesses that the plaintiff, Parks, had repeatedly declared that the terms upon which the

partnership was dissolved were, in substance, that Parks was to take all the property of every kind belonging to the line, receive all the moneys due, and pay all the debts, and that Hoover was to be discharged from all liability to Parks or any other person; which statements the defendant avers he believes. The answer also states that the plaintiff has never exhibited any account of the partnership, nor made any statement from which it could be seen what he claimed thereon, or how he wished to have the same settled; from which circumstances, and the proofs before and investigations by the arbitrators, the defendant says that he verily believes that the award was not only honestly made, but that it determined justly and truly the rights of the parties.

Upon this answer and on the motion of the defendant the injunction, which was granted on the bill, was dissolved; and from that order his Honor allowed the plaintiff to appeal.

Mendenhall for the plaintiff.
Winston for the defendant.

(156) RUFFIN, C. J. As the answer is silent upon the charge of the insolvency of Hoover's estate, we assume it as established, for the purpose of the motion to dissolve the injunction, for, in this stage of the cause, everything is to be presumed against the defendant in respect of any matter to which he could answer directly and has not so answered.

Though some of the suits at law, brought by the present plaintiff, were for demands, which he states in the bill were items in the partnership accounts, yet there was no suit directly on the partnership dealings; and as only the suits pending between the parties were referred, the award does not, therefore, conclude the parties on the point of a settlement of the partnership. The plaintiff would therefore be entitled to come into this Court to have the benefit of the equitable set off of the sum due him on the partnership, if any; and especially, in the case, which we here take for granted, of the insolvency of the plaintiff at law. But we are not satisfied that the plaintiff is entitled to any such set off. It is not sufficient that he should shew that there have been transactions betwen him and the other party, on which, possibly, a sum of money may be coming to him. Upon a bare possibility of that sort the Court ought not to tie up an undoubted creditor, who has established his debt at law, from reaping the benefit of his recovery. The present plaintiff says that there was a certain partnership between himself and the defendant's intestate, which was dis-

solved in 1838, but has never been settled, up to 1843; and upon which, if settled, a large balance will be due him, the plaintiff. This result the defendant, who is an administrator, can not deny positively, because he says he has no knowledge of his own upon the subject. But he denies it as far as an honest man can deny it; which is upon his information and belief. And he states the sources and particulars of his information, so that it may appear whether his belief, deduced therefrom, be fair and reasonably entertained. The answer does not aver that the partners actually came to an account, and that a balance was found due to Hoover; but it states that, in the course of a judicial investigation, credible witnesses proved, that the plaintiff himself said that they (157) had dissolved upon terms, which, of themselves, imported that Hoover owed nothing on that transaction. The fair meaning of the statement is, that Hoover simply retired from the firm, giving up anything he may have advanced, and leaving Parks to pay for all the property and to have it. And the answer further states that, if such settlement had not really been made and an account were taken, the defendant from information believes the balance would be found due to Hoover, and not to the plaintiff. We do not see that more could have been expected in an administrator's answer; and it strikes us as making a candid statement upon the material points, and, as fully as it could, denying any sum to be due to the plaintiff, and as entitled to more credit in that respect, than if the denial had been less scrupulous and more peremptory. But the answer does not constitute the entire case against the plaintiff. Much more is to be inferred from the vagueness of the statements of the bill, and from its suppressions on matters peculiarly within the plaintiff's knowledge. It merely states a partnership to transport the mail; but as to the terms, the capital and how much each was to advance, or what personal services to render, or how share the profits, there is not a word in the bill. Then it states that the next year after the business began, the plaintiff took all the partnership effects to himself; but at what price, when or how payable, or upon what other terms is wholly suppressed. How are the accounts of such a partnership to be taken? There is nothing to begin with: though the plaintiff, as the surviving partner, is the person best, and, perhaps, alone capable of furnishing the requisite data for the action of the Court. Besides all that, the bill does not even undertake to account, why, when there was so much litigation between the plaintiff and Hoover, in his lifetime, the plaintiff did not then file his bill for a settlement of

the partnership, if it had not been settled, or why he did not propose to the defendant to include it in the reference, if he thought he could make it appear that anything was com-
(158) ing to him thereon to recover the recovery that would be made against him on other demands. We find, indeed, that the plaintiff had brought some of those actions at law for demands, which the bill now states to have been partnership transactions. Upon the whole case we must say that it wears the aspect of a suit, not to get an account, but to get an injunction for the time being; and, therefore, that there is no error in the decree. This will be accordingly certified to the Court below.

The plaintiff must pay the costs in this Court.

PER CURIAM. ORDERED ACCORDINGLY.

The HONORABLE WILLIAM GASTON, one of the Judges of this Court, died on 23 January, 1844, during the term of the Court, in the 66th year of his age.

EQUITY CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA.

JUNE TERM, 1844.

WILLIAM J. T. MILLER et al. *v.* JOSIAH WASHBURN et al.

1. On the hearing of a motion to dissolve an injunction, the defendant is the actor; and although the contents of his answer are generally to be taken as true, it must fully meet the plaintiff's equity—there must be no evasion, no disposition shewn to pass over the material allegations of the bill—and if a reasonable doubt exist in the minds of the court, whether the equity of the bill is sufficiently answered, the injunction will not be dissolved but continued to the hearing.
2. Where money alone is the demand, the common law security is the person of the debtor, nor will equity go further—but when property is *in contest* a Court of Equity will, when the circumstances authorize its interference and when its aid is invoked, secure the property itself during the existence of the controversy.
3. Especially will the Court of Equity in this State, *in analogy* to the practice of the Courts of Chancery in England in cases of waste, exercise this preservative power, where the property in contest consists of slaves, and retain the possession of the slaves until the cause is finally disposed of.

APPEALS from two interlocutory orders made in this cause at the Fall Term, 1843, of CLEVELAND Court of Equity, his Honor, Judge DICK, presiding—the one dissolving the injunction and sequestration theretofore obtained by the plaintiff against the defendant, Abraham Washburn, and (162) the other refusing to dissolve the like injunction and sequestration against the defendant Josiah Washburn. From the former of these decrees the plaintiffs appealed, and from the latter, the defendant Josiah Washburn.

The bill states that Gabriel Washburn died in the year 1825, leaving a considerable landed estate and several negroes, and that the complainants, or those under whom they claim, with the defendants, are his children, and entitled to his personal estate, together with his widow—that after the death

of the said Gabriel, the defendants, at the February term, 1826, of Rutherford County Court, offered for probate a paper-writing, purporting to be the last will and testament of the said Gabriel Washburn, which was admitted to probate, and they qualified as executors thereof, having been appointed by the said will, together with their mother Priscilla, to execute the same. The bill further states that, at the succeeding July term of the said court, a petition was filed by the complainants to set aside the probate of the said paper-writing, and that the Court accordingly ordered an issue of *devisavit vel non* to be made up to try the validity of the said will—that this issue was continued on the docket until July sessions 1827 of the said court, when the parties entered into a compromise, whereby it was agreed between them that the will should be set aside, and that all the property should remain in the possession of the widow until her death, and that then the defendants should have all the lands, and the complainants all the negroes. By the will the whole of the property, real and personal, was given to the widow for life, and after her death to the defendants. The bill further stated that this compromise was reduced to writing, signed by the complainant for himself and the other claimants, and by the said Josiah Washburn for himself and the said Abraham, and that Abraham assented thereto. It was further agreed at the same time that the said widow should qualify as administratrix of her said husband, which she did at March term, 1828, of the said court, the two de-
(163) fendants being her sureties to her administration bond—that, soon after the compromise, the defendants took into possession the land and divided it between them, and one of the defendants also took possession of a portion of the negroes, with the consent of the widow—that the widow died in 1839, whereupon letters of administration *de bonis non* on the estate of the said Gabriel Washburn, were, by the County Court of Rutherford, granted to the plaintiff William Slade—that, immediately upon the death of the said widow, the defendants took into their possession the slaves respectively bequeathed to them by the will, and again offered it for probate—and the said William Slade, as such administrator, sued them at law to recover the slaves, which suit was pending at the filing of the bill—that the defendants were men in slender circumstances, and the plaintiffs believed and were afraid that they would take the slaves beyond the jurisdiction of the Court, and prayed that they might be restrained from so doing. The bill further set forth that, upon the death of the widow, Priscilla, the right of the defendants as executors survived, and

they had a right to seize upon and hold the slaves in that capacity.

Upon the exhibition of this bill, and on the prayer of the plaintiffs, a writ of sequestration was issued to the sheriff of Rutherford, and by him was duly executed.

The defendants answer jointly, and admit the allegations in the bill of the death of their father Gabriel, and aver that he left a will in writing, of the tenor set forth in the bill—that this will was duly proved by them, and they qualified as executors thereof. They admit that a petition was filed by Gilbert Harrell and his wife, two of the plaintiffs, to set aside the said probate—and the defendant Josiah admits that, during the pendency of the said suit, he and the said Gabriel signed a paper, the purpose of which was to compromise the said suit—that the said Harrell signed it for himself and wife, and not for the other heirs and distributees of the said Gabriel, who were no parties to it, and that he signed it for himself alone, and not for himself and his brother Abraham—that, on the contrary, it was expressly understood and (164) agreed that he was not to be bound by it, unless Abraham should agree to it and sign it, which he never did. And Abraham avers he never did agree to it—on the contrary, he refused to be bound by it, as soon as he heard of it. They admit that their mother took out letters of administration upon the estate of their father, and they state that, upon her death, they took possession of the negroes as legatees, and not as executors. They claim to hold the negroes as their property, and deny that they belong to the plaintiffs—and aver that the probate of their father's will was never set aside, but that it still remains in force. They deny that they ever had any intention of removing the negroes out of the State or of running or removing their other property.

Upon the coming in of the answers, the Judge presiding removed the sequestration from the slaves of the defendant, Abraham Washburn, and ordered them to be delivered to him; but continued the sequestration upon the slaves of Josiah until the final hearing of the cause.

The plaintiffs appealed from the former order, and the defendant Josiah from the latter.

Alexander for the plaintiffs.
Caldwell & Hoke for the defendants.

NASH, J. The equity of the complainants' bill is, that a controversy existed in the County Court of Rutherford, as to

the validity of the last will and testament of Gabriel Washburn, deceased, and, during its pendency, a compromise was entered into between the parties for its final adjustment—that these defendants were the propounders of the will, and the plaintiffs, or some of them, the caveators—and that the compromise was entered into in behalf of the whole of those who were interested in setting aside the paper-writing—that by the compromise it was agreed the property should remain with the widow, Priscilla, during her life, and that at her death the land should belong to the defendants, as devised, and the negroes to the other children, and that letters of adminis-
(165) tration should be taken out by the widow on the estate of the said Gabriel—that, in violation of this compromise, the defendants, upon the death of the widow, immediately took possession of the negroes and divided them between themselves, as they were bequeathed to them in the alleged will. The object of the bill is to enforce this compromise of family disputes, and prevent the defendants, in the meantime, from removing the negroes beyond the jurisdiction of the Court. On the hearing of a motion to dissolve an injunction, the defendant is the actor, and, although the contents of his answer are generally to be taken as true, it must fully meet the plaintiff's equity. There must be no evasion—no disposition shown to pass over the material allegations of the bill—and, if a reasonable doubt exists in the mind of the Court, whether the equity of the bill is sufficiently answered, the injunction will not be dissolved, but continued to the hearing. *McNamara v. Irwin,* 22 N. C., 19. *Little v. Marsh,* 37 N. C., 18. *Moore v. Hylton,* 16 N. C., 435. *James v. Lemly,* 37 N. C., 278. *Sherrill v. Harrell,* 36 N. C., 194.

In this case the defendants join in their answer. Josiah admits he signed the compromise, but avoids it by alleging that Harrell signed for himself and wife alone, and not for the other parties, who, therefore, were not bound, and that he signed, under the express understanding, that it was not to be binding on him unless his brother Abraham agreed to it; that he was not present, and, as soon as he heard of it, disagreed to it, and refused to become a party; yet they both admit that letters of administration upon the estate of their father Gabriel were issued to Priscilla, the widow, and they avoid saying, whether they signed the administration bond as her sureties, though the fact is averred in the bill, and their answer required.

In this stage of the proceedings, we must assume that the defendants did become their mother's sureties, and that Abra-

ham, therefore, did concur in the agreement for a compromise—neither of them gives any account of the suit instituted to prove the will or to try the issues after the time of (166) the alleged compromise, and, after the death of their mother in 1839, eleven years after she had become administratrix, they again bring forward the will and offer it for probate. We can not say we have not a reasonable doubt whether the equity of the bill is answered. When money is alone the demand, the common law security is the person of the debtor, nor will equity go further; but when property is in contest, chancery will, in special cases, exercise its preservative power and look further than to the personal liability of the defendant. It will, in cases where the circumstances authorize its interference, and where its aid is invoked, secure the property itself, during the existence of the controversy. Thus in cases of waste, the common law gave the writ of waste, and to aid and secure to the plaintiff the full benefit of the process, the writ of estrepement to stay the further injuring of the property, during the contest, was awarded. The writ of waste, both in England and in this country, from its peculiar features, has become obsolete, and has been succeeded by the more convenient and less cumbrous action on the case in the nature of waste. With the old writ fell that of the estrepement, and the power of the court of equity was called in to supply its place, in aid of the more modern action on the case, and in analogy to the writ of estrepement. Equity, when it interferes, will secure the property in the contest during the litigation. With us, we have a species of property peculiarly requiring the exercise of this power in a court of chancery. Without it, the fruits of a judgment at law would often prove illusory. Thus Judge HENDERSON, in *Edwards v. Massey*, 8 N. C., 364, says, "the same principle which induced the chancery in England to interfere in the case of waste applies in all its force in cases of property in slaves; for the nature of the property is such, that possession may be lost by the most vigilant owner, without there being an actual taking, or the commission of a trespass." In cases, then, of this species of property, in which it is proper for a court of equity to interfere, hav- (167) ing taken possession of the property, the Court, in analogy to the principle and object of the estrepement, retains that possession, until the cause is finally disposed of.

It is the opinion of the Court that the interlocutory decree in this case, removing the sequestration from the negroes of Abraham Washburn, was erroneous, and that the sequestration ought to have been retained until the final hearing. The Court

is further of opinion that there was no error in the interlocutory decree, retaining the sequestration on the negroes of Josiah Washburn. There must be judgment against the defendants for both appeals.

PER CURIAM. CERTIFICATE ORDERED ACCORDINGLY.

Cited: Monroe v. McIntyre, 41 N. C., 69; *Deaver v. Eller,* 42 N. C., 29; *Dupre v. Williams,* 58 N. C., 99; *Lowe v. Comrs.,* 70 N. C., 533; *Perry v. Michaux,* 79 N. C., 98; *Riggsbee v. Durham,* 98 N. C., 87.

EDMUND BRYAN *v.* PETER GREEN et al.

Where a creditor of a deceased debtor alleged that the defendants were fraudulent donees of certain property of the said debtor: *Held,* that the plaintiff was bound to have the representatives of the debtor parties before the court, although it was alleged in the bill that the debtor had died in another State, and had no representative in this State.

This cause, having been set for hearing, was removed by consent from the Court of Equity of RUTHERFORD, at Fall Term, 1843, to the Supreme Court.

This bill sets forth that, in February, 1841, the plaintiff obtained a judgment in Rutherford County Court against one Moses Waters for the sum of $569.50, upon a bond previously given by said Waters, and which for some cause he had declared he never would pay—that the said Waters, immediately after the rendition of the said judgment, left the State, having previously disposed of the whole of his property, and is
(168) since dead, intestate, and no administration has been taken out on his estate—that, upon the flight of the said Moses Waters, the plaintiff took out an attachment against him, and the defendant Green was summoned as a garnishee, and, upon his garnishment admitted that he had, in the year 1840, executed to Moses Waters his two bonds, each for the sum of $600, one of which bonds was payable in July, 1841, and the other in 1842; upon the first he had made payments to Waters to the amount of $379.53, and the balance upon that and the whole of the other was unpaid, but that he had understood that Moses Waters had transferred the said bonds to his sons, John and Henry Waters, who, he was informed, had transferred them to Miller McAfee. The bill charges that

Moses Waters made the assignment of the two bonds, due from Green to his two sons, without consideration, and for the purpose of defeating the judgment obtained by the plaintiff against him, and that they, the said John and Henry Waters, had instituted suits against Green for the recovery of the money due on the said bonds—that he was unable to obtain a judgment against the said Green on his garnishment, in consequence of the death of the said Moses Waters. The bill concludes with a prayer for relief.

The defendant Green, in his answer, admits his indebtedness, as set forth in his garnishment, and his willingness to pay the money to whomsoever the Court may direct—states that the notes were by Moses Waters assigned to his sons on 16 July, 1840, in his presence, and for the avowed purpose of defeating the claim of the plaintiff, the said Henry and John Waters, being at that time in the State of Georgia, and that he made the payments claimed by him between the time of the assignment and the time when Moses Waters left this State, which was in March or April, 1841—alleges the death of Moses Waters, and denies all fraud.

The answer of Henry and John Waters admits their residence in Georgia, the death of their father and his having traded to them the two bonds, and that no administration has been granted to any one upon their father's estate.

Badger for the plaintiff. (169)
Hoke & Iredell for the defendants.

NASH, J. We are of opinion that the plaintiff's bill can not, upon its own statement, be sustained. The plaintiff had obtained a judgment at law against Moses Waters, upon a bond given by the said Waters, and he having removed to the State of Georgia and having no visible property, upon which an execution could act, the plaintiff sued out an attachment against him, and had it levied in the hands of the defendant Green, and summoned him as garnishee. During the pendency of this suit Moses Waters died, and the plaintiff sets forth that he had no personal representative, and for that reason came into this Court. Why could he not proceed at law against the garnishee Green? Simply because the judgment against him would be but ancillary to the one against Waters. When a garnishee admits he is indebted to the defendant in the attachment, the sum so due is condemned by a judgment of the Court to the use of the plaintiff, subject to the judgment the plaintiff may recover on his attachment. If then the defendant die before

judgment, and no representative be brought in within two terms, like every other suit it abates, and of course carries out of court with it all its accessories. We know of no principle, which authorizes a court of chancery to grant a decree against a dead man, more than a court of law. Neither court can legally proceed without having before it the proper parties. The plaintiff might have put this objection out of his way by procuring some other person to administer; though we do not decide, if such administration had been granted, it would have enabled the plaintiff to have been benefited in his attempt to recover the money. Should the said Henry and John Waters recover the money due from Green, they will become executors of their own wrong, and thereby subject themselves to the action of the plaintiff, and his redress is one at law. This Court does not know of an executor *de son tort*, for the purpose of a remedy against him as such. There is no doubt that chancery will afford relief against a fraudulent donee, to an equitable creditor of the donor, who is dead, but the rightful representative of the donor must be before this Court. *Dozier v. Dozier* 21 N. C., 96. But this is a legal claim; and the proper parties are not before the Court if it were an equitable one. If it be objected that John and Henry Waters are citizens of the State of Georgia, and that the process of the courts of this State can not reach them, the answer is, the courts of the State of Georgia are open to the plaintiff, and we have no reason to doubt will be as proper to give him relief as the courts of this State. The bill must be dismissed with costs to the defendant Green.

(170)

PER CURIAM. BILL DISMISSED.

Cited: Martin v. McBryde, post, 533.

ISAAC LYRELY *v.* CLAUDIUS WHEELER et al.

When the equity of a bill is not denied by the answer, but a new equity is thereby introduced to repel or avoid it, the injunction which had been granted, should not be dissolved upon the answer, but should be continued to the hearing of the cause.

This was an appeal from an interlocutory order of the Court of Equity of ROWAN County, at the Spring Term, 1844, dissolving the injunction which had been granted in the case.

The matter disclosed by the bill and answer is fully stated in the opinion delivered in this Court.

Alexander for the plaintiff.
Caldwell, Osborne & Boyden for the defendants.

NASH, J. The bill states that, for several years prior (171) to the filing of the bill, the plaintiff lived as a clerk with the defendant, Wheeler, who keeps an apothecary's shop in the town of Salisbury; that during that time he had accumulated property consisting in notes, bonds, and money, and other personal property, which, together with what he had before he went there, amounted to the sum of $5,000; that the plaintiff occupied a room over the said defendant's shop, and that the said defendant's brother usually slept in the same room; that on the night of 2 October, 1842, the brother, by concert with the said defendant, and under pretense of being unwell, left his room, and that between the hours of 11 and 12 o'clock, while he was in bed, the defendant Wheeler came into his room with a candle in one hand and a large knife in the other, and after putting down the window curtain came to his bed, and, putting the knife to his throat, charged him with having robbed him of large sums of money, and threatened to put him to instant death, if he did not immediately surrender to him all his money, notes and bonds; that, under the fear and terror excited by his conduct and threats, he gave up his keys, and the said Wheeler opened his trunk and took out all his money, bonds and notes, and gold watch; that he threatened to take his life if he mentioned what had then taken place, promising to have a settlement with him the next day; that this settlement did not take place as promised by the defendant, in consequence of the dangerous illness of one of his sisters; that he continued to live with the defendant up to 8 January, 1843, endeavoring from time to time to get a settlement. The bill further states that in March, 1843, the plaintiff and the defendant came to a settlement, and the defendant gave the complainant a receipt for the papers so taken, and a bond for $4,869, payable one day after date, and the plaintiff gave the defendant, at the same time, a list of the bonds and notes and receipts for bonds, authorizing him in said written list to collect them; that after this transaction the plaintiff borrowed for (172) the defendant of one Jacob Trexler $575, and for him from the Branch of Cape Fear at Salisbury $500; that he being stript of all his means, was the reason why he did not sooner attempt to redress his wrongs, and that he did not disclose the

transaction, except to one or two confidential friends, until the filing of the bill, and not to them fully. The bill concludes by praying an injunction to prevent the defendant from collecting the moneys due on the papers and from trading them off, and for a sequestration of the bonds, notes and receipts still in his hands, and for special and general relief. The bill also charges that the defendant is insolvent. The writs prayed for were issued and executed.

The answer admits that the complainant lived with the defendant Wheeler, as a clerk, for the time set forth, denies that when he came there he had any property, avers that he received no wages for his services, that a short time before the transaction of 2 October, he had reason to believe that the complainant, during the time he had so lived with him, had been in the habit of robbing him; and that on the night of 2 October, as set forth, he went into the complainant's room, which was over the shop, and charged him with the robbery, and demanded of him restoration of what he had stolen, or he would expose him; that the complainant confessed that he had robbed him and immediately arose from his bed, opened his trunk, and gave him a number of bonds, notes and receipts, and money and a gold watch, denying that he used any violence or any threats other than that of exposure; that his reason for going into complainant's room at night and by himself, was to save the character of the complainant and the feelings of his friends; that with the same view he permitted him to remain in the shop, with the understanding that he would leave the State in the ensuing spring; admits that the complainant borrowed the money for him as set forth, and that he and the complainant at the time specified came to a settlement, when he gave the complainant a receipt for the papers, and the complainant gave him a list of the same papers,
(173) authorizing him as assignee to collect the moneys due, and stating that he had given the complainant full value for them. The answer admits that the defendant at the same time gave the complainant his bond for $4,869, payable one day after date; and alleges that the complainant at the same time executed to him a receipt under his hand and seal for the amount of the said bond; that he gave the bond at the request of the plaintiff, to enable him to satisfy his friends that he had that amount due him, and that all the papers were antedated to 3 October, 1842. The answer further admits that the defendant is in embarrassed circumstances.

Upon the coming in of the answer, the injunction was dissolved and the sequestration discharged by the presiding Judge,

from which decree the plaintiff appealed to this Court, and the case is before us now, on the simple question, whether that decree shall be affirmed or reversed.

The case, in all its features, is a remarkable one. The plaintiff charges upon the defendant an act of violence, heretofore unheard of in this part of the country, and the defendant substantially admits it. He confesses that he entered the plaintiff's bed room, in the night, after he had retired to rest, charged upon him a crime, for which, if convicted, he would suffer an infamous punishment, and threatened him with public exposure unless he instantly surrendered the money which he alleged he had stolen from him. Under the fear and alarm excited by his conduct and threats, the plaintiff delivered all the property he had, except his clothes, consisting of the money, notes, bonds and receipts, as set forth in the bill. Upon this statement, and upon the unsupported allegations that the plaintiff had robbed him to the amount, nay, to double the amount of the money, and the evidences of debt so taken by him, the defendant asks the Court to dissolve the injunction, remove the sequestration and return to him the property in contest, and enable him to realize its value, though he at the same time admits that he is in embarrassed circumstances. In *McNamara v. Irwin*, 22 N. C., 13, it is stated by the Court to be the settled rule, that "when the equity of (174) a bill is not denied by the answer, but a new equity is thereby introduced to repel or avoid it, the injunction will not be dissolved by such an answer, but shall be continued to the hearing of the cause." The plaintiff's equity in this case is, that he has, through terror and alarm, induced by the violence and threats of the defendant, parted with the property in dispute, and that the defendant is either insolvent or in failing circumstances. The terror and alarm, and the violence in part, are admitted, and that the defendant is embarrassed in his circumstances. The plaintiff's equity is not answered, for though some of the acts of force and legal duress are denied, yet it is not pretended that the brother was not induced to change his bed that night, so as to leave the plaintiff unprotected by a witness, nor that the defendant did not charge the plaintiff with the robbing, and threatened to proceed against him therefor, if he did not comply with the demand to give up all his effects. Upon the defendant's own statement in the answer, there was at least a moral compulsion on the plaintiff, and duress in the view of a court of equity. Such conduct can not be justified at all, nor does it admit of any excuse, unless the defendant shall make it appear that the plaintiff

actually committed the alleged depredations. That he may do by evidence upon the hearing. It could not be assumed as true upon the answer alone, nor can the defendant be allowed at this stage of the cause to repossess himself of the property in dispute upon the evidence alleged by him. The property is in the custody of the Court; there it must remain until it is properly ascertained who is entitled to it.

It is the opinion of this Court that the interlocutory decree made in this cause below, dissolving the injunction and removing the sequestration was erroneous, and that the said injunction and sequestration ought to have been continued to the final hearing. A certificate to this effect must be transmitted to the Court of Equity for Rowan County, with instruction to proceed accordingly, and there must be judgment here against the appellee for costs.

PER CURIAM. ORDERED ACCORDINGLY.

Cited: S. c., post, 599; *Hughes v. Blackwell,* 59 N. C., 77; *Longmire v. Herndon,* 72 N. C., 631.

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(175)

AZARIAH NELSON *v.* THOMAS W. OWEN et al.

It is an established rule that, where an injunction is applied for to stay proceedings at law on a money bond, the plaintiff must agree to give the defendant a judgment at law and be bound by order to bring no writ of error.

APPEAL from an interlocutory order of the Court of Equity of CASWELL, at Spring Term, 1844, refusing a motion to dissolve the injunction, which had been granted in the case, and directing it to be continued to the hearing.

This bill states that in October, 1843, the plaintiff purchased a tract of land of the defendant, Owen, containing about 127 acres, at the price of $300, for which he gave his bond, and the other defendant signed it as a witness; that at the time of his purchase one David Brooks was living on the land, and it was agreed between the plaintiff and the defendant that the latter was to put the former into possession in time to enable him to sow a crop of wheat, and that he failed to do so. It further charges that Brooks is still in possession, claiming to hold about 30 acres of the land as his own, and refuses to surrender the possession, and that all the buildings are on these

thirty acres together with the only spring of water, that the defendant can not make title to these thirty acres, and without them the land will be of no use to him. It further states that the defendant, Winshad, the witness to the bond, has taken an assignment thereof to himself, and has brought an action against him in the County Court of Caswell, and prays he may be enjoined from prosecuting said suit and that the contract may be rescinded. The defendant admits the sale of the land to the plaintiff, as set forth, and that Brooks was at the time of the sale in possession of about thirty acres, and alleges he was his tenant at will, and that he is still in possession and refuses to surrender it up, claiming to hold it in his own right; admits he can not make title to those thirty acres, but says that the defendant is not entitled to rescind the contract as (176) the defect in the title was fully disclosed to him at the time of the bargain, and he accepted a conveyance with this knowledge. He further admits that all the buildings on the land and the only spring are on that part claimed by Brooks and still in his possession. The bill is filed 9 November, 1843, and the answer 8 May, 1844, up to which time it does not appear that the defendant Owen had taken any steps to put the plaintiff into possession of the land. Upon the coming of the answer, on a motion by the defendant to dissolve the injunction, his Honor refused the motion and continued the injunction to the hearing.

Norwood & Venable for the plaintiff.
Kerr for the defendants.

NASH, J. This case is now before us upon the interlocutory decree of the Court below, and our only business is to say whether it is erroneous or not. The power of a court of chancery to grant injunctions has been long considered as a most useful one—enabling the party applying for it to avail himself of some equitable defense to a recovery at law, of which he would be deprived by the strict rules of the common law. But it is a power liable to much abuse, as injunctions are generally obtained upon the *ex parte* statement of the applicant, and often employed to delay the obtaining of justice at law. To remedy this evil as far as practicable, with a just regard to the rights of all parties, it has long been established as a rule, that, when an injunction is applied for to stay proceedings at law upon a money bond, the plaintiff must agree to give the defendant a judgment at law, and be bound by order to bring no writ of error. Anon. 1 Ver., 120. In

this case the injunction originally granted was general, restraining the defendants from proceeding in their suit at law, and in that form it was, by the presiding Judge, continued to the hearing, and in that form it is now before us and on the same motion. The defendant Owen, in his answer, admits the material allegations of the complainant's bill, and claims the dissolution of the injunction upon the ground that, if con-
(177) tinued to the hearing, it can do him no good, as his bill must be dismissed. The ground upon which it is alleged that the plaintiff can obtain no relief is, that at the time he made his purchase, he was fully apprized of the fact of Brooks' possession and claim, and with that knowledge accepted a conveyance from the defendant Owen. It is very certain, where a contract is executed by the purchaser taking a conveyance with knowledge of existing defects in the title, he has no claim to the interference of a court of equity. Whether this defect in the defendant's title was known to the plaintiff at the time he took his conveyance, does not appear, except by the defendant Owen's answer. If that was the fact and the case stopt there, the injunction would be dissolved; but the plaintiff alleges that a parol agreement accompanied the transaction, whereby the said defendant was bound to put the plaintiff in possession of the land, it being then in the adverse possession of Brooks, and that the said defendant failed to do so at the time specified, though requested by the plaintiff. This agreement is not denied by the said defendant, and he expressly admits that Brooks is still in the adverse possession of the land and refuses to give it up. The statute then did not transfer the possession to the plaintiff upon the execution of the conveyance because of the adverse possession, nor can the plaintiff, for the same reason, recover the possession from Brooks by an action at law. And the question submitted to us is, whether we will permit the defendants to compel the plaintiff to pay them the full purchase-money, when it appeared the plaintiff can not get into possession of the land, and when the defendant admits he has not done what he agreed he would, and when at the same time he further admits that he can not make a good title to the portion of the land on which Brooks is fixed, where the whole of the buildings are, and where is the only spring belonging to the whole tract. Whether the plaintiff will be entitled to the relief he seeks to have the contract rescinded, or whether it be a case for compensation, and if so to what extent are questions depending upon the testimony which may be before the Court
(178) upon the final hearing. They can not be considered now. The bill charges that the defendant Winshed

knew of all these facts before he took his transfer, and is therefore a purchaser of the bond with notice. The answer of this defendant admits his knowledge, except as to the inability of Owen to make title. Upon the whole we think it would be contrary to good conscience to suffer the defendant, at this stage of the proceedings, to compel the plaintiff to pay the purchase-money.

The interlocutory order of the Court below is affirmed with costs, to be taxed by the master against the defendants.

PER CURIAM. ORDERED TO BE CERTIFIED ACCORDINGLY.

WYATT CANADAY v. DENNIS PASCHALL et al.

A deed in trust was made for the purpose of securing or satisfying a number of debts—among others one debt is described as being a debt due "*to Lucy F. Jinkins for about the sum of $1,000 on account of the guardianship of John Blacknall for the said Lucy F. Jinkins.*" It appeared afterwards, upon the settlement of the guardian accounts, that the sum actually due to Lucy F. Jinkins, at the time of the execution of the deed, was $1,481.99 cents: *Held*, that the whole of this amount was secured by the deed, and not merely the sum of $1,000.

APPEAL from an interlocutory order of the Court of Equity of GRANVILLE, at Spring Term, 1844, his Honor, Judge *Dick*, presiding.

It appeared in this case that John Blacknall made a deed of trust, dated 5 September, 1839, by which he assigned the property and effects therein specified to Dennis T. Paschall, as a trustee, to pay out of the asigned property certain debts specified in the deed, in the order in which the said debts are named. This bill was filed by Wyatt Canaday, one of the creditors named in the deed, against the said Pas- (179) chall, Blacknall and the other creditors therein named, for an account and application of the assigned effects to the payment of the debts according to the provisions of the deed. Among the debts specified in the deed, and having prior right of satisfaction to that of the plaintiff, is one to the defendant Lucy F. Jinkins, and is described in that instrument in these words, "and also in a debt to Lucy F. Jinkins for about the sum of one thousand dollars, on account of the guardianship of the said John Blacknall for the said Lucy F. Jinkins." The debt of Blacknall to Jinkins, so referred to, arose upon his

guardianship of the said Jinkins, and at the time the deed was made the amount thereof was unliquidated, and, by proceeding at law afterwards taken, the amount thereof was ascertained to have been, at the time of the execution of the deed, $1,481.99, and not $1,000, and at the time of the filing of the bill, the same, including interest, amounted to nearly $1,700. The effects in the hands of the trustee were admitted to be insufficient for the satisfaction of all the debts, and if the whole amount of the debt actually due to the defendant Jinkins from the said Blacknall be first paid out of the said funds, there will not be sufficient left to pay in full the debt due to the plaintiff Canaday; and at this time the funds being all in hand and a reference being moved to the master to state the accounts of the trustee, and apply the same to and amongst the creditors, according to the provisions of the deed, the counsel for the plaintiff moved the Court to declare that, by the true construction of the said deed, the defendant Jinkins was not entitled to priority over the said Canaday for the whole amount actually due, but only for the amount specified in the deed, and that the master might be instructed to allow to the said Jinkins only that amount. The counsel for the said Jinkins on the contrary insisted that she was entitled to priority for the whole amount actually due, and prayed such declaration from the Court. His Honor, being of opinion upon the said matter with the plaintiff, declared the said Jinkins to be entitled to satisfaction
(180) before the said Canaday, only for the said sum of $1,000, to be taken as due at the date of the deed; and ordered that the master, in making distribution among the creditors, should allow to the said Jinkins only the said amount.

From this order the defendant, Jinkins, by permission of his Honor, appealed to the Supreme Court, and his Honor directed the foregoing statement to be certified to the Supreme Court, as containing the matter upon which the question between the parties arose.

Venable & Iredell for the plaintiff.
Badger for the defendant.

RUFFIN, C. J. The Court can not concur in the construction put on the deed by his Honor. That instrument enumerates many debts from the maker to sundry persons. Some of them are described specially, as being due, for example, by bonds, of such and such dates, for certain sums mentioned, and payable at certain days mentioned. Others are described as being due by bond or by judgment to particular persons for "about"

certain sums mentioned. And others again are described as being due on open accounts, for "about the sums" specified. It is obvious that the writer of the deed did not know at the time the precise amounts of the several debts, thus described as being for "about" such sums. But there can be no difficulty to the trustee in administering the fund, nor any serious doubt, as it seems to the Court, of the meaning of the party. The debts are sufficiently identified by the names of the debtor and of the several creditors and the nature of the debt, as arising on bonds, notes, judgments, or open accounts. The amount of each debt was added as a further description; and where the amount is stated to be a specific sum, thus due, that may be deemed an essential part of the description, which can not be departed from. But where the debt is otherwise well enough described, and then, as an additional description, the amount is given, but is given as not being certainly the true amount, or as not being certainly known to be so, it would seem but a fair interpretation of the meaning of the parties, to hold that the accurate and sufficient parts of the de- (181) scription, in respect to which the words of the deed are affirmative and positive, should not be restrained in their obvious import, *per se*, by a further description, which thus professes on its face to be conjectural. The several sums, thus mentioned as the probable amounts of some of the debts, could not have been intended as exclusively controlling the operation of the deed in that respect. For suppose this debt, instead of being more than $1,000, had turned out to be less; for example, $800; no one could contend that, notwithstanding, the creditor could claim the whole sum of $1,000, upon the ground that the deed mentioned and secured the debt really owing; and therefore the deed would be restrained to the lesser sum. So, on the other hand, when the true debt exceeds the conjectural sum specified, the security must be considered as extending to the whole debt. We think nothing less can be held upon the supposition which must be made here—that no fraud was intended on the other creditors by concealing the real amount of the debt, and that the language of the deed was used to describe the debt correctly, as far as the party was able at the time to do so.

It was, indeed, argued that the true construction is, that only the sum of $1,000 was intended to be secured, whatever the amount of the debt might be. But that seems to be wholly inadmissible. If that had been the meaning, the language would have been that the maker of the deed was desirous to secure the debt to his ward, or a part thereof, not exceeding the sum of $1,000. But the words under consideration are used in that

part of the deed, which is descriptive of the debts; and it is in a subsequent part that it is said, "that the said J. B. is honestly desirous of securing the payment of *all the debts above named or referred to*," and yet further on the trustee is required (after some prior applications) "to pay the residue of the funds in his hands towards the discharge of the *remaining debts named*, in the order in which they are named above." It is obvious, therefore, that the sum secured to Lucy F. Jin-
(182) kins is not a part of any sum due to her, but the debt thus secured to her is her entire debt—supposed indeed to be "about the sum of $1,000, more or less," but intended to be secured as a whole, whether it was more or less. The interlocutory order, was, therefore, as we think, erroneous, and must be reversed with costs in this Court. This will accordingly be certified to the Court of Equity.

PER CURIAM. ORDERED ACCORDINGLY.

JORDAN WOMBLE *v.* AMOS J. BATTLE et al.

A vendor of real estate, who has conveyed it by deed, has no lien upon the land for the purchase-money.

This cause being set down for hearing, was transmitted by consent from WAKE Court of Equity, at Fall Term, 1843, to the Supreme Court.

The bill stated that the plaintiff had conveyed to the defendant, Battle, a certain lot of land, in the city of Raleigh, for the price of $700, for which he had taken the note of the said Battle without any security—that Battle afterwards conveyed this land to the defendant, Blake, as trustee, for the purpose of satisfying certain debts of the said Battle mentioned in the said conveyance; that the said Battle is now entirely insolvent, and has never paid his said bond nor any part of it. The bill states that these facts were well known to the defendant, Blake, at the time he received the said conveyance in trust from the defendant, Battle, claims that the plaintiff has a lien on the said
(183) land for the said purchase-money, and prays that the said defendants may pay off and discharge the said purchase-money, or that the land may be sold for the satisfaction thereof.

The defendants' answer was filed—and the facts alleged in the plaintiff's bill were substantially proved.

Wm. H. Haywood, Jr., for the plaintiff.
Badger & Manly for the defendants.

NASH, J. On 5 September, 1839, the plaintiff sold and conveyed to the defendant, Battle, the lot of ground mentioned in the bill, at the price of $700, payable on 1 January, 1840, for which Battle gave him his bond without any surety. Battle, by deed bearing date 3 August, 1841, conveyed the same lot of ground to Bennet T. Blake, the other defendant, in trust to sell and pay off certain debts due and owing by the said Battle to the individuals mentioned in the conveyance. Both these deeds have been duly proved and registered. The bill is filed to compel the defendant, Blake, to pay off and discharge the bond, given by Battle to the plaintiff for the land, upon the ground that the purchase-money is unpaid, and that in equity the plaintiff has a lien upon the land for the purchase-money.

That this is the doctrine of the English Court of Chancery, there can be no doubt. It is established by many authorities and running through many years of the judical history of that country. I do not deem it necessary to refer to these cases at this stage of this inquiry. I shall have occasion to notice them upon another part of the case. The inquiry presented to us is, whether it is the law of North Carolina—has it ever been engrafted upon our system of jurisprudence? And, if it has not, is its adoption necessary? Is it in harmony with that policy which the Legislature of our State has, by various enactments, pointed out? The Legislature of North Carolina, as such, commenced in 1715—or rather in that year the various statutes, which had been enacted by the colonial authorities, (184) were revised and collected into one body, and our judicial history is coeval with it. During the long period of time which has since transpired, we have no record that this principle of the English Chancery law was ever noticed or recognized here, and not until the year 1828 was it brought under the action of our courts of justice. In that year the case of *Wynne v. Alston*, 16 N. C., 163, was decided in this court, in which the existence of this lien in favor of the vendor of land, was apparently recognized as the law. This case, under all the circumstances attending it, and which have since come to light, we do not consider as establishing the doctrine. Judge HALL, it is true, delivered his opinion as that of the Court, and so in truth it was, as Judge HENDERSON in the decree was in favor of the plaintiff. Chief Justice TAYLOR dissented, and gave an able opinion against the doctrine. It is to be remarked that Judge HALL states that he was not aware that the question had been

stirred in our courts before that suit. Divided as the Court were, the profession was nevertheless well warranted in considering it as establishing the doctrine; and, if it stood alone, and upon its own circumstances, as reported, we should so consider it, and, however much we might regret, would certainly consider ourselves bound by it. But we are not compelled to receive it at this time as authoritative on the subject. On the hearing of *Kelly v. Terry* (not reported), from Franklin, in which this lien was set up by the plaintiff, it was intimated by one of the counsel concerned in the case that it was supposed the principle was definitely settled by the case of *Wynne v. Alston,* when Judge HENDERSON observed that was not the case; he concurred with Judge HALL that the plaintiff was entitled to a decree, but did not concur with him upon this point; his opinion rested upon other grounds. The bill in *Kelly v. Perry* was dismissed, and Judge HALL, in delivering the opinion of the Court, appears himself not to consider the doctrine as settled. That case was

(185) before the Court in the year 1831, and was followed by that of *Johnson v. Cawthorn* in 1834, 21 N. C., 32. In that case the Court distinctly lay it down that it is an unsettled question in our courts. The language of the Court is "the rules by which we are to be guarded are exceedingly different (referring to the English Chancery rules), according as the doctrine may or may not have been sanctioned by our predecessors. An adjudication by them is a precedent which we are bound to regard as evidence of the law, unless it can be shown conclusively to be erroneous." "Where there is no such precedent we then ascertain the true rules by the deductions of reason from settled principles." The Court had before them the case of *Wynne v. Alston*—and yet they say there was no such precedent as was to them evidence of what the law is on the subject. We think, then, it may be safely assumed, that the vendor's lien upon land sold for the purchase-money has never been received as the law of this State; and the question is now an open one. Two of the Judges in the case of *Wynne v. Alston* dissented, and in that of *Johnson v. Cawthorn,* the distinguished Judge, who delivers the opinion of the Court, says "after several conferences we are unable to agree upon this general question, and, as a determination of it is not necessary in the present case, we must leave it, reluctantly leave it, in the state in which we find it." It is not difficult, however, to perceive the inclination of his mind, and how he would have decided, if a decision had been demanded by the case. Let us then proceed to the next inquiry. Ought this principle to be engrafted upon our chancery system? Is its adoption necessary to the safety of vendors,

and is it in harmony with the course of legislation pursued in this State? In our sister States different decisons have taken place. In New York the English doctrine is adopted (*Garson v. Green*, 1 John., Ch. 108), as between the vendor and vendee, and where there is no contract, express or implied, that the parties did not intend a lien. In Masachusetts no such lien exists in any case. In coming to a decision whether we ought to sanction the adoption of the principle here, let us examine its workings in England, and what is the present state of the question there? It is very certain that every rule (186) adopted by the courts, whereby the titles to real property shall be affected, should be plain and perspicuous, so that the citizen may know for himself what the law is—at least this is the theory of the law. A system, then, complex in its nature, and leading to uncertainty and confusion, ought not to be adopted, unles imperiously demanded, either by natural justice or necessity. In *Mackreth v. Symmons*, 15 Ves., 344, Lord *Eldon* reviews the whole of the English cases on this subject—he collects them and points out their disagreement with each other. Some of the authorities consider it as the result of a natural equity, that a man shall not be deprived of his property by a sale without receiving the price agreed on—and others referring it to the contract or understanding of the parties, that the lien should not exist. In *Chapman v. Tanner*, 1 Ver., 267, the earliest case on the subject, and decided in 1688, the bill is dismissed, because it was agreed between the parties that the vendor should retain the title deeds—and it further appeared that he had taken no security. In *Bond v. Kent*, 2 Ver., 281, the vendor had taken a mortgage for part of the money and the parties' note for the balance. Lord *Eldon* admits that, though the argument had considerable weight, it was not conclusive against the vendor's lien for the residue not secured by the mortgage, and this opinion of his Lordship is expressed in 1818. In *Pollexen v. Moore*, 3 Atkins, Lord *Hardwick* decided that the vendor had a lien upon the land sold for the purchase-money; but that it was an equity confined to the parties themselves, and not to be extended to third persons. This decision was made by one of the ablest chancellors that country, so fruitful in able lawyers in every branch of jurisprudence, has ever produced. This opinion of the chancellor is controverted by Lord *Eldon*, and denied to be correct, and is indeed overruled by many subsequent decisions. *Elliott v. Edwards*, 3 Bos. & Pul., 181. So the case of *Fowell v. Hulis*, Ambler, 724, decided that if the vendor parts with the estate, and "takes a security for the purchase-money, there is no reason for

(187) a Court of Equity to assist him against the creditors of the vendee." That case was similar to the present. It was a suit to establish a lien in favor of the vendor against the trustees of an insolvent debtor. It was decided against the lien, because a receipt was endorsed on the deed for the purchase-money, and the vendor had taken the bond of the vendee for it. The former fact of the endorsement of the receipt was not relied on, and the opinion of the chancellor is explained as resting on the taking of the bond, as furnishing evidence that the vendor did not intend to rely upon his lien. *Naim v. Prowse,* 6 Ves., 752. In this latter case, *Fowell v. Hulis* is shaken, if not denied. The Master of the rolls decided that there may be a waiver of the lien by taking a security, but it must be one "totally distinct and independent," meaning that not the taking of the security is evidence of the waiver, but the nature of the security. He then, to illustrate his idea, puts the case "of the mortgage of another estate, or any other pledge," as evidence of the waiver. To this, however, Lord *Eldon,* in *Mackreth v. Symmons,* says: "It must not, however, be understood that a mortgage taken is to be considered as conclusive ground for the inference that a lien was not intended"; a conclusion, he thinks, not dependent upon taking a mortgage or a pledge, but must be the result of the circumstances of each case as it may arise. The conclusion to which his Honor comes, is the expression of a strong regret, as to the condition of the question at that time in the English courts. His language is—"The more modern authorities upon this subject have brought it to this inconvenient state—that the question is not a dry question upon the fact, whether a security was taken, but it depends upon the circumstances of each case, whether the Court is to infer whether the lien was intended to be reserved, or that credit was given, and exclusively given, to the person from whom the other security was taken." So that it appears from this opinion of his Lordship, that the chancellor must be satisfied that when the bond of a third person is taken, the vendor must have
(188) given his credit *exclusively* to him, before he can decide that the lien was waived by the vendor. In the commencement of the opinion the chancellor states that the question is one of very great importance, and regrets that, as to the waiver of the lien, "he can find no rule laid down in distinct and inflexible terms"—that if the question is made to depend, as it appears is now the settled doctrine of English chancery, though he still doubts, not on the taking of security by the vendor, but on the nature of the security taken, "it is obvious that a vendor taking a security can not know the situation in which he stands

without the judgment of a court—that the observation is justified by a review of the cases, from which it is clear, different Judges would have determined the same case differently, and if some of them had come before him, he could not have assented to them." This declaration is made by an English Chancellor, and one of the most distinguished among them, so late as the year 1808, nearly two hundred years after the occurrence of the first case, as reported in Vernon. It sanctions fully the decision made in the case of *Gilmore v. Brown, v. Mason*, 191, where it is declared that the lien of a vendor for the unpaid purchase-money is a right which has no existence until it is established by the decree of a court in the particular case. Justice Story, in the 1st vol. of his commentary on Equity Jurisprudence, page 461, sec. 1215, says "a lien is not, strictly speaking, either a *jus in re* or a *jus ad rem*. It more properly constitutes a *charge* upon the thing." In commenting upon equitable liens, he admits that the doctrine of the vendor's lien upon the land sold does exist, and at page 416, sec. 1218, he observes: "It has often been objected that the creation of such a trust by a Court of Equity is in contravention of the policy of the statute of frauds. But whatever may be the original force of such an objection, the doctrine is now too firmly established to be shaken by theoretical doubts." This undoubtedly is true, so far as the Court of Chancery in England is concerned. There it has been established by repated decisions of their ablest chancellors and highest tribunals. Here we are fettered by no such current of authorities, and are (189) at liberty to be governed in our decision, in the language of Judge GASTON, in the case of *Johnson v. Cawthorn*, "by the deductions of reason from settled principles." In discussing the question as to the evidence of the lien, Judge Story says the difficulty lies in determining what circumstances are to be deemed sufficient to repel or displace the lien or amount to a waiver of it. Upon the authorities, this is left in such a state of embarrassment, that it would have been better to have held at once that the lien should exist in no case, and that the vendor should suffer the consequences of want of caution, or to have laid down the rule so plain the other way, as not to require the aid of a court to tell the vendor and others how he stood, p. 470, s. 1224. Chief Justice *Marshall*, in the case of *Bailey v. Greenleaf*, 5 Peters, 231, yields that the doctrine in the English Courts of Chancery is well established, but it is evidently one which did not meet his entire approbation. At page 232 he remarks, however the equity may arise, "still it is a secret, invisible trust, known only to the vendor and vendee, and to those to

whom it may be communicated in fact. To the world the vendee appears to hold the estate divested of any trust whatever. A credit is given to him in the confidence that the property is his own in equity, as well as law. A vendor relying upon this lien ought to reduce it to a mortgage, so as to give notice of it to the world. If he does not, he is in some degree accessory to the fraud practiced on the public by an act which exhibits the vendee as the complete owner of an estate, on which he claims a secret lien. It would seem inconsistent with the principles of equity, and with the general spirit of our laws, that such a lien should be set up in a Court of Chancery to the exclusion of *bona fide creditors*. And he refers with approbation to the case from Ambler of *Fowell v. Hulis*. He concludes by observing that in the United States the claims of creditors stand on high ground—and to support the secret lien of a vendor against a creditor, who is a mortgagee, would be to counteract (190) the spirit of the laws made for the protection of creditors against secret trusts. To no State in the Union are the concluding remarks of the venerable Judge more applicable than to this—nowhere does the creditor stand upon higher ground—nowhere is his interest more sedulously guarded and particularly against secret trusts. All that the debtor has is subject to his claim. The *fi. fa.* reaches all his tangible property, and binds it from the test of the writ—all—all that he has shall be given to redeem his body—except the few articles secured by the insolvent law. By sec. 23, ch. 37, Rev. Stat., it is enacted by the Legislature, "That no mortgage, nor deed, nor conveyance in trust for any estate, real or personal, shall be good or available at law against creditors or purchasers for a valuable consideration, unless the same shall have been proved and recorded within six months after its execution; and, if not so proved and recorded, shall be absolutely null and void against such creditor"—and by the 24th sec. it is provided, "that no deed of trust or mortgage of real or personal estate 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 of trust or mortgage in the county where the land lieth—or, in case of chattels, where the donor, bargainor or mortgagor resides—or if he does not reside in the State, then in the county where the chattels or some of them are." There can be no doubt as to the policy of the Legislature in the enactment of this statute. It was to put an end to the many frauds, which might be practiced upon creditors and purchasers by secret deeds of trust and mortgages, by furnishing a convenient and sure mode in which might be discovered all the encumbrances

under which an individual held his property. It is not sufficient for a man to take a deed of trust or mortgage to secure his claim upon the property—he must, to render it available against creditors or purchasers, have it recorded—and the deed so recorded has no relation back, as other deeds have, to their delivery, but take effect only from the registration. And we have held that notice of an unregistered deed of trust (191) will not affect a creditor. *Fleming v. Burgin*, 37 N. C., 584. It may, therefore, be true that it is a natural equity, that when a vendor sells his land, that he should have a lien upon it for the security of his purchase-money. We think he ought; and the law tenders it to him in the shape of a mortgage or deed of trust properly registered. If he do not choose to avail himself of it, it is his own fault and if any one is to suffer from his negligence, the loss ought, in equity to fall on him. By refusing him the existence of this private equity, known alone to him and his vendee, or to those to whom they may choose to communicate it, which is so dangerous in its consequences to creditors and purchasers, we do not deny him the most ample security—one which, while it secures his interest, protects the community from fraud. Where, I would ask, is the value of this statute so far as sales are concerned, if the vendor can defeat its positive enactment by his original equity as it is termed? The law says he must take his security in writing, and have it registered. He does take it in writng, but does not have it registered. A question arises between him and a creditor of his vendee. The latter produces the act of Assembly; that fails to protect the vendor—all he has to do then is to throw himself upon his reserved right, and the Court is to enforce it. This, we think, would be a great absurdity. Shall we then introduce into our law a principle which, in its operation, is so inconvenient and uncertain, and has produced such a state of things in England as to induce one of its ablest chancellors to say that no man there can tell how he stands, until he has the opinion of a court—a principle so evidently fraudulent in its effects—so contrary to the plain policy of our legislative acts; or shall we cut up the mischief by the roots, by refusing to recognize this secret trust? We are satisfied as to the course our duty points out. We do not believe this secret trust ought to, or does, exist in this State. It is no part of the common law, and is borrowed by the English Chancellor from the civil law, and we believe that it would be in defiance of (192) legislative action, if we were so to decide. The bill must be dismissed without costs.

DANIEL, J. The principle, upon which the Courts of Equity have proceeded, in establishing the lien of the vendor on the land, in the nature of a trust for the purchase-money, is, that a person having got the estate of another ought not in natural justice and conscience, as between them, to be allowed to keep it and not pay the consideration money. A third person, upon like principles, having full knowledge how the estate has been obtained, ought not to be permitted to keep it, without making such payment, for it attaches equally to him as a matter of conscience and duty. It would otherwise happen that the vendee might put another person into a predicament better than his own, with full knowledge of the facts. 2 Story Equity, 465; Cross on Lien, 89. This equitable mortgage will bind the vendee and his heirs and volunteers, and all other purchasers from the vendee with notice of the existence of the vendor's equity. 4 Kent Com., 152 (3 ed.). Lord *Eldon* says, that the doctrine was borrowed from the Roman or civil law. *McKreth v. Symmons*, 15 Ves., 329. It has been adopted, I expect, by all the States in this Union which has a separate Court of Chancery. Virginia, New York, Indiana, Ohio, Tennessee and South Carolina, we know, have adopted the rule. We see the authorities all collected at the foot of the page. 4 Kent Com., 152. There is no decision or printed *dictum* in this State against the doctrine; but *Wynne v. Alston*, 16 N. C., 416, has, ever since its determination, been considered by the profession as establishing in this State this rule, which all admit is founded upon natural equity. C. J. RUFFIN admits that the rule of equity of the English Courts would come within our act of assembly, adopting so much of the laws of England, etc., and that we would be bound to obey it, if it was not virtually repealed by our legislation in favor of creditors, and particularly by our registry laws.

(193) Our registry acts make void unregistered mortgages and deeds in trust only against *bona fide* creditors and *bona fide* purchasers for a valuable consideration. As against all the rest of the world the mortgage or trust is good without registration, at common law or in equity. Now it is admitted that the defendant, Blake, is but a volunteer, and it must follow, I think, that he is not such a purchaser as the Legislature intended to protect by the registry acts; and it is equally true that the creditors of Battle, who are here represented by Blake, as their trustee, are not those *bona fide* creditors which the Legislature meant (from motives of rigid policy and against the rule of natural justice), should be satisfied their debts out of the plaintiff's landed estate, because the plaintiff's lien or equitable mortgage was not registered. The decision will destroy

the right which legatees had of marshalling the assets against the heirs acquiring the estate by descent, and to stand in the place of the vendor of the land, and set up his lien, so far as to have them satisfied out of the personal effects of the vendor. *Sproull v. Prior*, 8 Sim., 189. It does seem to me that the plaintiff is entitled to a decree in his favor.

RUFFIN, C. J. As the Court has been heretofore divided on the question that arises in this case, and the present Judges are not unanimous, it seems incumbent on me to state explicitly my concurrence in the opinion, that the bill should be dismissed, and to assign the reasons for that opinion.

I do not propose going through the English cases, which my brother NASH has fully stated, and doubtless, with accuracy. It is sufficient to admit that they establish the principle on which the bill is founded. It is worthy of note, however, that hardly any two succeeding Judges have agreed in the application of the principle, or, rather, in what should repel its application. So numerous and complicated have been the modifications of the rule, that one of the most eminent of those Judges has acknowledged that the law had been brought to the inconvenient state, that no one could tell what his rights were until the Court had made a decree in his case, and, perhaps, it would have been better that the doctrine had never been admitted. I can not say that would be sufficient to author- (194) ize the Courts of this State to reject this, more than other parts of the common law and equity, brought with them by our forefathers; and I suppose that without other legislative alterations of the laws, rendering this needless or inconsistent with them, we should have been bound to receive it and deal with it, as well as we could, in its application to the contracts of our people. But certainly the opinions, thus expressed by those best acquainted with its origin and operation, are well calculated to prevent it from being a favorite with us, and to lead us without reluctance to give it up, if its necessity is dispensed with by new laws enacted by the Legislature, or if such laws be incompatible with it.

That the reasons for it in England do not now exist here would seem to be apparent to one who adverts to the different states of the law in the two countries in respect to the legal remedies of vendors against the land for the purchase-money. Upon a judgment for it in England against the vendee, only half the land could be taken by elegit from him by his voluntary or fraudulent alience. If a security for the purchase-money was not taken, expressly binding the heir, or if the ven-

dee devised the land, the heir, and at common law, the devisee, held exempt from recourse by the vendor on any part of the land. That those persons should hold, some one-half of the land and others the whole, without paying the purchase-money, was so palpably unjust as to make a strong appeal to the chancellor for redress. It is plain that the application to the court of equity would only be made, when the vendee was insolvent, or when payment could not be enforced by an action at law, as against the heir on a simple contract security or a devisee. In such cases, doubtless, the rule had its beginning; and in such cases the vendor unquestionably had conscience on his side. But one would think nothing was hazarded in saying that the court of equity in England, under her peculiar judicial organization and system of jurisprudence, would never have borrowed from any law, nor of itself set up this lien, as a creature of that Court, if at law the vendor had a direct recourse to (195) the land in all cases. Why should equity have interfered in that state of the law? It would be a complete answer to the vendor's bill that the law had done all for him, which equity could, and as his demand was for a sum of money, claimed as a debt, it was merely legal, and he should go to law for it.

Such is precisely the state of our law, as to the remedies for the purchase-money and all debts against the real estate of the debtor in his own hands and those who succeed to him. Upon a judgment against the vendee, the land is taken from him or his fraudulent alienee, and sold out by *fieri facias*. In like manner it is, by several statutes, rendered liable at law in the hands of the heir or devisee for every debt of the ancestor or testator. Wherefore, then, should the vendor come into equity? This consideration presses strongly on me; and seems not to have been allowed its due importance by those who advocate this doctrine. Its fair weight may be estimated from the fact that there never has been an application to the court in this State against the vendee or his voluntary or fraudulent alienee, or his heirs or devisees, upon the ground that, as *against them*, the vendor had not an effectual remedy at law against the land: For the legal liability of the land for the debt is a cheaper and better security than a lien in equity. It is true that other creditors may sell the land for their debts, and in that way the vendor may lose his purchase-money, for the want of a specific security on the land. But that brings up other considerations which will be noticed hereafter. We are now considering the question between the vendor and volunteers; and between them there is, plainly, no occasion for this implied equity. It is

said, that it is against natural justice, that a man should lose his estate without being paid for it. So it is, and if he did not of his own accord convey it, equity would never take it from him until he was paid for it. But when he actually conveys the estate, the question is then, whether the parties meant or justice requires, there should be a specific lien in equity for the purchase-money. It may be so in England, where the purchaser may, by law, iniquitously hold the land (196) from his creditors, including his vendor. But, if it be the object of a court to compel persons to fulfill their contracts according to their actual intentions at the time of making them, it can not be so here. They know that by our law the vendor may sell the land by legal process for his debt, and they never contemplate this constructive equitable lien as a natural right of the one against the others, or as necessary or useful. It can not be so at all in this State, except when advantage is taken of it against creditors of the vendee or purchasers from him. But if the lien does not exist between the original parties, it can not against purchasers or creditors who are entitled to all the rights of their vendor or debtor, besides some which he has not. But so far from the argument in favor of the lien receiving strength from the necessity for it to protect the vendor from purchasers or creditors of the vendee, it is refuted by that very circumstance. A secret and uncertain equity, like this, is entirely inconsistent with the numerous enactments requiring early publicity to be given to all encumbrances. There has been an anxious solicitude in the Legislature to prevent false credit and imposition on purchasers, arising from the concealment of mortgages and other encumbrances. This has been evinced from the year 1715, down to this time; and, at every interposition, the provisions on the subject were made more rigid. In 1820 it was enacted that every mortgage or deed of trust, not registered within six months, should be void as against purchasers and creditors. That not answering all the purposes desired by the Legislature, in 1823, all the evils were cut up by the roots by an act, that no such deed shall be valid as against creditors and purchasers but from its registration. Now, what is the necessary construction of such acts? It must be that, as the object is to suppress fraud by compelling persons to register encumbrances, every encumbrance, not in writing, and so not capable of registration, is within the mischief of the act and made void by it. An act upon a kindred subject long received that construction. The act of 1784 recited that many persons had been injured by secret deeds of gift, and then enacted that all deeds of gift should, within nine

(197) months, be proved and recorded, or should be void. Notwithstanding a constant succession of acts, giving further time to register deeds of gift, it was held in *Sherman v. Russell,* 4 N. C., 79, and *McCree v. Houston,* 7 N. C., 429, that a parol gift of a slave, accompanied by possession, was void, although the act did not in words make it void, but only written ones, not registered. The reason was that, if it were not so held, the statute would be always evaded, to the detriment of creditors and purcasers, by making secret oral gifts, instead of written ones, which required registration. It follows conclusively, as it seems to me, that no parol agreement for a lien between the vendor and vendee would be admissible against the acts of 1820 and 1829; and, for the like reason, that no resulting or constructive lien should be raised by the court of equity. Indeed the cases upon the Act of 1784 were not necessary to the argument, except as illustrations merely: for there have been several cases upon those very acts for the registry of encumbrances, which follow out the principle. In *Gregory v. Perkins,* 15 N. C., 50, and in *Halcombe v. Ray,* 23 N. C., 340, the Court decided that a deed, absolute in its terms and registered, but in fact intended as security merely, was void under the acts of 1820 and 1829. In the latter case there was no actual intent to deceive, and the sum, intended to be secured, was really due. But the Court could not sustain the deed, because the Legislature intended that every security should speak the truth, so that, when registered, its extent could be known; and, therefore, although those parties were innocent, yet, if the deed was held good, other persons with bad intentions might effectually evade the act and conceal their encumbrances. So, in *Fleming v. Burgin,* 37 N. C., 584, it was held, that under the Act of 1829, the deed does not become complete until registration, and, therefore, that notice of it does not affect a subsequent mortgagee taking a security for a prior debt. Indeed, in no respect has the Legislature of this State so changed our law, as to make the contrast between it and the law of England greater than upon this point. In England, if a fine or recovery was

(198) not indispensable, the conveyance by lease and release became almost universal, for the very reason that it enabled persons to shut out the view of the public from the title; and mortgages were nearly all created by that species of conveyance and for terms for years. Persons are there allowed purposely to keep their encumbrances under cover. Whereas, here, every conveyance requires registration; and those given as securities are not effectual to any purpose as against creditors and purchasers, until they are registered, and then but from

the time of the registration; and such as were so intended, but do not appear so to be on their face, are absolutely void, though registered.

It is thus seen that the Legislature has spoken in as strong terms as possible against latent liens, and secret and indefinite encumbrances; and that the Court has endeavored to follow the legislative will and policy in administering those acts. If there be any such encumbrances still subsisting here, it must be only this lien for the vendor. All others are abolished here, though they may yet be upheld in England. There, for example, an equitable mortgage by a deposit of the title deeds is well known. But I presume no one, in the face of our acts of Assembly, would hold that it can be so here. Those acts require a registration, and, by consequence, a written mortgage, and if we once depart from the rule, there will be nothing to guide the Court or prevent persons acting as if no such statutes existed. The supposed lien in question must give way to the principle, on which the legislative policy and enactments rest, like all other encumbrances the parties may attempt to create, without putting them into the form required by the statute. If the vendor intends that the estate shall be a security for the price, he has nothing to do but retain the title, or, if he conveys, to take a mortgage or deed of trust. If he should take a mortgage and not register it, the law makes it void. In such a case I think it impossible to contend that he could still insist on an equitable lien as a security. The law and equity would both avoid the security created by the express contract of the parties, on the ground that it had been kept secret, or (199) rather had not been published in the manner prescribed. Then, certainly, another encumbrance ought not to be raised by mere construction of equity, which can not be registered, and especially for the sole purpose of setting it up against creditors and purchasers, who are the very persons, for whose safeguard the writing and registration of encumbrances are required.

I conclude that there is no ground in this State for implying such a lien against the vendee or volunteers under him; and that such an implication against creditors or purchasers is opposed by the plain import of the statutes that have been mentioned and the policy which dictated them.

Upon these grounds I was prepared to decide the general question in *Johnson v. Cawthorn*, 21 N. C., 32. It is true that *Wynne v. Alston*, 16 N. C., 163, was understood by me, then on the circuit bench, to have decided in favor of the lien; and I should have held accordingly, had a case come before me. And so I should have done up to the time, at which *Kelly*

v. Perry came before the Court, which I think was in 1831. Then the occurrences happened, which were mentioned, on his memery and my own, by Judge GASTON in *Johnson v. Cawthorn*. From that time to this it has been considered an open question; and has been so mentioned in some cases. *Crawley v. Timberlake*, 36 N. C., 346. How the question might have been decided, had it been necessary in *Kelly v. Perry*, I can not say, as I had then no very distinct impression on it, having received *Wynne v. Alston* in its obvious import. But I know that Judge HENDERSON disowned the doctrine on that occasion; and that, after consideration and consultation, Judge GASTON and myself would have given judgment against the lien, altogether, in *Johnson v. Cawthorn*, had not my brother DANIEL'S opinion to the contrary induced us to retain the question under consideration, until it should, as now it has, become absolutely necessary to dispose of it.

It is to be noted, however, that of the Judges, who have set in this Court, seven have been called on for their opinion (200) on this question, and that only two have been for entertaining this alleged equity, while the other five have held the contrary.

Wherefore I concur with my Brother NASH that the bill must be dismissed.

PER CURIAM. BILL DISMISSED WITHOUT COSTS.

Cited: Doak v. Bank, 28 N. C., 327; *Henderson v. Burton, post*, 263; *Cameron v. Mason*, 42 N. C., 181; *Simmons v. Spruill*, 56 N. C., 12; *Blevins v. Barker*, 75 N. C., 438; *Smith v. High*, 85 N. C., 94; *Moore v. Ingram*, 91 N. C., 381; *White v. Jones*, 92 N. C., 389; *Peck v. Culberson*, 104 N. C., 426; *Quinnerly v. Quinnerly*, 114 N. C., 148; *Gorrell v. Alspaugh*, 120 N. C., 373; *Carpenter v. Duke*, 144 N. C., 293; *Piano Co. v. Spruill*, 150 N. C., 169; *Lumber Co. v. Lumber Co., Ib.*, 288.

HILL JONES et al. *v.* BENNETT PERRY et al.

1. A testator bequeathed certain negroes to his wife for life, and made no specific disposition of them after her death. He had other negroes, and, after making several other bequests, he bequeathed as follows: "All my negroes that are not given away by this my last will shall be equally divided between W. E. and M.": *Held*, that the remainder in the negroes given to the wife for life passed by this residuary clause to W. E. and M.

2. As to personal estate, a residuary clause carries not only every thing not disposed of, but everything that turns out not to be disposed of.

This cause was set for hearing at Spring Term, 1844, of the Court of Equity for NASH, and then transmitted by consent to the Supreme Court.

The bill was filed to obtain the opinion of the Court upon the will of William Boddie, deceased, late of Nash County. The testator died in the year ...., having previously made and published in writing his last will and testament. In the will is contained the following bequest: "I give and bequeath to my dearly beloved wife, Patsy Boddie, one bay horse by the name of Sipp, and my plantation whereon I do now live. Also my still, also the use and labor of the following negroes, to wit, Isaac and Silvy and Mary, her daughter, and Buck and little Dinah and Glasgow and Mingo—also four cows and calves, two barren cows and four breeding sows, and (201) ten year-old hogs and ten head of sheep, and also the use of all my kitchen and household furniture, that is not in this my last will otherwise ordered and during her life or widowhood." In a subsequent clause, after some legacies to his son William Willis Boddie, and to his daughters, is the following residuary disposition: "All my negroes that is not given away by this my last will shall be equally divided between William Willis Boddie, Elizabeth and Martha Ann Boddie—and also all my horses, cattle, sheep and hogs for to be equally divided among them." It is admitted that William Willis Boddie qualified as executor of his father's will and assented to the legacies contained in the will—that the defendants are in possession of the negroes who were bequeathed to Mrs. Boddie, the widow, during her life or widowhood, claiming them under the said residuary clause, in their own right, and as representing W. W. Boddie who is dead—and that the plaintiffs are other children and distributees of the said William Boddie, the testator. It is further admitted that the testator died possessed of other negroes than those left for life to Mrs. Boddie. The plaintiffs contend that the negroes, in which a life-estate was given to the widow, and their increase did not pass under the residuary clause, but as to them, the testator died intestate—and they are entitled, as in a case of intestacy, to their distributive share of them. The defendants allege that, by the terms of the residuary clause, those negroes are embraced in it and passed to the residuary legatees, and that the plaintiffs are entitled to no portion thereof. It is admitted that Mrs. Boddie has recently died.

Saunders for the plaintiffs.

B. F. Moore for the defendants.

NASH, J. We are of opinion that the negroes bequeathed to Mrs. Boddie for life, passed, under the residuary clause, to the persons therein named, to wit, William Willis Boddie and Elizabeth and Martha Ann Boddie, and constituted in them a vested remainder, to be enjoyed after the death of the
(202) widow. It is a principle of law, that a testator is to be presumed to intend not to die intestate, as to any portion of his estate; and, therefore, it is always held that a residuary clause passes whatever is not otherwise disposed of, unless particularly restrained. Indeed, the very end and object of a residuary clause appear to be, to gather up the fragments of an estate after other portions of it have been particularly disposed of. It is, therefore, a rule well established in the English courts, as in ours, that, as to personal estate, a residuary clause carries not only everything not disposed of, but everything that turns out not to be disposed of. 1 Ves. Jr., 109, 110; 15 do., 509; *Taylor v. Lucas,* 11 N. C., 215. It is not so much the intention of the party, though that intention clearly expressed will govern, as the presumption of law in favor of the residuary legatee, to avoid an intestacy. When, therefore, a particular legacy lapses, it falls into the residuum for the benefit of the residuary legatee—he being preferred to the next of kin. In *Speight v. Gatlin,* 17 N. C., 5, the devise to Mrs. Speight, the widow, was of a tract of land and five negroes during her life. There was then a devise of all the remainder of his estate of every description to be sold and divided between his two sons. There was no mention otherwise, in the will, of the negroes devised for life to the widow. The Court decided they passed under the residuary clause. It is difficult to distinguish that case from the present. The negroes passed to the residuary fund, because the language was sufficient to embrace them, and because it was evident the testator did not intend to die intestate. Here the words in the residuary clause are sufficiently comprehensive to embrace the negroes given to the widow for life; "all my negroes that are not given away by this my last will," etc. The language used by the testator, in the bequest to the wife, may assist us in ascertaining his intention, if it is necessary to resort to his intention to expound the clause under consideration. "I give the use and labor of my negro Isaac," etc. It is fair to suppose he used those terms in their common and ordinary acception; for in the residuary
(203) clause he varies the expression so as to give the negroes themselves, and not merely the use. But, if he had given them in so many words to his wife for life, without more, an interest remained in him undisposed of—the remainder—and

the language used is sufficient to embrace it; for, according to *Taylor v. Lucas*, 11 N. C., 215, the residuary clause will, by construction of law, carry not only everything not disposed of, but everything that in the event turns out not to be disposed of. The testator, then, in this case, not only had negroes not expressly given away by the will, by any devise going before the residuary clause, but it turned out that he had others of which he had not disposed. The law then, beside the intent of the testator, places them in the residuary clause, and, upon the death of the widow, Mrs. Boddie, they go, together with their increase to the residuary legatees, the defendants in this case. The bill must be dismissed.

PER CURIAM. BILL DISMISSED.

Cited: Hyman v. Williams, 34 N. C., 94; *Bennehan v. Norwood*, 40 N. C., 109; *Hastings v. Earp*, 62 N. C., 6; *Mabry v. Stafford*, 88 N. C., 604; *Blue v. Ritter*, 118 N. C., 582; *Peebles v. Graham*, 128 N. C., 225.

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(204)

WILLIAM SMITH and wife et al. *v.* WILSON McCRARY et al.

1. A testator, who was seized in fee in his own right of two-thirds of a tract and seized of the other third in right of his wife during the coverture, and also possessed of personal property, devised as follows: "I give and bequeath to my wife during her natural life the whole of my landed and personal property. And after the death of my wife the whole of the lands and personal property (except the slave Cæsar) to be sold, and the money arising from the sale to be equally divided between my sons and daughters": *Held*, that the testator did not intend to include in his devise the lands he held in right of his wife.
2. When land is directed by a will to be sold, after the death of one to whom it is devised for life, and the money arising from the sale to be divided among certain ulterior devisees, Equity treats the land as personalty, and, if one of those devisees should die before the expiration of the life estate, his or her share of such proceeds, being a vested interest, would go to his personal representative, and be disposed of as personal property.
3. When a will does not direct, in express terms, by whom a sale of lands, directed to be sold, is to be made, it is in the power, and it is the duty of the executors, who qualify, or the survivor of them, or of the administrator with the will annexed, to make such sale.

This cause was set for hearing at the Spring Term, 1844, of DAVIDSON Court of Equity, upon the bill and answer, and transmitted by consent to the Supreme Court.

The bill was filed for the purpose of obtaining the construction of the Court upon certain parts of the will of Henry McGuire. The bill set forth that the said Henry McGuire died in 1834, having previously duly made his will with the proper solemnities to pass lands—and that the said will had been duly admitted to probate, and the executors therein named, to wit, the widow, Margaret, and James McGuire, the son of the testator, qualified as such; that in and by the said will, the said Henry devised and bequeathed as follows, to wit:

(205) "I give and bequeath unto my beloved wife, Margaret McGuire, during her natural lifetime and during her widowhood, the whole of my landed estate, all my horses, cattle, etc. (mentioning particularly his perishable property). I further give to my wife during her widowhood five negroes, named, etc., and should she marry, in that case my will is, that my executors hereinafter named give unto her her distributive share, agreeably to act of Assembly. And after the marriage or death of my wife, my will is, that the whole of the lands and negroes, except Cæsar, which I have devised to my son Addison, with the whole of the other property be sold, and the money arising from the sale thereof be equally divided among my sons and daughters." The bill further set forth that Margaret, the wife, survived her said husband, and occupied and possessed by the assent of the executors all the property devised and bequeathed to her during her life, until she died in 1843, having never contracted a second marriage—that the testator left surviving him the following children, to wit: Margaret, who afterwards intermarried with the defendant Casper Smith, Elizabeth, who intermarried with the defendant Wilson McCrary, Susan, the wife of the plaintiff, David Yarborough, Nancy, the wife of the plaintiff, William Smith, Sarah McGuire, Emily McGuire, James McGuire, William McGuire and Addison McGuire; that the femes covert here mentioned were married before the death of the widow, Margaret McGuire; that previous to the death of the said Margaret, James McGuire died intestate, leaving the plaintiff, Hamilton, his only child at law, and leaving a widow who is since dead, and whose only heir at law and distributee is the said Hamilton; that also, previous to the death of the said Margaret, the widow, Margaret, the wife of the defendant, Casper Smith, died, leaving issue an infant child, which infant also died during the tenancy for life, without brother or sister; that since the death of the said tenant for life, William McGuire died intestate, leaving the plaintiffs, Margaret, Grecian, Milos and Gerusha his only children and heirs-at-law, and leaving the

plaintiff, Fanny, his widow; that Elizabeth, the wife of the defendant, McCrary, died since the death of the tenant for life, having never had issue; that the said deceased persons departed this life in point of time as follows: 1st, Margaret, wife of the defendant, Smith; 2d, her infant child; 3d, James McGuire and his widow; 4thly, Margaret, the widow of the testator, Henry; 5thly, William McGuire; 6thly, Elizabeth, the wife of the defendant, McCrary. The bill further stated that one-third of the only tract of land, which was possessed and occupied by the testator at the time of his death, belonged in fee to his wife, the said Margaret, the other two-thirds belonging in fee to the testator himself. The bill was filed by the surviving children of the testator, and by the heirs of such of the children as had died, against Wilson McCrary, the administrator, with the will annexed, of the testator, Henry McGuire, the said Wilson, as administrator of his wife, Elizabeth, and Casper Smith, as administrator of his wife, Margaret. The bill prayed the Court for their opinion upon the following points: 1st. Did the third part of the land, belonging to the widow in fee, and which the testator held as tenant by the curtesy, pass under the devise of *the whole of his landed estate?* 2dly. Did the testator intend to convert his land into personalty "out and out," so as to break the descent, or have the heirs an election to take the land itself, and if sold, shall the proceeds go to the heirs or next of kin? 3d. What interests have the defendants, Smith and McCrary, in the real and personal estate devised? 4th. What interest has the plaintiff, Fanny, in the real and personal estate, as the widow of William McGuire? 5th. Who are entitled to the share of the said estate owned by the late Elizabeth, wife of the defendant, McCrary? The bill then prayed for a sale of the said land, as a partition could not, without injury to the heirs, be made by metes and bounds. (206)

The defendants, Smith and McCrary, admitted the facts stated in the plaintiffs' bill, and claimed that the land directed by the will to be sold was thereby converted into personalty in the view of a Court of Equity, and that they were entitled as administrators to the shares bequeathed to their late wives, respectively.

Clemmons for the plaintiffs. (207)
Caldwell for the defendants.

DANIEL, J. We are of opinion that the testator, by making use of the words, *"my landed estate,"* in the above clause of his will, did not intend to include his wife's landed estate in the

said tract of land; no fair interpretation can give the words so extreme a meaning; as he must have known that the interest which he then held in her land would determine on his death. *Secondly,* the remainder in the testator's land and personal estate is, by the will, directed to be sold, and the money to be raised from this mixed fund is directed to be divided among his sons and daughters. A Court of Equity considers real estate or personalty, as that species of property into which it is directed to be converted. Nothing is better established in equity than this principle, that money directed to be employed in the purchase of land, or land directed to be sold and turned into money, is to be considered as that species of property into which they are directed to be converted; and this, in whatever manner the direction was given, whether by will, contract, marriage articles, settlement or otherwise. The owner of the fund may make money land, or land money, and it is a business of a Court of Equity to enforce the execution. *Fletcher v. Ashburner,* 1 Bro. C. C., 497; *Lechmere v. Carlile,* 3 P. W., 211; *Ashby v. Palmer,* 1 Mer., 296. In this case, the testator has directed his land to be converted into money, and mixed with the money arising from the sales of the personal estate, for the purpose of division among his children, on the death of their mother; and although one of the children (Margaret, the wife of defendant, William Smith), did die during the life of the tenant for life, still the purpose exists, for which the land has been directed to be converted, to wit, the division among the children on the death of his wife, the tenant for life. That share (Mrs. Smith's) of the mixed fund, created, or to be created by the sale, must go to her administrator; for equity (208) impressed on the estate in remainder in the land the character of personal property, which was vested in the legatees (the children) from the death of the testator. The foregoing principle appears to be now well established. *Fletcher v. Ashburner,* 1 Bro. C. C., 497; *Smith v. Claxton,* 4 Madd., 484. If the purpose of the conversion no longer existed, the property would remain as it was in the hands of the testator, and pass according to its true nature. *Smith v. Claxton,* 4 Madd., 484; Leigh and Datzell on Conversion, 72. The lands which belonged to the testator, the slaves and their increase, and the other personal property directed by the will to be sold, must be decreed by this Court, to be sold and converted into money. The said fund will then be divided into nine equal parts or shares; one share will be assigned to each of the living children; one share to Casper Smith (the administrator of Margaret); one share to Wilson McCrary (the administrator of

his late wife, Elizabeth); one share to the administrator of William McGuire, deceased; and one share to the administrator of James McGuire, deceased. *Thirdly*, the complainants are the heirs-at-law of the widow, Margaret McGuire, the elder; and they state in the bill that the one-third of the land, mentioned as having descended to them from her, can not be divided without loss and injury; they pray that it (to wit, the one-third) may be decreed, under the act of Assembly, to be sold, and the money divided among them, according to their respective rights. We are of opinion that they are entitled to a decree to have the one-third of the land sold as prayed for. *Fourthly*, it is asked of us what interest William McGuire's widow (Fanny McGuire) takes in the land descended from his mother. He died after his mother, and he was therefore seized at his death as a tenant in common of one-eight of the said land, which descended from his mother; out of this one-eighth part his widow, Fanny McGuire, is entitled to dower. She agrees that the said land may be sold, and that her dower interest may be paid to her in money. *Fifthly*, that the executors or survivor could sell the land, intended to be converted, and personal estate after the death of the tenant for life, and to form a mixed fund for distribution among the (209) legatees, is established by *Foster v. Craige*, 22 N. C., 209; and by the Revised Statutes, ch. 46, s. 34, on the death of the executors that duty devolves on the administrator with the will annexed. It will promote the convenience of the parties, and probably improve the price of the whole tract, to appoint Mr. McCrary to be also the commissioner to sell the undivided share, which descended from Mrs. Margaret McGuire, the testator's widow. The sale may thus be of the whole undivided tract, and the proceeds of the sale may be divided by between the several persons, entitled to the respective estates, according to their rights before declared.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Gay v. Grant, 101 N. C., 221; *Orrender v. Call, Ib.*, 403; *Benbow v. Moore*, 114 N. C., 270; *Trogden v. Williams*, 144 N. C., 204.

WILLIAM RAMSAY et al. *v.* ELIJAH S. BELL.

1. In a bill in equity for partition of lands, the plaintiffs must set forth their own title and also that of the defendants, so as to show that they are joint tenants or tenants in common or otherwise have an undivided interest in the lands.
2. If the defendant in his answer claim the whole in severalty, the Court will not decree a partition, but will hold up the bill until the plaintiffs have an opportunity of establishing at law the title they assert.
3. But if the bill denies that the defendant has any title, but only says that if he has any it is as a tenant in common, and admits that he has had the sole possession of the whole tract for many years, claiming it as his own, the bill must be dismissed. The Court however will dismiss it without prejudice, to enable the party to try, if he chooses, his title at law, and then file a bill for partition.

This cause, having been set for hearing on the bill, answers and proofs, was transmitted by consent of parties from the Court of Equity of CARTERET, at Spring Term, 1844, to the Supreme Court.

The bill asks partition of a tract of land lying in the (210) county of Carteret. It alleges that Andrew Wilson, Sr., formerly of that county, died many years since intestate, seized and possessed of the tract of land in dispute, without leaving any widow, and that the female plaintiffs are his heirs-at-law, and entitled with the other plaintiffs, their husbands, to the said tract of land; that among the children of said Andrew Wilson, Sr., who survived him, was his son, Andrew Wilson, Jr., and that they have been informed, but have no knowledge of the fact that the share or interest of the said Andrew Wilson, Jr., had been sold by the Sheriff of Carteret under an execution issued against him and that he, the defendant, had purchased it. The bill does not admit any such sale ever did take place, but alleges, if it did, that the said Andrew Wilson repaid to the defendant the money paid by him, or that he, the defendant, had property or funds of the said Wilson in his hands which he applied in that way. It states that the defendant took possession of the whole tract under his said alleged purchase, and has remained in possession claiming the whole land as his own ever since. The bill further alleges that, at the time the defendant made his purchase, the female plaintiffs, the heirs-at-law of Andrew Wilson, Sr., and Jr., were married to the other plaintiffs and were each under the age of twenty-one years—and that they are still covert of their husbands. It then alleges, if the defendant, by his purchase of the interest of Andrew Wilson, Jr., acquired any in-

terest in the said lands, which they do not admit, that they are tenants in common with him and entitled to partition and to an account of rents and profits. The defendant admits by his answer the seizin of Andrew Wilson, Sr., but denies that he died seized—as before his death he had sold and conveyed the whole of the land to his son, Andrew Wilson, Jr.; avers that a judgment was obtained against the said Andrew, Jr., in his lifetime, upon which an execution issued and was levied on the land, as the property of said Andrew, Jr., and it was sold by the Sheriff of Carteret County at public sale, when he purchased the said land and took from the sheriff a conveyance of the whole tract, which deed of conveyance (211) was immediately proved before the proper authorities, and duly registered; that he paid his own money for it, and that no part was paid out of the funds of the said Andrew Wilson, Jr., nor did the said Andrew ever repay the same or any part of it. The defendant further avers that the sale was on 21 June, 1826—that he immediately took possession, claiming it as his own, and has so remained in the adverse possession up to the time of the filing of the bill, a period of fifteen years, and claims the benefit of the statute made for the quieting of titles to land. The answer denies that the female plaintiffs were under age at the time of their marriage, but avers that they were then each of them over the age of twenty-one years. It denies that Andrew Wilson, Sr., died intestate, but avers that he made a last will and testament sufficient to convey real estate, and that by the said will the plaintiffs nor any one of them are entitled to any portion of the lands in question.

J. W. Bryan and *Iredell* for the plaintiffs.
J. H. Bryan for the defendant.

NASH, J. Upon the evidence we could not say that the defendant has established the fact that Andrew Wilson, Sr., ever did convey the land to his son, Andrew Wilson, in fee, and it appears that the *feme* plaintiffs were married when the defendants entered. Yet as this is a bill for partition, we are unable to sustain it on other grounds. 2 Story Eq. Jur., 599, in treating on partition, says, "Another head, of concurrent jurisdiction is that of partition in cases of real estate held by joint tenants, tenants in common and parceners." And our act, passed originally in the year 1787, Rev. Stat., ch. 85, enacts, that the Judges of the Superior Courts of Law and Equity and the Justices of the County Courts of Pleas and

Quarter Sessions are required and empowered, on the petition of one or more persons claiming the real estate of any intestate or otherwise claiming any real estate as tenants in common or joint tenants, etc., to decree a partition. It is under
(212) this act that our Courts of Equity exercise jurisdiction on this subject. To entitle a party to the aid of a Court of Equity in making partition, he must state his own title and the title of the defendant, whereby it shall appear that they do claim to hold the lands in one of the characters pointed out in the act. If the defendant denies the legal title of the plaintiff, or claims a sale and adverse possession, a Court of Equity can not proceed, until the plaintiff has re-established the unity of his possession with the defendant as a tenant in common. This can be done only in a Court of Law, when the title of the plaintiff is a legal one; for the question of title and possession are legal questions. When, by the trial of issues directed for this purpose, or of an action directed to be brought, the plaintiff has by the verdict of a jury established his legal title and restored the unity of his possession with the defendant, the decree in equity will follow of course. In such cases, that is, when the plaintiff has stated a case in his bill entitling him to the aid of the Court, and the defendant denies his title and possession, the Court will not dismiss the bill, but will retain it, and give the plaintiff proper time to establish his title and recover the possession of the share he claims. *Wilkin v. Wilkin,* 1 John., ch. 111; *Phelps v. Green,* 3 do., 282; *Garrett v. White, ante,* 131. The Court in this case has been urged to retain this bill and give the plaintiffs time to establish their title at law. This we can not do. The plaintiffs have not stated such a case as in our opinion will authorize the Court to do so. It has been before stated that, in a bill for partition, the plaintiff must not only state his title to the share in the land sought to be divided, but the title of the defendant, whereby it may appear that they are tenants in common, and have a unity of possession. 1 Mod., 240; *Cartwright v. Pultney,* 2 Atk., 380. In this case the plaintiffs allege their title to the land in question, and claim the whole. They deny that the defendant has any title; and if his purchase of the interest of Andrew Wilson, Jr., was a fair one, and made for a valuable consideration, then they charge they are tenants in common with him, are
(213) entitled to have the land divided, and their shares allotted them.

And they admit that the defendant is, and for many years has been, in the sole possession of the premises. In no case do they give the defendant a joint title or a joint possession, but

make a case for the action of a Court of Law, when the title is exclusively with the plaintiff and the possession with the defendant, and are calling on a Court of Equity to try an action of ejectment. Let them, if they can, establish their title at law, and thereby restore the unity of their possession with the defendant, and equity will aid them, no doubt, in obtaining partition of the land, according to their several interests. The bill must be dismissed, without prejudice to the plaintiff's right to file another bill. The plaintiffs must pay the costs.

PER CURIAM. BILL DISMISSED.

JESSE A. CLEMENT v. THOMAS FOSTER et al.

1. A creditor of a firm can not file a bill to stop the business and tie the hands of all or any of the partners from disposing of the effects, for the purpose of applying them, even to satisfy all the creditors of the firm equitably, and much less to satisfy his own debt singly, whether his claim against the partnership be either a legal or an equitable demand.
2. It is only at the instance of one partner that the Court will interfere against another, who is appropriating the effects to his own use; because in that case they are joint owners of the property, and he has no right to apply it to his separate use, thereby leaving the other liable to the partnership debts out of his own estate, or, at all events, depriving him of property that belongs to him.
3. So, if a creditor of one of the partners gets a judgment against him, a Court of Equity will entertain the bill of the creditor against all the partners to pay the debt or to have the partnership account taken, and payment made out of the surplus belonging to the debtor.

This cause, after having been set for hearing, was transmitted by consent from the Court of Equity of DAVIE, at Spring Term, 1844.

The facts, as they appear upon the pleadings, are as (214) follows:

The plaintiff and the defendants, Thomas Foster and Armfield, entered into copartnership, as traders in merchandise, in 1837, and continued the business until April, 1839. They then sold the stock of goods to a new firm, composed of the defendants, Foster and Gilbert; and they executed bonds for the price payable to the former firm, namely, Clement, Armfield and Foster; of which one for the sum of $1,935.63\frac{1}{2}$, to fall due 25 September, 1840, afterwards fell to the plaintiff, Clement, in the settlement and division of the effects of Clement, Arm-

field and Foster amongst the three parties. The settlement took place 25 October, 1839, and included all the copartnership transactions, except a demand against one Roberts, who had been employed by the firm as a peddler of goods on their account and had not made a settlement. All the time, however, a number of debts were owing by the firm, which, in the settlement, Clement and Armfield covenanted with Foster to pay, and partnership funds were kept by them for that purpose.

In December, 1840, the plaintiff commenced this suit; and by an original, amended and supplemental bills against Foster, Gilbert, Armfield, C. Harbin, James F. Martin, Radford Foster, H. R. Austin, it is charged that Gilbert has left this State and gone to Alabama to reside, and that the books, papers and effects of Foster & Gilbert were in the hands and disposition of the other partner, Foster, and that he, Foster, had become insolvent and unable to pay his debts, and, for the purpose of doing so, had applied large sums and assigned debts belonging to the firm of Foster & Gilbert in discharge of his own debts, and that, in fact, he had assigned to Austin as a trustee, by a deed of trust, all his own estate and all the partnership effects in trust to secure certain debts which Foster and Gilbert and he, Foster, owed to the other defendants, Harbin, Martin and Radford Foster or to indemnify them against responsibilities for the firm, and for Thomas Foster himself, not at all providing for the debt to the plaintiff, on which the plaintiff
(215) can not proceed at law by reason that by mistake the bond was so drawn as to make Thomas Foster, upon the face of it, both obligor and obligee. The bills likewise charge that Foster received from the peddler, Roberts, several payments on his account to the firm, which went to the use of Foster and Gilbert. The prayer is, that the plaintiff may have a decree for his debt against Foster and Gilbert, and that it may be declared to be entitled to satisfaction out of the effects of Foster and Gilbert in preference to those creditors for whose benefit the assignment to Austin was made, and that Thomas Foster and Gilbert may be restrained from applying any of the effects of the firm to the payment of their several private debts or to their own uses, until payment thereout of the plaintiff's demand.

Upon the bills the plaintiff obtained an order of sequestration of all the effects of Foster and Gilbert, and had a receiver appointed, who has gone on to collect debts due to the firm.

Gilbert has not answered, and the bill has been taken *pro confesso* against him. Armfield takes no part in the controversy, but submits to any decree.

Thomas Foster answered, that Clement and Armfield deceived him in their settlement, and did not give him his due share of the effects; also that they did not pay the debts of the firm of Clement, Armfield & Foster, as they jointly covenanted with him to do, but that he was sued therefor and compelled to pay larger sums thereon than is now due to the plaintiff on the demand now claimed by him; and he insists thereon that he is entitled to call on the plaintiff to surrender to him his claim, that he may have the benefit of it, as having been paid by him, in the account of Foster & Gilbert upon a settlement between him and Gilbert. He and the other defendants admit the assignment to Austin in trust; and they state that the debts of Foster & Gilbert therein secured are just debts, and also that the debts of Foster himself therein secured are just debts and not more in amount than the sum he is in advance for the firm by payments on their account out of his own separate estate; and, therefore, they insist that the plaintiff is (216) not entitled to any preference in having his debt paid before those. These defendants further insist that the plaintiff has no lien at law or in equity on the effects of the firm of Foster & Gilbert, or any right to control the partners in the disposition thereof in the payment of other creditors of the firm or their own creditors.

Hoke and *Caldwell* for the plaintiff.
Boyden for the defendants.

RUFFIN, C. J. As to the right which the defendants set up upon the score of the state of the accounts between Foster and Clements and Armfield, by reason of the payment of debts by Foster, which the two latter took on themselves; that is a proper matter for an inquiry upon the reference to ascertain the sum due to the plaintiff on the foot of the bond allotted to him in the division of the effects of Clement, Armfield & Foster. For, as Foster was obligor and obligee therein, the debt is an equitable one only, for which the plaintiff can have no relief but in this Court. If, therefore, he should be indebted to Foster, it will form a fair deduction from Foster's liability to him.

But the principal question in the cause is, whether the plaintiff has a right in this Court to have the management of the partnership effects taken out of the hands of the partners themselves, Foster & Gilbert, or their assignees, and the effects applied to the payment of the plaintiff's debt, upon the ground that the partners are not able to pay their debts, and that they

are, or one of them is, appropriating those effects to their or his separate uses. We own that we know of no such equity in a general creditor of a partnership. At the instance of one partner the Court will in such a case interfere against the other partner, because they are joint owners of the property, and one has no right to apply it to his separate use; thereby leaving the other liable to the partnership debts out of his own estate, or, at all events, depriving him of property that belongs to him.

So, if a creditor of one of the partners gets a judgment
(217) against him, the Court of Equity will entertain the bill of the creditor against all the partners to pay the debt or to have the partnership accounts taken and payment made out of the surplus belonging to his debtor. That is done on the ground of the difficulty on the creditor and the ruin to the business, by proceeding to sell under execution an aliquot part of the joint effects. Indeed, the interest of the debtor in the partnership effects is only in the surplus after a settlement of all the joint debts, and also a settlement between the partners themselves. But there seems to be no principle on which a creditor of a firm can file a bill to stop the business, and tie the hands of all or any of the partners, or one of them, from disposing of the effects, for the purpose of applying them, even to satisfy all the creditors of the firm equitably, and much less singly to his own debt by note, bond or account. Such a jurisdiction as the former is exercised in cases of bankruptcies under statutes giving the power to take and assign all the effects of a bankrupt partnership or individual, for the benefit of all creditors. If the Court of Equity had an original jurisdiction of the kind, there would have been but little necessity for a bankrupt act. Without such an act, a creditor of the firm must take his remedy by judgment at law against the partners personally, and proceed, as upon any other joint judgment, against persons who are not partners. The nature of the debts to the present plaintiff does not vary the case upon this point. As he can not recover at law, he is entitled to a decree here for so much money; but it is only a general decree that the debtors personally shall pay him the money. The debt does not especially attach itself to the partnership effects, more than to any other owned by the debtors or either of them. If the relief which the plaintiff asks could be granted, there is no insolvent partnership, whose concerns would not be brought to a close under an administration in the Court of Equity. We can not suppose that one of these partners is acting in opposition to the will or interests of the other; since no complaint is made
(218) by the one against the other. To stop his collection and

disposition of the effects, is the privilege of the other partners, and can not be claimed by the plaintiff. Indeed the bill takes the effects alike from both, upon no allegation but that of the plaintiff's having the rights of a general creditor. The firm has a right of preferring other creditors of the firm before the plaintiff, upon the general principle pervading the law, except in cases, not of insolvency, but of bankruptcy. So, if the partners so agree between themselves, they may apply, each his own share of the joint effects, to his separate debts; for, as respects them severally, the separate debts of each are as much his debts as the joint debts are, and nothing but the duty of one partner to another prevents either from paying his separate debt out of that portion of his property, as soon as out of any other portion of his property, or as soon as a joint debt. If the creditor of the firm were confined to his remedy against the effects of the firm, there would be more consistency in the present attempt. But the plaintiff is not so restrained, but may raise his debt out of the separate property of the partners to the hindrance of their separate creditors and may take their persons.

It follows, that the orders for a sequestration and a receiver must be discharged, and the receiver directed to settle his accounts before the Master, and pay over to the defendants, as entitled, the moneys in his hands, and deliver up the books of accounts, and other evidences of debts and property, to the defendants, Foster and Gilbert, or their assignees, respectively. And the plaintiff must pay all the costs that have been incurred under those orders.

The bill must be dismissed with costs as to all the defendants, except Thomas Foster and Gilbert and Armfield. And it must be referred to the Master to take an account of the sums received by the plaintiff or Armfield, or by Foster and Gilbert, or either of them, from Roberts, on account of his dealings with or for the firm of Clement, Armfield & Foster; and also to take an account of what may be due to the plaintiff on his demand in the pleadings mentioned, and of any proper (219) deduction therefrom in favor of the defendants, or any or either of them.

PER CURIAM. DECREED ACCORDINGLY.

Cited: *Holmes v. Holmes*, 43 N. C., 23; *Potts v. Blackwell*, 56 N. C., 454; S. c., 57 N. C., 69; *Richards v. Baurman*, 65 N. C., 166; *Allen v. Grissom*, 90 N. C., 93; *Davis v. Smith*, 113 N. C., 101; *Patton v. Carr*, 117 N. C., 179.

WILLIAM S. HARRIS et al. *v.* WILLIAM T. DELAMAR et al.

1. Interest, gained by one person by the fraud of another, can not be held by them; otherwise fraud would always place itself beyond the reach of the Court.
2. An instrument, obtained by fraud or imposition on the part of the father in behalf of his infant children, must be set aside in equity.
3. When a bill is filed by a father, as the next friend of his children, still infants, to carry such an instrument into effect, the Court will dismiss the bill at his own costs.

This cause was transmitted from CRAVEN Court of Equity at the Spring Term, 1844, by consent of parties to the Supreme Court.

The following are the facts appearing from the pleadings and proofs:

The plaintiffs are the four infant children of Gatsey Harris, deceased, and sue by their father, Lovick Harris, as their next friend.

The bill states that some time after the marriage of Lovick Harris and his wife, Gatsey, her father, Smith Delamar, wishing to make a provision for his daughter and her husband, and such children as they might have, made a deed of gift for a negro woman named Bridget, and her child, Sitty, whereby he gave them to the said Gatsey during her natural life, with remainder after her death to such child or children as she might have by the said Lovick. The bill states that the deed was written by one Carraway, in accordance with instruc-
(220) tions given to him by the said Smith, who voluntarily executed the same, and caused it to be attested by his son, William S. Delamar, and then delivered it to Lovick Harris for the benefit of his wife and children; and also put the slaves into his possession. The bill then charges, that a short time before his death (which happened in 1842), the father, from some unknown cause, became incensed with his son-in-law and daughter, and wished to retract his gift, and, with the view of so doing, that in his absence he went to the house of said Lovick, and by threats and force extorted from his daughter the deed, and destroyed it before it was registered, or suppressed it, so as to deprive the plaintiffs of the benefit thereof.

Mrs. Harris then died, leaving the four infant plaintiffs, her children, and also her father, surviving her. The negroes continued in the possession of Lovick Harris until the death of both Mrs. Harris and her father, when they were taken by Stephen Delamar, as the executor of the will of his father, the said Smith.

The bill is filed against Stephen Delamar and William S. Delamar, who were appointed by their father his executors, but of whom only the former proved the will. The prayer is that the defendant shall surrender the slaves and their increase to the plaintiffs and execute to them a proper conveyance, to supply the place of that destroyed by the testator.

The answers admit that it was the intention of Smith Delamar to make a provision for his daughter, Gatsey, and such children as she might have, by a gift of the two negroes mentioned. The defendants state that their father, in the presence of one of them, William S., so informed his son-in-law, Lovick Harris, and directed him, in the year 1836, to have a deed prepared, by which the said negroes should be limited to his daughter, Gatsey, during her natural life, and after her death, in remainder to such children of the said Gatsey as she might leave surviving her; that in a few days the said Lovick produced to the father a deed in the handwriting of one Carraway, who is now deceased, and that the father executed it, at (221) once, without reading it, and called upon his son, William S., to subscribe it as a witness, which he did. The answers further state, that the son then read the deed, but to himself, and not aloud; and that he perceived that the limitation over, as he understood it, was not to all the children of his sister, who might survive her, but "such child or children as she might have by the said Lovick Harris." The son said nothing of this to the father at the time, and the latter gave the deed immediately to Harris, who carried it away. Within a few days afterwards, however, he asked his father if he did not intend that all the children his sister might have, either by her present or any subsequent marriage, should take in remainder after her death, as he, the son, understood him; or whether he intended only to include her children by Harris? To this the father replied that he meant the former, and so expressly had told Harris; and upon the son's informing him of the contents of the deed as he had read it, the father expressed great dissatisfaction, and said that it was not as he had directed Harris to have it done, and thought it was done, and that he would get that back and have one written according to his wishes, so as to include all the children of his daughter, surviving her, whether by Harris or any other husband. The answers then state that the father went to Harris's house and returned in a short time with a paper in his hand; and they deny that, in the belief of the defendants, their father obtained it from Mrs. Harris, or that he obtained it from Lovick Harris by force or threats, and state that they believe that it was surrendered by

Harris, because it had been improperly drawn and contrary to the instructions given for it. Which belief they founded on the character and general conduct of their father, his purposes at the time, and his allowing Harris still to have the use of the negroes during the life of the father, and, particularly, on the disposition of the negroes in their grandfather's will, executed after the death of their mother, in favor of the plaintiffs. In the will, Mr. Delamar gives Bridget and her four chil-
(222) dren then born to the present plaintiffs, and directs that they shall be hired out until Joseph N. Harris, the youngest child of his daughter, should arrive to 21 years, and the hires applied to the education of the said Joseph and his sister, Ann, and then to be equally divided between the four children, with a contingent limitation, that, if either of the children should die before the division, his or her part shall go to the survivors. .

The defendants further say, that no complaint was ever made by the mother or the father of the plaintiffs, that they had been improperly deprived of the deed, or induced to give it up; for they well knew that it was the father's intention, by another deed or by a will, to make the provision as he had first intended it. And, they say, he did so, substantially in his will, as before set forth. The defendants admit that after the death of the testator they found the deed of the tenor set forth in the bill and before admitted in the answer, among his papers, but in the cancelled state, having the name of the maker and witness both torn off; and they say that, having then no knowledge or belief that any claim would be set up to the negroes unless under the will, they took no care of the paper in question, but threw it away or lost it as mere waste paper.

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

RUFFIN, C. J. There could hardly be a more useless litigation than the present, since, by the deed, as the bill would set it up, and by the will, the plaintiffs get nearly the same thing: the only difference being that the profits for a period are devoted to the education of the two younger of them, and then the negroes and their increase to be equally divided between those then living. There is no intimation that there is a deficiency of other assets of the grandfather to answer his debts. It seems, therefore, essentially, to be the bill of the father, and to be brought for the mere purpose of getting the prop-
(223) erty from the management of the grandfather's executor

into his own hands. This is mentioned rather with a view to the costs, than to the merits. For the merits depend on different considerations; and upon them our opinion is against the bill.

There is no evidence that the father obtained the deed by force, fraud, or undue influence. Nor, indeed, do the plaintiffs give any evidence that the deed ever existed, except the admissions of the answers, and the deposition of the defendant, William S. Delamar, who was examined under an order for that purpose. His deposition is to the same purport with the answers, and fully sustains them. According to that statement, the allegations of the bill as to the preparation of the deed, under instructions given to the writer by the donor himself, that the limitation was to the daughter's children by her husband, Harris, only, and that knowing this, Mr. Delamar freely executed the deed, are, in every essential particular, falsified. The father intended to provide for all the children of his daughter by any marriage, and gave instructions to that effect, not to the writer of the deed, but to his son-in-law, Harris, who was to have the deed prepared accordingly. That he did not do; but, on the other hand, had a deed drawn which restricted the provision to his own children only; brought it to the old gentleman, as one prepared according to the instructions, and, consequently, as containing a limitation to all the daughter's children, and, in a blind confidence of his son-in-law's integrity, the father was induced by those representations to execute it. If it be said it was the party's own fault that he did not read the instrument, as he was able to do, and, therefore, that he must be presumed to have known the contents; the answer is; that the presumption only stands until proof of the fact is produced, and that, here, the actual imposition is established by proof of the instructions, the variance of the instrument from them, when it was represented to accord with them, and that the father did not, in fact, read the deed, but, believing the false representations made to him, executed it as containing one provision, when it contained another, materially different.

Thus put, it was a case of plain imposition on the (224) donor, and he would have been entitled, by the help of this Court, to have the deed called in and cancelled. Clearly he would be so entitled as against the author of the fraud himself, as to any interest derived by him from the deed. So, too, interests gained by one person by the fraud of another, can not be held by them; else fraud would always place itself beyond the reach of the Court. *Bridgeman v. Green*, 2 Ves., 627; *Huguenin v. Bosely*, 14 Ves., 273. The father had a right, there-

fore, peaceably to redress himself by obtaining the instrument from the person who had improperly procured it, and who would have been compelled by a Court of Equity to surrender it to be cancelled. Nor can the present plaintiffs, although not consenting to the surrender, nor capable of consenting, insist upon the deed now being set up, if it sufficiently appear against them, that upon the bill of the supposed donor there should have been a decree to deliver up the deed. Such, we have shown, would have been the case upon the evidence of the plaintiff's uncle, the subscribing witness to the deed. And that evidence is strongly fortified both by what otherwise appears in the cause, and by what does not appear. In the first place, everything that was done by Mr. Delamar, after he got back the deed, is consistent with the account his son gives. He did not take back the instrument with the intent to deprive his daughter's family of the use or ultimate property of the negroes. On the contrary, as long as he lived, he let them remain with Harris, and by his will he gave them to his children. It is true that, as events turned out, the remainder goes to the same persons who would have had it under the deed; for Mrs. Harris had but one set of children, having died before her first husband. But the provision by the will is in accordance with the avowed reason for destroying the deed, and proves that it was destroyed with an honest purpose, because it was not the instrument the party thought it was. Again, if this representation by the subscribing witness, who heard the instruc-
(225) tions given to Harris, the father of the plaintiffs, who were present when he brought the deed, and heard him state, that it was written according to the instructions, and knows that his father signed it without reading it, and was astonished and indignant when he was afterwards informed of its contents; if, we say, this could be disputed, it must be upon the knowledge and by the testimony of Lovick Harris himself, who was a party to the transaction throughout. Then, his putting himself forward as the *prochein ami* of the plaintiffs, and thereby keeping himself back as a witness, is strong to induce the belief that this evidence as to his conduct could not be contradicted by him, but that he would be obliged to confirm it. Nor is there any evidence as to the mode in which Mr. Delamar got the deed again, except what he said to his son, when he returned with it, which was, that Harris had given it up. That, too, is confirmed by the fact that no complaint was made, or anything said to the contrary by Harris, as long as Delamar lived, which was six years afterwards.

Our opinion, therefore, is that the deed was obtained from

the defendant's testator by mistake on his part and surprise, and by the imposition of the plaintiff's father, Lovick Harris, and that it ought to have been given up to be cancelled, as it was, and ought not to be set up; and, therefore, that the plaintiff's bill stand dismissed, and, under the circumstances, with costs, to be paid by Lovick Harris, who has so improperly and unnecessarily instituted the suit in the name of his children.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Tisdale v. Bailey, 41 N. C., 362; *Black v. Bayless*, 86 N. C., 535; *Corbett v. Clute*, 137 N. C., 551.

SAMUEL NEWLAND *v.* JAMES S. TATE et al. (226)

1. Where, upon the death of a defendant, a person comes in and acknowledges service of a bill of revivor as administrator of the deceased party, it is too late for him at a subsequent term to plead that he never was administrator.
2. Where two form a copartnership, and one of them sells out one-half of his interest to a third person, who is appointed general agent and manager of the firm, the latter, though responsible to other persons as a partner, is not so to the partner retaining his original interest in the firm, but is only responsible to him as agent, and as such he is entitled to proper compensation for his services.

This cause, having been set for hearing, was removed from the Court of Equity of BUNCOMBE, at Spring Term, 1844, to the Supreme Court.

The bill was filed in February, 1839, and charges that in 1836 the plaintiff and the defendant, James H. Tate, became partners together in making a contract with the government for carrying the mail on a certain route in Georgia for four years from the 1st day of January, 1836, at $6,150 annually; and that they were equally interested therein, each being entitled to a moiety; that they accordingly entered upon the performance of the contract, and put on the line coaches, horses, and other stock to the value of $6,091, and continued their operations up to March, 1837, when the stock and contract were sold out to one Wilson, at the price of $10,000. The bill states, that after the contract was made by the plaintiff and James H. Tate with the government, the defendant, Robert W. Tate, a brother of said James H., entered into an agreement with the said James H., by which the two brothers became partners, as

between themselves, the said Robert W. becoming entitled to one-half of the original share of James H., and the latter retaining the other half thereof. The plaintiff resided in Buncombe County in this State, and took no personal man-
(227) agement of the line and property in question; but the whole was under the care and management of the two Tates jointly, though chiefly that of Robert W., who received the money paid by passengers, the pay from the government, or nearly all of it, and made the sale to Wilson and received the price from him, and also made the necessary disbursements for keeping up the line by employing and paying drivers, purchasing horses, coaches, provender and other needful supplies. The bill charges that large profits were made on the contract, and the sale of the stock, as the defendant represented to the plaintiff, and as he believes, and that all the effects were received by the defendants, or one of them, Robert W. Tate, and are retained by them or him, without having paid to the plaintiff anything for his share of the profits, or even his advances of the original stock. The prayer is for a recovery and account of the partnership effects, from each of the defendants, and that the defendants may be decreed to pay the plaintiff his share thereof. The defendants answered severally, and each admits the partnership as charged in the bill to have been originally made between the plaintiff and James W. Tate, the contract with the government, the advance of stock and the line in operation, and sale to Wilson, as stated in the bill. But both of the defendants deny positively that Robert W. Tate was a partner in the contract, originally, with the plaintiff and James H. Tate, or that there was any partnership between the defendants themselves, in respect of the moiety of James H., or that the defendant, Robert W., had any interest whatever, directly or indirectly, in the contracts and property, or any concern with it, saving only as the agent of the plaintiff and of the other defendant, who, the defendants say, were the sole partners and owners of the property, entitled to the profits, and liable for the losses. The defendants state that Robert W. Tate was employed by the other defendant to conduct the business, as managing agent, at an annual salary of $700; and they admit that in that character he received and disbursed all, or nearly all, the funds of the concern. And the de-
(228) fendant, Robert W., annexes to his answer, as a part of it, an account of his transactions for the firm of Newland & Tate; which shows the receipts by him to the amount of $51,278.17, and disbursements to the amount of $51,470.34, thus leaving a balance due to him of $192.17. The defendants

state that the business was a losing one, and the defendant, Robert W., insists that the loss is to be borne by the plaintiff and the defendant, James H., alone, and that he has in his hands no funds belonging to the other two parties. Replications were taken to the answers, and both parties proceeded to take a great number of depositions. At April Term, 1842, the death of Robert W. Tate was suggested. At the succeeding term, October, 1842, the transcript states that "James H. Tate, administrator of the estate of Robert H. Tate, deceased, appears in court and acknowledges service of process reviving this suit against him as administrator aforesaid." At Spring Term, 1844, the defendant tendered a plea, that he was not the executor of the will of Robert W. Tate, deceased, nor the administrator of his personal estate within the State of North Carolina. The Court rejected the plea, and the cause was then set down for hearing, and transferred by consent to this Court with an agreement that before the hearing the interlocutory order rejecting the plea might be reheard in this court as upon a petition or otherwise.

Caldwell for the plaintiff.
Badger for the defendants.

RUFFIN, C. J. The first question in the case is upon the plea; and we are of opinion that it was properly rejected. It came too late. We suppose, from the circumstances of the commissions to take the answers, that the defendants both resided in Mississippi, and, probably, that Robert W. Tate died there, and the other defendant may have become his administrator there. But if that be so, which we only conjecture, still the party had precluded himself from the objection, that he was not answerable as administrator, by his voluntary assumption of that character in this cause eighteen (229) months before, and submitting to have the cause revived against him as administrator. It is true, it is not entered, as the formal order of the Court, that the cause shall stand revived. But it is substantially so. The statute authorizes the reviving a suit in equity, without bill, by *scire facias;* the object of which is, merely to give the requisite notice. The process may be waived, and the party appear without it; and that this party did. He expressly acknowledges his representative character, appears as such, and makes no objection to a revivor, and for eighteen months takes out process to take testimony in the cause, as having been revived. He thus became a party to the suit, and waived all objection to the jurisdiction and to his accountability as administrator.

Upon the main question in the cause, which is the right of the plaintiff to have an account against these parties, the opinion of the Court is for the plaintiff. It is yielded, as a matter of course, that the defendant, James H., individually, as an acknowledged partner with the plaintiff, must come to an account. But it is said that Robert W. Tate was not liable, and therefore that his administrator is not, because the bill is not filed against him upon his liability as the agent of the firm, having its funds in his hands, but, as being himself one of the partners; whereas, in fact he was not a partner in any sense, neither with the plaintiff and James H. Tate, nor even with James H. Tate in respect of his moiety. If we are to judge from the manner in which the parties have taken their testimony, they must have been under a singular delusion on both sides, as to the grounds on which the plaintiff could have relief against Robert W. Tate. The plaintiff has taken many and very voluminous depositions to the acts and declarations of both the defendants, tending to establish that all three of the parties were originally copartners, or became so in this contract by subsequent agreement between the three, apparently under the belief that such a state of things was necessary to entitle the plaintiff to a decree against Robert W. Tate.

(230) But that is a mistake, as a general principle of law; for that the defendant was liable to account, as having received the funds, either as the agent of the firm really existing and merely as agent, without any interest in himself; or as such agent, having also an interest, under a separate agreement between him and one of the parties, in the share of that partner. But, in truth, such evidence of a general partnership between the three can not avail the plaintiff in the present suit; because the bill specially excludes the idea of a partnership of that kind, and states that James H. Tate was the sole partner of the plaintiff, and that the interest of Robert W. Tate arose by an agreement between the brothers alone, and extended to the one-half of James H. Tate's moiety. On the other hand, the defendants have taken as many depositions to prove, some that Robert W. was agent only for the firm, consisting of his brother and the plaintiff, and others, that he was not a general partner with both of the other parties, but was then agent and concerned in interest in his brother's share only, by a private agreement between those two alone, as if he could be held liable to account with the other defendant, to the plaintiff, only in case he were a general partner.

We are not prepared to say that if Robert W. Tate were merely the agent, the bill is not so founded as to entitle the

plaintiff to a decree against him to account, for it distinctly charges his general agency and management and sale of the property and receipt of the funds; and it is not perceived why the plaintiff's rights arising from the facts should be impaired by untruly stating further that, besides being agent, that person had an interest under his brother, and that he had also acted in the business by virtue of that interest.

But upon the question of fact, whether Robert W. Tate had an interest and the nature of it, the opinion of the Court is, that the statements of the bill are really according to the truth, as established by the evidence. The plaintiff has proved a great variety of declarations of both of the defendants, when they were together and apart, and also conversations between the plaintiff and the defendants, from which the witness (231) collected, that all three of these persons were recognized by each of them as partners with each other; and so, perhaps, we might also conclude, if we were confined to that evidence itself. But the truth no doubt is, that the parties, knowing that each had an interest, spoke of Robert W. Tate as an owner of a part of the line, as well as themselves, without being particular to designate the origin and nature of the respective interests, and from that the witnesses naturally enough concluded, that they were partners by joint agreement, whereby the plaintiff was half owner, and the other two a fourth each. But the bill admits that there was no joint agreement, and states that Robert W. Tate became his brothers' partner in his share, and, by virtue thereof, and by agreement with the other parties, became the general manager of the business, and got the effects of the firm into his hands. And that, in the opinion of the Court, is the effect of the weight of the evidence. It clearly establishes that Robert W. Tate claimed to have an interest, as owner in some way or to some extent, and that other parties recognized such interest in him. Though many witnesses thought, from indefinite expressions dropped from the several parties, that Robert's interest was that of a general partner, yet that was but an impression derived from loose declarations, not descending into particulars. Where the origin and nature of Robert's interest by itself became distinctly the subject of observation, the parties speak of it, as represented in the bill, to consist of one-fourth part derived out of the share of his brother by an agreement between them alone, but known to the plaintiff and recognized by him. To that extent, Robert W. was the assignee of James H. Tate; and there can be no doubt that as a person having an interest, and also having the fund, he may be called on to account to the plaintiff. Thus accounting, it is true, he

will not be directly liable to the plaintiff for any losses sustained, if any there be, unless by his own fault as agent; because, although he might be liable for the contracts of
(232) the firm to third persons as a partner, yet he was not a partner with the plaintiff, as between themselves, to share the profit or loss. That was between the plaintiff and James H. Tate; and to the latter, Robert W. was to look for a portion of his profits or make up a portion of his loss. For the same reason, to his case is not applicable the principle, that, except by agreement, an acting partner can not claim compensation beyond his share of the profits, for the rule proceeds on the ground that the contract of partnership stipulates what each is to contribute and receive, and, therefore, it can not embrace a case in which there is no contract of partnership between the plaintiff and the party rendering a service to the firm. No doubt, therefore, Robert W. Tate will be entitled to reasonable remuneration, as against the plaintiff, for his time and labor, or such as may have been fairly agreed on between him and the other parties. There must, therefore, be the usual decree for an account against the defendant in his own right, and as administrator of Robert W. Tate, and also, unless the defendant shall admit sufficient assets of his intestate, there must be an inquiry as to the assets which the defendant has or ought to have.

PER CURIAM. DECREED ACCORDINGLY.

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(233)

DANIEL LEWIS, Admr., etc., *v.* WILLIAM KEMP'S EXECUTOR.

1. A testator bequeathed certain slaves to his son A for life, and at his death to his son, if he arrives at the age of maturity, but if A should have no son or this son should not arrive at maturity, then to be equally divided between B and C: *Held*, that this was a vested legacy in remainder to B and C, subject to be divested on the happening of the contingency mentioned in the will. And if that contingency should not happen, the interest would pass to the personal representatives of the ulterior remainderman.
2. The remainderman after a life estate in a slave can only ask the aid of a Court of Equity, during the life-estate, to protect his interest against any improper disposition by the tenant for life.
3. After the death of a tenant for life of a slave, the remainderman can not call upon his representative to account for the value of the slave sold by the tenant for life, unless such tenant acted in bad faith and sold the whole interest in the slave, or sold his own interest fraudulently with a view to his being taken out of the State

or to some person, who, he knew or had reason to believe, would take him out of the State.

4. If the slave, though sold, should die during the life of the tenant for life, or during that time should become deteriorated in value, the remainderman in the former case can claim nothing, and in the latter only the value at the death of the tenant for life

This cause, having been set for hearing, was removed by consent from the Court of Equity of BLADEN, at Spring Term, 1844, to the Supreme Court.

The bill sets forth that Joseph Kemp died in the year 1821, having first made and published in writing a last will and testament, which was duly admitted to probate by the proper authority, and the executors therein having refused to qualify as such, William Kemp was appointed administrator with the will annexed. In the said will the testator bequeathed as follows: "I give and bequeath to my son William Kemp my negroes Dorcas and Ruth during his natural life, and at his death to his oldest lawful son if he arrive at the age of maturity, but if he should have no son, or he should not arrive to full age, in that case said negroes Dorcas and Ruth with increase to be equally divided between my two sons John (234) and D. W. Kemp." The bill then states that this bequest was assented to by the administrator with the will annexed, and he took possession of the said negroes as a legatee. The bill sets forth that John and D. W. Kemp died during the lifetime of the tenant for life, and that the plaintiff was duly appointed his representative; that William Kemp is dead and the defendant is his executor duly appointed; and that said William during his lifetime sold several of the negroes who were of the increase of the said Ruth and Dorcas, some of whom were carried out of the State and are in possession of persons unknown to the plaintiff; that the legacy to the said John Kemp and D. W. Kemp was a vested remainder, and upon their death carried their interest in the said slaves to their personal representatives. The bill then prays that the defendant may be decreed to deliver over to the plaintiff the whole of the negroes embraced in the said bequest, as the personal representative of the said John and D. W. Kemp, and to account with him for the negroes sold, together with their increase since said sales by the said William Kemp, his testator, and to account with him for their hires, and for general relief.

The defendant by his answer contends that the bequest to John and D. W. Kemp lapsed into the estate of Joseph Kemp, the original testator, from the fact that they died in the lifetime of the tenant for life, and admits that William never had a son, and died as set forth in the bill, and that he is the

executor of his will; he further admits that the plaintiff is the rightful representative of John and D. W. Kemp, and that William Kemp during his life sold several of the negroes descendants of the original stock.

Strange for the plaintiff.
Winslow for the defendant.

NASH, J. The principal question presented in this case was substantially decided by this Court in *Lewis v. Smith*, 20 N. C., 471. The parties then were the same (235) as in this case, except that, being at law, the plaintiff sued as administrator with the will annexed of Joseph Kemp alone, and the decision was upon the same clause of Joseph Kemp's will. In that case the Court ruled that the plaintiff could not recover, because the assent of William Kemp to the legacy for life was an assent to the ulterior limitations over to John and D. W. Kemp. The legacy to John and D. W. Kemp, after the life estate given to William Kemp, was a vested legacy, subject to be divested by the birth to William of a son, and that son's attaining the age of twenty-one. William Kemp died without having any son, and of course the legacy to John and D. W. Kemp was not disturbed. If a legacy once vests, though liable to be divested on a contingency, it can not be divested unless the contingency does happen, and, upon the death of the remainderman, passes to his representative. 1 Mad. ch. 16; 3 Meriv., 343; *Harrison v. Freeman*, 5 Ves., 207; *Smither v. Willock*, 9 Ves., 234. We think therefore that the plaintiff is entitled to relief, but not to the particular relief he seeks. In all cases of a tenancy for life with remainder over, the remainderman is entitled to the aid of a court of chancery to prevent or restrain waste, and if the tenant for life of personal property aliens it fraudulently, he in remainder may either pursue the specific property in the hands of the alienee, or may by a bill in equity claim from the estate of the tenant for life redress for the injury sustained from him. We do not doubt that the tenant for life of personalties may rightfully sell his interest in them, and that his vendee will, by such sale, acquire in the property sold the same interest as his vendor had, and when the tenant for life does so sell, the person in remainder has no claim upon the property itself, during the existence of the life estate, and can only ask the aid of a court of equity to the securing of it, and if it is destroyed his remedy is gone. He has no claim against the estate of the tenant for life; he has done only what

the law allowed him to do. If, however, the tenant for life act in bad faith and sells the whole interest in the chattel, or sells it to a person for the purpose of being carried out of the State or to one who he knows will do so, upon his (236) death his estate will be answerable to him in remainder for the value of the chattel sold, to be estimated at the time of the sale, together with interest from the death of the tenant for life. If, however, the chattel sold, a negro for instance, has died during the life of the tenant for life, we hold that the remainderman has no claim for its value upon the estate of the tenant for life. The latter was entitled to the use during his life, and the remainderman was only entitled after his use ceased. So if the chattel has become, by lapse of time or some inevitable cause, deteriorated before the life estate falls in, the remainderman is entitled only to that which remains, and the value in that case would be estimated at the time of the death of the tenant for life, with interest from that time.

The plaintiff is entitled to a decree for such of the slaves in the possession of the defendant, as are of the original stock or their increase, together with their heirs since the death of William Kemp. It is referred to the master to take an account of the other negroes that were sold by William Kemp. He will enquire and report, whether William Kemp in selling the said negroes disposed only of his life estate, or whether he sold them out and out, or any of them, or whether he sold them, or any of them with a view that they should be carried beyond the limit of this State, or whether he sold them, or any of them, to persons he knew or had reason to believe would carry them beyond the limits of the State. The master will report the sums for which the estate of William Kemp ought to be answerable to the plaintiff for any such sales, upon the principles herein declared.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Hampton v. Bonbury, 55 N. C., 340; *Isler v. Isler*, 88 N. C., 579.

(237)

FRAZIER and KINGSBURY *v.* TIPPOO S. BROWNLOW et al.

Property in the hands of a trustee, for the sole and separate use of a *feme covert* and subject to her absolute disposition, will be held liable in a Court of Equity for any debts she may contract, with an understanding express or implied, that they are to be paid out of such property.

This cause, having been set for hearing, was transmitted by consent from the Court of Equity for HALIFAX, at the Spring Term, 1844, to the Supreme Court.

The following are the facts disclosed by the pleadings:

Mrs. Martha M. R. Brownlow, being seized in fee of two tracts of land situate on Roanoke, in the counties of Halifax and Northampton, intermarried with Tippoo S. Brownlow, by whom she had issue. Brownlow, the husband, became involved in debt, and, indeed, insolvent; and his estate in the lands was sold on execution, and bought by William W. Williams, a friend of Mrs. Brownlow. William leased the land for five years to one Clanton at a yearly rent of $200, and then, by indenture bearing date 9 August, 1827, he conveyed the said lands and the reversion and the rents accruing on the said lease to Mark H. Pettway, his heirs and assigns, to have and to hold during the natural life of the said Tippoo S. Brownlow, in trust, that the said Pettway should receive the said rents and the profits of the said lands and pay them to the said Martha M. R. Brownlow, to her sole and separate use, free and discharged from any control or claim of her said husband, during the natural life of her, the said Martha, and upon further trust, after the death of the said Martha, to convey by proper assurances the said lands to such person or persons as the said Martha M. R. Brownlow might by any writing, witnessed by two witnesses, appoint, and, in default of such appointment, to convey the same to all the children of Mrs. Brownlow that should be living at her death.

(238) Pettway, the trustee, received the rents and profits of the lands up to 1833, and applied them, according to the terms of the deed, by either paying them over to Mrs. Brownlow, for the support of herself, her husband and their children, or by investing by her directions a part thereof in the purchase of slaves, which were conveyed to Pettway as a trustee, likewise, to Mrs. Brownlow to her sole and separate use.

In 1833, by an arrangement between the persons concerned, the lands above mentioned were sold and conveyed in fee, and the proceeds invested in other land, which was conveyed to William B. Lockhart in fee, as a trustee for Mrs. Brownlow, and to her separate use and subject to her appointment as therein stated.

In 1838, and prior thereto, the present plaintiffs kept a retail store from which Mrs. Brownlow obtained the necessaries for herself and family; and on 7 November, 1838, she came to a settlement with the plaintiffs, gave to them her bond for a balance of $283.48, payable on 1 January, 1840, with interest thereon from 1 January, 1839. Just below the bond and on the same sheet of paper the following memoranda were at the same time made.

"The above bond is given Frazier & Kingsbury for articles they furnished me for the use of myself and family, and in case it is not paid when it becomes due, then it is my wish and desire that Mark H. Pettway, to whom property is conveyed for my use and benefit, should sell so much of the same as will pay the said debt and interest; this being and shall be a sufficient order to my trustee for the same, this 7 November, 1838.

(Signed.) M. M. R. BROWNLOW."

"I as trustee for Mrs. Brownlow have consented to her giving the above order. 7 November, 1838. M. H. PETTWAY.

On 14 July, 1840, Mrs. Brownlow paid on her bond the sum of $150; and 17 May, 1841, the further sum of $25. In October, 1843, the plaintiffs filed their bill against Mr. Pettway, Mrs. Brownlow and her husband, praying for (239) the satisfaction of their debt and costs out of the trust property in the hands of Pettway.

The defendants admit that the slaves held by Pettway are of value sufficient to answer the plaintiff's demand; which they also admit to be just, and which Mrs. Brownlow says, she intends to pay as soon as she can raise the money. But they submit that the debt is not sufficiently charged on the wife's separate estate, and further, that the negroes themselves can not be sold for the payment thereof, but are to go over, under the deed, as a part of the capital—the profits of them only being applicable from time to time to the satisfaction of the plaintiffs.

Purnell for the plaintiffs.
Badger for the defendants..

RUFFIN, C. J. There has been a diversity of opinion, as to the right and power of a married woman to charge her general specialty debts on her separate property, or to dispose of such property, when the settlement designates a particular mode of conveyance or appointment, by any other mode than the one specified. Some have supposed that every security given by a

feme covert, having separate property, is to be considered as given with a view to her separate estate, because in that way only can it have any effect. Some also have thought that, as a married woman, in respect of her separate property, is in a court of equity regarded as a *feme sole,* the general right of disposition, as the owner of the property, authorizes her to convey or charge the estate by any instrument or means not positively forbidden in the settlement. But whatever doubts have been entertained on those points, they can not affect the present case; in which those questions do not arise. The deed before us, although it provides how Mrs. Brownlow may appoint the estate itself to go after her death, does not designate the manner of charging or disposing of the profits arising in her lifetime, which are given to her absolutely. She has, therefore, an unrestricted authority to charge them with her (240) debt by any instrument or means which distinctly denotes her intention to do so.

In *Hulme v. Tenant,* 1 Bro. C. C., 16, lands were settled in trust, that the trustees receive and pay the rents and profits to the wife to her separate use, and convey the estate themselves, as she, by will, or deed executed in the presence of two witnesses, should appoint, and in default of appointment, to her heirs. The wife and husband joined in a bond, and afterwards she borrowed a further sum, and then gave her own bond for the whole, amounting to £180. The creditor filed his bill for payment out of the separate estate, and *Lord Thurlow,* without deciding upon the liability of the estates themselves, declared the rents liable to the satisfaction of the debt. In coming to this conclusion *Lord Thurlow* reasoned to a great degree, as if he thought the *feme covert,* in respect to the rents, when they arose, as her separate personal property, competent to act in all respects as if she were sole; and, therefore, that her bond, as a general engagement, bound that property. That has been confidently questioned, and in *Sperling v. Rockford,* 8 Ves., 164, and *Jones v. Harris,* 9 Ves., *Lord Eldon* approves of the decree, not upon that reasoning, but on the ground that the intention to contract with reference to the separate estate of the wife was to be implied from the circumstances of her joining the husband in one bond and giving another solely. And he lays down the doctrine, which seems to have been generally adopted in succeeding cases, that the separate property is liable only to a person "contracting with her, not as a married woman merely, but as a married woman having a separate estate." In other words the engagement must be contracted in reference to the separate property, either express

or presumptive. All admit that, if clearly so contracted, in reference to the separate property of the *feme covert* and upon the faith of it, her engagements must be answered out of her separate personal property and out of the profits, at least, of her separate real estate.

Such is our case, for the intention to make Mrs. Brownlow's separate property, held by Mr. Pettway as (241) her trustee, liable was declared in writing at the time of giving the bond, and, therefore, making part of the contract, and is admitted in the answer.

Mrs. Brownlow's children have no interest in the slaves, but they belong exclusively to her. The rents of the land in her time were hers, as her part of the benefit of the gift. She could dispose of them as she pleased, either by spending them in living, or in the purchase of property, to the use of another or to her own separate use. She chose the last, and the slaves thus purchased are, consequently liable for the plaintiff's debts. Indeed, those slaves were the fund, in reference to which, directly, the contract was made, for the land itself had before been sold, and the slaves alone were then held by Mr. Pettway as trustee. It is admitted that they are of value sufficient to satisfy the plaintiff's demand, and the costs of this suit; and, therefore, it must be referred to the Clerk to compute the principal money and interest due to the plaintiff, and to ascertain the costs of this suit, and upon the coming in of the report, there must be a decree that, unless Mrs. Brownlow should in some reasonable time pay the sum so found due to the plaintiffs and their costs, Mr. Pettway shall raise the same out of the said trust of negroes by the sale of one or more of them and pay the same to the plaintiffs, or into court for them, on or before the first day of the next term of this Court.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Harris v. Harris, 42 N. C., 116; *Knox v. Jordan*, 58 N. C., 176, 177; *Rogers v. Hinton*, 62 N. C., 106-7; *Withers v. Sparrow*, 66 N. C., 138; *Harris v. Jenkins*, 72 N. C., 185; *Pippen v. Wesson*, 74 N. C., 442; *Hardy v. Holly*, 84 N. C., 667; *Kemp v. Kemp*, 85 N. C., 497; *Alexander v. Davis*, 102 N. C., 20; *Flaum v. Wallace*, 103 N. C., 306-11-12; *Sanderlin v. Sanderlin*, 122 N. C., 3; *Vann v. Edwards*, 135 N. C., 673; *Cameron v. Hicks*, 141 N. C., 24.

(242) WILLIAM A. WHITFIELD *v.* JOHN B. HURST.

1. The will of a married woman can not be made available, as a will, in equity, without having been first established as a testamentary instrument in the Court of Probate.
2. After such probate, the Court of Equity is still to see that the instrument is of that kind, by which the *feme covert* can dispose of her property.
3. A Court of Equity has no right to instruct the Court of Probate as to the proper construction to be put upon marriage articles, and whether by them the *feme covert* is or is not authorized to make a will.
4. The course in the Court of Probate is, where the wife assumes the right to make a will, and the right is questionable, to pronounce for the will on the proof of the *factum*, and leave it to the Court of Equity to determine definitely, whether she has such an interest or authority as she could dispose of or execute by will.
5. When, before such probate, a bill is brought to enforce the alleged will, it must be dismissed; and the Court will not hold it up, to give the party an opportunity of propounding the will in the Court of Probate.

This cause, having been set for hearing, at the Spring Term, 1844, of WAYNE Court of Equity, was transmitted by consent to the Supreme Court.

The following are the material facts of the case:

The defendant and Sarah B. Whitfield, a widow, being about to intermarry, entered into articles on 6 April, 1826, and were then married. The bill charges, that according to the true construction of the articles, a separate estate in her property, consisting of a number of slaves and other things, was secured to Mrs. Hurst, with certain benefits from a part of the income of the property to the husband during the marriage, and that the wife had the right of disposition by will or otherwise, after the coverture. Or, if such be not the construction of the articles, as drawn, the bill charges that such was the intention of the parties, and that the articles failed to ex-
(243) press the same through mistake or through the fault of the defendant, who undertook to have them properly drawn.

In July, 1839, Mrs. Hurst executed an instrument purporting to be a will made under a power in her marriage articles, in which she gave to her son, the present plaintiff, several negroes specified, and gives the residue of her estate to her husband, and appointed him and another, executors. She died early in the year 1840, and in August of that year, the defendant and the other person having refused the office of executor,

the plaintiff propounded the instrument as his mother's will, when the defendant opposed the probate, and an issue of *devisavit vel non* was made up. On the trial the defendant insisted that his wife had no right to dispose of the negroes after her death, as the articles only secured to her a separate estate during her life and no longer, and conferred on her no power to bequeath or convey them afterwards; and the Court having so decided, the plaintiff withdrew the instrument and then filed this bill, in which he prays that the articles may be executed according to the true meaning, or, if necessary, that they may be reformed so as to be made conformable to the intention of the parties as before stated, and the defendant held to be a trustee for the plaintiff, and compelled to deliver and convey the slaves so bequeathed to the plaintiff and account for the profits.

The answer states that the parties did not mean to restrain or encroach on the marital rights of the defendant, except by securing for the wife a certain and adequate maintenance during her life, and therefore the articles gave her a separate estate for that period; but that it was not intended she should have the slaves absolutely as her separate property, or should have any power or disposition over them by will. The answer insists that the articles as drawn, accord entirely with the agreement of the parties, and that they were read and perfectly understood by his wife before she executed them.

The articles are proved by the subscribing witness, and exhibited, and the instrument, alleged to be a will, is proved to be all in the handwriting of Mrs. Hurst, but no account is given of its being deposited with any person (244) or found among her valuable papers or effects. A number of depositions were taken, as to the declarations of the parties before and after the marriage, as to their intentions in regard to the form and meaning of the marriage article. But as the decision of the cause does not turn on them, it is not thought of any consequence to notice them.

Badger, J. H. Bryan and Mordecai for the plaintiff.
Henry and Iredell for the defendant.

RUFFIN, C. J. It is now settled beyond doubt that the will of a married woman can not be rendered available as a will in equity without being first established as a testamentary instrument in the court of probate. Note to *Bailey v. Stubington*, 2 Lee Eq., 537; *Douglass v. Cooper*, 3 Mylne & Keene, 378; *Newlin v. Freeman*, 23 N. C., 514. The court of equity is concluded by the decision of the court of probate, that the

instrument is or is not a will, because upon that question the court of probate is in every case the exclusive judge. The court of equity can no more be called on to construe and enforce the will of a *feme covert* before probate, than the will of any other person. After probate, indeed, the court of equity is still to see if the instrument is of that kind by which the *feme covert* can dispose of the property.

But it is said that it is the province of this Court to construe the articles, and therefore that it ought to make a declaration; that under them or the original agreement, Mrs. Hurst had the right to make a will, in order to establish that right to the court of probate. We, however, think otherwise. This Court has no power to instruct a court of probate upon that point; for it necessarily enters into the inquiry, whether the instrument is a will, since, unless she have a separate estate or a power of appointment by will, a feme covert can not make a will. Each court must therefore act for itself, as it is entirely competent to do. The course in the courts of probate is
(245) indeed settled, when the wife assumes the right to make a will and the right is questionable and doubtful, to pronounce for the will, on proof of the *factum*, and leave it to the court of equity, as a court of construction and disposal, to determine definitely whether she had such an interest or authority as she could dispose of or execute by will. *Braham v. Burchell*, 3 Addam, 243. Therefore, before the Court can take a step towards the relief of the plaintiff, he must come here with a probate of this paper as a will.

But it was further said that the cause should stand over to allow time to procure a probate, as was done in *Ross v. Ewer*, 3 Atk., 160. Leave was given in that case, because the doctrine touching the separate estates of married women and wills by them had not then been so thoroughly considered, and the proper proceedings settled, as it has since been. There has been no doubt upon the law of the case for a long time past; and, therefore, the party ought to have taken the right way at first. Besides the plaintiff made an effort, and the court of probate in the first instance, in effect, pronounced against the instrument, and the plaintiff abandoned it without carrying the question to a higher court. If the plaintiff should still think it worth his while, he may yet endeavor to get a probate; and if he should succeed, he will then have matter for a bill to which the present decree will be no bar.

PER CURIAM. BILL DISMISSED.

Cited: Rogers v. Hinton, 63 N. C., 83.

(246)

WILLIAM COLTRAINE, Admr., etc., *v.* ENNOLDS CAUSEY et al.

Where a bill is filed by an administrator for the purpose of setting aside a deed executed by his intestate, on the ground that it was given to defraud creditors, he is estopped from shewing that it was fraudulent, although he alleges that he was himself one of the creditors intended to be defrauded.

This cause, having been set for hearing, was transmitted from RANDOLPH Court of Equity, at Spring Term, 1844, by consent of parties to the Supreme Court.

The bill states that John Coltraine had executed to William Coltraine (the plaintiff) four several bonds of $500 each; that he the said William Coltraine purchased of Manlove A. Causey a tract of land at the price of $2,000, and paid the purchase-money, by endorsing to him the aforesaid four several bonds; that the said Manlove A. Causey, being greatly indebted, and much harassed with *ca. sa.'s* by his creditors, with a view to defraud his aforesaid creditors, did, without any *bona fide* consideration, assign the aforesaid four bonds which he thus held on John Coltraine, to the defendant Ennolds Causey, under a secret trust that they should hold the proceeds of the same for the benefit of the assignor, his wife and children. The bill further states that Manlove A. Causey died in September, 1840, and that the plaintiff administered on his estate. Upon the coming in of the answer of Ennolds Causey, in which he stated that only two of the bonds had been assigned to him, and that the other two had been assigned to Levin Kirkman, the plaintiff, amended his bill, and therein alleged that the said other two bonds were in the hands and custody of Jane S. Causey, the widow of Manlove Causey, and of Levin Kirkman, the father of said Jane S. for safe keeping for the use of said Manlove or his representatives, and to be delivered when they should be demanded; and further, that, if the said two bonds were endorsed by said Manlove to the said (247) Levin, the endorsement was without consideration, and in trust for said Manlove; or that, if the same were upon consideration, that it was a security for the payment of some inconsiderable sum of money due, or alleged to be due, from the said Manlove to the said Levin, or some other person. The prayer of the bill is, that the defendants respectively be decreed to surrender the aforesaid several bonds to the plaintiff, as administrator of Manlove A. Causey, in order that the proceeds may be held by him, when collected, as assets for the benefit of the creditors of his intestate, and for general relief. The

defendant Kirkman, in his answer, says that he was a creditor, by open account, of M. A. Causey, to the amount of $446.32 1-2 cents; and that one John Kirkman was another creditor by bond for $20; that M. A. Causey assigned to him as collateral security for those debts two of the said bonds mentioned in the bill, due December, 1843 and 1844, to collect and pay the said two debts. He submits to account, and pay to the plaintiff, as the administrator, the balance of the said two bonds, after deducting the aforesaid claims. Ennolds Causey, the other defendant, in his answer says that he is a *bona fide* assignee of the plaintiff's intestate of the other two bonds mentioned in the bill. But he now insists, that if he was to be considered an assignee of the said bonds upon the terms mentioned in the bill, still a decree ought not to be rendered against him in favor of the plaintiff, and he moved the Court to dismiss the bill as to him.

No counsel for the plaintiff.
Mendenhall & Morehead for the defendants.

DANIEL, J. It is very certain, that if the assignment to E. Causey of the said two bonds by M. A. Causey, was for the purpose stated in the plaintiff's bill, to wit, to hinder, delay and defraud the said M. A. Causey's creditors, and also enable him by fraud to get the benefit of the insolvent act, it was nevertheless both in law and equity a good and effectual
(248) transfer as against the assignor and his representatives, although it does not appear that he did take the oath of insolvency; for it, by force of the statute, was *only void* against the creditors of the assignor, Rev. Stat., Ch. 50, sec. 1. The plaintiff, although he alleges in his bill that he is a creditor, nevertheless sues as the administrator of M. A. Causey, deceased, and not as a creditor. He therefore stands here in no better situation as to these bonds than his intestate would, if he were now alive, and the plaintiff in the case. The bill must be dismissed as to E. Causey and Jane S. Causey. And there will be a decree for an account against Kirkman.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Burton v. Farinholt, 86 N. C., 266.

JOHN PAXTON *v.* AMBROSE M. RHEA, Executor, et al.

A being entitled to one-sixth of certain undivided negroes, and B to two-sixths of the same, it was agreed between them by parol, in the year 1803, that if A would permit B to use and enjoy his one-sixth during B's lifetime, A should be entitled at B's death to the whole of the three-sixths. B accordingly kept A's one-sixth till his death: *Held*, that this was a valid contract—that, being executory, A did not convey an absolute interest in his one-sixth to B by giving him a life-estate, and that suit being brought within three years after B's death, the statute of limitations was no bar to the recovery.

This cause was removed for hearing to the Supreme Court from MECKLENBURG Court of Equity, at Spring Term, 1844.

The following facts were disclosed by the pleadings and proofs:

The plaintiff's father, James Paxton, soon after making his will and leaving his wife, Mary Paxton, executrix, died in 1781. By the said will the testator bequeathed as follows: "I give and bequeath to my child that is not born my sorrel mare, together with the first child that the negro (249) wench Sive does have, if she should have any." The testator's wife, Mary, was, within six months from his death, delivered of a son, who was named James Paxton, Jr.; the slave Sive, about the same time, was delivered of a female child named Rose. Mary Paxton, the widow, afterwards married Reuben Boswell, and by him had three children, Ambrose, Mary and Esther. In the year 1798, James Paxton, Jr., died intestate, and without issue. His next of kin were his mother, the plaintiff, Esther the wife of Alexander Gray, and the three children, then living, of Reuben Boswell by his mother. Alexander Gray administered on the estate of James Paxton, Jr. Reuben Boswell in right of his wife was entitled to one-sixth of the personal estate of James Paxton, Jr., and he purchased Alexander Gray's one-sixth in right of his wife Esther. The plaintiff was entitled to one-sixth as his share. The bill states that Reuben Boswell, in 1803, entered into an agreement with the plaintiff, that if he would not then claim a division of the slaves, Rose and her increase, but would let him, Boswell, have the plaintiff's undivided interest in the said slaves, for and during the lives of himself and wife (the plaintiff's mother), that, then he, the plaintiff might have and hold in his own right the interest in three-sixths of the said slaves. The agreement, the bill states, was firmly entered into by the plaintiff and Boswell. And that Boswell, up to his death, always ad-

mitted it to be obligatory on him; and that he, Boswell, took and kept possession of Rose and her increase, under the said agreement; that the plaintiff, several years ago, moved to the western country, and Boswell, who resided in Mecklenburg County in this State, in the month of August, in 1836, made his will and bequeathed the whole of the said three-sixths which he then held in Rose and her increase to his grand-children, with a view to defraud the plaintiff, as the bill states, of his rights, and soon after died; that Rhea, who had married one of Boswell's daughters, was left the executor; that he (250) qualified and took possession of the slaves Rose and her increase, and has delivered them over to the other defendants, the legatees under R. Boswell's will. The bill prays that the said slaves be decreed to be brought forth by the defendant and divided, and that three-sixths of the same may be decreed to him; and there is a prayer for general relief. The defendants have answered and (except Gray) admit all the allegations in the bill, except the agreement therein stated to have been made by Reuben Boswell, with the plaintiff and with Alexander Gray. The defendant A. Gray admits the allegations *in toto* in the bill. The other defendants deny the said agreement, and pray that the plaintiff be put to full proof it. They also allege that, if such an agreement had ever been made, it amounted to a conveyance for life of the slaves Rose and her children, and that, in law, would be a conveyance of the entire interest; as a remainder in slaves at that time could not have been created by contract. The defendants insist, likewise, that if the charges in the bill be true, the plaintiff had his remedy at law. The defendants, except Gray, state in their answer that Reuben Boswell had possession of Rose and her increase for near forty years, claiming them as his own property. They insist on length of time, and also on the statute of limitations. They also insist that all and every kind of demand, which the plaintiff ever had against Reuben Boswell was discharged by the sale to the plaintiff of a slave by the name of Alexander, in 1823. There was a replication to the answer, and depositions being taken, the cause was set for hearing.

Osborne for the plaintiffs.
Alexander & Caldwell for the defendants.

DANIEL, J. The parties have taken depositions and set down the cause for a hearing, and it now comes on to a hearing. The testimony of Robert Porter expressly establishes the agreement as stated in the bill, to wit, that Boswell and his wife were to

have the slave Rose and her increase during their lives, and then the said slaves were to be the property of the (251) plaintiff. This testimony of Porter is supported by that of John Stile and John Jones, who depose that they had frequently heard R. Boswell say, that after the death of his wife and himself, Rose and her increase would be the property of the plaintiff—and that he, Boswell, made such remarks within a year or so before he died. And there is no evidence in the cause that Boswell ever set up an absolute right to Rose and her children. There is proof that Boswell had, in 1803, purchased Alexander Gray's share, and that he then agreed, in consideration, that the plaintiff then let Boswell have the plaintiff's share for the life of Boswell and his wife, or the survivor of them; that after the death of himself and wife, Rose and her increase should be the property of the plaintiff. *Secondly*, the contract between the plaintiff and Boswell, being executory in its nature, are not to be completely executed until the death of Boswell and his wife, the rule of law insisted on by the defendants does not apply, to wit, that a conveyance for life of a chattel was a conveyance of the whole interest. *Thirdly*, the act of limitations does not bar, as it appears that R. Boswell made his will in August, 1836; and this bill was filed at February Term, 1839. *Fourthly*, we are of the opinion that the slave Alexander was conveyed in 1823 by Boswell to the plaintiff, but not in satisfaction of the demand now set up by the bill. Alexander was not one of the children of Rose, nor had the plaintiff then any right to press this demand upon Boswell, and there is proof by the witness, Porter, that the plaintiff and a slave he owned named Sambo, before he left this State for Tennessee, worked for Boswell for several years. There is a witness (A. Spratt) examined for the defendants (his daughter married the son of R. Boswell, and his children are some of the legatees, under R. Boswell's will of these very slaves), he says that he and the plaintiff had a conversation, when he came in from Tennessee to commence this suit, and he asked the plaintiff if he had not received a negro boy of A. Boswell in satisfaction of this claim, the plaintiff (252) said that he had got a negro boy in satisfaction of his claim, as the witness understood. And he further said that he would then have signed any instrument of writing, if any had been drawn up, in full satisfaction of his claim against Reuben Boswell, and that he never would have troubled the defendants if he had not been urged to it by his son and son-in-law. We think that this witness must be mistaken, if he understood the claim spoken of by the plaintiff in that conversation, to be this

claim; for in the year 1823, when the boy was purchased for $300, as is expressed in the bill of sale, the one-half of the price of Rose and her increase (upwards of four) must have been considerably larger—the plaintiff, if he talked of a claim at all, must have meant some claim he then had a right to urge against Boswell; there is no writing here exhibited evidencing exactly what claim was paid when the boy Alexander was sold. And upon the other point in his evidence, it may be true, that the plaintiff, an old man residing in Tennessee, said that he would not have brought this suit in equity, if he had not been urged to it by his son and son-inlaw; but that does not prove that he had no right to commence such a suit. He did commence the suit—and all the circumstances shew that Pratt has intentionally misstated this conversation, or that he is mistaken in what was said and meant at the time by the plaintiff. There must, therefore, be a decree declaring that the plaintiff is entitled under the agreement between him and Boswell to one-half of the slave Rose and her increase, and to have partition made of them; and there must be a decree that the slaves be produced by the parties in whose possession they are, for the purpose of partition, and that a division be made accordingly; and for an account of the profits, with just allowances to the several defendants, if the plaintiff choses to have such account.

PER CURIAM. DECREED ACCORDINGLY.

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(253)

ROBERT B. OVERBY et al. v. ROBERT HARRIS.

1. The act of 1806, Rev. Stat., ch. 37, sec. 17, excludes all parol proof of the gift of a slave, of every sort, or to any purpose, in the Courts of Equity, as well as the Courts of Law.
2. Therefore, where the plaintiff alleged that the defendant had assured him, and also told divers other persons, that he had given, though not by deed certain slaves to his son; that upon the faith of these representations, the plaintiffs, who were merchants, gave credit to the son to a large amount, and took as a security, a deed in trust, on said negroes, executed by the son; that the son afterwards died insolvent, and praying that, unless the defendant would pay their demand, the slaves should be surrendered up to satisfy the said trust: *Held*, that such parol evidence of a gift from the father to the son, could not be received for any purpose, that the slaves still belonged to the defendant, and were not subject to the debts of the son, and that therefore the bill must be dismissed. If the plaintiff was deceived by fraudulent representations of the defendant, his remedy was at law.

This cause was transmitted to the Supreme Court, by consent of parties, from GRANVILLE Court of Equity, at Spring Term, 1844.

The bill states that two of the plaintiffs, Overby and Gregory, were partners in a country store in Granville County, in which one Lawson Harris, the son of the defendant, Robert Harris, had dealings before and in 1840. That before that time the defendant had put into his son's possession several slaves, whose names are stated, which the son claimed and used as his own, keeping them in his service and hiring them out and applying the hires to his use. That the defendant also spoke of the slaves in the family, among his neighbors, to constables, and others having demands against his son, as his son's property; that the firm having trusted Lawson Harris to a considerable extent, one of them inquired of the defendant, whether the said Lawson could be safely trusted, and was in- (254) formed by him that he was very good for all his contracts to the amount of $2,000, and that the property he had in his possession belonged to him, including the said slaves; that upon the faith of his representation, the firm went on to give credit to Lawson Harris until the debt amounted to about $801.58, on 23 June, 1840, when Lawson Harris gave several bonds for different sums, making in the whole the said sum. On 9 July, 1840, Lawson Harris, for the purpose of securing the payment of the bonds to those plaintiffs, conveyed the said negroes to the other plaintiff, David J. Williamson, in trust, to sell and pay the debt; and afterwards, upon hearing of the deed, and that the trustee was about selling the negroes, Robert Harris set up a claim to them upon the ground that he had never conveyed them to his son, and he took them into his own possession, and refused to let Wilkerson have them for the purpose of selling them.

The bill states that the plaintiffs can not establish that Robert Harris did make a conveyance of the slaves to his son. But it insists that, but for the belief of the plaintiffs founded on the conduct and representations of the defendant, that he had given them to him, the plaintiffs would not have trusted his son. And it states further that Lawson Harris has since died intestate, and also insolvent, unless these slaves belonged to him, and that there has been no administration on his estate, and that the plaintiffs will lose their debt, unless they can recover it from the defendant Robert Harris, or raise it out of the slaves conveyed in the deed to Wilkerson. The prayer is, that the rights of the plaintiffs may be declared, their debts ascertained, and the slaves declared to be the property of Law-

son Harris, as between the plaintiff and the defendant, to the extent of satisfying the debt. That the deed of trust may be set up and declared an effectual security in this Court against the defendant, and that he may be decreed to pay the plaintiff's debt, or surrender the slaves to be sold for that purpose.

The answer states many circumstances for suspecting (255) the capacity of Lawson Harris to make a conveyance, and tending to show imposition on him in contracting the debts and giving the securities for it. The answer admits, that several years before 1840, the defendant had put four negroes into his son's possession; but it denies that he executed a conveyance for them, or ever intended to give them. It states that the defendant put his son into possession of a plantation and these negroes, and allowed him the use and profits of them for the support of his son and his family; and that the defendant believes that it was generally understood in the neighborhood, that he had neither given the land nor the negroes, but only lent them. He denies encouraging Overby and Gregory to trust his son, or that he ever gave them to understand, that he had conveyed the negroes to his son, or that the son had a right to sell or mortgage them, though he often said in the neighborhood that he gave his son the use of the property and allowed him to hire the negroes.

Replication was filed to the answers, and numerous depositions having been taken, the cause was set for hearing.

Badger for the plaintiffs.
E. G. Reade and *Iredell* for the defendant.

RUFFIN, C. J. The plaintiffs have endeavored to establish their debt, and to prove declarations of the defendant to several persons, importing that he had given the negroes and land to his son, or that they were his. No particular communication appears between the plaintiffs and the defendant, except that it is stated by a person, who was a clerk for the plaintiffs, that in 1837 he informed the defendant that his employers were not willing to trust his son further without inquiring from him what he was worth, and whether the negroes in his possession were his, and that the defendant replied that he had given the negroes to his son, and that he might tell Overby and Gregory that his son was as good for $1,500 as anybody. On the contrary, other persons living in the neighborhood state (256) that it was clearly understood, generally, that Lawson Harris only had the use of the land and negroes as a loan, at the pleasure of the father.

If the cause turned, in our opinion, on the question of fact, whether the defendant had spoken in general conversations among his neighbors, of the negroes as his son's, and as having been given to him by the defendant, or even that he had given Overby and Harris so to understand, the Court might upon the preponderance of evidence, declare the fact affirmatively, though, certainly, there is a good deal of evidence both ways. But we do not deem it material to weigh the evidence upon those points, because, admitting those facts to be for the plaintiffs, our opinion is still against them upon the law.

The frame of the bill, in itself, admits that the defendant never did give, that is to say, never did convey the slaves to his son, and that, as we conceive, is fatal to the plaintiffs' case. The plaintiffs do not claim as purchasers of these particular slaves in the presence, or with the knowledge and concurrence of the defendant. In that case he would be relieved, not upon the ground that the defendant was estopped by his fraud to deny that he had given the negroes to his son, but upon the ground that he had induced the plaintiffs to part from their money under a belief that they were getting a good title, derived by their vendor by purchase or otherwise from the defendant or some other person. But this bill is founded simply upon the oral statements of the defendant to sundry witnesses and to the plaintiffs that he had given the negroes to the son. To sustain it, would be directly in the teeth of the Act of 1806. For after all, what do the defendant's declarations amount to, but this, that he had made a parol gift to his son, whereby he became the owner of the slaves and might be dealt with as such? Upon the face of such declarations they disprove any gift, that is, any valid gift, and therefore, in legal contemplation, they could not be deceptive. In truth, however, such declarations can not be received at all, to establish the gift. The Act of 1806 says no gifts of slaves shall be available, either in law or equity, unless made in writing, signed (257) by the donor, attested, proved and registered, with a proviso as to advancements to a child who remains in possession until the death of the parent intestate. The act begins by declaring that it was made "for the prevention of frauds." On whom? On the alleged donor and his creditors, of course; for it can be on no one else. And the method taken to prevent the fraud, then in the view of the Legislature, is by requiring all gifts of slaves to be in writing. Consequently it excludes all parol proof of every sort, or to any purpose. The very object is to protect the pretended donor from the fraud of having his slaves taken from him by gifts, proved by witnesses

from his word of mouth at the time of the alleged gift, or in the form of subsequent acknowledgments. But it is said to be a gross fraud in the defendant, thus to deceive persons induced to deal with the son, both by his apparent ownership and by the defendant's declarations. Certainly the possession of personal property is calculated to produce the belief of a title in the possessor; and upon that idea, and the fraud that might be practiced upon creditors and purchasers from the possessor, was founded the old rule laid down by the courts, that a gift was to be presumed, when a father put slaves or other chattels into the possession of a child. *Carter v. Rutland*, 2 N. C., 97. It was admitted in the argument that the Act of 1806 has abrogated this rule of the common law, implying a gift for the protection of creditors and purchasers. But it was contended, that active means, taken by the father and son to impress the public with a belief of a gift and to induce particular persons to trust the son, stand on a different footing; and should induce the court of equity to hold, that, although as between the father and son the negroes belong to the former, yet as between the father and son's creditors they belong to the son. Such false representations may subject the party to an action at law for the deceit, as in *Pasley v. Freeman*, 3 Term, 51, as to which it would be the same, whether the false representation was as to the son's owning particular prop-
(258) erty, or generally, being trustworthy. But in reference to a change of the property in the slaves or creating a charge on them in equity for any purpose, the position is erroneous. For, if we are to receive parol evidence of this sort to establish a gift or *quasi* gift, we must likewise listen to similar evidence on the other side; so as to bring about all the danger of fraud and perjury the Legislature meant to exclude by requiring a writing. This case is an example of that danger. The answer positively denies the gift, or that the defendant ever stated that he made a gift, and there is much testimony on both sides as to the defendant's conduct and the neighborhood belief. And the most express declarations carry the case only a step beyond the presumption from long possession. So that it can not be said that creditors are more likely to be deceived in one way than the other. The Court has repeatedly expressed its sense of the hardships, nay, mischiefs, arising in this respect out of the Act of 1806, and supposed it would be better to hold the title to be with the possessor after a certain time, even if there were the most express evidence of a loan. For it is much more probable that purchasers or creditors of the child will be defrauded by being deceived from the possession and

apparent ownership of the child, than that the parent will have a gift falsely proved on him. For the Act of 1806 allows the parent to place slaves in the possession of the child, to be his, at his election, as an advancement *ab initio*, and yet says that it shall create no presumption of a gift, and that nothing shall be evidence of such gift but a writing executed according to the statute. Although this is a fraud in fact, the Court can not hold it to be so in law; because, as was said in *Hill v. Hughes*, 18 N. C., 336, it would be a manifest departure from the province of the judiciary to treat, as a fraud, what a statute expressly sanctions. So, in *Hamlin v. Alston*, 18 N. C., 479, and in *Alston v. Hamlin*, 19 N. C., 118, we held that the notion of a parol estoppel upon a supposed donor was inconsistent with the Act of 1806, for that, by requiring a writing, it necessarily avoids everything in parol. Therefore for the purpose of charging these slaves with the plaintiff's debts, they (259) must establish an actual gift to the son, through the legal medium of a written conveyance. There is no such thing as a gift to the son, in the contemplation of the court of equity, merely for the purpose of paying the plaintiffs, and not for the purposes of the son; for a gift of a slave to any purpose can only be in writing. We can not hear parol evidence of a gift at all. The act would be entirely evaded by allowing creditors to set up this right, for, in effect, it would reinstate parol gifts, not indeed, at law, but in equity. If the plaintiffs have any right in the slaves, let them assert it at law. If the defendant committed a fraud on the plaintiffs in inducing them to trust his son, he is liable personally for it at law. But the plaintiffs have no right to satisfaction, attaching to those slaves more than to the land; therefore they can not claim to have them sold or delivered to them.

PER CURIAM. BILL DISMISSED WITH COSTS.

LAWSON HENDERSON et al. *v.* ROBERT H. BURTON'S Executor.

1. In the course of legal administration, a judgment *quando* does not alter priorities between debts so as to give one of inferior dignity, on which such judgment has been taken, a preference before a debt of higher dignity not sued on.
2. But where the debts are of the same dignity, that, on which there is a judgment *quando*, must be preferred to that on which there is no judgment.

3. Since the act of 1830, Rev. Stat., ch. 43, sec. 15, lands devised to be sold for the payment of debts are equitable assets, and the proceeds are therefore to be applied to the payment of debts as, and in the order, the will directs, and, if there be not a sufficiency to pay all the debts of a particular class, they are to be applied to all the debts of that class *pari passu*, whether due by bond, simple contract or otherwise, saving the preferences that may arise from specific liens for any particular debts.

This was an appeal from certain interlocutory orders made in the Court of Equity of LINCOLN, at Spring Term, 1844.

The following statement of facts was presented by (260) the record transmitted to this Court:

Robert H. Burton, largely indebted, chiefly on responsibilities for other persons who failed, died in September, 1841, having previously made his will, in which he appointed Mrs. Burton and two other persons, executrix and executors, and bequeathed and devised to the same persons all his estate, real and personal, in trust, to sell the same or such part as should be necessary, and as the executors might choose, at private or public sale, for cash or on credit, and out of the proceeds to pay all the testator's debts; but in making those payments the executors are to pay the testator's own debts first, that is, such as he contracted on his own account and not as surety for others, in preference to such as he owed as surety for any other person; and among the testator's own debts, those, for which any person was liable as the surety for the testator, are preferred before those for which no one was surety; and after discharging all the debts of those descriptions to pay the debts for which the testator was liable as surety for any other person or persons. The present bill was filed by several bond creditors of the testator, on behalf of themselves and all the other creditors, against the executors and devisees, praying for an account of the real and personal estate and for payment of their debts according to the several rights of the respective creditors, legal and equitable. At September, 1842, the defendants having answered there was the usual decree for the defendants to account and the creditors to prove their debts before the master, and for an injunction against any creditor proceeding further at law. At March, 1844, a report was made by the master, and thereon and on the motion of some of the creditors the Court made the following interlocutory orders, with which some of the party were dissatisfied and by leave appealed.

"It appearing to the Court, by the report of the master, that the judgments existing against the testator at his death, and the absolute judgments rendered against the executors themselves have been fully paid out of the assets of the testa-

tor; and it also appearing that there are judgments (261) *quando* to a large amount on specialties, which remain unpaid; and it being suggested that the executors will receive funds before the next term of the court, which, not being sufficient to satisfy all the said judgments *quando*, the executors are nevertheless desirous to apply under the direction of the Court; and it also appearing that one Henry Fullenwider, was on 21 January, 1841, very largely indebted to many persons, and that the testator was the surety for the said Fullenwider for a considerable number of those debts, and that for the purpose of saving harmless the testator and also securing the payment of all his said debts in the order therein mentioned, the said Fullenwider on the day aforesaid executed to B. Shipp, Esq., a conveyance for a large estate, consisting of a number of slaves and divers valuable tracts of land, and iron factories, in trust to sell the same for cash or on a credit and appropriate the proceeds of sale to the payment in the first place of the said debts (which are scheduled) for which the testator, Burton, was surety or for which any other person was surety; and secondly, to the payment of all other debts which the said Fullenwider owed; and thirdly, to pay the surplus, if any, to the said Fullenwider himself; and it further appearing that Mr. Shipp sold the said estates at public sale, and at that sale the testator, Burton, became a purchaser to the value of $32,000, including a place called the High Shoals Factory at the price of $21,200; that the said Burton paid for all his purchases except the High Shoals, and that for the price thereof he gave his bond to the said Shipp, dated 7 June, 1841, and payable twelve months after date, and that, thereon, by agreement between the said Burton and Shipp, the said Burton made sundry payments by discharging so much of Fullenwider's debts that were secured by said deed, and that by such payments the sum due on the bond for $21,200, was reduced to $16,946.45, for which a judgment *quando* was taken against the executors in June, 1843, which is one of the judgments *quando* before mentioned. And it further appearing that there is a large number of debts outstanding due by bonds of the testator, on which no suits have been brought. And thereupon, further instructions to the master being (262) prayed as to the proper appropriation of the personal and real estates, and also a declaration upon which the executors might with safety apply the funds they expected shortly to receive, the Court ordered: *First*, that the defendants should pay such funds as might come to their hands to the judgments *quando* in proportion to their respective amounts. *Secondly*,

that for the said balance due to Mr. Shipp, he had a lien as vendor for the same on the High Shoals, and was entitled to be paid thereout in preference to any other creditor of the testator. *Thirdly,* that the payments *quando* on specialties were to be paid before the specialties not sued on; and lastly, that the real estate or its proceeds were legal real assets and not equitable assets." Several persons concerned in interest, being dissatisfied with the decree, by several appeals brought the whole decree before the Supreme Court.

J. H. Bryan, Osborne & Alexander for the plaintiffs.
Badger, Caldwell, Boyden & Iredell for the defendant.

RUFFIN, C. J. The facts are so imperfectly stated, that we fear we shall be able to render much less assistance to the parties, towards ascertaining their rights, than they expected from their appeals. The report of the master is not before us, except as certain facts of it appear in substance in the decree, nor does it appear whether Mr. Shipp had conveyed the High Shoals to the testator or not, nor whether "the funds" which the executors suggested they expected shortly to receive and wished to pay out without delay, were the proceeds of the personal or real property, nor does it appear whether the judgments *quando* were rendered at the same or different periods, or whether the suits, in which they were rendered, were brought at the same or different periods. It is therefore impossible for the Court to say distinctly whether there is or is not error in the several parts of the decree. We can only say, as to the first declaration made in the decree, upon the equality of the right of payment of the creditors by judgments *quando,* that it is certainly correct in respect to the proceeds of the real
(263) estate, as we hold that to be equitable assets; and may be correct and probably is correct in respect to the personal estate, because no fact is stated upon which one of those judgment creditors can be entitled to a preference over another. But as the Court can not, for the last reason, see whether that part of the decree is correct, as between the parties in this cause, the Court can neither affirm nor reverse it, but must remand the case. Then the decree can be reheard on petition, and then the facts may be more distinctly set forth, or by consent, the question may be sent up again, if the parties should still wish the opinion of this Court on it.

We are of opinion, upon the second point, that Mr. Shipp is not entitled to a preference of payment out of the High Shoals property; that is to say, upon the supposition that he conveyed

it to Burton in his lifetime. The question of a vendor's equitable lien for the purchase-money of land conveyed by him, we consider settled by the decision at this term of *Womble v. Battle, ante*, 182. We know of but one way, if any, in which that fund could be reached, so as to give Mr. Shipp the benefit of it, upon the ground of the purchase-money having a preferable right of satisfaction before Burton's general creditors. That is by considering the conveyance by Mr. Shipp to Mr. Burton—if one was made—before the payment of the purchase-money and without any personal security for it, except the purchaser's own bond, as an act of such gross negligence or inexcusable want of caution, as to amount to a breach of trust in Mr. Shipp, and, of course, in Burton, who concurred in it by taking the conveyance. Therefore, probably, the creditors of Fullenwider, who are secured in the deed, or Fullenwider himself (who has an interest that his debts should be paid as well as in the clear surplus), might, upon their bill against Shipp and Burton, or by coming in before the Master, be allowed to follow the property; and if so, that would relieve Shipp to the amount of what they might get out of the property. That, however, is the province of those persons, and Mr. Shipp can not claim it. Looking at Shipp merely as the vendor of land belonging to him, we think he has no lien, after a conveyance. It is probable he did convey; else, he would not (264) apply in the way he has. But as the fact is not stated, we can not assume it, and must, therefore, send the cause back undecided upon this point also.

Upon the third point, the Court is of opinion that the decree is correct, as far as it affects the personal estate; but incorrect as far as respects the fund arising from the real estate, as the latter is assets in equity only, and is, therefore, applicable to all debts alike, or, in this case, to the debts in the order directed in the testator's will. In the course of legal administration, and in that way the personal estate here is to be applied, a judgment of assets *in futuro* does not alter the priority between debts so as to give one of inferior dignity, on which such a judgment has been taken, a prefence before a debt of higher dignity, not sued on. This was held in *Roundtree v. Sawyer*, 15 N. C., 44. An executor may, of course, pay such a judgment on a simple contract before notice of a bond debt, as he might do, if the simple contract debt had not been reduced to judgment. But the judgment *quando* does not fix the executor with assets, but assumes that he had fully administered up to the time of judgment; and, therefore, when called on to account upon a *scire facias* for assets thereafter come to hand, the ex-

ecutor may show that there were none applicable to that debt, because debts of higher dignity existed. But between debts of the same dignity, here being, originally, all specialties, we think the law is, that the diligent creditor shall be preferred. It seems to have been so considered by *Lord Hardwick,* in *Ashby v. Pocock,* 3 Atk., 308. Although the judgment is not absolute, yet the suit gives notice of the debt and the judgment ascertains it, and the executor would not be at liberty after suit to make a voluntary payment to a creditor in equal degree, who had not sued. Hence the bond outstanding could not protect the executor in a *scire facias* on the judgment; while to a suit on the bond he might plead the prior suit on bond and judgment therefor. Such seems to be the understanding of the text-writers upon this question. Wms. Exrs., 659; Ram. on Assets, (265) 290, and the authorities cited by him.

We have already said that we hold the real estate to be equitable assets, and that the decree was wrong in declaring them legal. Under the Act of 1789, as we held in *Dunn v. Keeling,* 13 N. C., 283, the land would be undoubtedly legal assets. For that act makes all devises void against creditors, as the first section of the St. 3 and 4. W. and M., ch. 14, had in England done; but it did not take out of the operation of its enactment a devise in trust or charge for the payment of debts, as by the provision in the fourth section of the English Statute had been done. It followed necessarily that all devises were here alike void against creditors, and they might proceed against the devisees in actions at law for their debts. It might seem strange to hold that a devise for the very purpose of paying debts should be held to be fraudulent as to the creditors. So it would be, if it were not declared fraudulent and void upon the intent of the testator in making the gift, as a deed by a debtor is by the St., 13 Eliz., when made with the intent to defeat creditors. But the acts of 1789, and of 3 and 4 W. & M. do not make devises void upon the intent, or as a fact to be found by the Court or jury, but upon the fact of the devise, since, at common law, that defeated the creditor, with whatever intent it might have been made. Therefore, under these acts, lands devised to one for his own benefit are clearly liable to the testotor's creditors, although, in the same will the testator made, otherwise, an ample provision for the payment of his debts. The question of intent, therefore, was immaterial; and the general enactment made a devise even for payment of debts void. But the English statute, by that proviso, took such a devise out of the operation of the previous clause; and consequently left it, as if the statute had not been passed. Therefore, in England

a creditor could not sue such a devisee. If he did, the latter would plead that the devise to him was in trust for payment of debts; which, being a protection by statute, the Court was obliged to take notice of and sustain. There, therefore, the creditor was obliged to go into equity and obtain satisfaction upon the footing of the trust for him created in the will. (266) By omitting that proviso in our act, all that was reversed here. For when a creditor sued the devisee here, it would be no answer to the action to plead that he was a devisee in trust for others, although those others might be honest creditors. The creditor would reply, there is nothing to help you in the statute, which, for my purpose, has made the gift to you void. We were obliged then to hold lands thus devised to be legal real assets. It would seem that the Legislature could mean nothing less by omitting the proviso of the act of W. & M.; which might have been from an intention to prevent debtors from creating preferences by their wills, and to make the land liable to debts according to legal priorities. That was the necessary construction of the act; and the Court could not avoid it, thought not insensible of the great confusion and immense losses that would almost certainly arise out of it. For it might defeat the most reasonable provisions for the testator's family, and for the payment of his debt. For example, an heir or devisee can not, after process sued, alien; so that one obstinate creditor, by bringing suit, might prevent a sale for a fair price, and sacrifice a large estate by a sale for cash on execution for a trifling debt. And, at all events, instead of selling the land by the executor or trustee and applying the whole proceeds to the satisfaction of creditors, in nine cases out of ten, more of it would be sunk in costs of suits at law than came to the hands of the creditors themselves. Then as to the preferences the debtors may create, that raises no objection. It can not be a fraud in a person to devote his property to the payment of just debts, although he may not have enough to pay all his creditors. Upon that ground preferences by deed are upheld. But if preferences be wrong, they are less likely to be made by will than by deed. Men may expect favors from particular creditors for whose benefit they make deeds; but they are past that before their wills can go into effect, and, therefore, will not be much inclined to make unjust preferences by will, or, indeed, to make any. It is almost universal, when lands are devised in trust for creditors, that it is for all creditors; though, sometimes, (267) certainly, it is otherwise, and perhaps ought to be. It is highly probable that views of this kind, when the subject

was brought to the notice of the Legislature by *Dunn v. Keeling*, 13 N. C., 283, decided in June, 1830, induced that body, in the act of that year, ch. 36, to enact here, in substance, the proviso contained in the St. 3 and 4 W. & M. It is now found in Rev. St., c. 43, s. 15, and provides that "nothing in that act contained shall impair or in any way affect the right of any person to whom land may be devised in trust, or to whom power to sell land shall be given, by any will, for the purpose of paying the debts of the testator, to dispose of the same, *in order to carry into effect the intention of the testator.*"

The effect of that provision undoubtedly is, to sustain against general creditors that devise for the sake of the purpose of it, namely, the trust for creditors, as far as it may be necessary for that purpose. Beyond that, perhaps, the residue of the land or its proceeds might be liable, as at law. But to the extent that the will raises a trust for creditors, clearly the land is no longer liable in an action at law, under the statute of fraudulent devises, but can be reached only in equity, upon the footing of the trust. Consequently, it is equitable assets; the distinction between them and legal assets being, that the one may be reached, at law, and the other only in equity. It was formerly doubted in England, whether, in some cases of devises or powers to executors to sell for payment of debts, the proceeds were not legal assets. But since the case of *Silk v. Prime*, 1 Bro. C. C., 138, it has been considered as settled in the English court of chancery, that in every case the assets are equitable. And recently the same doctrine has been held at law in the cases of *Clay v. Willis*, 1 B. & C., 364, and *Barker v. May*, 9 B. & C., 489.

What effect this will have on the rights of the parties to this suit we can not say, as the facts are not stated, so as to enable us to see the application of the rule. Therefore, we can only declare that the lands devised in the testator's will are (268) not legal assets, but equitable assets; as to which the general rule is, that they are to be applied to the payment of the debts, and as in the order the will directs, and that, if there be not a sufficiency to pay all the debts of a particular class, they are to be applied to all the debts of that class *pari passu*, whether due by bond, simple contract, or otherwise—saving, however, the preferences that may arise from specific liens for any particular debts.

PER CURIAM. ORDERED TO BE CERTIFIED ACCORDINGLY.

Cited: Simmons v. Spruill, 56 N. C., 12; *McLean v. Leach*, 68 N. C., 98; *Gaither v. Sain*, 91 N. C., 307.

RICHARD SMITH, Admr., etc., *v.* SAMUEL DOWNEY, Admr., etc.

1. A donation *causa mortis* can not be by deed, without delivery of the thing, even where the death of the party takes place.
2. Where there is no delivery of the thing, nor any intended to be made, nor any dominion over the thing intended to be parted with, by the donor during his life, the gift is not good as a donation *causa mortis*.
3. A donation *causa mortis* can not take effect, if the party recover from the illness under which he is then laboring.
4. Where A, expecting to die, endorsed upon a bond due to her for $900 that B was entitled to $600 out of it, but made no delivery of the bond, and afterwards recovered from her then illness: *Held*, that this was an invalid gift.
5. An administrator, who honestly defends a suit, is to be protected by the judgment obtained against him *per testes* and in *in invito*, although the claim, on which the judgment was founded, may have been unjust.
6. But where an administrator manages a suit against himself, is personally concerned in interest with the plaintiff and suffers a judgment to be obtained without the examination of any testimony, such judgment shall not be received as evidence that the debt was due and that he was bound to discharge it.

This cause, having been set for hearing, was transmitted by consent from the Court of Equity of GRANVILLE, at Fall Term, 1843, to the Supreme Court.

The facts alleged in the pleadings are as follows: (269)

The defendant is the administrator of Miss Ann Smith, deceased; and the bill was filed in September, 1842, by the plaintiff, as the administrator of Maurice Smith, the residuary legatee in her will, for an account of the estate and payment. It sets forth that the defendant pretends to have lent a small sum due to the plaintiff, and particularly, that he insists on a credit in his account for the sum of $1,044.35, as having been paid by him in discharge of a judgment recovered against him by Mrs. Ann A. Smith, administratrix of Alexander Smith, deceased. The bill charges that the judgment was recovered by collusion between the plaintiff in that suit and the defendant, for a sum not due, and without any real defense.

In support of the charge, the bill states that the residuary legatee and executor of the will proved it, and lived for several years thereafter in the immediate vicinity of Ann A. Smith and of the defendant, who was her general agent and son-in-law, and entitled to one-half of the personal estate of Alexander Smith, and that no suit was brought against the executor, or

claim for this debt preferred in his lifetime. That after the defendant obtained administration, he sued out a writ against himself in the name of his mother-in-law, Ann A. Smith, administratrix of Alexander Smith, returnable to a county court, and employed counsel for the plaintiff therein, and made no defense, but by a formal plea, which was intended only to give to the proceeding the appearance of an adversary suit, when in fact it was not, and that he permitted a verdict to be rendered against him without the examination of a witness, and upon a statement by the defendant himself, whereby this large sum was recovered, when no part was due. The bill further states that in fact the judgment was for the benefit of the defendant himself, although in the name of Mrs. Smith; for that he has never paid any part of it, but got a receipt therefor as having been paid into the Clerk's office, when in truth it was not, but Mrs. Smith gave her acquittance therefor without pay-
(270) ment, which the Clerk accepted as money, and for which he gave his receipt.

The answer insists on the correctness of an account, which the defendant had rendered to the plaintiff, but submits to an account in the cause. With respect to the item of $1,044.35, the answer states that in 1827, the testatrix, Miss Ann Smith, held a note of T. & H. Young for $900; and thereon was an endorsement, signed by the testatrix, in these words: "Six hundred dollars of the within for Alexander Smith"; and that a judgment was in that year obtained on the note, and upon the execution issued thereon, an endorsement appears that $600 dollars of the judgment was transferred to Alexander Smith. Alexander Smith was a brother of the testator, and died in December, 1827, intestate, leaving Sally P. Smith (the wife of the defendant) and Ann Smith, the younger, his only child, and a widow, Mrs. Ann A. Smith, the latter of whom administered on his estate. Soon afterwards, Ann, the daughter, also died intestate and without issue, being very young. The answer states that Young, the debtor, paid to Mrs. Smith, the administratrix of Alexander Smith, the sum of $139.25, on account of the debt; and that, after the death of Ann, the daughter, the testatrix, Miss Ann Smith professed much anxiety to have the sole control of the debt, as she was a relation and friend of Mr. Young, and wished to have the power of indulging him, and applied to Mrs. Ann A. Smith, and to the defendant, to give up their interest in the debt, and promised if they would do so that she would by her will make up the amount to the said Ann A. and Sally P.; and they agreed thereto, and by endorsement on the execution, Mrs. Ann A. Smith and the de-

fendant severally relinquished their claims to the testatrix, who, afterwards, received the whole debt, and in 1831, made her will and gave all her property to the plaintiff's intestate and other persons. The answer admits that no demand was made on M. Smith, the executor of the will, in his lifetime for the money, and states, as the reason therefor, that there was another subject of litigation between the said M. Smith and the defendant, in which the defendant expected a re- (271) covery against him, and expected in the settlement thereof to use this claim; that the said M. Smith died before that controversy terminated, and that then the defendant took administration on Ann Smith's estate, in order to get payment of the demand in question.

The answer further states that, after the defendant had administered, he took the advice of counsel, as to the manner in which the claim should be asserted, and was advised that an action should be brought in the name of Mrs. Ann A. Smith, as administratrix of Alexander Smith, against the defendant, as administrator of Miss Ann Smith, with the will annexed. The defendant admits that he was the agent of the plaintiff therein, and long had been, and that as such he retained counsel for her, but he states that he retained other counsel for himself. He also admits that the verdict passed without the examination of a witness; and he says that he stated the foregoing facts to his counsel, as being known to himself, and was advised that, as the right came within his own knowledge, it would be idle to examine witnesses to prove it; and that accordingly he allowed the judgment to be taken for the balance of the $600, and interest, after deducting the before mentioned sum of $139.25. The answer further admits that no money passed in settling the debt, but that Mrs. Smith, his mother-in-law, gave the defendant an order on the Clerk for the money, with which the defendant paid the debt, and then took the Clerk's receipt.

The answer then avers that, within the defendant's personal knowledge, the debt was justly due, and that in all the transactions before stated, he acted from pure motives, and with the sole purpose of doing what he knew to be just and equitable, and was advised to be legal. Upon the hearing, it was admitted by the defendant's counsel, that there must of course be a reference to state the administration accounts of the defendant. But each of the parties desired that the reference should be made with instructions as to the sum of $1,044.45, claimed as a credit for the judgment of Alexander (272) Smith's administration.

The defendant produced several depositions. The first was that of Dr. Graham, the minister, at the time of the congregation of which all those persons were members. He states that Miss Smith desired him to use his influence with Mr. Downey and Mrs. Smith, to induce them to relinquish their right in the bond of Young, and said, if they would, they should lose nothing by it; by which, he understood, that she intended to repay the amount in her will, though she did not say so. That argument he made to the other parties, and they did relinquish. The deposition of Mrs. Ann A. Smith states that she relinquished the claim to Miss Ann Smith, under a promise from her, that her brother, Alexander Smith's estate should not lose anything, and she wished the control of the debt, that she might indulge the debtor; that she understood Miss Smith to mean that she would at least compensate the estate in her will, and indeed, that she promised so to do, and had it not been for that, she would not have relinquished. She further states that Miss Smith in like manner applied to the defendant to relinquish, saying it would be no loss to him and his wife, and the defendant, after at first refusing, finally made a relinquishment.

John R. Hicks states that he advised the defendant to make the relinquishment desired by his aunt, because it would prevent an alienation of her affections from him, and, as he was a great favorite with her, the witness believed she would be sure to leave him a large portion of her estate; and the defndant always informd the witness that he made the relinquishment from the belief, that his aunt would more than compensate him therefor.

The deposition of James Beasley, a brother of Mrs. Ann A. Smith, states that in 1828 he lived with his sister, and had various conversations with Miss Smith and Mrs. Smith upon the subject of the death of Young. Miss Smith stated, that at the time she made the memorandum on the note in favor (273) of Alexander Smith, she was sick and expected to die, and that she wished to give her brother Alexander that much more than she had given him in her will, and that she regarded that transfer as a part of her will; and then, at the conversations with the witness, wished to make a different disposition of her property. In all her conversations heard by this witness, Miss Smith distinctly claimed the whole bond as her property, and she said Mrs. Smith and Downey, by refusing to relinquish the bond to her, would act morally wrong, and be endeavoring to prevent her from doing as she pleased with her own property. Miss Smith mentioned to the witness that

she did not wish Mrs. Smith to relinquish the claim to the debt without consulting her friends and being sensible of the propriety of it, and she requested the witness to give his advice to his sister on the subject, remarking also, that if she and the defendant did not relinquish, they would lose more than they would gain. He says that he held conversations with his sister accordingly, in which he advised her not to relinquish the bond, but she informed him afterwards that she had relinquished her interest, as she wished to keep peace in the family, and if Ann chose to take back what she had once given, she could live without it. The witness understood that Miss Smith then had a will, in which she gave to Mrs. Smith and Mr. Downey, more than the bond of Young, and he supposed that by the expression, "they would lose more than they would gain," she meant, that if they did not relinquish, she would alter her will and cut them off.

The deposition of Mrs. Mary Smith, on the part of the plaintiff, states that Miss Ann Smith resided with her brother Alexander, as a member of his family; that in the latter part of 1825, she was extremely ill, and expected by herself and her friends to die; that the witness was her relation, and attended on her as one of her nurses in her illness; that Alexander Smith had been her agent in her business with Young, who was then expected to become insolvent, and that some apprehension was expressed by some person, that, if she (274) died, and Young should fail, her brother Alexander might be held liable to her estate upon some ground, which the witness did not understand. This witness states that, Miss Smith then said, she would provide against that, and directed the witness to bring her the bond, which she did, and Miss Smith wrote on it the memorandum in favor of her brother, and then the bond was put back. Miss Smith said if she died, she wished her brother Alexander to have that much of the bond, but not otherwise, as she did not intend to give her property away in her lifetime. The witness further states that Mrs. Ann A. Smith, and all the family of Alexander Smith, knew that the memorandum had been made on the bond, and the purpose for which it was made, as it has been already stated by the witness.

The deposition of James W. Smith, a brother of the testator in behalf of the plaintiff, states that he frequently heard her say after recovery that she had transferred $600 of Young's bond to Alexander Smith, by making a memorandum on it, when she expected daily to die, and that she made the transfer with the intention that her brother Alexander should have that

sum in case she should then die; that she recovered, and her brother never claimed any part of the bond, but that after his death, his widow and Downey claimed it, and that she refused to let them have it, because she had received nothing for it, and had intended the benefit to Alexander, only in case of her death in that illness, and that Mrs. Ann A. Smith and Downey well knew that, and all the facts of the transaction. That she claimed the bond as her own, and had collected the money and kept it as her own.

Saunders for the plaintiff.
Badger for the defendant.

RUFFIN, C. J. The answer and the deposition of Mrs. Ann A. Smith, in support of it, state the original transaction out of which this controversy arose, as if the right of property in Young's bond vested in Alexander Smith, at least to the (275) amount of $600. Upon that supposition they hold out that the surrender of their interest in the bond was a valuable consideration for the promise, which, they say, was made to them by the testatrix, to leave them an equal sum in her will.

Upon that statement even it would be a question whether what Miss Smith said was intended, or was understood by the other parties as a promise, amounting to a binding contract, or was not merely a vague declaration of an intended bounty, on which the other parties, from their relation to this single lady, and their intimate association with her, relied for a more valuable acquisition than the bond itself, or her promise, strictly speaking, to leave them as much at her death.

The latter is rendered extremely probable, as the truth of the case, from the testimony of Dr. Graham and Mrs. Hicks; especially the latter, who says that the defendant expected a large part of his aunt's estate by her will, unless he alienated her affection. In that belief, and with a view to please and keep in with her, he probably made the relinquishment, and, if so, he ought not to set up the expectation of a bounty on his part, as an obligatory contract on the part of the aunt. Had such a contract been intended, it can hardly be supposed that some distinct and permanent evidence of it by a written memorandum, would not have been framed at the time, or, at least, a disinterested witness called to it.

But if it were otherwise, and the most precise parol promise had been proved to have been made by Miss Smith, it would not have supported the action the defendant brought against

himself in the name of his mother-in-law, if it had been duly defended. It is a mistake to suppose that any right in the debt is vested in Alexander Smith, in virtue of the memorandum, on the bond or on the execution. As to the latter, nothing appears except the statement in the answer, that on the execution an endorsement appears, "that $600 of the judgment was transferred to Alexander Smith."

Even if that be true, it would transfer no legal interest, nor be obligatory in equity, as it would be an (276) assignment without consideration. But a clear answer is, that the answer does not intimate that the entry on the execution was the act of Miss Smith, or by her authority. Of course, then, that amounts to nothing. Then, as to the memorandum on the bond itself. It is clear from the testimony of Mrs. Mary Smith, who was present when it was made, took the bond out of the repository of the testatrix for the purpose, and replaced it after the memorandum was made, that it was without any valuable consideration, and, at most, was intended as a donation *causa mortis*, and that even that failed from an intrinsic defect in point of law, and also from the recovery of the donor from the illness in which the gift was made. The better opinion seems to be, that *donatio causa mortis* can not be by deed, without delivery of the thing, even where the death of the party takes place; because the instrument is to be considered testamentary, and may be proved as such, and delivery is indispensable, either actual or implied, to complete such a gift. Williams Exrs., 504. 1 Roper Leg., 12. Here the gift was certainly not intended to take effect, but on condition of the death of the donor, and in the illness under which she then labored. For that reason it failed. *Tate v. Hilbart*, 2 Ves. Jr., 120. The donor did not part with the dominion over the bond, nor did she intend to do so during her life. For that reason, also, this gift failed, as a *donatio causa mortis*. *Bunn v. Markham*, 7 Taunt., 231. There a person wrote on the parcels of property, the names of the persons for whom they were intended, and requested a person to see them delivered to the donees, from which appeared a clear intention that they should pass; yet it was held that they did not, for want of delivery. There was no delivery to this donee, nor to any person for him, nor was any intended in the lifetime of the donor, but only after her death. Therefore, also, the gift could not be valid. In truth, then, the bond in question belonged wholly to Miss Smith without the assent of Mrs. Smith and the defendant, and to use the expression of Miss Smith, as proved by Mrs. Smith, those persons have lost nothing by their (277)

relinquishment, although they got no legacy from Miss Smith. If she made such a promise as the defendant alleges, it was clearly upon an ignorance and mistake of her rights, and without the color of a consideration; for she was, without any relinquishment from the other parties, the undoubted absolute owner of the bond in equity as well as at law. Such is the law, upon the supposition, that Mrs. Mary Smith gives a true account of the transaction. That she does, no doubt can be entertained. She had full knowledge of the transaction throughout; and there is no attempt to discredit or contradict her. She is supported by the evidence of James W. Smith, as to the statements of it by the testatrix herself, and, most especially, by the testimony of Beasley, a brother of Mrs. Ann A. Smith, and a witness for the defendant, who states that the testatrix constantly claimed the bond as her own, on the ground that she had only given it upon the condition of her death in that illness, and that Mrs. Smith knew it, and the latter made no denial of the statement, but afterwards told her brother that she had relinquished, contrary to his advice, because she could live without it, if the testatrix chose to take back what she had once given. Now it is remarkable, that, although Mrs. Mary Smith states positively that Mrs. Ann A. Smith and all the family knew the purpose of making the memorandum on the bond, and although Beasley states Miss Smith's declarations on that point, and Mrs. Ann A. Smith's admissions of their truth, yet neither the defendant in the answer, nor Mrs. Ann A. Smith, in her deposition, gives the least intimation of the occasion or intention of making that transfer, as they call it. Neither of them ventures on the slightest denial of the testimony of the other witnesses, as to those facts, but are themselves entirely silent on them. We can not but impute their silence to their inability to deny those facts; since it can not be supposed that they deemed them unimportant, or had forgotten them after they had entered so frequently into the discussions between the parties, touching their rights to the bond. The Court

(278) holds, therefore, that the bond of Young, or any interest in it, never belonged to Alexander Smith or any other person but the testatrix; and, consequently, that the supposed promise of the testatrix, on which the action was brought against the defendant, if such promise was made, was not sufficient to sustain the action, but was merely void.

It is, however, said that the defendant is protected by the judgment against him. Certainly, an administrator who honestly defended a suit is to be protected by the judgment obtained against him *per testes* and *in invito*, although the

claim, on which the judgment was founded, may have been unjust.

For the administrator has done all he could to have justice done to the estate, and was compelled to pay the debt.

It may likewise be true, that an administrator may be justified by allowing a judgment to pass against him upon his own knowledge, since the creditor might compel a discovery by filing a bill against him. But that must necessarily be, when the debt is due to another person and not to a trustee for the administrator, and when the conduct of the administrator was *bona fide,* and not with the view of giving to the claim the form of a judgment, merely for the purpose of concluding or embarrassing those to whom he is to account for the estate.

Even in that case the judgment is, to some extent, but a formality; for the administrator might as well pay on his personal knowledge, without suit, as to let judgment go on his personal knowledge without the oath of a witness or even of himself. It is certainly better in such a case to leave the creditor to his bill for a discovery. But neither of those favorable views can be taken of the conduct of this defendant in procuring judgment against him. The claim appears to be not only unfounded, but without a plausible color. The defendant himself was the beneficial owner or claimant of half of it, and probably the whole. The answer states that the defendant administered to enable him to collect the claim, and the first act of his administration was to consult counsel how the claim might be asserted against him. In this he cer- (279) tainly was not acting for the estate, but for himself and the other pretended creditor. He brought the action and managed the case against himself, and for his own benefit, and let the verdict go upon his own statement of the facts to the jury, not on oath, which we must suppose to be like that contained in his answer; and that in it was kept back a most important fact, which was within the knowledge of both the plaintiff and himself; that is to say, that the supposed transfer of the bond to Alexander Smith had been made on condition of the death of Miss Smith of the disorder then existing, and, therefore, was no gift at all. We can not but deem the whole proceeding collusive. Even that is not the correct expression; for the defendant seems to have been the sole actor, and might as well claim credit for a judgment in a suit brought in his own name against himself as administrator. A judgment thus suffered, is a mere empty form, and does not establish the debt. It was incumbent on the defendant to establish it, therefore, by proof in this cause. That he has attempted, by giving his own testi-

mony in his answer, and that of the other claimant, Mrs. Smith. But neither of them states a case in which there appears any valid gift of the bond, and it turns out, on other proof, that in fact and law, there was no gift of it, and that both of these persons must have known. Whether they purposely suppress the fact, it is not for us to say. It is enough that they knew the facts, and that, if they had been fully laid before the counsel and the jury, no such verdict could have been rendered, as that of which the defendant claims the benefit. In taking the accounts, therefore, the Court directs that the master shall not credit the defendant with the said sum of $1,044.75, or any part thereof, or with any sum paid as costs or charges touching the same.

PER CURIAM. ORDERED ACCORDINGLY.

Cited: Thompson v. Badham, 70 N. C., 145; *Pate v. Oliver,* 104 N. C., 465.

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(280)

REDDING J. HAWKINS et al. *v.* EDWARD HALL et al.

1. If a debtor, who has been arrested upon a *ca. sa.*, obtain his liberty by the act or consent of the creditor, the debt is satisfied in law, and the creditor can no longer proceed against that person or any other for the same debt.
2. But where the person arrested has given bond under the Insolvent Debtor's Act, appears at court accordingly, is surrendered by his sureties, and is permitted afterwards to go at large, simply because no judgment of imprisonment is prayed against him, the debt is not discharged.

This was an appeal from an interlocutory order, made by his Honor, Judge *Pearson,* at the Spring Term, 1844, of HALIFAX Court of Equity, dissolving the injunction which had been granted in this case.

The following facts were set forth in the pleadings:

James Halliday died intestate, and his widow, Ariadne, administered on his estate, and gave bond in the sum of $100,000, with Robert C. Bond, James Simmons, Joseph L. Simmons, John G. Purnell, George W. Gary, James Frazer, Redding J. Hawkins, Andrew Joyner and Michael Ferrell, her sureties. Afterwards the same Redding J. Hawkins and Mrs. Halliday intermarried. Hawkins and wife wasted the assets; and the

defendant Hall, a creditor of the intestate, instituted an action on the administration bond against the obligors therein, and at May term of Halifax court, 1843, he obtained judgment, to be discharged by the payment of $6,649, with interest and costs of suit.

At that time some of the sureties had failed and others were considered in doubtful circumstances. In consequence thereof, the defendant Ferrell, on behalf of the defendant Joyner, as well as himself, applied to the plaintiff's attorney to allow them to sue out a writ of *fieri facias* and have it levied so as might seem to them most likely to make them safe, or to make each surety pay his fair proportion. Thereupon the attorney of Mr. Hall gave to Ferrell a memorandum in writing, (281) authorizing him to apply to the Clerk for the execution, and place it in the sheriff's hands with directions from whom to collect and what property to levy on, unless control should be taken by the plaintiff. He was also directed to consult Colonel Joyner, or only proceed to secure a lien by the execution until time before court to sell. Afterwards the defendants Joyner and Ferrell, understanding that Hawkins had two bonds to the amount of $6,000, which he refused to transfer to the sureties to the administration bond, thought it best to have a *ca. sa.* sued out on the judgment, with a view of compelling Hawkins to surrender those bonds for the indenmity of the sureties, or, at least, to insert them in his schedule, if he attempted to obtain a discharge as an insolvent debtor. Accordingly, they, Joyner and Ferrell, without the knowledge of Hall or his attorney, sued out a *ca. sa.* and delivered it to the sheriff with instructions to serve it on Hawkins alone, and the sheriff arrested Hawkins, who entered into bond, with sureties, for his appearance at August term, 1843, to take the benefit of the act for the relief of insolvent debtors, and thereupon he was discharged out of custody. Hawkins filed a schedule, but omitted to give due notice to the creditors, so that, if the creditors had moved the Court therefor, he would have been put into close prison.

The bill was filed 31 October, 1843, by Hawkins and wife and all her sureties, except Ferrell and Joyner, against those two persons and Mr. Hall, and it charges, "that at August term, 1843, an arrangement was entered into by Hall, or by Joyner and Ferrell, or one of them, for him, and with the assent of Hall's attorney in the suit, by which Hawkins was discharged from the *ca. sa.* without taking the oath of insolvency. This arrangement was made by the plaintiff Hawkins, in proper person and his attorney on one side, and with the attorney of Hall

and Joyner on the other, the said Joyner seeming to have the control of the debt and threatening to oppose the discharge of Hawkins, unless he would come into the terms proposed by him. That pursuant to an agreement then made between
(282) those persons an entry was made on the minutes of the court, "that the schedule filed by the said Hawkins is withdrawn by leave of the Court. And the said Hawkins being in open court surrenders himself in discharge of his sureties; and therefore he, Hawkins, went at large, as has been agreed on." Afterwards a *fieri facias* was issued on the judgment by Mr. Hall, returnable to November term, which he was about serving; whereupon the present bill was filed upon the ground that Hawkins had been discharged from custody by the act and consent of the creditor, and that thereby the judgment was discharged both as to him and his sureties. The prayer is for a perpetual injunction.

The defendant Hall denies that he authorized any person to take out the *ca. sa.* or to proceed on it, or in any way sanctioned it, or made any agreement for the discharge of Hawkins. He admits that, with the view of raising, as far as could be done, an equal sum from each surety, his attorney authorized Ferrell and Joyner (who were wealthy men and each well able to pay the whole debt) to take a *fieri facias,* but that was all. He says, that at August court he made known to the parties, that he was not satisfied that a *ca. sa.* had been taken out, and would in no manner adopt the same; and that his attorney expressly stated to the attorney of Hawkins that, as he had no agency in issuing the writ, he could allow nothing to be done, whereby it could be implied that he assented to the discharge of Hawkins, or have more stated on the record than that, according to the fact, the schedule was withdrawn by direct application to the Court. He says his attorney did not pray Hawkins into custody, because he had given him no instructions to that effect, and had refused to adopt the *ca. sa.*

The answer of Joyner states that at August court Hawkins' attorney mentioned to him that Hawkins was in an unfortunate situation, as he had not given notice and might be sent to prison, and suggested that he would surrender his two bonds for $6,000, or so dispose of them that his sureties should have the benefit of them, to which the defendant replied that he had no desire to see Hawkins put in prison, and was will-
(283) ing that any proceeding might be had in court, which would relieve him from imprisonment, provided such proceeding would not discharge him and his sureties from the judgment. He denies that he agreed to the discharge of Haw-

kins upon any terms, nor did he claim to act upon any authority from Hall touching the execution, further than as such authority might be inferred from the attorney's instructions respecting a *fieri facias,* and says that for himself alone he expressed a willingness that Hawkins might not be imprisoned. But he denies that he came to any agreement for his discharge, or knew that he was not prayed in custody until some days afterwards. Ferrell denies that he knew of any agreement for the discharge of Hawkins, or of any of the proceedings at August court, until he heard of them after the court ended; expecting Joyner to attend to the interest of both of them.

Both Ferrell and Joyner admit that, subsequently, Hawkins did surrender the bonds for $6,000 for the benefit of the sureties. They also state that a suit was instituted by the only child of the intestate Haliday against Hawkins and wife for her share of the personal estate, viz, two-thirds thereof; and that the sureties attended to the same. And that, in order to have the benefit of the said judgment in taking the accounts of the administration in the suit of the daughter, as well as because Mr. Hall had met with difficulties and embarrassments in collecting his debt, owing to his wish to serve them, and the said Ferrell having taken out the *ca. sa.* they, the defendants Joyner and Ferrell did satisfy or secure to Mr. Hall the said debt and took an assignment of the judgment to a third person for their benefit, on 2 November, 1843. They state that subsequently, upon the taking of the accounts in the daughter's suit, the amount of the said judgment was credited to the administrator, and thereby enured to the benefit of the parties. Upon the coming in of the answers, the defendants moved to dissolve the injunction which had been granted on the bill; and the Court allowed the motion with costs; and also entered a decree on the injunction bond against the plaintiffs and their sureties in the bond, for the debt and costs at law, and the costs (284) in equity; from which his Honor allowed the plaintiffs to appeal to this Court.

Iredell for the plaintiffs.
Badger & B. F. Moore for the defendants.

RUFFIN, C. J. There is no doubt of the rule of law that a *capias ad satisfaciendum* executed is a satisfaction of the debt by force and act of law, unless in a few excepted cases. *Foster v. Jackson,* Hob., 25. If the debtor escape, or die in prison, or be discharged by act of law, as by an insolvent act, the debt is not discharged; but an action may be brought on the judg-

ment or process of execution issue thereon. So while the debtor's body is in execution, the creditor may doubtless proceed against other persons liable for the same debt or the same judgment or otherwise. But if the debtor obtain his liberty by the act or consent of the creditor, the debt is satisfied in law, and the creditor can no longer proceed against that person or any other for the same debt. *Bryan v. Simonton,* 8 N. C., 51.

It might, however, be questioned, whether that is a species of satisfaction, which equity would enforce; not being an actual satisfaction by judgment, but one *stricti juris* and therefore to be enforced at law. Still less would equity be inclined to grant relief upon this ground against the express agreement of the party himself, who was discharged, and where no injury has accrued to other persons bound for the money, but rather the contrary, in this case, as all the sureties got the benefit of the bonds for $6,000, and also the credit in the administration account for Hall's judgment, which now belongs to the defendants Joyner and Ferrell, or to a trustee for them. Therefore, admitting Hall to have adopted the *ca. sa.* by not having it set aside, and admitting Joyner to have made an agreement for the discharge of Hawkins in the manner represented in the bill, and that Hall assented thereto through Joyner or his own attorney, we should hesitate to take cognizance of the
(285) case here and whether it would not be our duty to leave the parties, who claim the advantage of the rule of law, to get it at law if they could.

But the Court is of opinion that this is not a case, in which the rule of law applies; for the discharge out of custody was by act of the debtor himself, by permission of the law, and not by act of the creditor. The bill is not filed upon any rights of the sureties to be relieved on the score of dealings between the creditor and the principal debtor, to the prejudice of the sureties. But the bill is founded exclusively upon the position, that in law Hawkins' discharge satisfied the judgment as to himself; consequently, as to the sureties also. Now, we think Hawkins is not discharged of the debt by what was done here. The act, Rev. Stat. c. 58, sec. 58, says that upon the debtor, taken upon a *ca. sa.,* tendering to the sheriff a bond as prescribed in the act, it shall be the duty of the sheriff to release him from custody. The discharge, then, from actual custody or imprisonment in fact, is the act of the law, or of the debtor himself under authority of law—consequently the creditor is still at liberty to pursue his remedy for his debt against any other person. It is true, the debtor, to obtain his liberation, is required to enter into bond with sureties, somewhat in the nature

of bail, for his appearance at court and abiding by the judgment of the Court. But there is nothing in the act which compels the creditor to pursue his remedy upon the bond taken by the sheriff. If the debtor should not appear or comply in other respects with the law, the plaintiff may, on motion, have judgment on the bond. But that must be only cumulative, for as the creditor has done nothing to destroy the security of his original judgment (which indeed may be against others), he is certainly at liberty to waive a judgment on the bond and keep that he first had, or perhaps insist on both. That being so, we can not conceive why, if the debtor should appear, the creditor should be obliged to pray him into custody again as in execution. It seems to us very much like the case of principal and bail. The latter may surrender the former after judgment against him as well as before, either to the sheriff in vacation or to the Court. If the surrender be to the sheriff, he must necessarily accept the principal in dis- (286) charge of the bail, and consequently he must detain him, as he has no authority from the creditor or the law to discharge him. But if the surrender be made to the Court in term time, then notice to the plaintiff is required, that he may pray the debtor into custody, and, without such prayer, the Court does not commit the debtor as in execution. Consequently he goes at large. But he does not go at large as having satisfied the debt by the release of his body by the creditor. For, although the creditor declined having him placed under actual imprisonment, he is at liberty afterwards to take his property or his body in execution. The provisions of this act are much the same. It gives authority to the sureties to surrender the principal, either to the sheriff or in open court. Upon his surrender to the sheriff, either by himself or his sureties, no doubt he must take him and keep him as upon the execution still in his hands. But upon his appearance or surrender in court, as in the case of bail, we see no reason for compelling the creditor again to take him into custody, as between themselves. It may be that the debtor's bail in the original action is discharged by the debtor's body having once been in execution or by his appearance in court in discharge of his sureties, both the last and first. But that is a different question from one, whether the judgment against the debtor himself is satisfied or extinguished merely by the creditor's declining to have him replaced into actual custody. There seems to be nothing in the reason of the thing why it should be so. For the idea at the common law is, that the creditor consents to an enlargement from actual imprisonment. Hence on the surrender in court by bail after

judgment, the custody being only that of the law and ideal, and not actual under the dominion of the officer of the law, the creditor allowing the debtor to go off, without taking him, is no discharge of the debt. So, it seems, it must be under this act. It is true, the act says, that if the debtor shall fail to answer on oath or to show that he has given notice, he "shall be deemed in custody of the sheriff." But that does not mean that he is so without notice to the sheriff, act
(287) of the creditor, or order of the Court. It is clear the sheriff is not to take notice of the debtor's being in court and having failed in the performance of the matters required of him. The Court is to judge of that, and thereupon make an order. Therefore the sentence goes on, after the words, "shall be deemed in custody of the sheriff," to add, "and the Court shall adjudge that he be imprisoned." But that is not an *ex officio* duty of the Court, for such acts are never enjoined in courts, since in controversies *inter partes,* courts do not proceed but upon the motion of one of the parties. Therefore, in such a case, although the debtor may not have given the notice for ten days, as required to enable him to take the oath of insolvency, the Court should yet require the debtor or his sureties to give the creditor notice of the fact of surrender or appearance, to enable the creditor to move for a commitment under the act. Then as the creditor may move for the debtor's imprisonment, so it follows that he is at liberty not to do so. By not doing so, he does the debtor no harm. He does not release him from imprisonment; but he only declines subjecting him to it. Indeed he could, not by his own act merely, place the debtor into custody, but could only procure an order for it. It might be refused by the Court, perhaps; thought that is not probable. But if the Court did order it, it would be a new imprisonment on that order, as in execution, and not under the execution on which the arrest was originally made. For, perhaps, that may have been returned, or may have been served by the sheriff of a different county. Our opinion, therefore, is that the judgment obtained by Mr. Hall is still in force.

It was, however, said for the applicants, that at all events the injunction should have been continued as to the aliquot parts of Joyner and Ferrell, as two of the sureties, inasmuch as they are now the owners of the judgment, in the view of this Court, according to their answer; and so we were inclined at first to think. For such would be the rule as between the sureties themselves; since, although some of them, who are plaintiffs, are said to be failing, yet the sureties, who are defend-
(288) ants, have a right now to consider them all solvent, they

being in fact made so, as to these parties and as to this suit, by all of them joining in this suit and in the bond with sureties given for the injunction. Still Joyner and Ferrell, as two of the sureties, ought to pay their several shares, taking all the sureties to be solvent, and the principal insolvent, and, therefore, it struck us, that as to two-ninths parts, the injunction should have been continued; for although Mr. Hall does not admit in his answer that he had assigned the judgment to a trustee for his co-defendants, and it was not absolutely necessary that he should have said anything of it, inasmuch as it is not stated in the bill, and indeed could not be, for it occurred since the bill was filed; yet the fact can hardly be doubted and might have been brought out from Mr. Hall himself by a supplemental charge; and in such case we would not be disposed to allow the money to be raised out of some of the sureties and *their* sureties for the benefit of Joyner and Ferrell, which they ought to pay themselves.

But in thus regarding the subject, we overlooked the important fact, that the sureties who are plaintiffs, have joined themselves in this case with Hawkins and his wife, who are the principal debtors, and are therefore bound to pay the whole debt to Hall or his assignee, without any contribution from Joyner and Ferrell. The injunction was properly dissolved *in toto* as to them as principals; and upon that dissolution, the other sureties, and the sureties for the injunction would all be alike liable on the injunction bond. In other words, all the original sureties and the new sureties to the injunction bond have by that instrument undertaken to answer for Hawkins and wife as well as for themselves, in this suit, and thereby to guarantee that they are solvent for the purpose of paying the judgment at law, if the injunction should be dissolved. Therefore, the whole decree was proper and should be affirmed with costs.

Cited: Daniel v. Joyner, post, 518; *Ferrall v. Brickell,* 27 N. C., 70; *Freeman v. Sisk,* 30 N. C., 214; *S. v. Simpson,* 46 N. C., 81.

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JOHN HALL *v.* NELSON HARRIS et al.

1. An execution binds equitable interests and rights of redemption of mortgages, only from the time of issuing of the execution, and not from its *teste*.
2. As against a judgment creditor, a purchaser of a legal estate must take notice that the debt has been reduced to judgment at the time of his purchase, and that the execution will overreach his purchase.

APPEAL from an interlocutory order made by his Honor, Judge *Battle*, at the Spring Term, 1843, of MONTGOMERY Court of Equity, dissolving the injunction which had been granted in the case.

The following facts are stated in the pleadings:

E. L. Morgan, being seized of the land in controversy in this cause, and being desirous of borrowing the sum of $500, on 9 October, 1839, made a note payable to A. H. Saunders and G. Coggin for that sum, negotiable at the Bank of Cape Fear, at Fayetteville, which Saunders and Coggin endorsed for his accommodation, and redelivered to Morgan, that he might have it discounted. He offered it for discount but the bank declined taking it, and he then prevailed on an individual to discount it in part, that is, to advance him $150 on it. On 9 October, 1839, Morgan also executed to T. L. Cotton a deed for the land in controversy, in trust to sell the same and pay the debt mentioned in the note, or repay to Saunders and Coggin whatever sums they might be compelled to pay on the note.

In the early part of 1840, the plaintiff and Morgan were upon a treaty for the purchase of the land at the price $725, the plaintiff being informed by Morgan of the deed to Cotton, and it being agreed, if the contract was made, that out of the purchase-money that debt should be discharged. On 10 March, 1840, the parties, Hall, E. L. Morgan, Saunders and Cotton, met to adjust finally the contract, and the payments
(290) thereon. The defendant, Nelson Harris, was also present, and assisted in making the computations for the settlement; and then the plaintiff, by assuming debts for E. L. Morgan, or by cash, paid the whole price of $725, except the sum of $152; for which he executed his note, which he afterwards paid. Among the debts paid or assumed by Hall for E. L. Morgan, were some to Nelson Harris. Out of the money paid him on 16 March, Saunders and Cotton then received the sum due on the debt secured by the deed of trust, but they did not reconvey to Morgan, nor convey to Hall, as all parties

thought the deed became inoperative by the payment of the debt. After the settlement was closed, Hardy Morgan, the father of E. L. Morgan, delivered to the plaintiff a deed from E. L. Morgan to the plaintiff, purporting to be a bargain and sale in fee for the land, and bearing date 2 March, 1840. At the same time, Hardy Morgan took the note given by plaintiff for $152; and it was agreed between the parties that out of the money due thereon, when paid by the plaintiff, H. Morgan shoud pay a debt which E. L. Morgan owed to one Delamothe, and for which Nelson Harris was bound as surety. For the debt to Delamothe a judgment was taken in the Superior Court of Montgomery, which began on 5th Monday, which was 2 March, 1840; and afterwards, but it does not appear on what day, a *fieri facias* issued thereon, tested as of the first Monday of March, 1840, under which this land was sold by the sheriff in July, 1840, and purchased by N. Harris at the price of $50, and he took the sheriff's deed. He then instituted an action of ejectment against Hall, who had gone into possession, and recovered against him. Thereupon Hall filed this bill against Harris, E. L. Morgan, Saunders, Coggin and Cotton, and therein charges that the contract was concluded between E. L. Morgan and himself on 2 March, 1840, and that at that time the deed to him was drawn and executed by E. L. Morgan and left with H. Morgan, to be delivered when the plaintiff should have paid the purchase-money, or secured it satisfactorily; and that 16 March ensuing was then fixed on as (291) the time of meeting, when the creditors of E. L. Morgan could assemble, and Hall would be prepared to pay their demands. The bill also states, that although N. Harris and other persons informed the plaintiff on 10 March, that a debt was due to Delamothe, yet he was not informed that it had been reduced to judgment, otherwise he would have insisted on its being discharged out of the cash payment he then made. The bill then states that the plaintiff had offered to pay to N. Harris the sum he had given at the sheriff's sale, and requested from him a conveyance or release, which he refused to make, and was about suing out a writ of possession and turning the plaintiff out. The bill then insists that N. Harris, after being privy to the contract and settlement between the plaintiff and E. L. Morgan, and getting payment of Morgan's debts to him through the plaintiff, ought not to be allowed to disturb the plaintiff, even if Harris has the legal title under his purchase; and that, at all events, N. Harris ought not to be permitted to use his judgment at law, unless and only as the means of obtaining an indemnity for the sum paid by him, or not without paying to

the plaintiff the sum paid out of the plaintiff's purchase-money in discharge of the debt secured by the deed of trust. Wherefore the bill prays a conveyance of the legal title from Cotton, the trustee, and also a release from Harris, upon such terms as the Court may deem just, and, in the meanwhile, for an injunction against the judgment in the action of ejectment.

The answers of all the defendants, except Harris, substantially admit the bill and submit to such a decree as to the Court may seem right. The answer of Harris states that he had no agency in making the contract between E. L. Morgan and the plaintiff. He admits that at their request he made an account of the payments by the plaintiff and ascertained the balance of the purchase-money; but says that he did so merely as scribe at the request of the parties. He likewise admits that E. L. Morgan agreed that certain sums which he owed Harris should be discharged out of the price of the land, and
(292) that they were discharged either in money or the bond of the plaintiff. The answer then denies that the deed to the plaintiff was executed on 2 March, 1840, or that the contract or purchase was completed on that day or at any time before the deed was delivered on 10 March; because the defendant states, that on the trial at law it was proved by several witnesses, that about the middle of the week of Montgomery Court, the plaintiff said that he had not purchased the land, and that he did not think he should conclude a bargain for it, as he doubted the title Morgan could make him. Therefore the answer insists that the contract was not finally made until 16 March; at which time the plaintiff made his payments and accepted the deed. The defendant further states that he then distinctly informed the plaintiff that judgment had been obtained in the Superior Court the preceding week for the debt to Delamothe, and that he had consulted counsel and been advised that the land was bound from the rendering of the judgment on 2 March, and, therefore, that the plaintiff must see to the payment of the debt.

The answer further insists that the deed of trust was not good against the creditors of Morgan, because the note was not discounted by the bank, as was contemplated by the parties when it was made, and, moreover, if that should be otherwise, because, upon the plaintiff's purchase, it was not agreed or understood that the legal title of the trustee should be kept on foot for the benefit of the plaintiff, or to be conveyed to him or any other person; but it was considered by all the persons present, that as the debt was paid, the legal title conveyed by the deed of trust was worth nothing, and extinguished.

The defendant admits that he refused to accept from the plaintiff the sum he had given for the land at the sheriff's sale, and insists that he obtained by that sale a good title, both at law and in equity under a judgment and execution creating a lien on the land, prior or preferable to the title derived by the plaintiff under his purchase from E. L. Morgan himself on 10 March, 1840.

Upon the coming in of the answers, the defendant (293) H. moved upon his, to dissolve the injunction obtained against his judgment at law, and his Honor, thinking that whatever equity the bill contained had been fully answered, allowed the motion; but he also allowed the plaintiff to appeal therefrom.

Strange & Mendenhall for the plaintiff.
Winston for the defendants.

RUFFIN, C. J. On the points distinctly made in the bill, and upon which the case seems to have been considered on the circuit, and, indeed, was argued before us, the opinion of this Court would be the same his Honor gave. It seems to have been taken for granted by all parties, that the judgment of Delamothe attached on this land, either as the legal estate of the debtor E. L. Morgan, or as being held in trust for him, and therefore, that the purchase under that judgment would have the preferable title in a court of law, as against one purchasing from E. L. Morgan himself, subsequently to the rendering the judgment, and the *teste* of the *fieri facias* issued on it. Upon this idea, the plaintiff, after failing at law, filed this bill for the purpose of being relieved against Harris' title, upon several equitable grounds. As far as the grounds of that kind extend, as mentioned in the bill, we think the plaintiff must fail. For, if Delamothe's judgment constituted a lien on the land, or rather, if the execution issued on it, created a lien, by relation, from its *teste,* we do not see anything in the conduct of Harris, which would provent him from claiming all the advantages and rights that any other purchaser could. The right to a preference belonged to the judgment creditor, and every person becoming the purchaser under the execution, would entitle himself to the creditor's priority. That Harris had been paid debts, by Morgan, out of the purchase-money, makes no difference, for if he had not bid for the land, some one else would, and the plaintiff would have lost it at all events. He would, however, in each case, lose it by his own fault in buying land subject to a prior encumbrance of a judg- (294)

ment and execution, and being so negligent as not to pay it off, but allow the land to be sold under it. If Harris had drawn the plaintiff into the contract, with a view of being paid his debts, while he deceived the plaintiff as to the title he was getting, it might be different, and Harris might, perhaps, be held to be a trustee of the legal title subsequently got by him at the sheriff's sale. But Harris seems to have had nothing whatever to do with the treaty between Hall and Morgan at any time; all he did in the business, being to act as accountant in stating the debts of Morgan payable out of the price, and striking the balance. He received some of the money, but not as a person interested in the sale, and only as being paid to him by Morgan after he had received it, or became entitled to it, as the price of the land sold by him. Moreover, as against a judgment creditor, a purchaser of a legal estate must take notice that the debt has been reduced to judgment at the time of his purchase, and that the execution will overreach his purchase, or else, the rule of law upon that subject would, in effect, be abrogated. But in this case, the answer removes every pretense of hardship on the plaintiff in that respect, by the positive statement, responsive to the bill, that this defendant gave the plaintiff express notice of the judgment, and of the opinion of counsel, that the land would be bound, if the plaintiff should buy. Upon each of these grounds, we think the plaintiff would have no equity on that part of the case.

We are likewise of opinion that the plaintiff has not an equity to be subrogated to the rights of the creditors secured by the deed of trust, as upon the supposition that the plaintiff paid those creditors, and, therefore, ought to stand in their places. It appears, both by the bill and the answer, that it was not the intention to keep those debts on foot, nor, of course, the deed of trust, as far as it was a security for them. The intent was to pay them, and the belief was, that by so doing, the deed itself became inoperative; which, to be sure was a mistake as far as the legal title of the trustee goes, and (295) as far as a trust resulted thereon, in favor of E. L. Morgan or his assignee. But the debts to the sureties were both in law and fact paid; but, like those to Harris, were paid by Morgan out of his money, which he received for the sale of his resulting trust to the plaintiff, and not by the plaintiff out of his own money. That deed can not, therefore, be set up now as a surety for debts, which the parties intended should be paid, and were paid and extinguished.

But the Court is of opinion, that upon another ground, as

*far as the case now appears, the plaintiff may be entitled to relief, and therefore, that the injunction ought to have been ordered to stand until the hearing. That ground is, that the answer does not state a case, in which the land was certainly liable to be sold under the judgment and execution, so as to defeat the admitted and honest purchase of the plaintiff. Morgan had not the legal title when the judgment was taken, nor at any time after; and, therefore, at common law, the land was not subject to be sold on execution, but became so, if at all, by the Act of 1812. It is obvious, from the statements of the answer, that on the trial at law, the question was treated, either as if Morgan had the legal title, or as if his resulting trust would be bound by the judgment and execution, in the same manner as his legal title would have been. The relation of a *fieri facias* at common law is to the *teste;* and it is settled, that if the *teste* of the execution and the alienation by the debtor be of the same day, the former is preferred, and a purchaser under the execution gets the title. That is the case, when the interest of the debtor is a legal one, either in personal or real property. But as relates to equitable interests made subject to execution at law, the statute establishes a different rule. The first section of the Act of 1812, is taken from the statute, 29 Car. II., Ch. 3, sec. 10. They both require every sheriff, to whom a writ shall be directed, etc., to do execution unto the party in that behalf, suing execution of all such lands, etc., as any *other person* shall be seized of, etc., *in trust for him, against* whom execution is sued, as he might, if the *said* party, against whom execution shall be sued, etc., had (296) been seized, etc., of such land, etc., of such estate as they be seized of in trust for him *"at the time of the said execution sued."* The liability of trusts to execution is not, therefore, as at common law, or under the statute of Westminster, from the judgment or *teste* of the execution, according to the nature of the property, *but from execution sued.* This was so held in the first year of George the first, in the case of *Hunt v. Coles,* reported by Chief Baron Comyns. I Com., 226. The case was, that H. Saursby was seized in fee of lands in trust, and to the intent that P. Chamberlain and his wife Anne should have £40 a year out of the profits for life, and the rest of the profits should be paid to Hope Chamberlain and the heirs of his body. Then in Trinity term, 1695, one Boardman recovered judgment against Hope C. for a debt of £160. On 26 July, 1699, Anne C. and Hope C. borrowed £600 from the defendant Coles, and for surety therefor, H. Saursby, by their direction, mortgaged the premises to Coles for 500 years. In 1714, Boardman sued*

out an elegit on his judgment against Hope Chamberlain, and upon an inquisition it was found that Hope C. was seized in fee, and the sheriff extended one-half and delivered it to the creditor, on whose demise an action of ejectment was brought against Coles. And it was held, that by force of the words in the statute, *"at the time of the execution sued,"* the plaintiff could not recover, although the trustee was seized in trust for the debtor at the time of the judgment rendered, and long after. As the trustee had conveyed the lands to another person before the execution was sued, though after the judgment, the case was not within the act of Parliament. It appears from the report, that Chief Baron Comyns was himself of counsel for the plaintiff; and he seems to have been entirely satisfied with the judgment, and states it with his approbation in his Digest—Execution, ch. 14. It is mentioned in the case that *Sir Edward Northey* remarked, after the decision, that, ever since the act, that had been thought the proper construction, though he did not know that it had been judicially decided; and then (297) *Mr. Justice Tracey* mentioned a case in Queen Anne's reign, in which *Chief Justice Trevor* had given that opinion in the Common Pleas, without any dissent from the other members of the Court. The case of *Hunt v. Coles* is subsequently cited by all writers on trusts, and in treating of them and their liability for debts, as establishing the rule, that the relation of trustee and of the defendant in the execution as *cestui que trust,* must exist at the time of execution sued. 2 Comyn's Dig., 71. If the trustee has conveyed to another, then the case is out of the statute. So, it follows, that if the debtor has assigned his beneficial interest to another, so that the trustee is no longer trustee for the debtor, but, in the contemplation of equity, is trustee to the assignee of the original *cestui que trust,* the case must be equally out of the statute, the words being, "in trust for him *against whom execution is sued, at the time of the said execution sued.*"

In the present case the purchase by the plaintiff of the resulting trust of Morgan with the knowledge and approbation of Cotton, the trustee, unquestionably, as between those three persons, converted Cotton into a trustee for the plaintiff and authorized him to call for the legal title and have it decreed in this Court. The defendant, Harris, says, however, that, although that may be true as between those persons, if alone concerned, it is not true here, because Delamothe's execution created a probable lien. But he says that, very plainly, upon the supposition that the execution created a lien from its *teste,* as in ordinary cases, and not from "the time of execution sued."

Hence he insists that the plaintiff did not purchase on 2 March, but afterwards, that is to say, on 16 March; and further, that, if the purchase was on either of those days, it was not valid, as the judgment was rendered as of 2 March, also, and the execution binds from that day. But we have seen, that in point of law the position is untrue; and that the execution does not bind but from the time it was sued. Now, that time is not set forth in the answer; and it may have been even after 16 March; at which latter day the answer admits the plain- (298) tiff completed his purchase and took the deed. Therefore, the plaintiff's equity, founded upon his purchase of the trust estate is not completely answered; as his purchase can not be defeated by the sale under execution, unless the writ was actually sued before or on 16 March. As the answer does not state the fact, it will be the subject of proof in the case; and until it be proved, the injunction should have been kept up.

It may be said that this defense might have been made at law; for if the case was not within the Act of 1812, Harris did not get the legal title under his purchase, and, therefore, ought not to have recovered. It is probable that Harris recovered at law without going into the legal title further than to shew that he and Hall both claimed under Morgan, and, therefore, that Hall was estopped at law to deny the title to have been in Morgan. For so it appeared on the deeds of the parties; neither professiong to pass the trust, but the one to be a sheriff's deed for the land, and the other, Morgan's deed of bargain and sale. It is not intimated in the bill or answer, that the outstanding title in Cotton was mentioned on the trial, and the present plaintiff, not having the deed, could not shew it. It is true, as we think, that Hall was not estopped to insist upon that outstanding title if he could have shewn the deed. He was only estopped to say that Morgan had no interest, because he claimed to derive an interest under him. But he was at liberty to shew that his true interest was, and that it had been assigned to him in such a manner and at such a time, as prevented it or the land from being liable to be sold by the execution under which Harris bought. But admitting that to have been so, that will not oust the court of equity of its original jurisdiction over this, as a case of trust, and upon that footing its right to relieve the plaintiff, as a person entitled as a *cestui que trust*. *Henderson v. Hoke*, 21 N. C., 138. Here upon the shewing of all parties, the plaintiff would have a right to a decree against Cotton for a conveyance of the legal title unless it was divested out of Cotton by the purchase of Harris under the Act of 1812. It does not yet appear to have been so divested, be-

(299) cause it does not appear when the execution was sued.

If it should turn out that it was before the plaintiff's purchase, then the plaintiff's bill will be dismissed. If, afterwards, there, then, should be a decree that Cotton convey to the plaintiff; and, for his safety, it was proper that Morgan and Harris should be parties to this suit, in order that they should be concluded by the decree, and not at liberty to harass him with another suit after he had conveyed under a decree in this. This being so, it follows that until the plaintiff's right, as equitable owner as set up by him, has been determined against him or appears upon the answer to be unfounded, his possession ought not to be disturbed. For to what end should he be turned out, when he may in this suit compel his trustee to convey to them the legal title, and as soon as he shall, he will in his turn bring an ejectment against Harris, another party to this suit, and evict him? That double litigation at law is avoided, if this Court, having all the parties before it, in respect of one of its peculiar subjects of jurisdiction, namely, a trust for the plaintiff, in which the others allege an interest, shall proceed to determine the rights of all those who thus claim an interest in the subject. Therefore, although it might not have been indispensable that the plaintiff should have made Harris a party to his bill against Morgan and Cotton, seeking a conveyance from the latter, yet it is convenient and useful that he should have done so, as it saves further litigation and expense, and enables the Court to decree as to their rights in the premises. While that question is *sub lite,* the possession ought not to be changed.

The case has been treated as one of a trust in Cotton purely for Morgan, and, therefore, falling within the first section of the Act of 1812. We suppose it must be so considered after the payment of the debts to Saunders and Coggin; because then there is a resulting trust for the maker of the deed exclusively. But if, upon the principle of *Harrison v. Battle,* 17 N. C., 537, this was to be considered as an equity of redemption, within the second section of the act, the result would be the same. For the words of that section are, "that

(300) the equity of redemption in lands mortgaged shall *in like manner* be liable to any *execution sued out* or any judgment against the mortgagor." Neither section carries the liability of the lands held in trust or mortgaged further back than execution actually sued. Until the creditor takes out his process, purchasers may safely deal for the trust in equity of redemption, according to the statute.

For these reasons we think the decree of his Honor was

erroneous, and that it should be reversed, and the injunction continued to the hearing.

PER CURIAM. ORDERED TO BE CERTIFIED ACCORDINGLY.

Cited: Edney v. Wilson, 27 N. C., 235; *Morisey v. Hill,* 31 N. C., 68; *Williamson v. James,* 32 N. C., 164; *Presnel v. Landers,* 40 N. C., 254; *Hall v. Harris, Ib.,* 304.

The Honorable FREDERICK NASH, of Hillsboro, one of the Judges of the Superior Courts of Law and Equity, was appointed by the Governor and Council, on 11 May, 1844, a *Judge of the Supreme Court,* to supply the vacancy occasioned by the death of Honorable Judge GASTON. Judge NASH took his seat on the Supreme Court bench at the commencement of this term.

The Honorable DAVID F. CALDWELL, of Salisbury, was appointed by the Governor and Council, on 10 July, 1844, one of the Judges of the Superior Courts of Law and Equity, to supply the vacancy occasioned by the appointment of Judge NASH to the Supreme Court bench.

EQUITY CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1844.

(301)

ATTORNEY GENERAL on the relation of J. BRADSHER *v.* WILLIAM A. LEA'S heirs.*

In the case of the erection of a mill dam, a Court of Equity will not interfere by injunction, unless it be shewn that it will be a public nuisance, or, if it will be a private nuisance only to an individual, unless it manifestly appears, that so great a difference will exist between the injury to the individual and the public convenience, as will bear no comparison, or that the erection of the dam will be followed by irreparable mischief.

This was a bill of injunction, filed in PERSON Court of Equity, at June Term, 1843, praying that the defendant (William A. Lea, ancestor of the present defendants) might be restrained from erecting a certain mill, on the ground that it would be injurious to the health of the relator, and the neighborhood generally.

From the pleadings it appeared that the defendants (302) were the owners of a tract of land in Person County, and that their father, William A. Lea, against whom the bill was originally filed, intending to erect thereon a public grist and saw mill, commenced the construction of a dam across a stream called Cobb's Creek, running through the said tract. The contemplated site of the mill, and the whole of the water to be ponded by the dam, are, and will be altogether on the land of the defendant, and the mill-pond, when full, will expose a surface of fifteen acres, being one acre in area for every foot in height of the proposed dam. The country round and about the site has long been settled with a dense population, and leaving but a small portion in woodland. Leasburg, in Caswell County, a pleasant, healthy and thriving village, is not more

* The opinion in this case was delivered at June Term, 1844.

than a mile and a half from where the dam will be, and the dwelling house of the relator, not more than three-quarters of a mile from the head of the pond. The bill alleges that the object of William A. Lea was not so much the benefit to be derived to himself or the community by the erection of a public mill, as his individual interest in the improvement of the land on which the water will be ponded. It charges that the pond will be a public nuisance, by destroying the health of the neighborhood, and of the plaintiff's family, and asks of the Court an injunction to restrain the defendant from proceeding in the work. The answer avers that the interest of the neighborhood demands the erection of a mill at the place contemplated, that such a mill will greatly contribute to the public convenience as there is not another mill in the neighborhood, and that it will not injure the health of the citizens—that the interest he expects to enjoy from it principally one in common with the neighbors, to be derived from their custom; and it is their wish, or that of a large majority, that the mill should be erected, and denies that the health of the citizens of Leasburg, or of the neighborhood or of the relator will be injured by its erection.

On the coming in of the answer at Spring term, 1843, a motion was made to dissolve the injunction, which was
(303) refused, and the injunction was ordered to be continued till the hearing. Replication was taken to the answer, and both parties having taken depositions, the cause was set for hearing, and at June term, 1844, was by consent transferred to the Supreme Court.

Palmer & Iredell for the plaintiff.
E. G. Reade and *Venable* for the defendants.

NASH, J. The testimony in the case is very voluminous. The witnesses are taken mostly from the immediate vicinity of the proposed pond, and they differ in their opinion as to the effect of the ponding of the water upon the health of the relator's family, and of the neighborhood. Of the many examined by the relator, but three are decidedly of opinion that the pond will have the injurious effect, and two of them are citizens of Leasburg, and these out of a population of eighty persons living in the village. Dr. Barnett, a gentleman of high standing in his profession, a witness for the plaintiff, thinks it will not injure the health of the neighborhood, for the reasons he gives. Dr. Walker, another of the plaintiff's witnesses, is doubtful, and is of opinion that the result would depend upon the fact,

whether the stream would possess sufficient power to keep the pond full of water during the summer season. Only three of those examined by the relator are opposed to the erection of the mill decidedly, and one of those would rather it were not erected for the fear of the result. Out of the number of the defendants' witnesses, eight think the health of the neighborhood will not be affected, and are in favor of the erection, and the two physicians are of the same opinion as to the probable effect in injuring the health of the neighborhood. In addition to this, it appears from the testimony, that the mill, when erected, will be a public convenience to the neighborhood. In time past, it further appears, that mills had been erected on different parts of Cobb's Creek with ponds, some larger and some smaller than the one contemplated, and that no injury to the health of the neighborhood was experienced, or not more than necessarily results in every case of such an erection, but that (304) all those mills are now down. The power of the Court of Equity to interfere by injunction, to restrain and forbid the erection of mill dams in cases of this kind, is admitted. Whenever any erection is about to be made, which, when made, will be a public nuisance by destroying the health of the neighborhood, or when the injury to an individual and his family is irreparable, and renders immediate action a duty founded on imperious necessity, or when in the case of a private nuisance, the injury is the result of an establishment made for personal gratification or mere private profit, a Court of Equity will exercise its preventive power. The case of the *Attorney-General v. Blount,* 11 N. C., 384, was that of a public nuisance —as injurious to the citizens of the town of Tarboro, in rendering the place sickly. The Court lay it down as a principle of equity long settled, that where irreparable mischief may be done, as of waste, or *in a plain case* of nuisance, an injunction will be granted; and accordingly, the injunction previously obtained was perpetuated, because, as the Court say, the evidence in the case approaches as nearly to ascertain the certainty of the apprehended evil, if not prevented, as can be expected from the nature of the subject. So in the case of *Attorney-General v. Hunter,* 16 N. C., 13, which was a case to abate a nuisance already in existence—the Court say, we are satisfied beyond a reasonable doubt, from the admissions of the defendant in his answer, that this pond would create a nuisance and that of the worst kind. The injunction was perpetuated. *Attorney-General v. Perkins,* 17 N. C., 38, is the case of a private nuisance to be occasioned by the erection of a mill, whereby the health of the adjoining country, and particularly the health

of the relator's family, would be destroyed. An issue was submitted to a jury, and they found that the health of the relator and his family would be injured by the millpond, but not that of the neighborhood. The bill was dismissed upon the maxim that private right must yield to public convenience upon
(305) adequate compensation. And when the mischief arising from the erection of a mill, which is a public convenience, does not extend to the neighborhood, but is confined to a particular family, it can not, as a general rule under this head, be held a nuisance, to be redressed by abatement or injunction. In the case before us, it does not appear from the evidence that the erection of the millpond will endanger the health of the neighborhood, or of the relator's family. Mills have, from time to time, been erected on the same creek, and in the same neighborhood, without injuriously affecting the air of the neighborhood, or, if so, to a very limited extent. Cobb's Creek is a narrow stream, rarely, if ever, overflowing its banks, with a current, according to some of the testimony, which never fails at the place where it is intended to erect the mill, and which, in all probability, will keep the pond filled with water. We can not, therefore, say we are satisfied that effects, so injurious to the health of the neighborhood as to render it a nuisance, will result from the erection of this pond. But it appears to us this is a case of private nuisance, if a nuisance at all, in the erection of a mill, which will be a public convenience. And there is nothing to shew us that there is so great a disproportion between the private suffering and the public convenience, as would authorize the Court to interfere. The Legislature considers public mills as public conveniences, and encourages their erection even by taking from another so much of his land upon just compensation as may be necessary, unless the mill when erected will be a public nuisance. Rev. Stat. ch. 122. In this case the whole of the land, on which the mill and pond will be, belongs to the defendants; they have a right to use it, as in their discretion may seem right, provided in doing so, they do not injure the public or private individuals, and when the use they make of it is to the public convenience, and the injurious effect confined to a private individual, the interest of the latter must give way to that of the many, unless he can make it manifestly appear, that so great a difference exists between his injury and the public convenience, as bears no comparison, and that the erection will be followed by irreparable mischief, in which case the
(306) Court will interfere by injunction. *Atto.-Gen. v. Perkins,*

17 N. C., 38. The interference with private rights is at all times a delicate subject, from which courts ought to abstain, except in cases of necessity. We see no such necessity here. The most that can be claimed for the plaintiff under the testimony is, that it may be doubtful whether the mischief apprehended may not follow the erection of the mill dam. We can not arrest any longer the action of the defendants on such a case. The answer denies that the improvement of his land was his object in erecting the mill; declares that its erection would be a public convenience, and denies that the health of the neighborhood, or of the plaintiff, would be injured by it—and we think the testimony does not sustain the plaintiff's bill, but does sustain the defendant's answer.

On the coming in of the answer, on motion in the Court below, the injunction was continued to the hearing; and replicating having been taken, the cause was set for hearing, and is in this Court now for final hearing. We are of opinion that the interlocutory order made in this case, continuing the injunction to the final hearing, was erroneous, and that the injunction ought to have been dissolved. The bill must be dismissed with costs to be taxed by the master.

PER CURIAM. BILL DISMISSED.

Cited: Ellison v. Comrs., 58 N. C., 58; *Privett v. Whitaker*, 73 N. C., 556; *Pedrick v. R. R.*, 143 N. C., 509.

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(307)

PETER HINES *v.* THOMAS BUTLER.*

1. The authority of an agent to collect a note or bill, does not authorize him to indorse the note or bill, either in the name of the principal or on his account.
2. Much less is an agent authorized to endorse another paper for the debtor, to enable the latter to raise money to pay the debt to the principal.
3. Before an agent can insist that his principal has adopted, as his own, acts which the agent had no authority to do, it is necessary to shew that the principal was fully apprised of all the facts and circumstances attending the transaction.

This was a bill filed for an account in WAKE Court of Equity,

* This opinion was delivered at June Term, 1844.

which, having been set for hearing, was at the Fall Term, 1843, transferred by consent to the Supreme Court.

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

Badger and *W. H. Haywood* for the plaintiff.
Alexander & Iredell for the defendant.

DANIEL, J. The plaintiff employed the defendant as his agent to manage his landed estates in the county of Burke, to receive the rents and pay the expenses of the same; also, to see to the renewal and payment of certain notes, which the plaintiff then owed in the bank at Morganton. The plaintiff, being much pressed for money, also employed the defendant as his agent to take eight of his slaves to Alabama, and sell the same for cash. The defendant carried the said slaves out to Alabama and sold them at high prices on credits, and took bonds for the purchase-money. When the plaintiff was informed of the said sale, and the manner it had been made, he adopted it. And when the said bonds became due the defendant was again employed by the plaintiff as his (308) agent to go to that State and collect the money due on the bonds. The plaintiff, then being in great distress for money, urged the defendant, by letters, to make remittances to him. But collections in that State then being difficult to be made, the defendant, for the accommodation of one of the debtors, Solomon Adams, who could not then pay his bond, endorsed a bill of exchange for $4,000, drawn by the said Solomon Adams and one Benjamin Adams, on Adams and Taylor, of Mobile, payable to the defendant nine months after date in order to enable Solomon Adams to raise the money to pay his bond. The bill was accepted by the drawees, and all the parties to it were considered good. This bill, endorsed by the defendant in his own name, was sold by Adams to Sheffield and Company for $3,200 only, which money Adams paid to the defendant, and he remitted it to the plaintiff. The bill of exchange, when it arrived at maturity, was protested for nonpayment. The holders, Sheffield and Company, then brought suit against the defendant on his endorsement. The defendant says that he was ignorant when he endorsed the bill, that he would be in law liable to the holders for the amount of the said bill, but that, being advised by counsel, that he was liable, he then paid the holders the whole sum mentioned in the face of the bill. It does not appear to us from any evidence in the cause that he, at the time, mentioned to his

counsel all the facts and circumstances under which the bill had been made, endorsed and discounted by Sheffield and Company. If he had done so, his counsel must have informed him that he could have effectually resisted the holders' action on the bill, on the ground of usury; as, by the statute (year 1819) of Alabama, it was in fact void for usury; or, if he did not wish to plead the statute of usury, he could have resisted the plaintiff's recovery of $800, at least of the sum on the ground of its being without consideration. This might have been done *at law,* if the New York rule is followed in Alabama. *Ham v. Hendricks,* 7 Wend., 569. *McElwee v. Collins,* 20 N. C., 350. Or it might have been done in equity, if the Alabama courts follow the English rule, by bringing the money actually received on the bill of exchange, and interest, into court, and then the court of equity would (309) have relieved by a perpetual injunction, or a decree to surrender up the bill to the endorser; *Taylor v. Smith,* 9 N. C., 465. *McBrayer v. Roberts,* 17 N. C., 50. But, says the defendant, if I did blunder and imprudently pay the holder of the bill $800 more than I received on it, I did it through ignorance of the law, when I thought I was doing the best for the plaintiff, and that I have not personally received one cent's benefit by the transaction; and furthermore, the plaintiff has since adopted my endorsement and subsequent payment of the bill. The answer we have to give to all this is: *First,* that the authority of an agent to collect a note or bill, does not authorize him to endorse the note or bill, either in the name of his principal or on his account; *Murry v. East India Company,* 5 Barn. & A. 504. Paley on Agency, 192. Much less is an agent authorized to endorse another paper for the debtor, to enable the latter to raise money to pay the principal. Its being done through ignorance of the law, can not be a reason why the plaintiff should sustain the loss, although the defendant has derived no benefit from the transaction, and did then believe he was doing the best for the plaintiff's interest. *Secondly,* before the defendant could insist that the plaintiff had adopted, as his, the endorsement on the bill, it became necessary for him to prove that the principal was fully apprised of all the facts and circumstances attending the transaction. Lewin on Trusts, 643. So far from showing us that the plaintiff had full knowledge of all the facts, the correspondence between them, filed as evidence in the cause, shews that the plaintiff was altogether ignorant of the terms upon which the bill of exchange had been obtained and negotiated. In truth the defendant at no time gave the plaintiff to understand that he was looked to

by the defendant as bound to take the loss on himself. And the plaintiff, particularly by his letters, sought information on this subject of the bill from the defendant, and never distinctly got of him, as we can see, the information sought. It (310) is true that the plaintiff did not at first, on the imperfect information he had received, declare that he would not stand to the loss. But this might well arise from the circumstances, that the defendant had informed him, that he had every assurance that the money ($800) would be obtained from Adams, whom he said in his letters that he had sued, and that he soon expected judgment and satisfaction. But there is not sufficient proof to authorize us to declare that the plaintiff ever adopted as his the said endorsement, or ever agreed with the defendant that he would sustain all the loss on the bill.

The utmost that can be presumed against the plaintiff is, that he agreed to indulge the defendant for money, which the defendant collected from other debtors to the plaintiff, and had used in taking up the bill from Sheffield and Company until the defendant could recover in an action he brought on the bill against the acceptors and drawer of the bill. When the plaintiff in his letters makes use of the words, "my funds," and "my debts," he is not, as we think, confining himself to the Adams' debt, or to the bill of exchange; for it will be recollected that he had several debtors in that State besides the Messrs. Adams, and that the defendant was his agent to get in all the said debts. We are of opinion that the first exception to the report of the master must be sustained, and that instead of the credit of $4,267.27 allowed for this bill, the defendant be allowed a credit for the sums actually paid by him into bank for the plaintiff on 12 and 18 May, 1836, for the plaintiff.

The second exception is to the allowance to the defendant for his wages while in the plaintiff's service. We think it must be overruled. The defendant claims his actual expenses and wages for himself while he was actually engaged at the rate of $2 *per diem*. It is apparently reasonable. Besides the plaintiff, when he first employed the defendant, agreed to give those wages on that trip; and he suggested no diminution when he subsequently sent him. But it was said that his subsequent journeys were rendered necessary by his own fault in making sales on a credit, and getting himself into a difficulty with the Messrs. Adams. As to the first, the plaintiff adopted (311) the defendant's acts, as it was to his profit, perhaps at the rate of 25 per cent. And as to the second, the visits

to the South were rendered necessary by the other business of the plaintiff, and were undertaken each time at the earnest instanc of the plaintiff, as is plainly seen in his letters.

PER CURIAM. DECREED FOR THE PLAINTIFF.

Cited: Hunter v. Jameson, 28 N. C., 266; *Sherrill v. Clothing Co.,* 114 N. C., 440.

JOHN IRWIN et al. *v.* WILLIAM DAVIDSON et al.

1. The general rule is that a court of equity takes no jurisdiction in cases of mere trespass, not eevn by granting a temporary injunction.
2. There is an established exception, however, in the cases of mines, timber and the like, in which cases injunctions will be granted to restrain the continued commission of acts, by which the substance of the estate is destroyed or carried off.
3. But when the plaintiff, seeking an injunction in such cases, claims to be the legal owner of the property, he must shew that he has established his legal title by the judgment of a court of law; or, that he is prosecuting his suit at law, and the injury, which he will sustain by the acts of the defendant before he can obtain judgment, will be irreparable—and in the latter case, the Court, in continuing the injunction, must make such order as will ensure the speedy determination of the suit at law.
4. A court of equity will not try the legal rights of parties to real estate.
5. If the plaintiff be a mortgagor, and the defendant a mortgagee, who alleges there is a subsisting claim for a debt upon the mortgaged property, though an injunction may be granted to stay a wanton or improvident waste of the mortgaged estate, by the mortgagee, who has taken possession, yet the plaintiff must, before he entitles himself to relief, bring into court the amount due, or profess himself willing to do so.

This was an appeal from an interlocutory decree of the Court of Equity of MECKLENBURG, his Honor, Judge *Manly* presiding.

The case was as follows: (312)

By an original bill filed 25 August, 1844, it is charged that the defendant, William Davidson, was the owner of several tracts of land in Mecklenburg County, and particularly two tracts called, the one, the Williams Gold Mine, and the other, the Dunn and Alexander Gold Mine Tract, and that, by deed bearing date 1 February, 1833, he conveyed the said lands to Joseph Curtis, James N. Hyde and Harry F. Talmadge; and

the said Curtis, Hyde and Talmadge, on 4 April, 1833, conveyed the same to an incorporated gold mining company, called the President and Directors of the Franklin Gold Mining Company, who entered into possession, and opened and worked certain gold mines thereon, and for that purpose erected thereon a steam engine and other machinery; and that the said William Davidson was a member of the company, and the manager of its mining operations. The bill then states that the corporation became indebted to the plaintiffs in the sum of $6,500.11, for which they obtained judgment in an action at law, and sued out execution, under which the plaintiffs became the purchasers of the said lands, and the sheriff conveyed the same to them on 28 January, 1839. The bill further proceeds thus: "Your orators further shew that, at the time of the sale, William Davidson was in possession of the premises as aforesaid, and that he has kept possession thereof in defiance of your orators, and used the same for his own individual purposes ever since; and that your orators have not as yet taken any steps to eject the said William by an action at law, hoping and believing that some arrangement would be made, either by the said company or some member thereof, to pay the debt to your orators, and take a transfer of their right under the sale, in which expectation they are disappointed, and in consequence they have now to look to the property solely for indemnity." The bill then states that Wm. Davidson had then recently discovered a very rich vein of gold ore on the Dunn and Alexander tract, and had opened it and raised a large quantity of ore,

(313) and was still doing so, and grinding it with the steam mill, and appropriating the proceeds to his private uses; and that the said Davidson was insolvent and not able to answer to the plaintiffs their damages therefor. The prayer is for a discovery of the quantity and value of the gold made by the defendant, and that an account may be taken between the parties, and a decree made for the amount that may appear to be due to the plaintiffs, and that the defendant may be enjoined from "using said property or any portion thereof, and from moving away any gold ore that he has taken out of the Dunn and Alexander mine as aforesaid, and for general relief."

Upon the bill and usual affidavit, an injunction was awarded by a Judge in vacation, as prayed for.

By a supplemental bill, filed 3 September, 1841, the plaintiffs charge that, upon notice of the filing of their original bill and of the award of an injunction, the defendant, William Davidson, and his single daughter, Sarah Davidson, who was

living with him, took, in the name of the said Sarah, a lease for the Dunn and Alexander mine for the term of two years from one Jane Dunn, who had no title whatever thereto, and then let one David Glenn into possession with William Davidson, and that they were working the mine on account of William Davidson, as before, or on the joint account of him and his daughter. The bill charges that the giving and accepting of the lease was by collusion between all the said parties, and with the view of evading the injunction that had been issued on the original bill; and that neither of the said persons is able to pay any recovery the plaintiffs might effect in an action at law; and, therefore, that the injury will be irreparable to the plaintiffs, unless the operations of the defendants should be stopped by an injunction; which the bill prays for accordingly.

Thereupon, an injunction was granted against all the parties, restraining them from "further operations on the mines and land in the bill described, and from removing any of the ore already taken out of the mine"; and there was a further order that the sheriff should seize into his possession the said ore, and keep the same from waste, unless the plaintiffs and William Davidson should agree as to the terms on (314) which the ore should be worked up, and the proceeds divided; in which case the sheriff was authorized to deliver the ore accordingly.

The defendants answered on 30 August, 1844. William Davidson admits that he was once the owner of the lands in question. But he says that, shortly previous to the sale and conveyance to Curtis, Hyde and Talmadge, as mentioned in the bill, he assigned and conveyed those lands, and all his other property to Washington Morrison as a trustee, in trust, to secure and pay certain debts in the deed mentioned, and more particularly a very large debt which he, Davidson, then owed to the Bank of New Bern, and for which the plaintiff Irwin, was his surety; that, at the time of the execution of the assignment, it was understood and informally agreed by the creditors and trustee that he, Davidson, might effect sales of the estate, and especially of the gold mines, as he might deem to the best advantage, provided that the trustee should approve the contracts, and that the purchase-moneys should be paid to the trustee, so that the same should be duly applied to the satisfaction of the debts. He states that, under that authority, he contracted with Curtis, Hyde and Talmadge (who were associated with others with a view to become legally incorporated as the Granklin Gold Mining Company) for the sale of the

land and mines in question, at the price of $25,000 in cash, payable in certain installments, and the further amount of $10,000 in stock of the corporation, when it should be recognized; that he communicated to his vendees the state of the title before the sale, and that they were satisfied therewith, and understood that they could not get the legal title unless the trustee should approve of the contract, and then, not until they should have paid to him the purchase-money; that Morrison did approve of and confirm the sale, and that he received, at various times, payments on account of it, amounting, in the whole, to $20,000, but that the remaining $5,000 of the purchase-money has never been paid, and is still due with the interest thereon, nor did any certificate of stock ever issue to him; that the corporation, in fact, consisted of the same
(315) association of persons, with whom he contracted, with the addition of himself; and that Curtis, Hyde and Talmadge conveyed to the corporation, with the full understanding that the corporation was to make the residue of the payments for the purchase-money. The answer states that all the foregoing circumstances were well known to the plaintiff, Irwin, at, or shortly after they occurred; and that, at the time of the sheriff's sale, notice was distinctly and publicly given that a large sum remained unpaid of the purchase-money, and that the legal title of the premises would not be conveyed until payment thereof, nor possession given until the balance should be paid or realized out of the property; and both of the plaintiffs fully knew all the said facts and circumstances. The answer admits that this defendant was a stockholder and manager of the corporation, and that, after the sheriff's sale, the operations of the company ceased, and that he has continued in possession ever since, for his own use, and claiming the profits in discharge of the sums due, as aforesaid, for the balance of the purchase-money and the stock in said company, which he was to have.

The answer then states that the reason why the defendant did not sooner answer was, that there had been propositions of compromise pending between the parties, in which a sale to a third person was projected at the price of $25,000; out of which the debt of the plaintiffs on the Franklin Gold Mining Company was to have been paid, leaving the residue for this defendant. The defendant denies that the lease to his daughter was of his contrivance or by his direction to defeat the injunction.

Sarah Davidson, by an answer, admits that she took the lease from Jane Dunn, as charged in the bill; but denies that

it was a contrivance to evade the injunction, and says that she took the lease because she believed Dunn had the title to the premises, and for the *bona fide* purpose of working the mine.

Glenn answers that he has no interest in the premises, and was employed by the other defendants, as a minor, to conduct the work.

Upon the answers the defendant move dto dissolvé (316) the injunction. But the Court refused the motion, and ordered that it should be continued to the hearing, unless one or more of the defendants would give bond, with approved sureties, in the penal sum of $10,000, with condition to perform such decrees, as should be made in the case against either of the defendants for the profits arising from working the mines in the pleadings mentioned. From that decree the defendants appealed.

Iredell for the plaintiffs.
Boyden for the defendants.

RUFFIN, C. J. The Court is of opinion that the decree is erroneous. The bill is not founded upon an equitable title. It proposes to state a legal title in the plaintiffs, and assumes that they could undoubtedly recover at law, if they chose to bring an ejectment. The whole purpose of coming into this Court, as appearing upon the bill, is to obtain an account of the ore already dug, and the profits made therefrom, which the plaintiffs claim as the legal owners, and for an injunction against further working in the mines, upon the ground that the defendants, by reason of their insolvency, will not be able to pay the damages, which the plaintiff may recover at law, as legal owners. No privity between the parties is stated, but the defendants are mere trespassers. With respect to the first object of the bill, namely, the account, it is to be observed that we have nothing to do at present. For although the plaintiffs be entitled to a discovery as to the profits, and also to an account and relief by a decree for payment, yet it does not follow that they are entitled to have, or, rather, to hold up an injunction indefinitely against a person, who is in the exclusive possession of the premises. The general principle is, that a court of equity takes no jurisdiction in cases of mere tresspass, not even by granting a temporary injunction.

But it is admitted, that in cases of mines, timber, and the like, when the trespass consists in acts, by which the substance of the estate is destroyed or carried off, there is an established exception, and that injunctions have been (317)

granted to restrain the continued commission of the trespass, upon the grounds that it is an injury of the nature of destructive waste, and of irremediable mischief to the substance of the inheritance.

But it is plain that the jurisdiction to restrain tresspasses, like that to restrain nuisances, is not an original jurisdiction of the court of equity, which enables this Court, under the semblance of preventing an irreparable injury to a legal estate, to take a jurisdiction of deciding conclusively upon the legal title itself. Therefore, in such case, the plaintiff ought to establish his title at law, or show a good reason for not doing so; and if he will not, this Court can not undertake, against a defendant's answer, to try the questions of title and trespass and nuisance. Drewry on Injunctions, 238. In *Chalk v. Wyatt,* 3 Mer., 688, the defendant, who claimed as lord of the manor, was removing earth, shingles and stones, from under a bank belonging to the plaintiff, which protected his land against the irruptions of the sea, and *Lord Eldon* granted the injunction, in consideration of the irreparable injury the plaintiff was likely to sustain; but he said, at the same time, that he would not have granted it, if the plaintiff had not established his right at law by an action, which he had previously brought and tried. However, it seems right to give an injunction even before a trial at law to prevent such irreparable mischief as, without the interference of the Court, would be done before there could be a trial at law. But it is manifest that, except in cases where equity assumes jurisdiction to prevent multiplicity of suits, or on other peculiar ground, the relief by injunction against trespass upon a legal owner ought only to be granted in aid of the defective legal remedy, and not to supersede the jurisdiction of the courts of law over a question purely legal; and, therefore, that the court of equity should only grant the injunction, where the plaintiff is endeavoring to establish his title at law, and until he should have had a reasonable time allowed for that purpose. Hence, Mr. Drewry, page 186, observes that, in such cases, where, from the nature of the circumstances, very great mischief may result (318) to the defendant from the injunction being held up too long, the interposition of the Court must be with considerable pressure, that, on the part of the plaintiff, there shall be no delay in going to trial; and unless some means of procuring a speedy trial are insured, the Court will not sustain the injunction. In the present case it seems extraordinary that the plaintiffs have brought no action of ejectment, from the time they took the sheriff's deed in January, 1829, until

last August, when this order was made, a period of more than five years and a half; during all which time the defendant has been in the exclusive possession, insisting upon an equitable right in himself, and a legal title in his trustee. No reason is given for this singular conduct, but one in very loose terms, intimating, however, sufficiently for us to understand, though vaugely, that the defendant held the possession, either upon some agreement or understanding—perhaps not very definite—that the plaintiff's purchase and conveyance from the sheriff should stand only as a security for the debt the company owed them, or that the defendant should pay them and take their title. Enough does not appear in the bill to authorize one to say, that is its statement; if it had, perhaps it would be difficult to sustain the injunction at all, as it would show an equitable interest in the defendant. But unless something of that kind is to be inferred from the bill, it sets forth nothing as an excuse for not having sued at law; it holds forth no purpose of the plaintiffs to sue at law; and the order of the Court lays them under no obligation thus to sue. What, then, is to be the effect of the decree in this suit? Either this Court must, upon the hearing, try the legal title, and decree, upon the ground that it is in the plaintiffs, that the defendants surrender the possession to them, and thus turn this writ into an ejectment, strictly speaking, or the defendant must be left in possession of the premises without being decreed to do anything, but with an injunction upon him in the negative, that he shall refrain from further operations on the mine and land perpetually. Such a decree as the former has been often refused; for this Court will not sustain a mere ejectment bill. And a decree of the latter kind, we have never known to be even (319) asked for. It would be inconsistent with first principles. For it would leave the plaintiffs still under the necessity of going to law to recover the possession, with liberty to the defendant, of course, to shew that they had not the legal title; and the consequence might be that persons, who turned out to have no right themselves, would have an injunction over another person, restraining him perpetually from all use of the property in his possession. The Court upon the hearing, therefore, would be obliged to direct an action at law, and a trial of it within a reasonable time. And in a case of this kind, where the mines may be injured by suspending operations, and the steam engines and other machinery be ruined by not being kept in use and repair, the plaintiffs ought to be required to speed a trial, even if the application were recent after the injury alleged. But, certainly, after so great a lapse of time

as five years and a half, it is wrong to keep up an injunction indefinitely without an offer on the part of the plaintiffs, or a requisition on the part of the Court, that a suit should be brought. And, thus viewing the case, the insolvency of the defendant becomes immaterial. Indeed, it is still more oppressive to a person in that situation, than if he were better off to hold over him an injunction indefinitely, although the plaintiff will not, as he might establish his title at law, and turn the defendant out of his possession.

The case has thus far been considered, as it is made by the plaintiffs themselves in the bill. The answer makes a case equally strong against the plaintiffs, though upon different principles. According to the answer the plaintiffs, it is true, could not maintain an action at law, as they have not the legal title, but it is in Morrison, the trustee. Therefore, the plaintiffs had a right to come here in the first instance, if they had stated their case properly in the bill. But, then, if they rely on that disclosure in the answer, they must submit to all the other consequences of that statement. The legal title is held by the trustee for the benefit of both the defendant and his vendees; and as between the defendant and his vendees,
(320) as the legal title was purposely retained as a security for the purchase-money, the defendant is looked on in this Court as an equitable mortgagee, and as such had a right to enter into possession of the premises, as the means of compelling the mortgagor to pay the debt, or as the means of raising it out of the profits of the estate. If, then, the interest of the Franklin Gold Mining Company was the subject of sale under execution, the plaintiffs bought subject to the same equity which affected the company (*Freeman v. Hill,* 21 N. C., 389), and, indeed, the answer states that they had distinct knowledge of all the circumstances. Therefore, as the defendant has the superior equity to be satisfied his debt for the residue of the purchase-money, he may avail himself of his right as equitable mortgagee, and of the legal title of the trustee, to retain the possession unless the plaintiffs will redeem by paying the principal, interest and costs, due him. We speak thus upon the supposition that the debts secured in the defendant's assignment to Morrison have been paid, and that the trust resulted to the defendants; which, though not positively stated, we collect from the answer to be so, as the defendant speaks of the unpaid balance of the purchase-money being his own. As to the stock in the company, which the defendant was to have, we presume that is now nothing, as we understand from the circumstances, rather than from any particular statement in the pleadings,

that the company is one of the many broken companies or bubbles of its day, in which the stock is not worth a copper. But, for the money balance of the price, certainly, the defendant has a right, as the title is situated, to look to the property as a security, and, if so, his right is, to that extent, preferable to that of the plaintiffs. The circumstance that the defendant became a stockholder in the company, makes no difference, for each stockholder has a capacity, an an individual, to contract with the corporation; and it does not appear that the stockholders were, by the charter, rendered personally liable for the debts of the corporation. It is true, also, that even as mortgagee in possession, the defendant might be restrained from doing any act willfully to the destruc- (321) tion or detriment of the estate, as feeling ornamental trees, or making the mines runious by not keeping proper props, or removing rubbish or the like; because the land is only a security to the mortgagee, and is considered in this Court as otherwise being the property of the mortgagor. But the mortgagee is doing nothing wrong in merely working the mine, and thereby receiviny money to be applied in sinking the mortgage debt. Such is the case before us, for the bill alleges no improper act in the defendant in the mode of working the mine, but it is merely founded on the allegation that the plaintiffs have the title, and that the defendant is insolvent, and therefore can not answer the plaintiff's damages arising from his trespass. But until the defendant's debt has been paid, his insolvency can lay no foundation for stopping his operations; because all his earnings are immediately accounted for as credits on the debt the estate owes him. So we think, in every point of view, the injunction should have been dissolved. As legal owners, the plaintiffs ought to have brought suit at law long ago, and asked only for an injunction until a trial could be had. As mortgagors, or the assignees of a mortgagor, or of one treated in equity as a mortgagor, they should have filed their bill to redeem, and offered to pay the principal and interest due to the defendant. We speak in reference to the defendant William Davidson, to whose situation alone these remarks are applicable.

As to the other defendants: Jane Dunn is in default in not answering, and this appeal brings up no question as to her. To the defendants, Sarah Davidson and Glenn, it is now immaterial what becomes of the injunction, as the lease to the former had expired before the motion to dissolve. But they were entitled, for the foregoing reasons, to be let loose by a dissolution of the injunction; though not with costs, we think.

For, notwithstanding the answer, we can not shut our eyes to the admitted facts, that the original bill was filed on 25 August, and between that day and 3 September, the (322) defendant Sarah Davidson, a single daughter of the original defendant, and an inmate of his house, took a lease for the premises; nor fail, as persons of common sense, to infer therefrom that the purpose was to enable her father to proceed in working the mine as he did before, only in her name instead of his own; especially as William Davidson expressly states in his answer that *he* has been in possession ever since the sheriff's sale, for his own use, as entitled to a balance of the purchase-money out of the land. And we can not understand the equivocation, on which the defendants, under such circumstances, can bring themselves to deny that, in taking the lease from Dunn, they had it as an object to evade the injunction. We can not doubt that it was an artifice in fraud of the process, and therefore we think that none of the defendants should be entitled to costs on the dissolution of the injunction.

This opinion will be certified to the court of equity; that further proceedings may be had in the cause accordingly.

PER CURIAM. ORDERED ACCORDINGLY.

Cited: Gause v. Perkins, 56 N. C., 179; *Bogey v. Shute,* 57 N. C., 177; *Thompson v. McNair,* 62 N. C., 124; *Ragland v. Currin,* 64 N. C., 357; *Levenson v. Elson,* 88 N. C., 185; *Roper v. Wallace,* 93 N. C., 31; *Lumber Co. v. Cedar Co.,* 142 N. C., 417.

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(323)

DAVID C. GUYTHER et al. *v.* JOSHUA TAYLOR et al.

1. A testator, by his last will, bequests, among other things, as follows: "It is my will, that my negroes and stock be kept on the plantation, whereon I live, until my son Kinchen attain the age of 21 years. Item—I give to my son Joshua, $1000, to be raised from the farm. Item—*I give and bequeath to my three daughters, Maria A. Guyther, Harriett Jane Taylor, and Charity D. Taylor, and my son Kinchen, to be equally divided between them, my negroes, when my son Kinchen arrives at the age of 21 years.* Item—It is my will that the residue of my estate of every description, belong to my son Kinchen Taylor": *Held,* that the three daughters and the son took vested and equal interests under the bequests of the negroes.

2. In construing a bequest, there is a leaning always in the Court toward vesting, if the expression be ambiguous, and the intention doubtful.

3. In respect to gifts of personal estate by will, the law is, that the word *when*, is a word of condition, and imports, that the time "when" the legatee is to receive the bounty, is of the essence of the donation, unless there be some other expression to explain it, or some provision in the context to control it.

4. A direction in the will, making a disposition of the property until the time specified, is such a provision as will control the general rule. So, also, the expression in the will, "to be equally divided between them," is equivalent to the expression, "payable," or "to be paid," in explaining the words "when," etc.

Cause removed from the Court of Equity of MARTIN, at the Fall Term, 1844, having been first set for hearing.

The following facts appear from the pleadings:

Kinchen Taylor, the elder, made his will 6 November, 1836, and therein devised and bequeathed as follows:

"It is my will that my negroes and stock shall be kept on the plantation whereon I live, until my son Kinchen attain the age of 21 years.

"I give to my two daughters, Harriet Jane Taylor and Charity D. Taylor, my piney woods tract of land, containing 776 acres.

"I give to my son Joshua, $1,000, to be raised from the farm.

"I give to my son, Kinchen, the house and plantation whereon I now live, and the rest of my landed estate. (324)

"I give to my grandson, John M. Guyther, one negro boy named Bob.

"I give and bequeath to my three daughters, Maria A. Guyther, Harriet Jane Taylor and Charity D. Taylor, and my son, Kinchen, to be equally divided between them, my negroes, when my son Kinchen arrives to the age of 21 years.

"It is my will that the residue of my estate of every description belong to my son Kinchen Taylor.

"Lastly, I nominate my son Joshua, and David C. Guyther my executors, and authorize them to keep the negroes and stock on this my mansion plantation, in such manner as they may think best for my heirs."

By a codicil, dated 1 January, 1837, the testator directs that his three younger children, Harriet Jane, Charity D. and Kinchen, should be handsomely supported by the executors, out of his estate; and he gives to his daughter, Eveline B. Jones, five dollars.

Joshua Taylor, alone, took probate of the will, and in 1839 a bill was filed against him by the other children, except Mrs. Jones, upon the grounds of his mismanagement of the estate, and apprehended insolvency, upon which a receiver was appointed, in whose hands the estate has ever since been,

under the direction of the Court. It appears that the profits of the plantation, on which the testator resided, and on which his slaves have been kept and worked, since his death, have not been sufficient to educate and maintain the three younger children, and discharge the legacy of $1,000 charged thereon in favor of Joshua Taylor, the executor, but a balance is still due to him.

On 27 April, 1844, Kinchen Taylor, the son, arrived at full age, and the daughter, Charity D., was then living, she having intermarried with William T. Powell. Before that day, however, Mrs. Guyther had died, and her husband, David C. Guyther, administered on her estate, and Harriet Jane had also died, having previously married John H. Dawson, who administered on her estate. Upon the arrival of Kinchen Tay-
(325) lor, the younger, at full age, the parties severally filed petitions in the cause for a division of the slaves; Guyther and Dawson, as administrators respectively of their wives, claiming that they were entitled to one-fourth each, as a vested interest in their wives; and Powell and wife insisting that the gift was contingent to those who might be alive when Kinchen came of age, and claiming that the whole was to be equally divided between those who should then be living, and, therefore, that Mrs. Powell is entitled to one-half, and Kinchen Taylor to the other; while Kinchen Taylor insisting, also, that the gift was contingent, as above, insists further, that neither of the donees can claim more than an equal share or fourth part of the slaves, by virtue of the clause in which the slaves are particularly given, and, therefore, he claims that the shares, which have fallen in by the death of Mrs. Guyther and Mrs. Dawson, belong to him as residuary legatee.

Badger & Whitaker for the plaintiffs.
J. H. Bryan for the defendants, K and J. Taylor.

RUFFIN, C. J. The rights of the parties depend upon the question whether the gift of the negroes was contingent. If the will gives a vested interest, then each of the four children was entitled to a share, and the shares of those dying before Kinchen came of age, were transmissible to their representatives. It is insisted that this was a contingent gift, chiefly on the strength of the word *when,* which, it is said, as the clause is framed, refers to the gift and not to the division of the negroes. It is no doubt the law, in respect to gifts of personal estate by will, that the word *"when,"* like "at" or "if," is a word of condition, and imports that the time "when" the legatee

is to receive the bounty, is of the essence of the donation, *Giles v. Franks,* 17 N. C., 541, unless there be some other expression to explain it, or some provision in the context to control it. It is well settled for example, that if there be a gift of a sum of money "to be paid" to "A," *at* a particular period, or *when* B shall come of age, the words "to be paid" control the expressions of contingency, by shewing that they were not used in that sense, but only to mark the period, at which the enjoyment would begin. The same effect, it would (327) seem, must be allowed to the words of this will, "equally to be divided between them," provided *when* is to be referred to these latter words, as denoting the time merely, at which the testator intended each child to have his or her share in severalty, and not to the words, "I give and bequeath," in the previous part of the sentence, so as to denote an intention that the gift itself was made only *when* the son should come of age. We do not perceive a distinction, to this purpose, between "equally to be divided" and "to be paid" or "payable." But upon the clause of this will, by itself, it is really not easy to say, to which the testator meant to refer the time, the gift, or the division. The sentence is not only ungrammatical, but is inaccurately and clumsily expressed. The ambiguity arises from the position in the sentence of the subject of the gift, "my negroes"; and it seems impossible to speak with any certainty as to the intention on this point, looking only at the words here used. But there is a leaning always in the Court towards vesting, if the expressions be ambiguous, and the intention doubtful. *Stuart v. Bruer,* 6 Ves., 529; *Sitwell v. Bernard,* 6 Ves., 522.

There are also other provisions in the will, and other considerations, which strike us as fortifying the construction that these are vested interests. In the first place, there is an apparent intention to put all four of these children upon an equality in respect of the negroes. They are to be equally divided between them. Now, it seems difficult to suppose that the testator meant the legacy of Mrs. Guyther to fail by her death, and, indeed, that he did not mean the contrary, as she was then married and had at least one son, to whom his grandfather gives a negro. If the words were clear, it is true that circumstance could not control them; but, upon an ambiguous sentence, it is quite material to aid in fixing upon the one intention of the other. With respect to his unmarried children, he might not have adverted to the probability of their marriage, having issue, and dying before Kinchen came of age. But he could hardly overlooked the probability of Mrs. Guyther's

(328) death before that event, and leaving a child or children, or have intended, in case she should, that her family should be altogether unprovided for. But when it is observed, that the gift of the negroes is not to the four children jointly, nor by a general description, under which such of them, as should be living when Kinchen came of age, would be entitled to take the whole, but is to the four, *nominatim,* equally to be divided between them, so that, in no event, could any one of them receive more than a share, viz: one-fourth, under that clause, *Johnson v. Johnson, post,* 426, the reasons for holding the legacies to be vested, become much stronger. For the effect of holding otherwise, would be to entitle Kinchen, by virtue of the gift of the residue, to the shares of those thus dying; which would be in opposition to the apparent equality intended between him and his sisters, at least as to this fund. But that is not all. The construction would produce this absurdity; that, if Kinchen should die while an infant, then his own share of the negroes, which, upon the argument for him, the testator intended should be contingent, and not belong to him unless he lived to be 21, would nevertheless fall into the residue, and, as to that no contingency is annexed, would in that form be a vested interest. That would render the gift of Kinchen's fourth part of the negroes, at one and the same time, by one clause in the will contingent, and by another clause, vested; which can not be supposed. He clearly has a vested interest by virtue of the gift of the residue, and, therefore, it must be taken—to avoid the absurdity pointed out—that the testator intended that he should have a vested interest by the clause giving the negroes specifically; and if, by that, he acquired such an interest, then the others must, by the same clause, have a vested interest also; for, in that part of his will, the testator puts the four on the same footing precisely. To those considerations, arising out of the particular provisions of the will, is to be added another important one; which is, that the testator disposes of his negroes until the period at which they are to be divided, and, consequently, the whole subject *corpus,* is given away for different purposes; so that the interest
(329) given to the children are in the nature of remainders, and the term "when," though generally a word of condition, marks in this case only the commencement of the remainder. The cases upon the subject are collected and well explained by 1 Roper Legacies, 392. Here, besides maintaining the children, the sum of $1,000 was to be raised for Joshua Taylor; and, that the testator judged rightly, that it would require at least the whole period to raise that sum out of the profits of

the estate, is proved by the event. It is not yet all raised; and we may therefore fairly presume that the sole purpose in not directing an immediate division of the negroes among the four donees, was, by keeping them together, to raise the pecuniary legacy to Joshua, after maintenance to the children; and, if so, the rule is to consider the gift to be immediate, though, being in the nature of a remainder, it is not to be enjoyed until a particular period; by which time the testator expected the purpose he had in view would be effected. Upon the whole, therefore, we are of opinion that we shall best effectuate the testator's intention, though very obscurely expressed, by holding those to be vested interests, and, consequently, that each of the children, or their respective administrators, is entitled to one-fourth part. The decree must be, therefore, that the balance due to Joshua Taylor for his legacy, and the expenses of the estate, including the costs of this suit, be raised out of the negroes, and those that remain, be divided as here directed.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Owen v. Owen, 45 N. C., 126; *Poindexter v. Gibson,* 54 N. C., 48; *Hathaway v. Leary,* 55 N. C., 266; *Devane v. Larkins,* 56 N. C., 380; *Sims v. Smith,* 59 N. C., 350; *Sutton v. West,* 77 N. C., 341; *Elwood v. Plummer,* 78 N. C., 395; *Hooker v. Bryan,* 140 N. C., 405.

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(330)

CELIA JOHNSTON *v.* THEOPHILUS EASON et al.

1. Every trustee for sale is bound by his office to bring the estate to a sale, under every possible advantage to the *cestui que trust;* and, when there are several persons concerned, with a fair and impartial attention to the interests of all concerned.
2. He is bound to use not only good faith, but also every requisite diligence and prudence, in conducting the sale.
3. If such trustee is wanting in reasonable diligence in conducting the sale, as if he contracted under circumstances, shewing haste and improvidence, or so manage the sale as to advance the interest of one of the parties, to the injury of another, he will be personally liable to make good to the party, suffering for his misconduct, the amount of his loss.
4. Nor will equity, in such a case, assist a purchaser, however innocent, in compelling a conveyance of the title.
5. When a trustee sells at auction, he must make due advertisement, and give due notice to the parties interested. Otherwise the sale will be avoided.

This cause, having been set for hearing upon the bill, answers and depositions, was transmitted by consent of parties from the Court of Equity of EDGECOMBE, at the Fall Term, 1844, to the Supreme Court.

The following facts appear from the pleadings and depositions and exhibits filed in the cause.

The plaintiff complains, that in 1829, she sold to Thomas Low a tract of land, the boundaries of which are set forth in her bill, for the sum of one hundred and fifty dollars, secured by four bonds, each for $37.50, payable at different times; that in order to assure the plaintiff the price of the land, the said Low executed a deed of trust to the defendant, Theophilus Eason, for the land, with the usual provisions for the sale thereof, upon his failing to pay off and discharge said bonds; that at the time this deed of trust was delivered to the defendant, Theophilus Eason, she delivered to him the said bonds given for the price. She further alleges, that soon
(331) thereafter, Thomas Low removed from this State, taking with him all his property, and leaving but the land to satisfy her claim, and that the whole of the said claim is still due, except $15 paid by Low before he went away. She further charges that in June, 1841, she notified the trustee, Eason, in writing, to sell the land and discharge the debt, or she would proceed against him to compel him; that to this notice she received no answer, and that she had several times before requested him to do so. In August following, she wen to Tarborough to see counsel and institute proceedings against the said trustee, when she learnt that he had sold the land the preceding Saturday, to the other defendant, his son, for seven dollars. She charges the sale was fraudulently made for the purpose of defrauding her of the land; that but six persons were present, the two defendants, a man by the name of Russ, who had been put upon the land by the trustee as his tenant, a man by the name of Eason, a relation of the defendants, and two other individuals, who were her neighbors, who were that morning invited by the defendant, Theophilus Eason, neither of whom had heard of the sale until so invited; that she resides within two miles of the place, where it is said the sale took place, but had never heard of it, nor was she ever notified by the trustee of his intention to sell—if he had done so, she would have attended and bid the amount of what was due to her, as advised by her counsel. She charges that the defendant, Thomas Eason, holds the land as her trustee, subject to the performance of the trust in the original deed of trust; and prays that the land may be sold under an order of the Court, for the payment of what is due to her, or that the

trustee, Theophilus Eason, may be decreed to account with her for the full value of the land.

The defendants in their answer admit the sale of the land, by the plaintiff to Thomas Low, at the price specified, and the execution of the deed of trust for the purposes therein set forth.

The defendant, Theophilus Eason, alleged that three of the notes or bonds given by said Low to the plaintiff, were, by her, transferred to him, to secure a debt which she owed him, to the amount of $70 or $80 in the year 1832; (332) that he made the sale at the request of the plaintiff, having received from her a written notice so to do, and that he sent her word, by her messenger, that he would do so. He further alleges that he advertised the sale at three different public places in the county of Edgecombe, where the land lies, to wit, at Daniel's store in Stantonsburg, at Otter Creek meeting house, and the court-house in Tarborough; that on the day of sale, to wit, the Saturday before the August term of Edgecomb County Court, according to the advertisement, he exposed the land for sale, on the premises, at one o'clock, when his own son, Thomas, the other defendant, became the highest bidder at seven dollars and sixty cents. He further avers that he took all necessary steps to make known the time of sale; and that the land was not worth what the plaintiff owed him.

The defendant, Thomas Eason, denies all fraud, so far as he was concerned, in the manner of making the sale, and believes it was fairly conducted, and that he is a *bona fide* purchaser.

A general replication was taken to the answers, and the cause was set for hearing and sent to this Court to be heard.

The deposition of John Evans states that he knows the land in dispute, that it is worth one dollar per acre; that, at the time of the sale, he lived within two miles and a half of the land, and never heard of the sale, and that the plaintiff lived with him at the time.

Bryant Evans knew the land, and the time of sale; lived within one hundred yards of the land for fifteen years, and did so at the time it was sold; heard nothing of the sale until the evening of the day on which it took place. Some years since, he purchased one-half of the land from Theophilus Eason, at the price of $50; took a deed from him, and gave his note or bond for the price. Afterwards learning from the plaintiff that she was interested in the matter, and dissatisfied, he surrendered up to the defendant, Theophilus, the deed he had received from him, and took back his note.

Benjamin Strickland lives about two miles from the
(333) land and did not hear of the sale until three or four days after it was made.

William S. Duggan. In the summer of 1841, at the request of Theophilus Eason, he went with him and his son, Thomas, to Stantonsburg, for the purpose of seeing the former put up an advertisement to sell the land. He did see the defendant set up an advertisement for the sale of the land at the store of Daniel and Rountree in that place. After night, he and Rountree went out with a candle to see the advertisement, and it was gone; and after that he and Theophilus Eason left Stantonsburg together. The next day he went with the other defendant, and saw him put up an advertisement for the same purpase at the course-house door in Tarborough, and another at Otter's Creek meeting house; that Tarborough is twenty-two or three miles from the land; Otter's Creek meeting house about ten, and Stantonsburg about six or seven. He further states that Oak Grove is a very public place, and is about one mile and a half from the land.

Nathan P. Daniel is one of the firm of Daniel & Rountree, at Stantonsburg, and lived there in the summer of 1841; saw no advertisement for the sale of the land at that place or anywhere else.

Abner Tyson lives about a mile and a half from the land; heard nothing of the sale until the morning of the day, on which it took place; on that morning, the two defendants came to his house, told of the sale, and asked him to go; he did so; on the way, Lawson Eason and Geralders Simms joined them, and they went on. When they got there, the land was put up to the highest bidder, and bought by Thomas Eason at seven dollars and sixty cents—no other persons there; and the land not worth more than fifty cents per acre.

John M. Barnes lives scarce a mile from the land; heard nothing of the sale for several days after; thinks it worth one dollar per acre.

Richard Howcott lives within about one mile and a half of the land; did not hear of the sale until some days after it took place.

(334) *Benjamin Moore* lives within three-quarters of a mile of the land, and never heard of the sale until it was over.

The depositions of *W. S. Duggan* and *Jonathan Eason* and *Elkamy Bailey* proved, by the former, the putting up the advertisements, as stated by him in his other deposition—by the second that he had heard the plaintiff say the land was Theophilus Eason's; and by the last, that she said, some eight

or ten years before the deposition was taken, that Theophilus Eason had paid for her sixty or seventy dollars, and she had given up the land to him—and does not think the land worth more.

B. F. Moore for the plaintiff.
J. H. Bryan for the defendant.

NASH, J. It is impossible to read this testimony, without being entirely satisfied that a gross fraud has been attempted by these defendants, in the pretended sale of this land. The land in question was conveyed by Thomas Low to the defendant, Theophilus Eason, in trust, for the purpose of securing to the plaintiff the money due to her from Low, for the purchase of the land; and the securities taken by her, as she alleges were at the same time delivered by her to Eason, for the purpose of being in his possession, when the sale should be had. Twelve years after this, the land was sold at public auction, as it is alleged by the defendants, and Thomas, the son of the trustee, became the purchaser, at the price of $7.60. Every trustee for sale, is bound by his office to bring the estate to a sale, under every possible advantage to the *cestui que trust. Dowes v. Graysbrook,* 3 Mer., 208; and, when there are several persons interested, with a fair and impartial attention to the interest of all concerned; *Ord v. Noel,* 5 Mad., 440. *Hunt v. Bass,* 17 N. C., 292. He is bound to use, not only good faith, but also every requisite degree of diligence and prudence, in conducting the sale. If he is wanting in reasonable diligence in the management of the sale, as if he contract under circumstances, shewing haste and imprudence, or so manage the sale, as to advance the interest of one of the parties to the injury of another, he will be personally liable to make good the party, suffering from his misconduct, the amount of his loss. Lewin on Trusts and Trustees, 22 Law Lib., 186. *Pechell v. Fowler,* 1 Anstr., 550. Nor will equity in such a case assist a purchaser, however innocent, in compelling a conveyance of the title. *Ord v. Noel,* per *Sir John Leach.* Where a trustee sells at auction, he must make due advertisement, and give due notice to the parties interested. Thus, in a mortgage deed, with a power of sale, it appearing to the Court that the power was limited to a trustee, and that the mortgagor had not been apprised of the sale, *Sir John Leach* granted an injunction to stay the sale. He observed, it was the duty of the trustee to attend equally to the interest of both *cestuis que trust,* and apprise both of the intention of selling,

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that each might take the means to procure an advantageous sale. *Anon* case, 6 Mad., 10. In this case, according to the testimony, there was not only a want of good faith in the trustee, amounting to actual fraud, but, according to his own statement, a degree of negligence and want of prudence, if he were acting honestly, that would make him answerable to the plaintiff. He alleges that he caused advertisements to be put up, at three different public places. The one at Stantonsburg was put up by him, and, that night, before he left there, it disappeared, and this was six or seven miles from the land, but the nearest place to it at which the advertisement was put up. The other two places were distant from the land, the one ten, and the other twenty-two or three miles. William S. Duggan, the witness who saw the advertisement put up, tells us that Oak Grove was a very public place, and not more than a mile and a half from the land, and the defendants do not pretend that any advertisement was put up there. Why was this omission? If the object was to apprise those, who would be most likely to purchase, the neighbors, would not a notice have been put up where it was most likely to come to their knowledge? So
(336) far from this being the desire of the defendants, the notice nearest to the land disappears the night after it was posted up, nor did any one, as far as is disclosed by the testimony, except Duggan, ever see it. Mr. Daniel, one of the partners in the store, and who was there at the time, swears he never saw it. The neighbors are examined, one living within a hundred yards of the land, another within three-quarters of a mile, and none more than two or two and a half miles, and not one of them ever heard of the sale until it was over. Mr. Evans, who lived within one hundred yards of the land, had actually, some time before that, made a contract with the trustee for the purchase of one-half of the land, for fifty dollars, but subsequently rescinded. How many persons were present? Altogether six: the two defendants, Lawson Eason, a relation of theirs, Russ, the tenant of the trustee on the land, and Mr. Tyson and Mr. Simms. Mr. Tyson had never heard of the sale until that morning. When they got to the land, it was put up to sale, and bid off by Thomas Eason, the son of the trustee, for $7.60. If the trustee had intended to act with good faith, upon finding so few persons in attendance, and so little bid for the land, he would, as it was clearly his duty to do, have adjourned the sale. In addition to all this, the defendant, Theophilus, tells us in his answer that the plaintiff owed him between $70 and $80, and this land was the only fund out of which he expected to get paid; and yet, he wishes the Court to

believe that the sale to his son for $7.60 was an honest one. The plaintiff charges that the trustee never gave her any notice of the intended sale, and that she never heard of it until she went to Tarboro, which was the week after; and the trustee does not pretend to say he did give her notice; he only alleges, that, in answer to her notice, which was in June, he sent her a verbal message he would sell the land before court, and, in evidence that she knew nothing about it, the individual with whom she lived swears he heard nothing of the sale until it was over. We are satisfied, from the whole case, that the trustee was not guilty alone of such negligence and want of care, as would render him liable to make good to the plaintiff (337) such injury as she would have sustained, if the sale had been effectual, to convey the title, but we see so much of trick and contrivance, as satisfies us that the whole was a base fraud.

There must be a decree for the plaintiff, declaring the sale made by the defendant, Theophilus Eason, fraudulent and void.

The defendant, Theophilus Eason, claims to be a creditor of the plaintiff, for the sum of seventy or eighty dollars. He is at liberty to have an account taken by the Master of what the plaintiff does owe him.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Woody v. Smith, 65 N. C., 118; *Hinton v. Pritchard,* 120 N. C., 3; *Woodcock v. Merrimon,* 122 N. C., 738.

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JOSIAH THOMPSON et al. *v.* JOHN NEWLIN, Exr., Etc.

1. A testatrix bequeathed certain slaves to A, without mentioning any trust to be attached to the bequest. The next of kin of the testatrix filed a bill against A, alleging that the slaves were bequeathed to A on the unlawful trust that he should permit them to reside in this State and enjoy their actual freedom, while he was to be only a nominal master; and the bill stated some circumstances to justify this belief, and particularly that A was a member of the Society of Friends, and could not conscientiously hold slaves. The defendant demurred to the bill.

Held, that the demurrer should be overruled and the defendant be decreed to answer, whether the gift was an absolute one to him, or whether it was in trust, and if so, what was the object of the trust.

2. If the trust was unlawful, as alleged in the bill, then A, who was also the executor of the will, was a trustee for the next of kin, and must disclose the facts, so that the Court may give them their proper

remedy. If it was on a lawful trust, the Court has a right to know it, that the execution of the trust may be decreed.

3. An express agreement between the testatrix and the donee in the will is not required to establish a trust on his part. An understanding, or belief and expectation, by the testatrix that the donee would not hold these negroes as slaves beneficially, and that he either assented thereto, or by his silence induced her, and intended to induce her, to think that he meant to comply with her view, are sufficient to constitute him a trustee.

4. A demurrer, unlike a plea, must be overruled *in toto*, unless it be good in its full extent. If it cover too much, as if it be to the whole bill, when the plaintiff is entitled to discovery or relief upon some part, it must be overruled; for it can not be held bad in part and good in part.

This was an appeal from an interlocutory order of the Court of Equity of ORANGE, at the Fall Term, 1844, his Honor, Judge *Pearson,* presiding, by which the demurrer filed by the defendant to the plaintiff's bill was overruled, and he ordered to answer.

The following is the case presented by the pleadings:

The bill was filed by the next-of-kin of Sarah Free-
(339) man, deceased, late the wife of Richard Freeman; and states that by her marriage settlement she was entitled to her separate use to a considerable number of slaves and other personal estate, consisting of money and debts, and other things to a considerable value; that she wished and intended that, after her death, her slaves should not serve any person in a state of servitude, but should be freed or held by some person in a state of qualified slavery, and have all the other parts of her personal estate. The bill states, that the defendant, Newlin, is a member of the religious society called Quakers, and that all the members of that society are opposed, and that the defendant is opposed, upon a religious principle, to slavery, and that the defendant will not hold slaves as property and for his own use; and that he had taken an active agency in procuring the manumission of slaves and had taken conveyances of slaves absolute, apparently, but had suffered such slaves to enjoy the privileges of freemen. The bill then states, that the testatrix well knew the said Newlin and the religious principles above mentioned of himself and the other members of his religious society, and that, in fraud of the slaves of the State and the public policy, she made her will, and therein bequeathed to the said Newlin all her slaves and other estate, but with the intention and understanding that the said Newlin should hold the negroes, not for himself, but for their own benefit and advantage, and for the purpose of their enjoying a qualified freedom, and that he

should hold the residue of the estate in trust for the said negroes. The bill also states that the plaintiffs contested the probate of the will, and that, upon the trial of the issue, *devisavit vel non,* the present defendant proved, as a part of his case in support of the instrument, that the testatrix had declared the intentions above mentioned as to her slaves after her death, and that she knew that he was a Quaker, and designed to bequeath the said slaves to a member of that society, who would not hold them as slaves, and therefore gave them to him.

The bill then charges that the bequests of the will were made upon a trust for the benefit of the slaves themselves, and that they might be kept here in a state of qualified (340) slavery, and should have the benefit of the other parts of the personal estate, and that such a purpose was unlawful and contrary to the policy of the State, and that a trust of the slaves and other personal estate results to the plaintiffs, as next-of-kin. The bill, therefore, prays a discovery, an account and relief.

The defendants put in a general demurrer to the discovery and relief for want of equity.

Upon the argument of the demurrer, his Honor held that Freeman, the husband, was a necessary party; and, also, that the allegation, and an interrogatory founded thereon, "that the defendant had taken an active agency in procuring the manumission of slaves, and had taken conveyances of slaves, absolute, apparently, but that such slaves were to enjoy the privileges of freedom," was impertinent, and that the defendant was not bound to answer thereto, because it would subject him to prosecution and penalties. But the Court allowed the plaintiff to amend the bill by making Freeman a party, and by striking out the allegation and interrogatory above mentioned, upon the payment of all the costs up to that time. And then the Court overruled the demurrer, but allowed the defendant an appeal to this Court.

Badger for the plaintiffs.
J. H. Bryan for the defendant.

RUFFIN, C. J. The Court is of opinion that the demurrer was properly overruled. The bill charges a bequest upon a secret trust for the benefit of the slaves; and the defendant must answer as to the truth of the charge. If the trust was expressed upon the face of the will, being against the public policy, the Court would hold that it was void, and that a trust resulted to the next-of-kin. *Haywood v. Craven,* 4 N. C., 360. The same

consequence follows, if it can be collected or implied from any incidental expressions in the will or deed. *Huckaby v. Jones,* 9 N. C., 120; *Stevens v. Ely,* 16 N. C., 493; *Sorrey v.*
(341) *Bright,* 21 N. C., 113. The doctrine of the Court is well settled to be, that slaves can only be held as property, and deeds and wills, having for their object their emancipation, or a qualified state of slavery, are against public policy, and a trust results. Since the Act of 1830, Rev. St., ch. 101, it is not unlawful to bequeath or convey slaves for the purpose of being removed out of the State in a convenient time, and emancipated there, and kept away from the State. *Cameron v. Commissioners,* 36 N. C., 436. But it can not be supposed upon this bill, that such was the purpose or nature of the trust here; for there is no allusion to the removal of the slaves to be emancipated, but, on the contrary, it is charged that they were to be held by the defendant, nominally as their's, to evade the law, but really for the benefit of the slaves themselves; which imports that the purpose was not to send them abroad for emancipation there, but, rather, that they should remain in this State. But, if, in truth, the trust was to send them out of the State, and the defendant intends to do so, and will submit to do so under the direction of the Court, and will enter into the obligations, which the law requires, that they shall not return, then let him thus answer, and that will terminate the plaintiff's claim. But upon the supposition, that the trust was that the slaves should be kept here, in which case the defendant could not carry them away without a breach of trust; or that it was, that they should be removed, and the defendant declines removing them, or declines securing the public against their return, then it is manifest that there is a resulting trust for the plaintiffs. For the defendant, having taken them upon a trust, can, under no circumstances, hold them with a good conscience, or be allowed by the Court to hold them, as slaves for his own use. The testatrix gave them to him with no such purpose, but upon trust. Therefore, he holds as trustee at all events, and the only question is, for whom does he hold? Not for the slaves, because that the law forbade him to do. It follows that he holds for the next-of-kin.

But the trust is not expressed directly in the will, nor is there anything said in that instrument or any other, as alleged,
(342) by which it appears by implication; and the question is, whether the defendant shall be obliged to discover it? We have no doubt that he must. Both upon principle and authority, it is clear that he must be required to answer as to the fact, because, if he admits it, the same duties of conscience

are unquestionably established against him, as if the trust was express on the face of the instrument. The law will not allow itself to be baffled, and its policy evaded, by secret agreements, the very objects of which are to defeat the law itself. Therefore, a legatee must say, whether he took the property for himself, as his property in the beneficial sense of the term, and not in the hollow and delusive sense of a mere legal title, in trust for some other person or purpose forbidden by law. It is said that compels him to make a discovery, by which he forfeits the property conveyed to him by the will. But that is a mere play upon words; for, in the view of this Court, if he took upon a trust, no matter what, he has no property in the thing, but merely holds it as the property of another, the *cestui que trust.* He forfeits nothing, therefore, unless every trustee may be said to forfeit what the Court compels him to convey, in execution of the trust assumed by him. The question is not, now, as to the evidence, by which a secret trust may be established against a party, who denies it by his answer, but is merely whether the party may be called on to say yes or no to the charge of such a trust. The defendant does not even plead that the gift is absolute upon the will; in which case, indeed, his plea would not be allowed, peremptorily, but only suffered to stand for an answer, with liberty to except. *Strickland v. Aldridge,* 9 Ves., 516. But he demurs and admits the facts for the purposes of a decision, whether, if they be true, the plaintiffs can have a decree. Now, if all this bill be true, there can not be a doubt that the plaintiffs are entitled to the relief they ask; and, therefore, the defendant must either admit or deny the truth of the charges. That the Court will enforce such secret trusts, where they are not unlawful, and will, when they are void in law, declare them so, and decree a resulting trust for the heir or next-of-kin, has been long established. We have had (343) a recent instance of the former kind before us, the case of *Cook v. Redman,* 17 N. C., 623, in which we held that a private promise, made to the testator by a legatee to hold in trust for another person, was binding and would be enforced; and, indeed, that a promise was not necessary, but that a silent assent to the known wishes of the testator was sufficient to raise the trust. So in respect to devises upon a secret trust for a charity, void under the mortmain acts, it is established doctrine that they shall be declared void by the Court, upon the admission of the answer, for *nemo potest facere per obliquium, quod non protest facere per directum. Boson v. Slatham,* 1 Eden, 508; 1 Cox, 16. The question was much discussed before *Lord Eldon* in *Muckleston v. Brown,* 6 Ves., 52, and the result was, that he

said the Court would compel persons to discover secret agreements, made with a view to evade the provisions of the acts, and require devisees to answer, whether they took the estate, as they legally could not do, for charitable purposes. And in *Strickland v. Aldridge,* the devisee was required to answer a bill, charging such secret trust, by way, simply, of allegation, without stating an inference of it from the will, or any other writing, or any evidence of it. These authorities come fully up to the present case, and, indeed, the last goes beyond it. For here the bill does state several strong facts, as evidence of the trust, which convey forcibly to the mind a clear impression that there must have been some agreement to the effect charged, or that there was some understanding or belief and expectation by the testatrix, that the defendant would not hold these negroes as slaves beneficially, and that he either assented thereto, or by his silence induced her, and intended to induce her, to think that he meant to comply with her views. It is, for example, stated, what we believe is notoriously true, that it is an article of religious faith among that respectable society, called Quakers, that it is wrong to hold persons in slavery; that the testatrix knew that, and also well knew the defendant, and that he was a member of that society, and was conscientiously scrupulous of holding his fellow-men in slavery for his own benefit; and it
(344) is thence inferred, that the testatrix made these bequests to him for that very reason, because she wished and expected that he would hold the negroes in a state of *quasi* freedom. And it is charged, in support of that inferrence, that, upon the trial of the contest about the probate of the will, the present defendant proved that the testatrix had those intentions, and made declaraions of that import. Now, although such expectations and intentions of the testatrix do not make an express declaration of the alleged unlawful trust, yet, it is clear, as *Lord Eldon* said in *Strickland v. Aldridge,* that a trust would be created upon the principle on which the Court acts as to fraud. For it would be a clear fraud on the testatrix to suffer her to suppose that the defendant, who understood her wishes, would carry them out without her inserting the directions in her will, and then to set up the will as an absolute gift, not coupled with any trust whatever. Therefore the defendant must answer to all those circumstances, in order that it may be seen whether he is not practising an imposition on the testatrix in the first place; and then, in the next, he must answer to the alleged purpose in both of them to evade the law of the country and its policy. And it is obvious that, if the principles of this gentleman are as alleged, and he has reason to believe from that, or

the other circumstance of her declarations as proved on the trial, that she really expected him not to keep these negroes in servitude as his own slaves, it would require a very plain, positive, and unevasive denial of such undertaking, on his part, to obtain credence; an undertaking that may be contracted, not merely by words, but also, under circumstances, by silence. *Paine v. Hall,* 18 Ves., 475.

Some minor objections were taken to the bill, which, though not necessary, it may be proper to notice. First, it is said the plaintiffs have no right to a discovery of the defendant's belief, as it is not a legal test of his right to hold property. The answer is, that the charge of the defendant's religious creed is not inserted for the sake of a discovery, which can produce a forfeiture, or subject him to a penalty, for in our law no such consequence follows from the professing of any (345) religion. Nor is it even to expose him to opprobrium, for it is to the single point, whether he does not in conscience scruple to hold men in bondage, and whether that was not known to the testatrix and formed, in his belief, an inducement to her to make this disposition to him. Now, there is certainly nothing criminal or discreditable in the eye of the law, or of any person, that one should, out of tenderness of conscience for the rights of his fellow man, refuse to have a property in him, though allowed by human laws; but rather the contrary, it is much to the credit of his disinterestedness and Christian charity, if the principle be truly carried out in practice. The only possible imputation that can be made, on this transaction, against the defendant is, not as to this article of his creed, but as to projecting by a secret contrivance to evade the law of the country, or in agreeing and giving the party, who projected it, to understand that he would endeavor to execute the contrivance. The sole subject, therefore, of making this inquiry is to ascertain from it, as evidence, whether the testatrix did not make this bequest upon some secret understanding with the defendant, that he would not hold the negroes in servitude. No discovery upon it can be a detriment to his property or his privileges as a citizen.

It is next said, that under the Statutes, Rev. St., ch. 111, secs. 31, 32, there are penalties on owners of slaves, who hire to them their time or let them keep house and go at large as free persons, and therefore the defendant is not bound to answer. But in relation to these slaves, there is no charge in the bill of that sort. It only alleges that the bequest was made upon a trust that they should be allowed to labor for their own benefit, and act as free persons, and not that the defendant

has, in fact, allowed them thus to act. There are charges of that character in relation to some other negroes, for which it is said the defendant had accepted conveyances from other persons. But that is to be considered as struck out of the bill by the plaintiffs themselves, by way of amendment, under leave of the Court, and no longer presents the objection, (346) if it ever did. Indeed, we must say, that if the plaintiffs had appealed from that part of the decree, it could not have been sustained, for, with a very few exceptions, and those founded on favor, the rule has long been settled, that a demurrer, unlike a plea, must be overruled *in toto,* unless it be good in its full extent. If it cover too much, as if it be to the whole bill, when the plaintiff is entitled to discovery and belief upon some part, it must be overruled, for it can not be held bad in part, and good in part. *Mayor of London v. Levy,* 8 Ves., 398. *Todd v. Eyre,* 19 Ves., 280. But with that we have no concern at present, as this is the appeal of the defendant from an interlocutory decree, and, under the act, brings up nothing more than the single question from which his Honor allowed the appeal to be taken. Upon that question we concur in the opinion of his Honor.

PER CURIAM. ORDERED THAT THIS OPINION BE CERTIFIED TO THE COURT BELOW.

Cited: Cox v. Williams, 39 N. C., 18; *Barnwell v. Threadgill,* 40 N. C., 89; *Lemmond v. Peoples,* 41 N. C., 140; *Thompson, v. Newlin, Ib.,* 384; *Grimes v. Hoyt,* 55 N. C., 274; *Henderson v. McBee,* 79 N. C., 221; *Shields v. Whitaker,* 82 N. C., 520; *Conant v. Bernard,* 103 N. C., 319; *Cobb v. Edwards,* 117 N. C., 247; *Avery v. Stewart,* 136 N. C., 441; *Blackmore v. Winders,* 144 N. C., 218; *Chappell v. White,* 146 N. C., 575.

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JAMES M. SMITH *v.* PHILIP BRITTAIN et al.

1. A sale by a Clerk and Master, under a bill praying the sale of land for partition, is but a mode of sale by the parties themselves. It is not merely a sale by the law, *in invito,* of such interest as the parties have or may have, in which the rule is *caveat emptor;* but professes to be a sale of a particular interest, stated in the pleadings to be vested in the parties, and to be disposed of for the purpose of partition only.

2. Hence, if a purchaser pays his money on a Master's sale, and discovers a defect in the title at any time before conveyance executed, he may recover it back.
3. When a sale under such a decree has been made to A, who pays a part of the purchase-money, and then assigns his claim to B, who pays the remainder, and then a defect in the title is discovered, so that the assignee of the purchaser objects and can not be held to take a conveyance: *Held*, DANIEL, J., *dissentiente*, that this assignee was entitled, upon the Court's rescinding the contract, to have the whole amount that had been paid refunded to him, both what was paid by his assignor and what was paid by himself.
4. *Held*, further, that the money having been paid into court in the original suit for a sale, he was entitled to his relief by a new bill against the plaintiffs in such original suit and his assignor. But, if he adopts this course, instead of applying to the Court by petition or motion in the original suit, he will not be entitled to recover his costs.

Cause removed to this Court for hearing, from the Court of Equity of BUNCOMBE, at the Fall Term, 1843.

The following was the case, as exhibited by the pleadings and exhibits:

David Myers, late of South Carolina, being seized in fee of certain lands situated in Buncombe County, in this State, by his will, dated 6 June, 1833, devised the same, with the residue of his estate, to his six children, "Mary Clendenning, Clayborn Myers, Elizabeth O'Hanlon, David Myers, Nancy Myers and Robert Myers, for life only, and after their decease to their children respectively, that shall attain the age of (348) 21 years; that is to say, to each of my said children one equal part of my estate (after the payment of my debts and legacies) for life, and after decease of any one of them, to his or her children then living, that may attain 21 years, the income to be applied to their education and maintenance during their minority, but the principal and the accumulation during their minority, to survive to such as may attain 21, and to vest in such, whether one or more, at the age of 21, absolutely and forever." The will then creates cross-remainders between all the children and their issue, upon the death of any of the children without leaving issue, or upon the death of their issue respectively, before attaining 21; providing, finally, that "in case my six children, Mary, etc., should all die without leaving issue, that shall attain the age of 21 years, as before mentioned, then, and in that case, I give all the rest and residue of my estate to my cousin, Henry Myers, his heirs and executors forever."

The testator died, and his will was duly proved in South Carolina, and in September, 1837, David Myers, the son, filed

his bill in the Court of Equity for Buncombe County, against his brothers and sisters, the other devisees with him, and therein stated, that David Myers, the father, was seized of the said land in fee simple, and that, by his will, duly executed to pass land in this State, he devised the same in fee simple to the said David, and to his said brothers and sisters, the parties in the cause, equally to be divided between them as tenants in common. The bill purported to have annexed to it, as an exhibit, a copy of the said will, certified from the proper courts in South Carolina, where it alleged the original to have been duly proved and to remain. The bill then stated that actual partition could not be made of the said land in Buncombe without injury to all the owners, and prayed, therefore, that the same might be sold by a decree of the Court, and the money divided between the persons entitled, according to the statute.

The defendants did not answer the bill, but suffered it to be taken *pro confesso;* and such proceedings were had in the suit, that in September, 1838, a decree was entered, purport-
(349) ing to be made by the Court on a hearing upon the bill, exhibits, and former orders, and decreeing that the land should be sold, as prayed for in the bill, and appointing the Clerk and master to make the sale to the highest bidder, upon a credit of one and two years, taking bonds from the purchaser with sufficient sureties.

On 12 February, 1839, the master made a sale to the defendant, Philip Brittain, for the sum of $5,656, which was duly secured, and he gave Brittain a written certificate stating the sale and the terms thereof, and he also reported the same to March term, 1839, and the report was confirmed and Brittain went into possession of the land.

In fact, however, a copy of the will was not exhibited with the bill, nor given in evidence on the hearing, nor filed in the cause, until January or February, 1840.

The master being ordered to collect the purchase-money, he received from Brittain the sum of $1,250, in April, 1840, and took judgment for the residue; and Brittain, being unable to pay it conveniently, without selling the land, agreed for the sale thereof to James M. Smith, on 28 February, 1842, at the price of $3,800, ready money, which was to be, and was, immediately applied towards the payment of the debt, and then Brittain discharged the residue. The contract between Brittain and Smith was written on the certificate, which had been given by the master to Brittain, and states that, in consideration of the sum of $3,800, paid to Brittain, he had bargained and sold to the said Smith "the lands within named, and doth hereby

transfer and assign to said Smith all my interest and right in and under this certificate, and authorize and request the honorable court of equity to make a title to the premises to the said Smith in my stead."

At March term, 1842, the master reported that the purchase-money was fully paid to him. And it was thereupon ordered that the master should execute a deed to James M. Smith, "the assignee or Philip Brittain, the original purchaser." And it was further ordered that the master should retain the purchase-money, and let it out on loans, bearing interest, (350) until the further order of the Court. In May, 1842, James M. Smith filed his bill against all the parties to the above mentioned suit, and against Brittain, and therein states all those matters, and that Brittain, when he purchased, and when he sold to Smith, and also, that Smith, when he purchased and obtained the order, that the deed should be made to him, fully believed that the parties to the original suit were seized in fee as in the bill stated; and that he knew nothing to the contrary until within a few days before the filing of his bill, when he discovered the contents of the said will, and was advised that he could not get a good title under the decree.

The bill charges that the statement of the title in the original suit, and the keeping back the will from the Court, and procuring and suffering the decree without defense, were fraudulent, and with a design to impose on the Court and deceive purchasers. The prayer is, that the decrees in the original cause may be reversed, and the sale declared void, and the purchase-money aforesaid, and the interest thereon, be paid to the plaintiff.

Upon the filing of this bill, the Court ordered, in the original cause, that the master should lease the land from year to year pending this suit, and bring the rent into court.

Brittain, by his answer, submits that Smith should have the money paid by him, Smith; but, he says, that, at the time of his sale to Smith, he was ignorant of any equity to rescind his contract of purchase upon the ground of a defect of title, but believed the title to be good, and the contract obligatory, and that, under that belief, he sold the land for less than he gave, from necessity; and, upon those grounds, he claims for himself such parts of the purchase-money as he paid out of his own funds, over and above the sum of $3,800, received from Smith.

All the Myers family, except two, suffered the bill to be taken *pro confesso;* and those two answered and denied their belief of any fraud intended in the original suit. They state

that real estate in South Carolina had been sold by a
(351) decree of the court of equity, in the same manner as prayed in the bill here, and that they were advised that a good title could be made.

They state further, that the land had fallen much in value since the sale to Brittain, and that they believe that is the plaintiff's motive for wishing to get clear of the bargain, and that they had offered him to refund to him the sum of $3,800, which he paid, and take the bargain in his stead, or to execute to him a covenant with the most ample security to indemnify him against any disturbance, and also to complete the title.

To the answers, replication was taken; and the cause was set down for hearing upon the foregoing orders, and the record of the original suit, and the orders therein, and a copy of the will of David Myers, as exhibits, and an admission of the truth of all the allegations in the bill, except those especially denied, and then it was transferred to the Supreme Court for a hearing.

Badger for the plaintiff.

J. H. Bryan and *Iredell* for the defendant, Brittain.

RUFFIN, C. J. A sale by the master in a case of this kind is but a mode of sale by the parties themselves. It is not merely a sale by the law, *in invito,* of such interest as the party has or may have, in which the rule is *caveat emptor,* but professes to be a sale of a particular estate, stated in the pleadings to be vested in the parties, and to be disposed of for the purpose of partition only. Therefore, if there be no such title, the purchaser has the same equity against being compelled to go on with his purchase, as if the contract had been made without the intervention of the Court; for, in truth, the title has never been judicially passed on between persons contesting it. Hence, if a purchaser pays his money on a master's sale and discovers a defect in the title, at any time before a conveyance executed, he may recover it back. Sugd. Vend., 345. *Johnson v. Johnson,* 3 Bos. & Pul., 162.

There is no question as to the want of title in this case.

Although the estate of the parties to the partition cause
(352) was stated to be a fee simple in possession, yet it is but a life estate. It is true, they would be allowed to complete the title, if they could. But, that is seen to be impossible, for the limitations over are contingent to persons not yet born, and it can not be determined who will be entitled to the fee in the premises until the death of every one of these

persons and twenty-one years afteryards—since the ultimate limitation is to the testator's cousin Henry and his heirs, upon the event, that all his own children should die without leaving a child that shall attain the age of twenty-one.

We are not prepared to say that it is material whether there be simply the defect of title pointed out, or whether there was a deception intended by the parties to the suit upon that point. But we think that nothing less than such a fraud can be judicially inferred from the facts. It is expressly charged in the bill, and is not controverted by four out of the six parties to the former suit; and the other two only answer to their belief of the motives of those who did manage the case. They state, indeed, a construction put on this will by the courts of South Carolina; but they have offered no evidence of the truth of that statement. We are very sure they could offer none such, for the construction of the will is so clear that no such respectable tribunal, as that mentioned by them, could have so held. Then there concur both the *suggestio fulsi* in the bill as to the title, and *suppressio veri* by withholding the will and by the omission of the defendants to file an answer or to make defense; and they constitute, upon legal principles, nothing less than a fraud. It is obvious that the intention was to get a decree without an oath being taken by any person, and to obtain evidence to the assertion of a good title by presenting it to the public, with the apparent sanction of judicial authority.

The purchaser can not, therefore, be compelled to complete the purchase, but the sale must be set aside.

This conclusion was not disputed at the bar; but the controversy turned upon the effect of that declaration on the right to the purchase-money. The plaintiff claims the whole of it; but both of the other parties deny his right to more than he paid, though they dispute between themselves, (353) which of them is entitled to the residue. We think, upon investigation, that neither Myers nor Brittain has the right to it, and, therefore, that it belong to the plaintiff.

This question, it is to be remembered, arises in the court of equity, and it is, in the first instance, what equity have the Myers' to any part of this fund? We think that they have plainly none at all. Ordinarily, when the vendor can not make a good title and the contract is rescinded, the parties are put in *statu quo*. If the vendor has paid no part of the purchase-money, that is effected simply by declaring that the contract is rescinded. In such a case it was never heard that the vendor had an equity against the vendee to say, "you agreed to give me more for the land than it was worth, at the time of the

sale—or rather it is now worth—and therefore you ought to pay me all the price agreed on beyond the present value of the land." For the question is not one of compensation or damages, but of specific performance. The purchaser agreed to give so much money for the land, if conveyed to him with a good title; and unless the vendor does that, the vendor can in equity get nothing from the other side, whatever might be the rule of law as to damages, if the vendee were to sue the vendor at law on his covenant to convey, or whatever may be the rule of equity as to compensation for a part of the land, for which a good title can not be made, when the vendee is content to take a conveyance for the part to which the title is good. But when the vendee declines taking a conveyance, and the Court holds that the title to the whole is defective, the contract is set aside, and the vendor can claim no part of the purchase-money for any difference in value. The same equity, precisely, compels the vendor to pay back such part of the purchase-money as he may have received. For the receipt of the purchase-money makes no difference, unless the purchase has been completed by the vendee's accepting a conveyance, or doing some other act which precludes him from asking for a good title or an inquiry into it. Then, it is apparent,

(354) that if Smith were out of the case, and Brittain and Myers alone were parties, the latter could have no equity against Brittain, as to any part of this money, whether it be considered as having been paid to Myers or still in Brittain's hands, or *in custodia curiæ*. All sides agree, indeed, that the whole fund would be decreed to Brittain had he never sold to Smith. But Myers says that Smith can recover no more from him than he, Smith, paid; that such would be the measure of damages at law, if the parties had respectively made deeds with warranty, and that equity must follow the law. It is to be observed that, in setting up this claim, Myers necessarily excludes Brittain from any share of the money. He does so properly, upon the supposition that the case is to be considered analogous to the case of warranties at law; for Brittain, as the immediate vendee, could not recover from Myers on this warranty to himself, after his sale to Smith. *Markland v. Crump*, 18 N. C., 94. Then why is Brittain to be excluded from any share of this money, as contended for by Myers? Certainly because he assigned his whole interest in the subject-matter to Smith. That is Myers' argument. Now, does it not follow, if Brittain is to be excluded by Myers from this fund because he has assigned it to Smith, that by that assignment Smith necessarily succeeds

to it? He would not be Brittain's assignee, unless he took all that Brittain could claim. The effect of the assignment in equity is, indeed, not precisely the same with conveyances at law. In equity the assignee stands absolutely in the place of his assignor, and it is the same, as if the contract had been originally made with the assignee, upon precisely the same terms as with the original parties. For example, if Myers could make a good title, the conveyance, as things stands, should be made by Myers directly to Smith in consideration, not of the sum paid by Smith to Brittain, but of $5,656 paid by Brittain to Myers, and then, even upon the rule of damages on warranties established in *Williams v. Beeman,* 13 N. C., 483, Smith would recover from Myers the whole price received by him. The rule of that case was much discussed in the argument, and its incongruity with previous cases and with itself, as applied to different states of facts, was much insisted on; and perhaps it may hereafter be found impossible (355) to carry out the doctrine fully. But, at present, we do not disturb that case; for, as before said, this is not a question of damages at law, but it is purely an inquiry, what rule the court of equity has adopted, as to the purchase-money, when the contract can not be completed, and what effect the Court gives to an assignment of an equity. Now, we have seen that Brittain would be entitled to the whole of this fund against Myers, and that he assigned his purchase to Smith. Does not that, *as against Myers,* put Smith in Brittain's shoes? Why not? Myers says, because he only paid $3,800. Admit it; but that is nothing to Myers. Suppose he had paid nothing for it, but that Brittain had devised it to him or assigned it to him, as an advancement to a son. Could Myers contend that, therefore, *he* was to keep the whole purchase-money and, at the same time. not convey the land? It would be monstrous, if it were so. There is no doubt that Smith has all the rights of Brittain in the premises. He is his assignee, and as much entitled to specific performance by a conveyance of *the land* bought by him; and if he can not get that, which he claims, because Brittain could claim it—then he has a right to the money, as belonging to him, because it would have belonged to Brittain. Smith is not restricted to the sum paid by him. He stands in Brittain's shoes, as to his liabilities, and he is therefore entitled to his privileges. Suppose Brittain had paid none of the purchase-money, Smith would have been bound to pay the whole to Myers; for the purchase of an equitable title takes it. subject to all prior equities. *Winborn v. Gorrell, ante,* 117. *King v. Lindsay, ante,* 77. Here, indeed, Brittain has been in

possession for three years or more; and there is no doubt that Smith must account for that to Myers. If he bears Brittain's burdens, then he must be entitled to his advantages. As we have already said, it is nothing to Myers how Brittain and Smith dealt. Suppose Smith had given Brittain $10,000 for his interest, yet he could have claimed from Myers only the sum which Brittain had paid, and in like manner he (356) is entitled to that, though he paid Brittain less. Smith may not be entitled to recover from Brittain more than he paid him, or even anything, and yet he is entitled to the whole from Myers; for the latter is liable to no one else, and can not in good conscience keep a sum of money, which, by fraud, they obtained for land which they can not convey.

This brings us to the question between Smith and Brittain. Now, we do not perceive any right remaining in Brittain, nor any ground whatever on which he can set up a claim for any part of the money. He assigned his whole interest to Smith, and put himself out of the case. It is plain that Smith and Myers might deal with each other as they pleased, without consulting Brittain. If Smith chooses, he may now take a conveyance from the master, and then the money would belong to Myers. Or they two might take out the money and modify their contract as they choose. Now, that they could not do, if Brittain had an interest. Brittain's claim is founded on the supposed hardship of his losing the money, which he paid, when his assignee does not get the land. But that is a hardship which arises solely from his having agreed to give too much for the land, or its falling in his hands. It is not a hardship growing out of a rule of equity, or for which any rule of equity furnishes a remedy. If he had given the land to his son, the latter, and not he, himself, would call for the money from Myers. It is simply the effect of an assignment, as sustained by the court of equity. As before observed, even if the Court, instead of decreeing upon its own principles of specific performance, were to decide in analogy to the rule of law respecting warranties, Brittain could not recover one cent from Myers. *Markland v. Crump,* 18 N. C., 74.

Therefore, the money must either be recovered by Smith, or kept by Myers; and, between them, the equity is already disposed of. It is said, indeed, that the decree is, that the contract shall be *set aside,* and that the consequence of that is, that the parties are to be put in *statu quo,* by which Myers will keep the land, and each of the other parties take the money paid by him. But that goes plainly on a fallacy. The con- (357) tract for the sale of the land is not enforced, and, there-

fore, the vendor must give up the purchase-money. But it is not considered that, in truth, it never was made; for, if so, there would be no ground for decreeing the repayment of the money received under it. Moreover, *the assignment* from Brittain to Smith is *not* rescinded; and while *that* stands, it excludes Brittain from all right in the premises, whatever may be the equities of the other parties between themselves. Indeed, the only necessity for making Brittain a party in this cause, was to have the assignment established against him, as Myers had a right to require should be done. And, but for his claim to a part of the money, he would be entitled to his costs.

It is next said that this bill ought not to be entertained, because all the objects of the plaintiff could have been attained by a petition in the first cause, and that there can be no decree in this cause to reverse the decree in that. The first part of the objection only goes to the costs of this suit, and is a good reason why the present plaintiff should not recover his costs. But we do not see why the Court may not decree, at the suit of this plaintiff against all the parties to the original suit, that they should, among themselves, take such steps in that suit, that the decree obtained therein by their fraud, declaring them to be owners in fee, and decreeing a sale of the land, should be reversed. But even if that can not be done, and we do not think it necessary to decide, in this case, that it can, there seems to be no objection to a decree against those parties, that they shall permit the present plaintiff to receive the money heretofore paid into court, in that case, upon his agreeing, in court, to accept the same instead of a conveyance of the land, and that the orders may be set aside, whereby the sale made by the master was confirmed, and he required to make a deed to the plaintiff. That far, the bill is not founded on any error in law in the first cause, but upon the mere fraud of the parties in that cause on the Court, and on the plaintiff as a purchaser.

DANIEL, J., *dissentiente*. David Myers and others, (358) petitioned the court of equity for Buncombe County (under the Act of 1812) to decree a sale of a tract of land for partition, of which the petitioners alleged that they were seized in fee as tenants in common. The Court made the interlocutory decree, that the master sell the said lands on a credit, etc., and report. The sale was made, and the master reported that Philip Brittain was the purchaser at the price of $5,656, and that he had given bonds and surety to pay the said purchase-money by installments; and the report was confirmed by the Court. Brittain paid into the master's office toward the first

installment $1,250. And before the other installments became due, he sold his equitable interest in the said lands to the plaintiff Smith, for $3,800, in the terms mentioned in the transfer written on the back of the certificate of purchase, given to him by the clerk and master. The money received from Smith by Brittain, was paid into the office for the benefit of Myers and others, and Brittain then paid the balance and took up all the bonds which he had given to the master to secure the purchase-money. Smith then petitioned the Court, with the approbation of Brittain, that the conveyance of the legal title in the land should be made to him; which the Court ordered to be done accordingly. And before the legal title was conveyed to Smith by the master, it was discovered that the petitioners, Myers and others, were never seized in fee of the lands, as they had alleged in their petition; but that they had only a life estate in the said lands. Instead of moving the Court for a reference to the master to report upon the title and see what title Myers and others could make to the said lands, the most correct course (*Atkinson on Titles,* 26), Smith filed this original bill against the petitioners, Myers and others, and Brittain, to have a decree that the contract, which Brittain had made with the master, as the agent of Myers and others, the petitioners, should be rescinded, and that the entire deposit of the purchase-money in the master's office should be paid out to him. We are of opinion that the said contract should be rescinded, as it is evident, from the last will of David (359) Myers, Sr., under whom the petitioners claimed title to the said lands, that they were not seized in fee of the same, nor could they make a good title in fee to the purchaser of the said lands. The money in the office had there been deposited by Brittain, for the benefit of Myers and others, the petitioners, when they made a good title to the lands. The parties are now all before the Court; and it is asked of the Court by Smith, that he may be permitted to take out all the purchase-money deposited in the office by Brittain. In *Wood v. Griffith,* 1 Swanst., 55, *Lord Eldon* said that it was clear that an equitable interest, under a contract of purchase of land, may be the subject of sale; that the original purchaser is then a trustee for the subpurchasers, and equity will compel him to permit them to use his name in all proceedings for obtaining the benefit of their contract. This is the law, where the contract is to be completed, and not where it is to be rescinded. But in the case now before us, had Brittain completed his purchase by taking a legal conveyance from the master, and he had afterwards conveyed to Smith by deed of bargain and sale

in fee, with covenants in it that he was seized in fee, and also with a further covenant for general warranty, and it had afterwards turned out that Brittain was not seized in fee, or that Smith had been evicted by title paramount, the damages the law would have permitted him, Smith, to recover, upon either of those two covenants, would only be the amount of the purchase-money he had paid for the land; this is the well settled law of this State. How then, can Smith claim more than his purchase-money, after the contract shall be rescinded? Can he be permitted, by any principle of equity, to ask the Court for more of the deposit than he is out of pocket? Can he pray to have the contract between Brittain and the master rescinded, so as to defeat Myers and others, of the whole of the purchase-money paid into the office by Brittain for their benefit, and at the same time pray that he should be allowed to take out of the office *all* the money Brittain paid in, on his own account. And we ask, where is this equity, to induce the Court to make such a decree? He has never advanced one cent to Brittain, to raise such an equity in his favor, (360) beyond the sum he paid to Brittain, to wit, $3,800. And there is not a single case to sustain him, to be found in all the books, so far as my researches have extended. If Brittain had devised to Smith his equitable contract in these lands, and then he had died, as the vendors of Brittain, for defect of title, could not have forced him, Brittain, in his lifetime to a specific performance, Smith, the devisee, could not have taken a cent of the money deposited in the office by the purchaser, for it would, in law, have belonged to the executor of Brittain. Nor could such a devisee or heir of Brittain have compelled the executor of the purchaser devisor, either to purchase another estate for him, equal in value to the one supposed to have been devised or descended, nor could the devisee or heir even compel the executor of Brittain to pay, out of the personal estate, the price of the defective estate, which had been devised to him, or descended to him. *Buckmaster v. Hanop,* 7 Ves., 341. Atkinson on Titles, 34. *Brome v. Monk,* 10 Ves., 597. I Powell on Dev., 160 (*note by Jar*). When a contract to purchase lands is rescinded, in consequence of a defect of title in the vendor, the general rule is, that the vendor resumes his land, and the purchaser the purchase-money which has been deposited. It is said that the contract, which Smith made with Brittain, is not intended to be rescinded. But it must be recollected that it is an executory contract, which can not be enforced without the aid of the court of equity, and that the Court never aids a voluntary assignee of such a con-

tract, which Smith is, without the consent of the assignor. Before Smith could call on the Court to make an order, that the $5,656, which had been deposited by Brittain in the office, should be paid to him, he should shew the Court a better consideration for it than the bare payment to Brittain of $3,800, for his equitable interest in the contract of purchase of the said land. All the money in office belonged to Brittain, on the rescinding of the contract with Myers, except that to which Smith was a *bona fide* assignee for value. And
(361) what was that? Answer: $3,800. The residuary was in the office to the use of Brittain, and the Court ought not to decree it out to Smith, who is, as to it, only an assignee of Brittain without any consideration. Smith can not get the money without a decree of this Court; and he has repudiated the contract made by Myers with Brittain, relative to the land, and admits that the money in the office, on setting aside of the aforesaid contract, would belong to Brittain, were it not for the subcontract made with him; but he insists, that by force of that subcontract, he is the purchaser from Brittain of the said $5,656 in *specie,* now lying in the master's office, for the sum of $3,800, in *specie,* paid by him to Brittain. He can not get this large sum out of the office, unless the Court will become active, and decree it to him, against the consent of Brittain; and he, therefore, prays the Court to decree the specific execution of this most usurious contract. To induce a court of equity to decree the specific performance of any assignment, it must be supported by a valuable, or a meritorious consideration. Newland Contracts, 65. Smith, over and above the $3,800, has given to Brittain neither of such considerations, for the $5,656. And we know that an agreement, purely voluntary, will not be executed in a court of equity. Newland Contracts, 79. All that Smith can, in conscience, ask of this Court, is to be placed in *statu quo ante.*

PER CURIAM. DECREED FOR THE PLAINTIFF.

Cited: Harding v. Spivey, 30 N. C., 67; *Williams v. Council,* 53 N. C., 231; *White v. Jones,* 88 N. C., 179; *Hampton v. Hardin, Ib.,* 596; *White v. Jones,* 92 N. C., 392; *Eccles v. Timmons,* 95 N. C., 544.

(362)

GEORGE W. GORDON *v.* JOEL K. HOLLAND.

1. A devise to A and "if she dies leaving no issue," then "to my children, B, C," etc., will operate as a good executory bequest to the children B and C, if A should die without leaving any issue at the time of her death.
2. It is a general rule in equity that all persons interested must be made parties, plaintiffs or defendants.
3. There are four modes of taking an objection for want of parties: by demurrer on record, demurrer *ore tenus*, by plea, and by answer. But the defendant taking such objection must always apprise the plaintiff of the persons who should be made parties.
4. The effect of an objection, successfully taken, for want of parties, is not that the bill is to be dismissed, but that it stands over with leave to amend by adding the necessary parties.

This was an appeal from an interlocutory decree of the Court of Equity of BEAUFORT County, at the Fall Term, 1844, his Honor, *Judge Dick* presiding, overruling a demurrer filed by the defendant to the plaintiff's bill.

The facts disclosed by the pleadings are incorporated in the opinion delivered in this Court.

J. H. Bryan for the plaintiff.
No counsel for the defendant.

DANIEL, J. George Gordon, in 1839, made his will, and in it among other things is this clause, "I loan to my daughter, Sarah, and to her husband, Joel K. Holland, during their natural lives, one-fourth part of my negroes; and then I give them, to the lawful heirs of Sarah. And in case she dies, leaving no issue, I give them to my children, George, William and Elizabeth, to be equally divided between them." The words in the will, "in case she, Sarah, dies, *leaving no issue*, I give them (the slaves) to my children, George William and Elizabeth," makes a good executory bequest (363) to the said children. The words, *"leaving," "leave,"* have been held sufficient to restrain the general import of the term issue, to those living at the death of the first taker, so as to give effect to the bequests over, upon there being no such *issue* in existence at that period. 1 *Roper Legacies*, 371, and the cases there cited. The slaves were divided, and the one-fourth delivered by the executors to Holland and wife.

The plaintiff, George W. Gordon, one only of the executory

devisees, has filed this bill *quia timet,* stating in it that Holland has threatened, and is now about to sell the said slaves, etc. The bill prays that Holland be enjoined from selling the said slaves, etc. The defendant demurred to the bill, for want of parties. The Court overruled the demurrer, and the defendant by the consent of the Court appealed. The two other executory devisees, William and Elizabeth Gordon, appear, upon the face of the bill, to have just the same interest in the said slaves as the plaintiffs. It is a general rule that all persons interested must be made parties, plaintiff or defendant. The rule is founded upon the advantage which all persons interested will derive from the completeness of the decree, and from the entire settlement of the matter in litigation; in other words it is founded upon convenience. Calvert Parties, 17, 19. There are four different modes of taking an objection for want of parties: by demurrer on record, *demurrer ore tenus,* by plea, and by answer. It is not sufficient that the defendant state a want of parties; he must give information that the plaintiff may be able to see who the persons are, who should be added as parties. Calvert, 113, 114. The demurrer put into this bill, has named the brother and sister of the plaintiffs as necessary parties, and they appear to be so from the bill itself; and the demurrer should, we think, have been sustained by the Judge of the Superior Court. The effect of an objection, successfully taken for want of parties, is, not that the bill is to be dismissed, but that it stands over, with leave to amend by adding the necessary parties. *Calvert,* 116. (364) But this is not for us, but for the Court below, and on such terms as shall seem good to that Court.

PER CURIAM.

ORDERED THAT A CERTIFICATE ISSUE ACCORDINGLY TO THE COURT BELOW, AND THAT THE PLAINTIFF PAY THE COSTS OF THIS COURT.

Cited: Smith v. Kornegay, 54 N. C., 42; *Caldwell v. Blackwood, Ib.,* 278; *Webber v. Taylor,* 58 N. C., 37.

JAMES DUNN *v.* HENRY MOORE et al.

1. The Court will not, on a bill for the execution of a parol contract for the sale of land, hear proof of such contract, when it is denied by the defendant and he relies upon the act (Rev. Stat., ch. 50, sec. 8,) making void all parol contracts for the sale of land.

2. Part performance, as by paying part of the purchase-money taking possession, etc., will not take the case out of the statute; but in case of such part performance, if the defendant admits the contract, as stated by the plaintiff, and the part performance, but relies on the statute, the Court will order an account to be taken and decree a compensation to the plaintiff for his payments and expenditures.

3. But if the contract is denied, the Court can grant no relief, because it can go into no proof of a contract variant from that stated in the answer.

This cause, having been set for hearing, on the bill, answers, exhibits, and proofs, at the Fall Term, 1844, of SAMPSON Court of Equity, was then removed by consent to the Supreme Court.

The plaintiff complains that he purchased from the defendant Moore, by parol, in the year 1836, the tract of land set forth in his bill, containing one hundred and thirty-five acres, at five dollars per acre; that he paid him, at the time of making the contract, one hundred dollars, and agreed to pay a discharge, a note for about five hundred dollars, due (365) from said Moore to one Daniel Kornegay; that the defendant put him in possession of the land, upon which he made valuable improvements, and paid off the note to Kornegay, which left a small balance due to said Moore, which he was ready and desirous to pay. He further states that Moore, becoming dissatisfied with his bargain, refused to complete the contract by conveying the land to him, and had instituted a suit against him in the County Court of Sampson, to turn him out of possession, and that he had sold and conveyed the land to the other defendant, Hicks, who, at the time of his purchase, well knew of his equitable claim, and therefore held the land in trust for him. He then prays that the defendant may be decreed to convey the land to him; or, if the Court will not give him such relief, that they compel the defendants to come to an account with him, for the money paid by him, and the value of the improvements he has put upon the land, and that the land may be held as security for what may be justly due to him.

The defendant Moore, by his answer, denies the contract, as set forth in complainant's bill, but states that he owned a tract of land containing about two hundred and sixty-two acres, which he agreed to sell to the plaintiff and one James P. Beck, at the rate of five dollars per acre; that it was understood between the parties, at the time, that the plaintiff and Beck were to divide the land between them, in such portions as they might think proper, it being a matter that did not concern him, so that between them, they should make the land average to

him five dollars per acre; that, accordingly, they did agree upon a division line, and the plaintiff paid the sum of one hundred dollars, and was to take up a note defendant owed to Daniel Kornegay; but he denies that he put the plaintiff in possession of the land, but admits he took possession. In a few days thereafter, Beck refused to give him five dollars per acre for the land, which had fallen to him in the division with the plaintiff, alleging, as is the fact, that his was the less valuable part of the land, and that he immediately
(366) apprised the plaintiff of the fact, and tendered to him not only the money which he had received from him, but also the money the plaintiff had paid to Kornegay, if he had paid it; that this tender was made by an agent of the defendant's before the plaintiff had taken possession of the land, and before he had made any payment to Kornegay; and his agent was directed to tell the plaintiff, and did tell him, at the time of the tender, that if he had not paid Kornegay, not to do so; and alleges that if the plaintiff has made improvements and paid Kornegay, he made the former and paid the latter in his own wrong after being apprised that the defendant would not convey to him the portion of the land claimed by him, unless they would take the whole; this defendant's object being to sell the whole of the land, or none of it. This defendant then prays the benefit of the act of the General Assembly, making void all parol contracts for the sale of land. He admits he brought an action of ejectment against the plaintiff to turn him out of possession of the land, and admits the sale by him to the defendant Hicks.

It is not necessary to set forth the answer of the defendant Hicks, as it is not noticed by the Court in delivering their opinion.

Strange and *W. Winslow* for the plaintiff.
Henry for the defendants.

NASH, J. The object of the bill is two fold—either to compel the defendants to convey the land to the plaintiff, or that a decree for an account may be made of the value of the plaintiff's improvements, and for the money paid by him, and the land be held as security for such sum as may be decreed. We do not think the plaintiff entitled to either relief. The ground upon which he seeks the former is, that of part performance of a parol contract. He alleges he has paid part of the purchase-money, and been put into possession by the defendant Moore. In his bill, the plaintiff sets for that *he* had purchased by parol,

from the defendant Moore, a tract of land containing one hundred and thirty-five acres, at five dollars per acre. The defendant, in his answer, denies that he ever made with (367) the plaintiff the contract set forth by him, and alleges that the contract made by him, was with the plaintiff and James P. Beck, and not for the sale of the hundred and thirty-five acres, but of a larger tract of which that was a part. Can the Court hear parol evidence to establish which is the true contract? We are saved all labor in investigating this question; it has already been decided by this Court. *Ellis v. Ellis* came before the Court in 1828. 16 N. C., 180. The plaintiff claimed the execution of the contract, which was in parol and which had been made in 1821, on the ground of part execution. The contract, as set forth in the bill, was denied by the defendant, and he claimed the benefit of the statute passed in 1819, making void such contract; and setting forth in his answer what *was* the true agreement. The Court decreed the execution of the contract, and the case came before the Court again the next year, 16 N. C., 345, on a petition to rehear the former decree. The decree was reheard and reversed. In pronouncing their opinion, the Court say: "The plaintiff sets forth one contract, which the defendant denies, and sets forth another, both in parol. To go into testimony, whether any, and what contract the parties did enter into, would be laying aside the act of assembly altogether." A case more in point with this, can not well be imagined. And the Court were well sustained in so deciding. *Lord Thurlow*, in the case of *Whitchurch v. Bevis*, 2 Bro., 566, expresses the opinion that the only effect of the statute of frauds on this subject is, to preclude the plaintiff from going into evidence *aliunde* for the purpose of substantiating a parol agreement denied by the defendant. The plaintiff is not entitled to any decree for the conveyance of the land claimed, neither is he entitled to an account, and that the land should be held as security for what might be due to him. If the defendant, Moore, had admitted the contract, as set forth in the bill, and that he had put the plaintiff into possession on the authority of *Baker v. Carson*, 22 N. C., 381, and of *Albea v. Griffin*, 22 N. C., 9, we should, upon the plaintiff's substantiating by evidence his payments and (368) improvements, have referred the case to the master for a report; and this upon the ground, not that this Court could, in a case of this kind, give the plaintiff anything by the way of damages for the violation of a contract—but because the defendant, after making the contract, and putting the plaintiff into possession, ought not to be allowed to put him out without

returning the money he had received, and compensating him for his improvements. It would be against conscience that *he* should be enriched by gains, thus acquired, to the injury of the plaintiff. But in this case, Moore, the defendant, denies the contract set forth by the plaintiff, and under which he alleges his payments were made, and the improvements were put on the land. If the proofs can not be heard to establish the contract, of which the plaintiff claims a specific performance, it can not be heard to prove a contract, variant from that stated in the answer, for any purpose; and if so, then the plaintiff has put the improvements on the land, and paid the money to Kornegay, in his own wrong, and can not ask this Court to keep the defendant Moore out of his land, until he has settled with him. If he has any claim upon Moore for the money advanced, this is not the forum in which it is to be litigated. In addition to this, the defendant Moore denies he put the plaintiff into possession of the land, but says that he took possession and paid the money to Kornegay, after he, Moore, had notified him that he would not go on with the contract, and after he had made a tender to him of the money he had paid him. And in these respects, the answer is fully supported by proof. Relief is further claimed upon the ground that the plaintiff paid his money and put the improvements upon the land, under the full belief he could compel Moore to execute the contract. We do not, however, perceive that this ignorance of the law did exist on the part of the plaintiff. He does not make it one of the grounds upon which he seeks relief, either in compelling the defendants to convey to him the land, or that the land shall be held as a security to indemnify him for his improvements and money paid. And we are (369) more confirmed in this opinion that he is not entitled to the second relief, from the statements in the answer and the proofs, that he took possession of the land and paid the money to Kornegay, after he had been notified not to do so.

PER CURIAM. BILL DISMISSED WITH COSTS.

Cited: Sain v. Dulin, 59 N. C., 197; *Bonham v. Craig,* 80 N. C., 231; *McCracken v. McCracken,* 88 N. C., 275; *Vann v. Newsom,* 110 N. C., 125, 128; *North v. Bunn,* 122 N. C., 769; *Luton v. Badham,* 127 N. C., 98; *Abbott v. Hunt,* 129 N. C., 404; *Love v. Atkinson,* 131 N. C., 547; *Ford v. Stroud,* 150 N. C., 365.

WILLIAM JONES, Admr., Etc., *v.* JOHN OLIVER et al.

1. A testator devised, by a will dated in 1837, certain property "to his wife for life, at her death to her heirs lawfully begotten of her body, if any there should be, equally. But in case there should be no such heirs lawfully begotten as aforesaid, then to be equally divided among the next of kin of myself and my said wife, to them, their heirs and assigns forever." The widow died leaving no issue. *Held*, that in that event, since the act of 1827, (Rev. Stat., ch. 122, sec. 11,) the limitation over was good and took effect.
2. After the death of the testator, his widow married a second husband, who survived her. *Held*, that this second husband, not being of the blood of the widow, was not comprehended within the terms, "her next of kin."
3. In a devise to the next of kin, the words "next of kin" mean "nearest of kin," and those only are entitled who are nearest in blood, in exclusion of others who are next of kin in the sense of the statute of distributions.
4. In a devise by a testator to the next of kin of himself and his wife, the next of kin of the wife take an equal share with the next of kin of the husband, though the former may not be in as near a degree of consanguinity to the wife as the latter were to the husband.
5. In a devise to the next of kin, to take effect after a prior limitation, the general rule is, that the next of kin at the time of the death of the testator are intended, and not those who may be next of kin at the period when the devise is to vest, unless there be some special circumstances to show that the testator meant otherwise.
6. In this respect, there seems to be no difference between a gift over to the testator's own next of kin or those of another person.

Cause removed from CARTERET Court of Equity, at Fall Term, 1843.

This was a bill filed by the plaintiff as administrator, (370) with the will annexed of Richard P. Oliver, asking the advice of the courts as to the proper construction of the said will. The questions presented are stated in the opinion delivered in this Court.

J. W. Bryan and *Iredell* for the plaintiff.

Badger, J. H. Bryan, Washington and *Mordecai* for the defendants.

DANIEL, J. The plaintiff has filed this bill, asking the advice of the Court as to the proper construction to be given on several points in the last will of his testator, Richard Oliver. The will was made in 1837. *First.* Is the executory devise in the following clause too remote, or is it good in law? "Item, I lend unto my wife, Sally Oliver, the house and plantation where I

now live, together with all my slaves and their increase, and all the rest of my estate, both real and personal, for, and during her natural life; and, at her death, I give and bequeath the said estate, as aforementioned, to her heirs lawfully begotten of her body (if any there should be) equally. But in case there should be no such heirs lawfully begotten as aforesaid, then and in that case, I give and bequeath the whole of my estate as aforesaid, to be equally divided among the next of *kind* (*kin* it is admitted) of myself and of my said wife, Sally, to them, their heirs and assignees forever." We are of the opinion that the executory devise over, on the death of the testator's wife, without heirs of her body (or issue) is not too remote, but clearly good since the Act of 1827. That act declares that a limitation in a deed or will, made to depend upon the dying without heirs of the body, etc., shall be held to take effect, when such person shall die, not leaving such heirs of the body living at the time of his or her death. *Secondly,* Sarah Oliver, the testator's widow, married Richard Parsons, and thereafter died without leaving issue. Is her last husband (Parsons) of *kin* to his said wife, in the meaning of the testator's will? We answer, that in common acceptation, the being of a man's kindred is being of his *blood.* The testator, therefore, (371) is here to be understood to refer to such persons, as were related by blood to him and his wife, Sally Oliver. It is not mentioned in the pleadings that Parsons was even of the blood of his wife; he, therefore, is not entitled to any part in the said legacy. 1 Roper. on Leg., 106; *Watt v. Watt,* 3 Ves., 244. Powell on Dev., 290, note 2. *Thirdly.* The testator left living at his death, and they are now living, a brother, John Oliver, and a sister, Mary Meadows, and, also, the children of a deceased brother, Daniel Oliver. Are the children of the deceased brother to take any part or share of the said legacies, under the words in the will? We answer, No. A bequest to next of kin generally will entitle those only to take, who are *nearest* in blood, in exclusion of others, who are next of kin in the sense of the statute of distributions. Next of kin means *nearest* of kin. *Wimbles v. Pitchers,* 12 Ves., 433. 1 Mad. Rep., 30. 1 Roper. on Leg., 108. *Elmsley v. Young,* 8 Cond., Ch. 227. *Fourthly.* At the death of Mrs. Parsons, late Sally Oliver, her next of kin *then* was one aunt, Hannah Russell; but two of her uncles, William Jones and John Jones, were *alive* at the death of the testator, and they died during the life of Mrs. Parsons, the tenant for life. Is Hannah Russell (the living aunt of Mrs. Parsons) to take equally with the testator's brother and sister, John Oliver and Mary Meadows?

And if this question be answered in the affirmative by the Court, then are not the personal representatives of the two deceased uncles of Mrs. Parsons, William Jones and John Jones, to take equally with the said three persons, John Oliver, Mary Meadows and Hannah Russell? We answer that Hannah Russell is to take an equal share with John Oliver and Mary Meadows.

The testator says, in his will, that the legacy is equally to be divided between and among (not *my* next of kin), but the next of kin of myself and my said wife, Sally. The next of kin of the wife, were therefore intended by him to take, although not so near in degree to her as the two others were to him. As to the representatives of the deceased uncles of Mrs. Parsons (John Jones and William Jones), are they to be entitled? When the devise or bequest is simply to a (372) testator's next of kin, it unquestionably vests in those, who sustain the character at his death; and it is equally clear, that when a testator devises or bequeaths for life, or for any other limited interest, and afterwards to his own next of kin, those, who stand in that relation at the death of the testator, will be entitled, without regard to the fact of their existence at the period of distribution. *Harrington v. Harte,* 1 Cox, 131. *Rayner v. Mowbray,* 3 Bro. C., 234. *Masters v. Hooper,* 4 Bro. Ch. 207. *Doe v. Lawson,* 3 East., 278. *Pope v. Whitcombe,* 3 Mer., 689. And the legacy or bequest thus given, will then vest in such next of kin; *Danvers v. Earl of Clarendon,* 1 Vern., 35. 1 Eq. Ca. Ab., 702. 1 Powell on Dev., 284—note. Of course, if property be given upon certain events, to such persons as shall *then* be the next of kin of the testator, the persons standing in that relation at the period in question, and not at the death of the testator, are upon the terms of the gift entitled; *Long v. Blackhall,* 3 Ves., 386. To take a case out of the general rule, however, there must be some special circumstances attending the case, to shew that the testator did not intend that the next of kin, who were to take, should be looked for at his death, but at some other period. *Lord Anvanley's* principle is, that where a testator has constituted his legatees or devisees by a general description, as next of kin, these words must be considered as referring to the death of the testator, "unless by the context, or by the express words, they plainly appear to be intended otherwise." *Hallowell v. Hallowell,* 5 Ves., 399. *Sir John Leach* says, that, when a testator gives property over to his next of kin, after the death of a tenant for life without issue, the Court must look at the whole will to ascertain who are the next of kin intended by the testator

to take. He proceeds and says, "It appears to me that the Court always considers whether the words of limitation are words of present intention, or that they are intended to take effect as soon as the testator's next of kin, living at his death, are ascertained, or whether they import a future period, (373) and are referable to the event, upon which the gift over is to take effect. The words, "such persons as *shall happen to be* my next of kin," or "such persons as shall or *should* be my next of kin," indicate an intention to confine the gift to such persons, as shall answer the description of the testator's next of kin at the death of the tenant for life. *Butler v. Bushnell,* 9 Eng. Cond., Ch. 12. There seems to be no difference, in this respect, between a gift over to the testator's own next of kin, and one to the next of kin of another person, *simpliciter,* or, as here, to the next of kin, both of the testator and of another person. The question as to all is, at what period is the next of kin to be looked for? If there be nothing to postpone the period, they are such as answer the description at the death of the testator. And here we see nothing, in the language of the will or in the circumstances of the parties to lead us to suppose that the testator meant to exclude any of the persons, who were next of kin of himself or of his wife at his death, in favor of persons, who might happen to answer the description at the death of his wife without having issue. If the wife had been one of the next of kin, herself, as it is clear the testator intended she should have but a life estate, the argument would be strong that the next of kin at her death were in the testator's contemplation. As it is, the disposition is but the common case of a disposition to one for life, with remainder to the next of kin of that person; and as "next of kin" does not mean those who are to take under the statute of distributions, at the death of another, but merely "nearest of kindred," such next of kin may be ascertained in the lifetime of the tenant for life as well as afterwards. Consequently, there seems no necessity nor reason for holding the remainder to be contingent during the life of the first taker, or that it does not vest, immediately upon the death of the testator, in those who are then the next of kin.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Peterson v. Webb, 39 N. C., 58; *Simons v. Gooding,* 40 N. C., 390; *Redmond v. Burroughs,* 63 N. C., 245.

(374)

JOSIAH COWLES *v.* SARAH BUCHANAN.

1. The facts upon which the plaintiff in a court of equity seeks relief must be set forth in the stating part of his bill.
2. The plaintiff can not rely upon the interrogatories to supply defects in the stating part of his bill.
3. A defendant is not bound to answer an interrogatory not warranted by what has been stated by the plaintiff as the ground of his complaint.

Cause transmitted from the Court of Equity of SURRY County, at the Fall Term, 1844, to the Supreme Court for hearing.

The nature of the pleadings, and grounds of the decision in this Court, are fully set forth in the opinion delivered.

Boyden for the plaintiff.
Dodge for the defendant.

NASH, J. The plaintiff's bill is so defectively drawn, that it is not in the power of the Court to grant him the relief he seeks, if he be entitled to it at all. *Lord Redesdale,* in his Treatise on Chancery Practice, in describing the various parts of a bill in equity, and pointing out their respective uses, says, the right of the several parties, the injury complained of, and every other necessary circumstance, ought to be plainly, though succinctly, stated. Whatever is essential to the right of the plaintiff, and is necessarily within his knowledge, ought to be alleged positively and with precision, Mitford, Ch. Pr., 42. The complainant's equity must appear in the stating part of the bill, *Flint v. Rivers,* 3 Ves., 343, and the *facts* set forth constitute the only ground of relief, and those facts must appear in the stating part of the bill, and constitute the *case* of the complaint. *Skinner v. Bailey,* 7th Day's Rep., 342. Nor can the plaintiff rely upon the interrogating part of his bill to supply the deficiencies of his case, as contained in the stating part; for as that part is intended to compel a full answer to the former part, it must be founded on the facts and (375) matters there stated. If, therefore, there is nothing in the stating of the bill, warranting the interrogatory part, the defendant is not bound to answer it. Mitford, 45. The object of the bill in this case is to obtain a partition of the slave mentioned therein; and it ought to have set forth, in a clear and distinct manner, the title by which he claimed the negro, and if there were any facts, either as to the title or to any

other portion of his claim to relief, particularly within his own knowledge, those he ought to have alleged positively and with precision. In the stating part of his bill, which must contain his case, he states, "he is tenant in common with the defendant, of the negro woman, Mourning; that he has called upon the defendant to account with him for his share of the services of said slave, and also to make sale of said negro for the purpose of division, both of which requests she had refused, alleging that she is the absolute owner of the said slave, and that she acquired the interest of her brother, David Buchanan, in said slave, previous to the sale by the said David to John Rhinehardt, under whom your orator *set up title.*" This is the plaintiff's case. He does not *allege* any title in David Buchanan to the slave, nor in John Rhinehardt, nor does he allege any title in himself, any farther than saying he is a tenant in common with the defendant, and he then explains what he means by saying "under whom (referring to John Rhinehardt) your orator sets up title." But what kind of a title, how acquired, whether upon a valuable consideration, or as a mere gift—or, if a purchaser, whether to be paid for it only in case he should succeed in this suit—are all facts within his knowledge, and not alleged nor set forth. It is true, in the charging part of his bill, he charges that David Buchanan sold and conveyed to John Rhinehardt, under whom he claims title, his interest in the slave Mourning, before he conveyed to the defendant. But, if the charging part of a bill can supply the deficiencies of the stating part, which must contain the plaintiff's case, here there are no such suppletory charges. They leave (376) the case precisely as it was. Nor can the interrogating part of the bill be made to supply a deficient statement of the case; if it would, the interrogatories here would remove the difficulties; they are varied and ingeniously framed to make out the case for the plaintiff, but they can not avail him. We know full well the difficulties which surround gentlemen of the bar, who are called on to draw bills in equity on the circuits, the little time allowed for reflection or revision, and the Court has not been very vigilant, in its practice upon the equity docket, in ruling cases as to matters of form. But we consider the defect in this bill not as formal, but substantial, and, even in matters of form, some attention must be paid to the precedents, which have been established by long practice.

PER CURIAM. BILL DISMISSED WITH COSTS.

RICHARD GENTRY *v.* ROBERT HAMILTON et al.

1. Where a contract is made to convey several contiguous tracts of land, *not particularly* designating each by metes and bounds, but stating that they contain "1,670 acres, more or less," and the plaintiff, the vendee, states in his bill that there is ascertained to be a deficiency of 355 acres, of the value of $1,266: *Held*, that the words "more or less" used in the contract can not extend so far as to prevent the plaintiff's demand for relief, the alleged mistake amounting to so large a number of acres and of such value.
2. In a suit for specific performance of a contract for the sale of land, either party is, as a matter of right, entitled to have a reference upon the title.
3. Except in a few excepted cases, on the coming in of the answer to an injunction bill, the Court will not permit the plaintiff to file additional affidavits for the purpose of contradicting the answer.

Appeal from an interlocutory order made in Ashe Court of Equity, at Fall Term, 1844, his honor, *Judge Battle* presiding.

The plaintiff filed this bill, to obtain a decree for a specific execution of a contract, made in the year (377) 1835, by Robert Hamilton, with him, for the sale of a tract of land lying in the county of Ashe, called the old fields of New River; and, also, for an injunction, restraining the defendants from proceeding at law on two of the bonds securing a part of the purchase-money. The said tract of land is represented in the written contract set forth in the bill, as being "composed of ten contiguous small tracts of land, containing, each, a certain number of acres, and making in all, about 1670 acres, more or less." The price was $5,000, payable by installments; and the plaintiff executed his bonds to Hamilton accordingly, and he took possession of the land, under the belief that he was to get the title to 1670 acres or thereabouts. But the bill charges that the tract of land, that Hamilton had a title to, was materially less in quantity and value than he had bound himself in his bond to convey. Hamilton left the five bonds given for the purchase-money in the hands of McDowell, the other defendant, for collection, and he removed to a foreign State. Three of the bonds for $1,000 each have been paid, and a part of the fourth bond. The plaintiff further says, that the fact turns out to be, that Hamilton had not title to considerable part of the land mentioned in the contract; some of the said lands are covered by better titles in third persons; and one of the ten small tracts, mentioned in the agreement, contains not more than one-half of the number of acres mentioned. The plaintiff says, that he informed McDowell of it

and also of his claim for a deduction in the purchase-money. He says, that he is ready to pay the residue of the purchase-money, after allowing him the proper deductions for the deficiencies in the qauntity of land as aforesaid, and take a legal conveyance for what land Hamilton can make a good title for. In 1842, he caused a correct survey to be made of the said land, and instead of there being 1670 acres, that there were but 1315 acres; leaving a deficiency of 355 acres, which the plaintiff estimates to be of the value of $1,266. He says that
(378) Hamilton assigned the two unpaid bonds to McDowell, after they became due; and he received them, with full knowledge of his, the plaintiff's equity; he has brought suit on them in Burke Superior Court of law. The bill then prays an injunction, staying the defendant's proceedings on the said bonds at law, and also a decree that Hamilton may execute to him a legal conveyance under the direction of the Court.

The injunction then issued as prayed for by the bill. At the next term of the court, McDowell only answered the bill, and said, that he did not believe there was any deficiency in the number of acres mentioned in the said contract of Hamilton with the plaintiff: for he understood and believed that, about the time the contract was made, a surveyor, by the name of Calloway, surveyed the land, and that his survey showed that there was no deficiency in the number of acres, mentioned in the contract. He admitted, that the two bonds in question were endorsed to him after they were due.

At Spring term, 1843, the injunction was dissolved, as to all the moneys due on the said two bonds, except $1,266. At October term, 1844, the answer of Robert Hamilton was filed. He admits the contract as stated in the bond for title annexed to the bill, and also that plaintiff has paid a part of the purchase-money, as he has stated in his bill. He states, that he believes and has been informed, that there is not any deficiency in the number of acres mentioned in the contract, but that if there be any deficiency, it must consist in mountain land, almost valueless for cultivation, and not worth ten cents per acre. And he insists, that, if the plaintiff is entitled to a reduction in the price, it should be according to the value of the land in the place, where the deficiency may appear to be. He admits that he assigned the two bonds to McDowell to collect, and to pay a debt due by his testator, Samuel P. Carson, to the bank, to which debt McDowell was surety.

At the same October term, 1844, the Court permitted the plaintiff to make an additional affidavit in support of the injunction, which was read, to resist the motion made by the

defendants to dissolve the injunction, on the coming in of the answer of Hamilton. The motion to dissolve (379) was overruled by the Court, and the injunction was continued, until the hearing of the cause. From this interlocutory decree, the defendants, by permission of the Court, appealed.

Dodge for the plaintiff.
Boyden for the defendants.

DANIEL, J. The plaintiff's equity rests on mistake, and by no means on the ground of fraud. The number of acres stated in the contract, although accompanied by the words "more or less," and the round sum $5,000 given by the purchaser, shows that the said numbers composed a principal part of the description of the land sold. The small tracts of land, which were intended to make up the aggregate amount of 1670 acres, are not described, in the contract, by metes and bounds. The plaintiff says, that there is a mistake in the description of the land of 355 acres, worth $1,266. The defendants in their answer state, that they *believe* that there is no mistake in the quantity of acres mentioned in the written contract; and they ground their belief upon an *ex parte* survey of the land made by one Calloway. It is seen, at once, that the master is the proper person, who, by a report, can settle this dispute. The master can have a correct survey made, when and where the parties can attend; he can call witnesses before him, and examine them as to all pertinent facts. The words, "more or less" used in the contract, can not extend so far as to prevent the plaintiff's demand, when the mistake amounts to so large a number of acres and of such a value as is stated in this bill. *Leigh v. Crump,* 36 N. C., 299, is an authority for the plaintiff. Again, it is a general rule, in a suit for specific performance, in which the single question is, whether the vendor can make a good title, that the Court at the present day directs a reference to the master to enquire into the title; and this, even without the consent of the other party. *Brooke v. Clarke,* 1 Swanst., 551. *Shelton,* 1 Ves. & Bea., 519. Atkinson on Titles, 226, says that either party to the suit is, as a matter of right, entitled to have a reference upon the title.

In a case like this, where the answers do not clear (380) up the doubt, it can not be expected that the plaintiff should be required to part with his money, without first seeing his title to the land was well secured. In this Court the vendor has not a right to the price, if it be not seen that he is able and ready to convey the land sold.

Secondly. On the coming in of the answer of Hamilton, the Court permitted the plaintiff to file an additional affidavit to repel the force of that answer. This was wrong. Except in a few excepted cases, though five hundred affidavits were filed, not only by the plaintiff, but by many witnesses, not one could be received for the purpose of contradicting the answer. *Clapham v. White,* 8 Ves., 35. *Drewry on Injunction,* 424. But we think, that there was enough in the original bill to uphold the injunction to the hearing, notwithstanding the answers.

PER CURIAM. ORDERED THAT A CERTIFICATE ISSUE ACCORDINGLY.

Cited: Kirkpatrick v. Hamilton, 62 N. C., 224; *Wilcoxon v. Calloway,* 67 N. C., 465; *Anderson v. Rainey,* 100 N. C., 335; *Campbell v. Cronly,* 150 N. C., 462.

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(381)

WILLIAM P. FERRAND, Admr., Etc., *v.* JAMES W. HOWARD, Exr.

1. An executor or administrator has no right to apply to a court of equity for its advice, when he claims the legal title, and another also claims the legal title. The decision belongs to a court of law.
2. A testator in 1814 bequeathed certain negro slaves to his daughter A for her life, and after her death to her son K, and "should he die without lawful issue," then over: *Held first,* that the remainder over was too remote. *Secondly,* that the son dying in the lifetime of his mother, and leaving no father, his interest in the estate was to be equally divided between his mother and his brothers and sisters, both of the whole and half blood. *Thirdly,* that the husband of the mother, who had the life estate, having survived her, her administrator must account to his administrator or executor for her share, after satisfying her debts, if any existed at the time of her death. *Fourthly,* that the husband, having kept possession of the slaves after the death of his wife, is bound to account with the estate of the son for the hires and profits after that time.

Cause removed from the Court of Equity of JONES, at Fall Term, 1844.

The plaintiff as administrator of Kilby Jones Ferrand, deceased, filed this bill, praying the advice of the Court, as to the distribution of the personal estate of his intestate. The facts appearing upon the pleadings are as follows:

Kilby Jones died in 1814, leaving the will, in which he bequeathed as follows: "I give to my daughter, Ann R. Fer-

rand, two negro girls, Venus and Comfort, during her natural life, and at her death to descend with their increase to my grandson, Kilby Jones Ferrand; and should he die without lawful issue, the same is to belong to my son Nicholas H. Jones, with all their issue, to him, his heirs and assigns forever."

The legatee, Kilby J. Ferrand, was the son of the legatee, Ann R. Ferrand, by her marriage with —— Ferrand. By a former marriage, —— Ferrand, the father, had several other children; who are made parties defendants in this suit. By the marriage with his wife Ann R., he had also several children besides Kilby Jones Ferrand, who are likewise (382) made defendants. After the death of the husband Ferrand, Mrs. Ann K. Ferrand married Joseph Whitby, and by that marriage she had also several children, who were all, it is admitted, born in the lifetime of Kilby Jones Ferrand, except Joseph C. Whitby. And as to the period of his birth, the bill states and he insists, that he was born or was *in ventre sa mere* at the death of Kilby J. Ferrand, while some of his brothers and sisters allege in their answers that he was not then *in esse*.

Kilby Jones Ferrand died intestate and without ever having had issue, leaving surviving him his mother, then the wife of Joseph Whitby, his brothers and sisters by his father's first marriage, his full brothers and sisters, and also his sisters, by his mother's second marriage; and it is a point of dispute, as before mentioned, whether Joseph C. Whitby his maternal half-brother, was not then *in esse*.

At the time of the death of Kilby Jones Ferrand, the negroes, bequeathed by Kilby Jones as aforesaid, with their increase, were in the possession of Joseph Whitby, the husband of the tenant for life, and so continued until her death. After his wife's death, Joseph Whitby also retained possession until his own death, which happened some short time before this bill was filed. They were then delivered by Whitby's administrator to the present plaintiff, who had administered on the estate of Kilby J. Ferrand, and claimed them under the limitation in his grandfather's will.

Nicholas H. Jones, to whom the ulterior limitation is made in the will, survived Kilby Jones Ferrand, and then died intestate, and Edward S. Jones administered on his estate.

The bill is filed by the administrator of the intestate, Kilby Jones Ferrand, against the administrator of Nicholas H. Jones, and against the administrator of Mrs. Ann K. Whitby, and the administrator of Joseph Whitby, and against the full brothers of the intestate, and the half-brothers on the part of

his father, and the half-brothers and sisters on the part of his mother, and the administrators of such of them as have died since Kilby J. Ferrand. It states, that the intestate (383) owed no debts, and that the plaintiff is desirous of distributing his estate and will be ready to do so, as soon as it can be ascertained what constitutes the estate to be divided, and among whom it is to be divided. But upon those points the bill alleges the plaintiff is put to a difficulty in several particulars. The first is, that the defendant Edward S. Jones claims from the plaintiff the negroes and their increase, under the limitation to his intestate, Nicholas H. Jones, on the event of the death of Kilby J. Ferrand without issue; whereas, the plaintiff insists that the limitation to Nicholas H. Jones is too remote, and that those negroes vested absolutely in Kilby J. Ferrand and now form part of his estate. A second doubt is, whether the mother of the plaintiff's intestate was entitled to a distributive share of these negroes, as one of the next of kin; and if so, whether that should go to her children or to the administrator of her surviving husband, Whitby. A third doubt is, whether, if Joseph Whitby's administrator be thus equitably interested in the negroes, he ought not to account for the profits of the slaves from his wife's death until they were delivered to the plaintiff. And a further doubt is, whether Joseph C. Whitby be entitled to a distributive share of the estate.

The defendants have all answered and do not controvert the facts stated in the bill, except as aforesaid, that some of them do not admit that Joseph C. Whitby was *in esse* at the death of the intestate, while he insists, upon information, that he was.

J. W. Bryan and *Iredell* for the plaintiff.
J. H. Bryan and *Washington* for the defendants.

RUFFIN, C. J. The bill can not be sustained against the administrator of Nicholas H. Jones. The Court entertains bills very liberally for an executor against those who claim under the will, and for whom he is trustee, for the purpose of settling the construction, where there is a fair doubt. But the present plaintiff does not stand in that relation to Nicholas H. Jones' administrator. On the contrary, they both claim the legal estate in the slaves in remainder after the (384) death of Mrs. Ferrand. It is not the case of trustee and *cestui que trust*, but purely of opposing legal titles. The plaintiff is in possession, and says that this defendant sets

up a legal title to the negroes, and he prays that the Court of Equity will determine, which of the two has the better title at law. There is no such jurisdiction. There is no occasion for it, for if the plaintiff has the better title, he may safely make distribution—if he has not the title, then, if he, and those for whom he is trustee, will only have patience for the short space of three years, he will get a title by the statute of limitations, unless the opposite claimant should sue at law, and in that case the question will be litigated in the proper forum. The bill must therefore be dismissed as to Edward S. Jones, and with costs. This would render it unnecessary to say anything on the construction of the will, but as the question is as plain as it can be, and it may be satisfactory to the parties, the Court will give an opinion on it.

The *first question* put to the Court is, whether the limitation over in the will of Kilby Jones to Nicholas H. Jones, is good in law? Answer: It is not good in law. It has been decided in numerous cases, both in England and this country, that such a limitation to take effect after the dying of another person *"without issue,"* is too remote, and therefore void. *Gowler v. Cadby,* 4 Eng. C. L., 163, cited by the defendant's counsel, was a bequest of two terms for years in houses, to the testator's daughter and her *children,* and in default of *such issue,* and in case of her death, to A. and B. The limitation over was held not too remote, because it was to take effect on his daughter's dying without *children.* The words "such issue" were explained by the antecedent word *"children."* That case is very distinguishable from the one now before us, which has no word or words in the clause, to tie up the words ("and should he die without lawful issue") to the time of the death of Kilby J. Ferrand.

Secondly. The vested remainderman, Kilby J. Ferrand, having died intestate without leaving father, wife or issue, in the lifetime of his mother, she is to be considered (385) as one of his next of kin, and to take a share of his personal estate, with the intestate's brothers and sisters of the whole and half blood, and the representatives of those brothers and sisters that were dead at the time of the death of the intestate. Rev. Stat., ch. 64, sec. 1. And as she died before her husband, Whitby, her administrator must account to his executor for her share after satisfying her debts, if any existed at her death.

Thirdly. Is not Whitby's executor bound to account to the plaintiff for the rents, hires, and profits of the said slaves, as Whitby kept possession of them after his wife's death, up to

his own death? We think that he is, as Whitby kept possession of the slaves, and used them after the death of his wife. The slaves belonged to Kilby Jones Ferrand, immediately on the death of his mother. The account must be taken, making all just and equitable allowances to Whitby's executor for the raising and maintaining the said slaves up to the time they were delivered over to the complainant.

Fourthly. Is Joseph C. Whitby, the half-brother of the intestate, K. J. Ferrand, entitled to a distributive share of the personal estate of K. J. Ferrand, as he was born (as is alleged) after the death of the intestate? He states in his answer, that he is an infant, and that whether he was born or *in esse* before or after the death of the intestate, he is ignorant. If he was born before, or *in ventre sa mere,* he is entitled to a share; if not, he is not entitled. And an inquiry must be made by the master, to ascertain whether he was born, or *in ventre sa mere* at the time of the death of Kilby J. Ferrand.

The plaintiff must pay the costs to Edward S. Jones out of his own pocket. The other questions have so little doubt in them, that we have been inclined to make him pay all the costs; but as the next of kin make no objection to the suit, we think those costs ought to be paid out of the fund.

PER CURIAM. DECREED ACCORDINGLY.

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(386)

JOHN B. ALLEN, Admr., Etc., *v.* JOHN WOOD.

1. The right of a surety to have contribution from his co-surety, in equity, is not founded upon any principle of contract, but is the result of natural justice.
2. When one surety brings a bill for contribution against a co-surety, he should at least allege that the principal is insolvent, so that he can have no redress against him. For the equity of a plaintiff, seeking contribution from a co-surety, lies in the insolvency of the principal.
3. Where money is advanced by the principal to one of the sureties, to discharge the debt, before the debt is actually discharged, the co-surety may file his bill in equity for an account and for relief.
4. But if the money is paid by the principal after the debt has been discharged by the sureties, to one of two sureties, to reimburse both, then the co-surety has his remedy against the surety receiving the money, by an action at law for money had and received, and, therefore, can not support a suit in equity.

Cause removed from the Court of Equity of JOHNSTON, at Fall Term, 1844.

The bill sets forth, that the defendant and William B. Allen,

the intestate of the plaintiff, became the sureties of one Joshua B. Wood, and one H. C. Ennis, on a note for one thousand dollars, to one Robert W. Sneed; that a suit was brought on said note against all the obligors, except Joshua B. Wood, who had removed from the State, and judgment obtained against all the defendants to the action for the sum of $953.28, with interest; that on this judgment, execution issued against all the defendants, and was discharged by the said William B. Allen and the defendant John Wood, in equal proportions. The bill further states, that, some short time after the judgment was obtained, the defendant received from Joshua B. Wood, one of the principals in the bond or note, the sum of $300 or $350, with directions to apply it to the payment, as far as it would go, of the said execution, to the equal benefit of the said intestate and the said defendant, and (387) should said execution have been discharged by the sureties, that one-half of said money should be paid over to the said intestate, or to his use and benefit. It then charges, that the defendant had applied the whole of said money, so received, to his own individual use, and that he has refused, though often requested so to do, to pay over to the said intestate, in his lifetime, or to the plaintiff, since his death, any portion of said money, and that by receiving the money in the way he did, and for the purposes alleged, he became a trustee for the said William B. Allen, the intestate, for one-half thereof.

It then prays, that the defendant may be decreed to pay over to the plaintiff one-half of the money so received.

The answer admits the statements made in the bill, as to the suretyship, and the payment by the intestate and himself, in equal portions of the judgment obtained by Robert W. Sneed, against all the parties to the bond, except Joshua B. Wood, and the amount of the judgment. It admits that the defendant did receive from Joshua B. Wood the sum of $350, but denies that he was directed by said Joshua B. Wood, or in any manner instructed, to apply the same equally, for the benefit of the said William B. Allen, on account of their said suretyship, or towards the payment of said execution; denies he ever admitted to the intestate or any other person, that the money so received was to be applied to the equal benefit of himself and said intestate, or that said intestate was to derive any benefit therefrom, but that he believes it was sent to him, for his sole benefit, on account of his being liable as the surety of said Joshua B. Wood.

The answer further admits the death of William B. Allen, and that the plaintiff is his administrator. To this answer there is a general replication, and proofs having been taken, the cause was transmitted here for hearing.

G. W. Haywood and *Miller* for the plaintiff.
J. H. Bryan for the defendant.

NASH, J. The right of a surety to have contribution from his co-surety is not founded upon any principle of con-
(388) tract, but is the result of natural justice, upon the maxim, *qui sentit commodum, sentire debet onus.* 1 Story Eq., 471. The plaintiff alleges, that the money received by the defendant from Joshua B. Wood, was paid to him for the mutual benefit of him, the defendant, and the intestate, William B. Allen. This, by the answer is denied, nor is there any sufficient testimony to show the fact was, as is alleged in the bill. The evidence only proves, that the defendant, at different times, said he had lived an honest man, and he intended to die one, and the intestate should have one-half of the money. This, to us, rather confirms the answer; he did not think it honest, and perhaps he was right, to keep to his own use, the whole of the money. It was, however, a matter within his own discretion. The pleadings do not very clearly establish, when the money was received, whether before or after the execution was discharged. We rather, however, think it may be gathered to have been before, and if so, the plaintiff would have been entitled to contribution, if the bill had been properly framed. Perhaps the facts would not justify a statement, different from the one made, if so, the plaintiff has no equity. There were two persons, principals in the bond or note, Joshua B. Wood, and Henry Ennis, and neither of them is made a party to the bill, nor is it alleged that they are insolvent and unable to pay to the plaintiff what his intestate paid. For aught that appears in the case, both these individuals are perfectly solvent, and Ennis may now be living in the county of Johnston, where this bill is filed. The equity of a plaintiff lies in the insolvency of the principals, where he is seeking contribution from a co-surety. *Williams v. Helme,* 16 N. C., 159. *Rainey v. Yarborough,* 37 N. C., 257. *Bell v. Jasper,* 37 N. C., 200. *Mayhew v. Crickett,* 2 Swans., 185. *Daring v. Winchelsea.* 1 Cox. 218. And the reason is obvious—the co-surety is bound to answer only in the place of his principal, and, if he is able, it is the duty of the surety, who has paid the debt to look to him; if he is not able, he then, and only then, has a right to

seek his redress from his co-surety. In this case according to the answer, and there is nothing in the evidence (389) to contradict it, the money was sent to him by Joshua to indemnify him, and when called on by the plaintiff he might well answer, go to the principal Wood or to the principal Ennis, they will pay you what you have advanced. They are able to do so.

It is not very plain to us, upon what ground the complainant places his right to redress, whether as a surety seeking contribution from a co-surety, or upon the ground that the defendant has received, from one of the principals, after the execution was discharged, a sum of money, which was paid to him, for the joint benefit of the defendant and his intestate. If the former, for the reasons above given, the bill can not be sustained. Neither can it be sustained on the latter ground. In that case, if true, his claim would be purely a legal one, to be enforced in a court of law, by an action of assumpsit for money had and received to his use. He can not have redress in this Court for it.

PER CURIAM. BILL DISMISSED WITH COSTS.

Cited: Dudley v. Bland, 83 N. C., 224; *Adams v. Hayes,* 120 N. C., 387.

(390)

BENJAMIN B. SMITH *v.* JOHN MCLEOD.

1. Whenever a collateral security on the property of the principal is given to or obtained by a creditor, by whatever means, it amounts to a specific appropriation of those effects to the debt, and therefore the surety is entitled to the benefit of it, as well as the creditor; and the creditor is under a duty to the surety, which will be enforced in equity, not willfully to impair the security or omit to enforce satisfaction of it.
2. The act directing that injunctions shall issue but within four months after the rendition of a judgment at law, is only directory to the judges; and forms no ground for dissolving an injunction after the defendant has appeared and put in his answer to the bill.

Appeal from an interlocutory order of the Court of Equity of WAKE, at Fall Term, 1844, his honor, *Judge Caldwell* presiding, which order directed the injunction, which had been obtained in this case, to be continued to the hearing. The facts disclosed by the bill and answer were as follows:

On 26 October, 1839, William W. White gave a bond for the

sum of $1,641.16, in which Johnson Busbee and the plaintiff joined, as his sureties, and which came by assignment to the Trustees of the Rex Hospital Fund. They brought an action on the bond in Wake County Court, and obtained judgment against all the obligors in November, 1842, from that, the defendants appealed, and at the next term of the Superior Court, which was on the first Monday of April, 1843, judgment was rendered against White, Busbee and Smith, and the sureties for the appeal. At the same term of the Superior Court, a judgment was rendered in favor of one Johns, for about $600, against the same persons, and also one, in favor of one Atkins, for about $700, against White, Busbee and Smith. The three judgments made, together, upwards of $3,000. Writs of *fieri facias* were taken out on all the judgments, and delivered to the sheriff, in April, 1843, and served on certain property of White on 4 May, following, and
(391) that was all the property he had.

At May term, 1843, of Wake County Court, which was on the third Monday, the defendant, John McLeod, obtained two judgments against the said White and Busbee for $3,269.72, in the whole, besides costs; and at the same time judgments were rendered in favor of other persons, against White and Busbee, for about $1,530.28.

A few days before the county court, but after the issuing of the executions from the Superior Court, Johnson Busbee conveyed to trustees, all his visible estate (except certain of his slaves) upon trust, to sell and pay certain debts of his own, which exceed in amount the value of the effects assigned. Writs of *fieri facias* were taken out in May, on the judgments in the county court, and delivered to the sheriff; and, as the latter executions could not reach the property conveyed by Busbee, in his deed of trust, and those from the Superior Court could, because their *teste* was prior to the execution of the deed, McLeod requested the sheriff to serve the executions from the Superior Court on the property conveyed by Busbee, and leave the property of White and the negroes of Busbee, which he omitted to convey, for the satisfaction of the county court executions. But the sheriff declined doing so, and levied the executions from the Superior Court on the said negroes of Busbee, as being of prior *teste,* and entitled to the preference, and, subject thereto, he levied the county court executions on the same property of White, and the same slaves of Busbee; and he made known, that he would apply the proceeds of sale to the executions according to their legal priorities; and White and Smith united in a request to him, that he would do so.

With the view of saving his own debts, McLeod then purchased the judgment of the Trustees of the Rex Hospital, and took an assignment of it, and gave the sheriff notice thereof, and, inasmuch as none of the executions designated any of the parties as sureties, he again required the sheriff not to proceed further on the Rex Hospital's execution, against the property of White and the negroes of Busbee, so levied on, but to sell the same under the other executions. But the sheriff, at the (392) instance of White and Smith, still persisted in his previous determination, and, in consequence thereof, McLeod withdrew the Rex Hospital execution, from his hands. The sheriff then sold White's property for $2,372.50, and Busbee's negroes, that were left out of his deed, for $2,967.15, in all, $5,339.65. He did not, however, pay over those moneys to the plaintiffs in the executions, but returned the special matter and submitted it to the courts to decide, to which of the creditors, and in what proportions, it should be paid. After the sale, McLeod again delivered to the sheriff the Rex Hospital execution, and required him to serve it on the property of Smith, and on that of Busbee, conveyed by the deed of trust, which he did, and returned the levies to the Superior Court, at October term, 1843. At that term, it was also decided, on the sheriff's return, that the executions from the Superior Court in favor of Johns and Atkins, should be first satisfied out of the proceeds of White's property, and the residue of the whole sum of $5,339.65, applied to the judgments in the county court, *pro rata*. McLeod then sued out a *venditioni exponas* on the levy on the property of Busbee and Smith returned on the Rex Hospital's execution and delivered it to the sheriff on 20 October, 1843.

On 29 March, 1844, the plaintiff filed this bill against McLeod, in which he prays for relief and an injunction. It states, that the plaintiff applied to Busbee to join in the suit, and that he had refused, and has become insolvent, and makes the same allegations as to White. Upon the bill and the usual affidavit of the truths of its allegations, an injunction was granted in vacation.

The answer sets forth the facts much as they appear in the foregoing statement. It admits, that White is insolvent and has no property; and it states, that Busbee's assignment did not include any debts that might be due to him, but it admits that he has no visible property except that assigned, and that he is reputed to be insolvent. The defendant denies, that, when he purchased the judgment from the Trustee of the Rex Hospital, he knew that Smith and Busbee were sureties, though he now admits such to be the fact. The answer (393)

further insists, upon the delay in filing the bill, for more than four months after the decision of the Court as to the application of the money raised by the sheriff.

The defendant moved upon his answer for a dissolution of the injunction, but his Honor refused the motion, and ordered the injunction to stand until the hearing, but allowed the defendant an appeal.

Iredell for the plaintiff.
Badger for the defendant.

RUFFIN, C. J. The question on which the merits of this case depend, has been fully settled by previous decisions of this Court. The judgment of the court of law was perfectly correct, that none of the money in the sheriff's hands was applicable to the debt in the name of the Rex Hospital; for the question there was between the plaintiffs in the several executions, and, as this execution had been withdrawn before the sale, the sheriff could not apply any of the money to it, but was bound to apply it to the executions under which he made the sale. But, still, the question remained, what effect the conduct of the creditor, in withdrawing the execution under the circumstances then existing, ought to have on his right in equity to raise the debt out of the surety. We think it clear, that, as far as he would have got satisfaction out of the property of the principal debtor, if he had let the execution have its course on the levy, to that extent the surety is discharged. *Cooper v. Wilcox,* 22 N. C., 90, and *Nelson v. Williams, Ibid.,* 118, are directly in point. The principle is, that, whenever a collateral security on the property of the principal is given or obtained, it amounts to a specific appropriation of those effects to the debt; and, therefore, the surety is entitled to the benefit of it as well as the creditor, and the creditor is under a duty to the surety not willfully to impair the security or omit to enforce satisfaction on it. It was urged on us at the bar, that there was a distinction between the case of *Nelson v. Williams,* and the present in this; that in the former, the security on the property of the principal by the *fieri facias* was, at the instance of the surety, and by an agreement between him and the creditor, and was expressly for the purpose of obtaining an indemnity to the surety. It might be replied, if necessary, that in point of fact, this is substantially the
(397) same case. But it is not necessary to compare the cases in that respect, for the truth is, that the circumstances alluded to, though noticed in the opinion of the Court, because

existing in that case, had no influence upon that decision. Care was taken to let that be seen by saying, that "the surety is entitled to *every* collateral security which the *creditor* gets into his hands, and that, as soon as it is created, and *by whatever means* the security's interest in it attaches, and the creditor can not impair it." Several instances of the application of the principle, are then noticed, in which the supposed securities were not obtained at the instance of the surety. The wrong done to the surety by the creditor, is not defeating an effort by the surety to obtain an indemnity; but it consists in this, that the creditor has a security for his debt on the principal debtor's own property, and has destroyed or departed with the same to the prejudice of the surety. Therefore, it was said in *Nelson v. Williams,* that it was immaterial by what means the security was created, and, in so saying, the Court adopted the language of *Lord Eldon.* In *Mayhew v. Crickett* 2 Swans., 191, he said "the circumstance, that the plaintiffs (the sureties) did not know that the defendants (the creditors) held a warrant of attorney, was of no consequence, because sureties are entitled to the benefit of every security which the creditor had against the principal debtor, and whether the surety knows of the existence of those securities or not is immaterial." Upon that ground, he held in that case, that where the creditor had taken a separate judgment against the principal debtor, and took his goods in execution, and then withdrew the execution—all, without the knowledge of the surety—it was a discharge of the surety. In the present case, the sureties knew of the security created by the levy on the principal's effects, and it was the only means of saving themselves from loss, and they urged the creditor to proceed on it; but he withdrew the execution for the express purpose of throwing the loss of this debt upon the sureties, because, thereby, he hoped to save another debt of his own, the execution for which was posterior to that of the hospital. (398)

It was said at the bar, that the sheriff might have arranged the executions so as to raise the largest possible amount of the execution debts, by satisfying the Superior Court executions out of the property of Busbee and Smith, and applying White's property and Busbee's negroes, that were not conveyed, to the county court executions; and that, if the sheriff had done so, those sureties could have had no redress against him. And it was thence inferred, that the defendant is not to blame for bringing about a state of things, for which the sheriff, if effected by him, would not have been responsible. But the consequence does not follow. The sheriff proceeds in

obedience to his writs, and therefore their mandates justify him, and he is not bound to enter into any equities between any of the parties. But, if the creditor attempts to have a use made of the writ, which, however legal, is inequitable, a Court of Equity will restrain him. Therefore, the legal irresponsibility of the sheriff, for discharging the property of the principal debtor and seizing that of the surety. *Eason v. Petway,* 18 N. C., 44, does not establish the liberty of the creditor to bring about the same state of things. It may be true, also, that the sheriff and the creditor might arrange the executions, or, if the expression may be allowed, marshal the debtor's property, so as to raise the largest sum for the creditors. But that can only be allowed in equity, if at all, in respect of a defendant, who is liable for all the debts, and whose property is in such a state, that only a portion of it can be reached by one of the executions, while another execution may cover the whole. Such, for example, may be the case of Busbee, against whom all of the judgments, both in the Superior Court and county court, were rendered. To him, therefore, it was immaterial, as White's property was sufficient to pay them all, whether this or that one had the benefit of that property. For that reason it may also be, that the creditor might properly obtain satisfaction of the Rex Hospital execution out of the property conveyed by Busbee in the deed of trust. But, with those questions we now have no concern. They arise between per-
(399) sons not before us. Smith was liable only for the judgments in the Superior Court, and was not a party to those in the county court. The only question which arises upon this appeal from an interlocutory decree is, whether the injunction should be continued for any and what part of the debt, so as to restrain the creditor from raising it from the present plaintiff. Now, as between Smith and the creditor, the latter is bound, as we have seen, not to have given up the securities he had for the debt. Even if he could, as against Busbee, levy the whole of the debt out of his property, yet he could not rightfully do so in respect to Smith's responsibility, because as soon as Busbee's property had paid the debt, an action would arise to him against Smith for contribution; whereas, White's property, as far as it went, would, if applied, have been an absolute discharge to all concerned. When, therefore, the execution was levied upon White's property, and also upon Busbee's negroes, and was the preferable lien upon both of those funds, McLeod ought not to have discharged those properties therefrom, and caused them to be applied otherwise. It is clear, therefore, that the injunction should have been

continued, at least, partially. And as far as we can conjecture, it might properly have been dissolved for, probably, three or four hundred dollars, or even a little more. But in the present state of our information, we are unable to see the precise sum, for which the injunction should have been continued, or for which it should have been dissolved. In the first place, it is admitted, that White's property brought $2,372.50, and that the executions of Johns and Atkins, said to be about $1,300, exclusive of interest and costs, were satisfied thereout. With that application of the fund, the plaintiff, Smith, has no cause of complaint, inasmuch as he, like Busbee, was bound for both of those debts as well as that to the Rex Hospital.

It was therefore immaterial to White and his sureties, whether the deficit exist as a balance due on one of the executions or as balances on all of them. After satisfying Johns and Atkins, there would be a residue of ten or twelve hundred dollars of the proceeds of White's property applicable to the Rex Hospital's judgment, which would, probably, (400) leave $700 or $800 thereof, to be paid by Busbee and Smith. Busbee's share thereof, was raised out of the sale of his negroes. We speak of it as having been raised, because, although, as between the creditor and Busbee, the former *may* still be at liberty to proceed upon the levy on this execution on the other property of Busbee, yet, for the purpose of exonerating Smith in this Court from liability for Busbee's half of White's deficit, the money is to be considered as having been raised, inasmuch as the sales of Busbee's property, on which the execution was levied, and which was applicable to it in the first place, exceeded Busbee's share of the deficit, and has been received by McLeod. Therefore, the injunction should have been dissolved only for the amount of Smith's share of the deficit—supposed to be, as before mentioned, three or four hundred dollars. Probably, that could soon have been estimated by the master, from the executions and sheriff's returns, shewing the debts, interest and costs. And if either of the parties had so moved, it would have been the correct course to have ordered that estimate, and required the plaintiff to pay into court his half of the balance found, and on those terms only continued the injunction. But, as the Court could not ascertain the balance from the pleadings, and there was no computation asked for, but the defendant moved peremptorily for a dissolution generally for the injunction, we do not see what course the Court could have pursued, other than that, which was adopted, of continuing the injunction to the hearing, at

which time only can the Court refer a cause to the master, properly speaking, for an account.

The Court holds that the delay in filing the bill, for more than four months, is not a ground for dissolving the injunction in this case. Perhaps it may be the proper construction of the Act of 1800, that it embraces only those cases in which the bill is founded on an equity existing at the time the judgment at law was obtained—which seems to be the obvious purview of the act. But whether that be so or not, we are of opinion, that when the defendant answers, and the plaintiff's
(401) equity is apparent upon the answer itself, the injunction should not be dissolved, although it may have been at first improvidently granted. The Legislature did not mean, that no relief should be given in the Court of Equity against a judgment at law more than four months old. The act has never been regarded as a statute of limitation, constituting a peremptory bar to a bill, or to granting an injunction. It is directory to the Judges out of Court not to grant injunctions on the bill, and the usual affidavit of the plaintiff to its truth; and it was not meant to alter the jurisdiction in court. By the original course of the Court of Equity, an injunction was not ordinarily granted before answer or a default in not answering. But as our courts sit but twice in the year, and only for short periods, it became necessary to authorize a Judge to grant the writ *ex parte* in vacation. Then the restriction of the Act of 1800 was provided as a proper guard against the abuses, that might grow up from those preliminary injunctions. But when the time comes for a defendant to answer, and he fails to do so, or he comes in with his answer, and upon its face an equity for the plaintiff is seen, the old jurisdiction of the Judge in Court exists to award an injunction, as ancillary to the relief, to which the plaintiff will unquestionably be entitled in the progress of the cause. Therefore, if, in such a case, an injunction had been granted by a Judge in vacation, however improvidently, it would be idle to dissolve it, because in the next breath the Court would be obliged to award one on the answer to the same effect. That the act has not been regarded as creating a bar, upon the very short period mentioned in it, is seen from *Pugh v. Mayer*, 11 N. C., 362, in which it was held, that where the defendant is fully secured, by the payment of the money into court, the purpose of the act is fulfilled, and the injunction may properly be awarded on the bill in vacation, after the time prescribed in the act.

PER CURIAM. ORDERED TO BE CERTIFIED ACCORDINGLY.

Cited: Hall v. Robinson, 30 N. C., 61; *Lloyd v. Whitley,* 321; *Bevis v. Landis, Ib.,* 314; *Thornton v. Thornton,* 63 N. C., 213; *McCoy v. Wood,* 70 N. C., 129; *Hamilton v. Mooney,* 84 N. C., 12; *Bank v. Homesley,* 99 N. C., 533; *Bell v. Howerton,* 111 N. C., 71.

(402)

EZRA A. SHARPE *v.* JOEL B. KING.

1. It is a rule in equity, on the subject of injunctions, that, where, by the answer, the plaintiff's whole equity is denied, and the statement in the answer is credible, and exhibits no attempt to evade the material charges of the bill, the injunction will be dissolved.
2. Where a party referred matters in contest between himself and another to arbitration, and, after the award was made, he had full time and opportunity to examine it, and then gave his bond for the amount awarded against him, he can not afterwards have relief upon the ground of errors in the award. Equity is no more bound to take care of those who can take care of themselves and will not, than is a court of law.

Appeal from an interlocutory decree of the Court of Equity of IREDELL, at Fall Term, 1844, his Honor, *Judge Manly* presiding, ordering the injunction heretofore granted in this case to be dissolved.

The matters contained in the bill of injunction and the answer thereto are stated in the opinion delivered in this Court.

Alexander, Boyden and *Iredell* for the plaintiff.
Osborne and *J. H. Bryan* for the defendant.

NASH, J. The plaintiff in his bill charges, that a copartnership existed between himself and the defendant, and that, having closed their business, they agreed to select two individuals to settle and adjust their accounts, agreeing to abide by their award; that, accordingly, Mr. Sharpe and a Mr. Cowan were selected as the arbitrators, to whom all matters in dispute were submitted; that the arbitrators proceeded to the discharge of their duties, and in due time made up their award, to which he objected, and it was by him and the defendant referred back to the same individuals, who again examined the accounts and made another award, based upon the first. And upon the return of this last judgment of the arbitrators, he gave to the defendant his bond to perform the award; that, upon

(403) this bond, suit had been brought against him, and a judgment obtained by the defendant; and he prayed, among other things, for an injunction to stay him from collecting the money. The ground, upon which he asked for the injunction, was, that in their award, the arbitrator had made a mistake, in this, among other items; that they had charged him with the sum of $1,553.59, whereas, they ought to have charged him only with the sum of $109.04, and that, upon a fair settlement of the accounts, the defendant would be largely indebted to him. The bill further states, that the first award of the arbitrators was made on 22 December, 1841, and contained this error, which was transferred, by the arbitrators, into the second award, which was made and returned on 17 March, 1842, and that he executed the bond, on which judgment was obtained, in ignorance of the error existing in it. An injunction was granted agreeably to the prayer of the bill.

The answer denies that the arbitrators made any mistake in stating the accounts, or that there was any error in the award made by them; and avers, that the item of $1,553.59, to which the complaint now excepts, was a just and proper charge against him, and that he did not owe the complainant anything. It further states, that when the second award was made and handed to the parties, it was deliberately read over to the plaintiff, who made no objections, and, with a full knowledge of its contents, executed the bond, upon which judgment was obtained. I have stated only such portions of the bill and answer, as have a material bearing upon the question before this Court. Before the coming in of the answer in the Court below, the injunction was, upon the motion of the defendant, dissolved, and from that interlocutory order, an appeal was taken to this Court, and our only inquiry is, whether there is error in that order. We think there is none. The plaintiff's equity is fully met by the defendant's answer, in each particular. He swears, there is in the award of the arbitrators no error, but that its statements and conclusions are just and true. It is a rule in equity, on the subject of injunctions, that, where by the answer the plaintiff's whole equity is denied,

(404) and the statement in the answer is credible, and exhibits no attempt to evade the material charges of the bill, the injunction will be dissolved. *Moore v. Hylton,* 16 N. C., 429. We see no attempt in the answer to pass by the allegations of the bill; it is full, and, so far from being incredible, it is fully sustained by the two awards, copies of which are appended to the plaintiff's bill. We have looked into the awards, and find that the investigations, made by the arbi-

trators, was a most minute and labored one. The accounts appear to have been gone fully into, and, after having their attention drawn to these alleged errors in the first award, upon a reconsideration of their report, they reaffirm them. There is not the slightest insinuation in the bill against the integrity of the arbitrators. Again, one of the grounds upon which the prayer for the injunction rests, is the allegation of the plaintiff, that he did not, at the time he executed the bond, know of the existence of the errors in the award of the arbitrators. This is, under the circumstances charged in the bill, an extraordinary allegation. The plaintiff states, and the awards show the fact to be so, that the material errors alleged to be in the last, were contained in the first award, and that he was dissatisfied with the first, because of its errors, and that the arbitrators took the first award as the basis of the second. But, beside this, the defendant swears in his answer, that, before the plaintiff executed the bond, the award last made was deliberately read over to him. This award was made on 17 March, 1842, when the bond was executed. Judgment is obtained on the bond in August, 1843, and the bill is filed 12 December, 1843. The case shows, that the plaintiff had availed himself of the award, so far as to collect the debts assigned him by it, or a portion of them.

The case is not before us for hearing, but only on the motion to dissolve the injunction.

If the plaintiff was ignorant, that the last award contained the same error that the first did, which the statements of the bill and answer do not permit us to believe, it was his own fault; if he had given himself the trouble to examine it, he would have found it so. The use of reasonable (405) diligence would have protected him. And equity is no more bound to take care of those who can take care of themselves and will not, than is a court of law. 1 Story Equity, p. 159, sec. 146. 1 Fonblan. Eq. B. 1, ch. 3, sec. 3. *Penny v. Martin*, 4 John., ch. 566.

It is the opinion of the Court, there is no error in the interlocutory decree appealed from. There must be a decree for the costs of this Court against the plaintiff.

PER CURIAM. CERTIFICATE ORDERED ACCORDINGLY.

Cited: Perkins v. Hollowell, 40 N. C., 26; *Monroe v. McIntyre*, 41 N. C., 69; *Perry v. Michaux*, 79 N. C., 98; *Rigsbee v. Durham*, 98 N. C., 87.

JESSE WOMBLE *v.* JOSIAH CHEEK et al.

1. Where the plaintiff has an equitable title to a tract of land, the legal title to which is in the heirs of a person deceased, and the plaintiff's wife is one of those heirs, he can not have a decree against her to compel her to join in the conveyance of such legal title.
2. When he dies, his representatives may file a bill against her, or, when she dies, he may file a bill against her real representatives to obtain her legal title.

Cause removed by consent from the Court of Equity of MOORE, at Fall Term, 1844. The facts, appearing from the pleadings and proofs, were these:

The bill states, that the plaintiff, some six or seven years ago, contracted with one Travis Harper, to purchase a tract of land lying in Chatham, containing 171 acres, more or less, at the price of $650, payable in three installments; that he paid the first installment ($300) and gave his bonds for the residue, and was put into the possession of the land, which he has retained ever since; that Harper, thereupon, made (406) a conveyance of the land to the plaintiff. Before the second installment became due, Harper required him to give further security for the payment of the said bonds; whereupon, he called on the late John Cheek to become his surety, who agreed to do so, upon condition that Harper should convey the land to him, for the purpose of indemnity. He therefore surrendered the deed, which Harper had before executed to him (it never having been registered), and the plaintiff, as principal, and Cheek, as his surety, executed to Harper their joint bonds for the residue of the purchase-money, and Harper then executed to Cheek a deed in fee for the said land. The plaintiff avers, that the conveyance was made to Cheek to secure him from any loss on account of his suretyship. And that it was agreed between them, and when the purchase-money should be paid by the plaintiff, the said Cheek was to convey the said tract of land back to him. The plaintiff says, that, since that time, and before the death of Cheek, he paid all the purchase-money that was due to Harper, and that Cheek then promised him to make him a deed for the said land, agreeably to the original contract, but he said he had mislaid the deed that Harper had given to him for the land, and could not do it then. Cheek died in the year 1836, without executing to the plaintiff any deed for the said land, as he intended. The bill states, that the defendants are the heirs-at-law of Cheek, and the widow, who has filed a petition for

her dower in the said land, and is prosecuting the same to execution. The bill prays for a conveyance to the plaintiff of the said land, and that the widow of Cheek be enjoined from proceeding in her suit for dower.

As to the adult defendants, there is a decree against them *pro confesso*. The guardian of the infant defendants has made the usual answer, that he knows nothing of the matter, and he prays that the plaintiff be put to full proof, etc. The wife of the plaintiff is one of the heirs of John Cheek, and the plaintiff makes her a party defendant.

Winston for the plaintiff. (407)

No counsel for the defendants.

DANIEL, J. In equity, a wife may, by her next friend, sue her husband. And it is said, that, if a husband is a plaintiff in a suit in equity, and makes his wife a defendant, he is considered as thereby renouncing his marital right over her, and she is allowed to answer separately, without an order of the Court for the purpose. Calvert on Parties, 273. 1 Ba. A. C., 737. But this plaintiff is now tenant in common in possession in right of his wife. How can this Court force her to make a conveyance of the legal title in fee to her husband? Although the wife, by her next friend, has not in this case made any resistance to the plaintiff's claim, we do not see the mode in which we can, by a decree, carry into execution the prayer of the plaintiff against her. We must therefore dismiss the bill as to her, leaving the plaintiff or his heirs to seek a proper remedy against the wife or her heirs, when the relation of husband and wife shall have ceased by the death of one of them. We have examined the testimony taken in the cause, and it proves to our satisfaction the case made by the bill, to wit, that the plaintiff purchased of Harper the said land, and paid the money, and that Cheek took the legal title by a conveyance from Harper, only to indemnify himself against any loss in his becoming the surety for the purchase-money. There is, therefore, a resulting trust in favor of the plaintiff, and he has a right to call for the legal title, so far as the same is now in the other heirs of Cheek. From the necessity of the case, a decree must be made for a conveyance to the plaintiff from the other children of John Cheek, deceased, excluding the plaintiff's wife. And, furthermore, he is entitled to a perpetual injunction, restraining the widow of Cheek from prosecuting her suit for dower in the said tract of land.

PER CURIAM. DECREED ACCORDINGLY.

(408)

HUTSON NANCE *v.* W. B. ELLIOTT et al.

When one purchases land from a vendor, whose title is afterwards ascertained to be defective, and the purchaser, by his own means, supplies the defect and secures his title, he has no claim in equity upon the vendor for what he has expended in so perfecting his title.

Cause set for hearing and transferred from the Court of Equity of RANDOLPH, at Fall Term, 1844.

The bill sets forth, that the plaintiff purchased from Benjamin Elliott, the testator of the defendants, the land mentioned in his bill, at the price of one hundred dollars, for which he gave his bond, and the said Elliott promised to make him a good title; that he took possession and made some improvements, after which, he discovered that Elliott had no title, the land being vacant; whereupon, he entered it himself, and took out a grant in his own name, and that he called upon Elliott to surrender up his bond, who refused to do so, but sued him upon it, and in 1840 recovered judgment, which he paid off in the year 1841. The bill charges, that at the time of the sale to him, Elliott knew he had no title, and prays that the defendants, the executors of Elliott, may account with and pay to him, the money so recovered and paid by him to the testator.

The defendants admit, that their testator had entered the land in question and had it surveyed according to law, and, in 1830 or 1831, made with the plaintiff a contract to sell to him for one hundred dollars; that at the time of the sale to the plaintiff, he, the testator, had taken out no grant, but merely held the land in entry; and allege, that the agreement between the parties was, that the plaintiff was to pay the purchase-money to the State and take out a grant in the name of the said Elliott, who was then to make a title to the plaintiff. And it was further agreed, that, if the plaintiff should suffer the entry to lapse, he was then to enter it in his own name. It further alleges, that the plaintiff did suffer the entry of the said Elliott to lapse, and, in accordance with the agreement,

(409) made his entry and obtained his grant, and is now in the undisputed possession of the land, under a full and perfect title. The answer admits the recovery of the judgment and its payment by the plaintiff, and that the plaintiff's grant issued in 1833—Benjamin Elliott died in 1840, and, after he had obtained his grant, the plaintiff made his several payments on his bond.

J. H. Haughton for the plaintiff.
Mendenhall and *Iredell* for the defendants.

NASH, J. The only witness, on behalf of the plaintiff, who speaks anything as to the contract between the parties is Col. Isaac Lamb, and, what he testifies, he states came from the plaintiff. He surveyed the land for the plaintiff, who on that occasion told him, that it had been agreed between him and Benjamin Elliott, that the entry of the latter should be dropped, as the witness expressed it, and that he, the plaintiff, should re-enter it, and in his own name, take out a grant for it, and, that they had made this agreement, because it would cost less money than to take out the grant in Elliott's name, who would then have to make him a deed, and Nance was to pay the expenses of the survey and the purchase-money to the State, all of which Elliott was to credit him for. We can not well see, why the case was not settled as soon as this testimony was taken. It is evident from it, that the statements of the bill were not true, and that those in the answer were. Nance must have known, at the time of his purchase, that Elliott had not perfected the title to the land, and it is evident, from his own testimony, that it was part of the agreement between him and Elliott, that the entry of the latter should be suffered to lapse, and a re-entry made by the plaintiff, after the lapsing of the entry made by Elliott. Another entry in his name could not be made of the same land, within twelve months thereafter; and all entries lapse and return to the State, and become subject to re-entry, whenever the purchase-money is not paid on or before 31 December, of the second year after the entry is made. Rev. St., c. 42, secs. 10, 11, 12. The re-entry, therefore, could not have been made by Nance in the name of Elliott, (410) within twelve months after its lapsing. But, the re-entry was made by him in pursuance of the agreement between him and his vendor. If he did not receive credit for the money paid by him, at the time the judgment was recovered, it was his own fault, in not claiming and laying before the jury his evidence to prove it. We do not see, however, how, upon his own statement, we could grant him the relief he asks. He does not, in his bill, seek to set aside the contract, but asks the Court to compel the defendants to return the money he has paid, and permit him to keep the land. He has now a good and indefeasible title to the land, and stands in no need of any assistance from the defendants to make it better. If the fact had been, as he states it, that he believed at the time of his purchase, that Benjamin Elliott had a good title to the land, and upon

discovering the contrary, had applied to a court of equity to set aside the contract, or to complete the title by paying the necessary expenses, no doubt his prayer would have been granted, if sufficiently sustained by proof. Instead of pursuing this course, he undertakes to supply, and does succeed in supplying, the alleged defects of title. He now has all that he contracted for, and in equity has no claim for relief.

PER CURIAM. BILL DISMISSED.

Cited: *Ramsour v. Shuler,* 55 N. C., 491; *Knight v. Houghtaling,* 85 N. C., 29.

(411)

SIMON NEWSOM *v.* JOAB NEWSOM'S HEIRS.

1. Where an administrator suffers a debt, which is really due from the estate, to be recovered from him by a person not properly entitled to it, though while the judgment is unreversed, he will be protected in paying it out of the personal estate, yet it forms no ground for a claim of the administrator against the heirs, as for money disbursed by him for the benefit of the estate beyond the personal assets he had received.
2. An administrator can have no claim against the heirs for his commissions, though he may have expended all the personal estate in the payment of debts.

CAUSE removed from the Court of Equity of WAYNE, at Fall Term, 1844. The case was as follows:

The complainant charges, that as administrator of Joab Newsom, he paid and discharged debts of his intestate, to an amount greatly exceeding the assets, which came to his hands, and that he was induced to make these advances from a full belief that the assets would reimburse him. In this expectation he was disappointed, from the insolvency of some of the debtors, and other causes. He claims to be in advance for the estate to the amount of $536.91, as reported by commissioners appointed to audit and settle his accounts. The deficiency in the personal assets, he also attributes to unexpected recoveries made against him, as administrator of his intestate. His prayer is, to be indemnified out of the real estate descended to the heirs of Joab Newsom, the defendants.

The answers, not denying the payments made by the plaintiff, allege he made the over-payments, officiously, and without any necessity, and that the deficiency in the assets was occasioned by the plaintiff's paying the interest of a large debt

obtained by one Kilpatrick, as the administrator of John King, against the estate of Joab Newsom, and that the said Kilpatrick had proposed to the plaintiff, if he would pay the principal, he would remit the interest, which considerably exceeded the principal. This proposition was rejected by the plaintiff, and the whole debt recovered of him. Replication was taken to the answers, and, the cause being set for hear- (412) ing, the accounts, by a decree of the Court, were referred to the Master, who duly made his report. In making his report the Master took for the basis thereof the account of the auditors returned to the County Court of Wayne, from which it appeared the estate was indebted to the plaintiff in the sum of $536.91, which was reduced by money subsequently received by the plaintiff, to the sum of $306.24.

To this report the defendant excepted, because the master, in making his statement, had allowed the plaintiff, as a disbursement, the sum of $2,206.76, which was the interest on a debt paid to Harry Kirkpatrick, as the administrator of John King.

Mordecai, Husted and *Washington* for the plaintiff.
J. H. Bryan for the defendant.

NASH, J. In looking over the exhibits filed in the case, we find that one John King died in the year 1813, having made and published in writing his last will and testament, which was duly proved, and the intestate, Joab Newsom, qualified as executor thereof, and took upon himself its due execution. By his will, John King gave several bequests, and among them the following: "I also give all the rest of my property, that is not given away, to be sold and equally divided between the heirs of my daughter, Martha Daniel, lawfully begotten of her body. My will is, that my executor keep the money arising from what I give my daughter, Martha Daniel's children, until they arrive at the age of twenty-one." Upon the death of Joab Newsom, intestate, Harry Kilpatrick, was by the proper tribunal, appointed administrator *de bonis non*, with the will annexed, upon the estate of John King, and filed his petition in the County Court of Wayne, against the present plaintiff, as administrator of Joab Newsom, to recover the legacy to the children of Martha Daniel, and obtained a decree therefor, under which decree the money was paid to Kilpatrick. We think this decree was entirely erroneous. It is evident that Harry Kilpatrick, administrator *de bonis non* of John King, was not the (413) proper person to take the legacy into his hands. It was in the possession of the plaintiff, as a trustee for the children of

Mrs. Daniel. They were no parties to the suit. The County Court gave the petitioner a decree for the sum of $3,471.17, of which the sum of $2,206.76 was interest, and for which the defendants except.

Erroneous, however, as this decree is, until reversed, it is binding upon all, who were parties to it. It is not, however, binding upon the children of Mrs. Daniel, the legatees under John King's will, and the payment of it to the administrator *de bonis non,* Kilpatrick, is no discharge to the real estate of Joab Newsom. And those, who were bound to make it good, are still so bound. And, of course, the plaintiff has no right to come into this court, and ask that the lands should be subjected to make good a deficiency so created. There is, however, another fatal defect in the plaintiff's claim. It is this. The Master reports, as due to the plaintiff, the sum of $360.24. Upon looking into the accounts audited in the County Court, and taken by the Master as the basis of his, we find that the auditors allowed the plaintiff commissions to the amount of $366.04, a sum exceeding that found due to him by six dollars. However just and proper the commissions may be, as a charge against the personal estate, it certainly can constitute no claim on the part of the plaintiff, as a charge upon the real estate.

Upon both grounds, then, the plaintiff is debarred of the relief he seeks. For, although the payment under the decree, referred to, will protect him against any one claiming the personal estate of Joab Newsom, it is different when he comes and claims relief against the real estate.

The exception of the defendant is allowed, and the bill dismissed with costs.

PER CURIAM. BILL DISMISSED WITH COSTS.

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(414)

WILLIAM HEATHMAN, Admr., Etc., *v.* JOSEPH HALL et al.

1. To constitute a conveyance to a trustee for a married woman, one for her sole and separate use, no technical language is necessary. But it must appear unequivocally on the face of the instrument, to the satisfaction of the Court, that the intention was to exclude the husband from any interference with the property conveyed.
2. Where a conveyance was made to a trustee of certain negroes, in trust "for the entire use, benefit, profit and advantage of" the *feme covert: Held,* that, by these words, a sole and separate estate in the property was conveyed to her.

HEATHMAN *v.* HALL.

CAUSE removed from the Court of Equity of ROWAN, at the Spring Term, 1844.

The bill sets forth that Joseph Kincaid died in August, 1840, and that, by the proper tribunal, the plaintiff was duly appointed administrator upon his estate; that, some twenty years before the death of the intestate, he, being much embarrassed in his circumstances, a constable levied an execution upon a negro woman, named Lucy, and at the sale the defendant, Joseph Hall, a brother-in-law of the intestate, became the purchaser, at what price the plaintiff does not know, as the bill of sale which the defendant took from the constable was never proved and registered. The bill avers, that, before the sale, it was expressly agreed between the said Joseph Kincaid and the said Hall that the latter should purchase said Lucy, and that Kincaid should have the right to redeem her at any time, by paying Hall his money with the legal interest thereon; that in pursuance of this arrangement, Hall, on the day after the sale or in some short time thereafter, sent Lucy back to the intestate, where she remained up to the time of his death; that during the time the said Lucy was in the possession of the said Kincaid she had six children, of whom one was named Betty and another Simon; that, about two years after the purchase by Hall, the intestate, through the agency of the said Hall, sold two other negroes to one Kirder, for about $1,000, and, with a view to pay off all of his debts and redeem Lucy; (415) and soon thereafter the parties met at the house of the said Hall, when they had a settlement, and the said Kincaid made a full payment of the purchase-money for Lucy, and the said Hall surrendered up the constable's bill of sale, and the said Kincaid took it away with him, and on his way home, from forgetfulness or some other casualty, left it at the house of one Linster, also a brother-in-law; and that thereafter the said Hall obtained possession of the said bill of sale, how, the plaintiff does not know, but without the knowledge or consent of Kincaid, which said Hall still keeps under various pretexts, always, however, admitting that Kincaid had paid him his money; that, about the year 1830, the intestate became diseased and continued to get worse until 1835, when he became entirely deranged, and so continued up to the time of his death; that, in 1837, the said Hall conveyed the said negro Lucy, with her increase, to one Ashbell Smith, then and still a resident of a foreign government, in trust, for the entire benefit of the defendant, Eleanor Kincaid, then the wife of the said intestate, during her life, and, after her death, the negro Simon to be conveyed to the defendant Lucinda Kincaid, and the negro Betty

and her increase to the defendant Sarah W. Kincaid, and the remainder of the property to be sold and equally divided among the heirs of the said Eleanor; that the said Lucinda and Sarah were children of his intestate, besides whom he left a son living out of the State, another daughter under coverture, and an infant granddaughter, whose mother was dead; that, in January, 1840, the negroes Betty, Simon and Mary, were hired out by one Jesse Kincaid, as the agent or attorney in fact of the said Smith, but that notes were taken payable to the said Hall, and that, in January, 1841, the said Hall, as trustee for Mrs. Kincaid, hired out the same negroes, though forbidden to do so; that the rest of the negroes remained in possession of the said Eleanor, and, soon after the plaintiff administered, he attempted to take them into his possession, and sell other portions of the property, all of which was claimed by the defendants, and they refused to surrender up the bill of sale; that the defend-
(416) ants, Eleanor, Lucy and Sarah, often, before his intestate became deranged, declared that the said Hall had no right to the negro Lucy, and that the said intestate had fully paid up Hall for the money, and that he surrendered the bill of sale; and that the defendants had conspired to defraud the deceased and his next of kin, and that the said Ashbell Smith had full knowledge of these facts at the time he accepted the deed of trust. The prayer of the bill is for a surrender of the negroes by the defendants, and that they may account for the hire, and concludes with a prayer for general relief.

The answer of Joseph Hall admits the death of Joseph Kincaid, and that the complainant is his rightful administrator, the sale of Lucy by the constable, and that he purchased her for $300. But he denies positively that there was any agreement or understanding between him and the said Kincaid as to the redemption of Lucy; before the sale or after. He avers, that, at the time he purchased Lucy, he bought a negro boy named York, and, as he was returning home, upon Mrs. Eleanor Kincaid complaining of the circumstances, he told her it was out of his power to keep both of the negroes; that, if, in the sale, he reimbursed himself, he would secure to her all over, but that this promise was merely voluntary; that he purchased York and Lucy for a fair and full price, and for himself, but with a determination to do something for the wife of Kincaid, who was the sister of his wife, as he saw the family would come to want; that Joseph Kincaid was entirely insolvent, and unable to pay his debts, and that, in a short time, all his property was sold, and did not discharge what he owed, and that a considerable amount remains unpaid still; that Joseph Kincaid never

set up any title to the negro Lucy, and knew of his conveying her and her children to Ashbell Smith, and the purposes thereof; that he never had a settlement with Kincaid, as to the money paid, nor has any of it ever been repaid him; that he kept Lucy some time in his possession after he bought her, and then hired her at the price of $50 a year, to the said Kincaid, and that he has always claimed the title of said Lucy from the time of the sale, and held her and her children adversely to (417) the said Kincaid, and with his knowledge. He admits the transfer of Lucy and her children to Ashbell Smith, and avers that Kincaid knew it at the time, and approved of it; that, some years before his death, Kincaid was afflicted with fits, but denies that they affected his mind, except for the time they were on him, but avers that his mind was sound to the time of his death, and denies all fraud.

The answer of Jesse Kincaid admits the death of Joseph Kincaid, and the qualification of the complainant as his administrator, denies all knowledge of any understanding or agreement between Hall and the said intestate, as to the purchase of Lucy, avers the total insolvency of the intestate, and denies that his mind was unsettled by his disease, but avers that it remained strong and active to the time of his death.

The joint answers of Eleanor and Sarah Kincaid admit the sale of Lucy and York by the constable, and the purchase by Joseph Hall, in the year 1821, but that he purchased for himself, and that, at that time, Joseph Kincaid was entirely insolvent, unable to pay his debts, and that they still remain unpaid. They aver that the intestate was not at the sale, but that, after it was over, Joseph Hall promised the defendant, Eleanor, that, after indemnifying him for what he had paid for the negroes, he would convey all over to her, that it would not do to convey anything to the said intestate, as his creditors would immediately seize it; that this conversation was communicated to Joseph Kincaid, who approved of the arrangement, and never during her life claimed said negroes as his, but always admitted they were Joseph Hall's. They deny that the intestate was, at any time before his death, deprived of his reason, or unable to manage his affairs, except when fits were on him, admit the making of the deed as set forth, and deny that they ever thought or said that Joseph Hall had no right to the negro Lucy and her increase, or that they were afraid he would injure the intestate.

Iredell for the plaintiff. (418)
Boyden for the defendants.

NASH, J. The foundation of the plaintiff's bill is that Joseph Kincaid, being in embarrassed circumstances, a constable levied an execution on the negro Lucy, and it was agreed between him and the defendant, Hall, that he, Hall, should purchase said negro, and permit the said Kincaid to redeem her, and the *gravamen* is that, in violation of that contract, he has conveyed the negro Lucy and all her increase to the widow of Kincaid, the defendant, Eleanor, for her life, and after her death, the negro Simon to Sarah Wells Kincaid, and Betty, the child to Lucinda Kincaid the other two defendants, and, after the death of the said Eleanor, the remainder of the negroes to be sold and divided among all her children. The defendant, Hall, positively denies that he ever made any such agreement with Joseph Kincaid, either before or after the sale; states that he purchased the negro Lucy with his own money, at a full price, and for his own purposes; that it would have been idle to have made any such contract, for he knew Kincaid was very much embarrassed; that he then owed at least $1,000 more than he could ever pay, which is still due and unpaid, and that, seeing the embarrassed situation of the family, he told Mrs. Eleanor Kincaid his intention of securing to her whatever might remain after repaying himself; that this promise was entirely gratuitous, but that he had performed it. The plaintiff has entirely failed to sustain his charge; no evidence has been adduced by him to prove the existence of any contract or agreement, or even understanding, between his intestate and Hall, that the former should have the right to redeem.

He alleges the long and continued possession of the intestate as proof of it. The answer of Hall fully and expressly denies it, and the circumstances proved in the case support the answer, and sufficiently explain the possession. Hall did not purchase with any view to his own profit, but with the intention to aid the sister of his wife and her children, and he has fully (419) and, we think, honestly done so. The plaintiff further alleges, that, about two years after the constable's sale, Kincaid and Hall met at the house of the latter, when they had a full settlement, and Hall surrendered up the bill of sale for Lucy to Kincaid. This part of the plaintiff's case rests upon the testimony of Joseph Linster and his wife. The character of the former has been assailed in such a manner as greatly to weaken the force of his testimony, and to incline the Court to lay it aside, and the testimony itself is suspicious. He appears, from his own account and from his connection with the parties, to have fully known all the circumstances attending the transaction; yet he gives us no particulars, does not tell

us what was settled, except that it was about Lucy, and in the presence of Newberry Hall, who, he says, made the statement, and that Hall surrendered up the constable's deed to Kincaid. The wife of Linster makes the same statement, as to the surrender of the deed.

If the character of Linster was unimpeached, corroborated as his statement, on this part of the transaction, is, by that of his wife, we should be compelled to believe that such a settlement had taken place, and that the bill of sale had been surrendered by Hall. But the latter denies that any such settlement ever did take place, or that Kincaid has ever repaid him any portion of what he paid for Lucy, and, with respect to the settlement, Newbery Hall explicitly supports the answer. But, if we were satisfied that the fact was as testified by Linster and his wife, as to the surrender of the bill of sale, we could not decree upon that fact, that the slaves should be surrendered; for that fact is inconsistent with a trust in Hall, either for Kincaid or for his wife and family. But, according to the statement of Hall, and there is no evidence in the case to disprove it, he purchased Lucy and York absolutely for himself, and his promise to secure to Mrs. Kincaid what might remain after satisfying his own claim, was a promise without a consideration, void in equity, as well as at law, when the action of the former is invoked to carry it into execution. The money by which his claim was satisfied, if satisfied at all, was raised by the sale of York; for it is not pretended by Linster that any money was paid by Kincaid at the time of the (420) alleged settlement; it was therefore the money of Hall.

The most that could be made of the surrender of the bill of sale is, that it was a parol gift of the negro Lucy to the intestate since the Act of 1811, and therefore void, by the act of the General Assembly.

We are of opinion, therefore, upon the point of fact, that the defendant, Hall, did not purchase upon any trust for Joseph Kincaid.

Upon the argument of this case, we were at first in some doubt, whether, under the deed from Joseph Hall to Ashbell Smith, the interest was conveyed to her separate use, or vested immediately in her husband. It was, therefore, necessary to inquire, whether the conveyance was of such a character as to exclude her husband. At the common law a husband is burthened with the debts of his wife, and is entitled absolutely or partially, according to circumstances, to her property; but, in equity, a gift may be made to a *feme covert*, so as to shut out and exclude the husband's interference or interest in it, pro-

vided the intention be clearly expressed. This intention, however, must be clearly and unequivocally expressed; and the reason is, that, as the husband is bound to maintain his wife and bear the burthen of her incumbrances, he has *prima facie* a right to her property. Lewin on Trusts, 150. There is no technical language, in which this intention must be expressed, to render it efficacious. If the meaning be certain, that the wife shall have the property, exclusive of her husband, a Court of Equity will execute the intention. *Darley v. Darley,* 3 Atk., 399; *Staunton v. Hall,* 2 R. & M., 180. Various expressions have been considered by the Court sufficient to deprive the husband of his marital right; such as "for the sole and separate use," *Parker v. Brooke,* 9 Ves., 583—"for her sole use," *Adamson v. Armitage,* 19 Ves.—or "for her livelihood," *Darley v. Darley,* 3 Atk., 399—or "that she may receive and enjoy the profits," *Tyrrell v. Hope,* 2 Atk., 258. In Lewin on Trusts, 150, the author has collected together various other cases, (421) in which the courts have held other words to be sufficient, as they were clearly inconsistent with the notion that the husband had any right to interfere with the property. These are but examples of expressions, sufficiently strong to secure the property to the wife, independent of the husband; and wherever words shall be used, equally expressive in the judgment of the Court, they must be deemed sufficient. In the deed we are considering, the words are "for the entire use, benefit, profit and advantage of Mrs. Eleanor Kincaid." The word "entire" governs the conveyance, and gives its meaning and force to each of the other words, and is the same as if written "entire use," "entire benefit," "entire profit," "entire advantage." The best lexicographers define entire to be *whole,* undivided, *not participated in with others.* If this be the proper meaning of "entire," as it certainly is, then it is evident that it was not the intention of the deed, that the husband should have any interest in the negroes whatever; for they are conveyed to Ashbell Smith for the use, benefit, profit and advantage of Mrs. Kincaid, to be enjowed by her, without any participation with any other person—a mode of expression equally strong with "sole use," "sole and separate use," and equally indicative of the same idea, that she was to enjoy the property free from any interference on the part of her husband. We conclude, therefore, that the deed from Hall to Smith conveyed the negroes to the latter, for the sole and separate use of Mrs. Kincaid, during her life, and therefore no interest vested in her husband, William Kincaid.

The bill must be dismissed as to Mrs. Kincaid, with costs.

As to the remainder, after the life of Mrs. Kincaid, the bill must likewise be dismissed with costs; because the trust in remainder, to the two daughters, as to two of the slaves, is certainly good, and the trust to sell the residue of the slaves and divide the proceeds among the heirs of Mrs. Kincaid, vests the right to those proceeds in her children or issue, as purchasers. (422)

My brethren instruct me to say, their opinion is founded on the whole sentence taken together.

PER CURIAM. BILL DISMISSED WITH COSTS.

Cited: Ashcraft v. Little, 39 N. C., 238; *King v. Rhew,* 108 N. C., 699; *McKenzie v. Sumner,* 114 N. C., 429.

GILES HEDGESPETH et al. *v.* ROBERT C. PURYEAR et al.

A testator devised all his property to his wife for life, and after her death his property, except his lands, to be divided among his three daughters. He then directs as follows: "After the death of my wife, as aforesaid, it is further my will and desire, if there should not be property and effects, exclusive of the lands, sufficient to make to the amount of $370 each, that my son Henry pay out of his portion what will be sufficient for the purpose." He devised his lands to be equally divided between his sons Joseph and Henry. Henry's interest in the land was sold under an execution against him: *Held,* that, upon a deficiency of the personal estate, after the death of the wife, to pay the daughters $370 each, these legacies were a lien upon the land devised to Henry, and the purchaser at a sale under an execution against Henry bought them subject to that lien.

CAUSE removed from the Court of Equity of SURRY, at Spring Term, 1843.

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

Alexander and *Boyden* for the plaintiffs.
Badger for the defendants.

NASH, J. John Sater died in the year ...., possessed of considerable real and personal property, having previously made his last will and testament, duly executed to pass real estate, and which has been admitted to probate. By his will he devised to his wife, Sarah Sater, the whole of his property,

real and personal, during her life, and bequeaths to his daughters, at her death, as follows: "After my wife's death, it
(423) is my will and desire that the residue of my property, except my lands, be equally divided among my daughters, to wit, Nancy McBride, Discretion Hedgespeth, and Malinda Kelly." He further gives power to his wife, Sarah, to give or make any distribution of the furniture that she may think proper. The will, then, proceeds: "After the death of my wife, as aforesaid, it is further my will and desire, if there should not be property and effects, exclusive of the lands, sufficient to make to the amount of $370 each, that my son, Henry, pay out of his portion what will be sufficient for the purpose." He then divides his lands between his sons, Joseph and Henry, giving to the latter much the larger portion. Sarah Sater is dead. The bill is filed to make the legacies out of the land devised to Henry Sater, alleging the exhaustion of the personal property during the life of Mrs. Sater. It prays a decree to subject the land in the hands of the defendants, Puryear and Edmonson, who, it alleges, are purchasers from Henry Sater, with full knowledge of their equity.

The defendants, Puryear and Edmonson, in their several answers, admit the allegations of the bill, as to the devise to Henry Sater, and the legacies to the three daughters, but deny that the latter are charged on the land; and aver that they are personal liabilities of Henry Sater. But, if such a charge did exist under the will, that the land was liable only in the event the personal property should prove insufficient, and they allege that the plaintiffs did receive out of that property, during the lifetime of Sarah Sater, the full amount of their legacies, and, if they did not, enough was left at her death to satisfy them, or that the property was wasted during the lifetime of Mrs. Sater, and it was their duty to take care it was not so wasted. The answer states further, that an execution was in the hands of the sheriff of Surry against Henry Sater, which was levied on his interest in the land, and, at the sale, the defendant, Puryear, as the agent of the defendant, Edmonson, purchased it, and that the deed was made to the latter, and that, at the time of their purchase, they knew the contents of the will. Upon the coming in of the answers, replication was taken, and the cause
(424) was set for hearing, and sent to this court for hearing.

Before the cause was transferred here, by consent of the parties, a reference was made to the Master to ascertain: 1st, the amount of the assets in the hands of Zachariah Williams, the administrator of Sarah Sater; 2d, the amount paid to the several complainants for their legacies; and, 3d, whether the

assets had been wasted by Mrs. Sater. The Master made a report upon these several matters, to which the defendants have filed two exceptions. It is not necessary to say anything as to the first, Nancy McBride never having been a party to the suit. She died before the bill was filed, as appears from the evidence, and her representative, if she has any, is not before the court. The second exception is allowed. Upon an examination of the testimony, we are satisfied that Mrs. Kelly received the full amount of her legacy out of the property during the life of Mrs. Sarah Sater. The Master reported that there was no evidence of any waste committed by Sarah Sater, and that the amount of assets in the hands of her administrator was $150. These items in the Master's report are not excepted to, and the report, as to them, was confirmed, and by the Court a decree was made, declaring that this sum of $150, in the hands of Zachariah Williams, was assets of John Sater, and liable to the payment of the legacies before the land. Such was the decree of the Court below, with which we do not interfere. The Master further reported that, of her legacy, Discretion Hedgespeth had received the sum of $50, to which the defendants do not except.

The primary fund, provided by the testator for the payment of the legacies, being exhausted, except the sum of one hundred and fifty dollars, in the hands of Zachariah Williams, the administrator of Sarah Sater, we are of opinion that the land devised to Henry Sater is liable to make up to the legatees what may remain due to them.

It was the testator's object that his daughters, Mrs. McBride, Mrs. Kelly, and Mrs. Hedgespeth, should each, after the death of his wife, receive the sum of three hundred and seventy dollars. After giving the whole of his property, real (425) and personal, to his wife during her life, he proceeds to make the bequests, giving that sum to each of them, to be paid out of the personal property of his, which should remain at the death of his wife. Apprehensive, however, that a sufficiency for that purpose might not remain, and anxious to secure to them his bounty, he provides another fund, to wit, the land devised to Henry. His words are, "if there should not be property and effects (exclusive of the land) to make equal, etc.," then, "that my son, Henry, pay out of his portion, etc." These words contain an express charge upon the land devised to Henry to pay the legacies, as much so as if he had used the word "charge" in the event of a deficiency of personal assets.

The answers of the defendants, Puryear and Edmonson, admit that the land was purchased by them at a sale made by the sheriff of Surry, under an execution against Henry Sater;

they then hold it, as he did, subject to this charge. They allege that the land ought not to be held liable now, for the reason that the personal assets, at the death of Mrs. Sater, were sufficient to discharge the legacies, and that the complainants either were paid out of them or might have been, and that the assets were wasted during Sarah Sater's life estate. The only assets found remaining, by the Master's report, after Sarah Sater's death, were to the amount of $150; to this part of the report the defendants did not except, and we have no evidence that the assets of the testator were wasted by Mrs. Sater. On the contrary, the evidence shows she was a prudent, careful woman, and survived her husband ten years. The property was not large, and it is evident the testator calculated it might not hold out, but might be exhausted in maintaining her.

The bill must be dismissed as to Milly Kelly, and Wakeman McBride and his wife, Nancy. There must be a decree for Giles Hedgespeth and his wife, Discretion, for the amount of their legacy, deducting the sum of $50 which they have already received, and, after the application of the sum of $150 in the hands of Zachariah Williams, administrator of Sarah
(426) Sater, and, heretofore by a decree of the Superior Court of Surry County, declared to be a fund for the payment of the legacies, the balance of their legacies is declared to be a charge upon the land devised to Henry Sater, in the hands of John B. Edmonson, in whom is the legal title. The bill is dismissed as to Puryear, with costs.

PER CURIAM. DECREED ACCORDINGLY.

NANCY JOHNSON et al. *v.* ANTHONY M. JOHNSON et al.

1. A bequest of "one-seventh part of all the balance of my negroes and stock," is a specific legacy, and, upon the death of the legatee in the lifetime of the testator, as well as a pecuniary legacy to the same person, becomes a part of the residue, and will pass under a residuary clause.

2. A testator, after having given several legacies, bequeaths the residue of his estate, "not disposed of, to his wife and her six children, to be equally divided between them and their heirs, share and share alike." A, one of the six children, died in the lifetime of the testator: *Held*, that this bequest was not to the children *as a class*, but as if each had been particularly named—and as each was entitled to only one-seventh, that share could not be enlarged by the death of one in the lifetime of the testator: *Held*, therefore, that the share of A, having so lapsed, was entirely undisposed of, and belongs to the next of kin of the testator and his widow, the latter being entitled, in such case, by the express terms of the act of 1835, (Rev. Stat., chap. 121, sec. 12,) to a child's part.

CAUSE transmitted from the Court of Equity of WARREN, at Fall Term, 1844, to the Supreme Court.

The facts are thus disclosed by the pleadings:

Sterling Johnson was twice married. By his first marriage he had the following children, Anthony M. Johnson, John P. Johnson, Willis Johnson, and Littleberry John- (427) son. The two former survived their father; but the two latter died before him, and before the making of his will, as hereafter mentioned, each of them leaving several children. By his second marriage, he had seven children; one of whom died before her father, and before the making of his will, leaving an only child named Amaryllis Shearin; the other six children were Etherton, Wade, Andrew, Augustus, Francis M., and Mary A. L. Johnson.

On 7 May, 1838, Sterling Johnson made his will. He thereby gave to his two sons, Anthony M. and John P. (by his first marriage) certain negroes and other things specifically; and in like manner he provided for the children of his deceased sons, Willis and Littleberry, and for his granddaughter, Amaryllis Shearin.

The testator then lends to his wife, Nancy, during her widowhood, a tract of land, one-seventh part of his negroes, not particularly given away, his furniture, etc.; and he directs that when the loan expires, the land shall be sold, and the proceeds thereof and the other legacies to her, be equally divided between his wife's children; his granddaughter, Amaryllis, having no part.

By the tenth clause in the will, the testator gave to Francis M. Johnson, "one-seventh part of all the balance of my negroes and stock, not hereinbefore given away, and the sum of $250." In like manner, by five other distinct clauses, he gave one-seventh part of the residue of his negroes and stock to each of his other children by the last marriage.

Finally, there is a residuary clause, in these words: "I give and bequeath to my wife and her six children all the balance of my money and other property, not heretofore disposed of, to be equally divided between them and their heirs, share and share alike; my granddaughter, Amaryllis Shearin, having no part of the above money or property."

The testator appointed his son, Anthony M., and Thomas W. Harris, executors; and then died in 1843.

Francis M. Johnson died in the lifetime of his father.

The bill is filed by the widow and her five surviving (428) children against the executors and the children and grandchildren by the first marriage, and also against Amaryllis

Shearin. It prays, in the first place, for the several particular legacies to the plaintiffs respectively, to which the defendants make no objection, but the executors say, they have always been ready to deliver or pay them. The bill in the next place insists, that the legacies to Francis M. Johnson in the tenth clause of the will, of $250, and one-seventh of the negroes and stock, fell into the residue by his death, and that the whole residue, including those legacies, belong to the plaintiffs as surviving residuary legatees.

The answers insist, that both these particular legacies to Francis M. and his share of the residue, which lapsed by his death, are undisposed of by the testator, and are divisable among his next of kin, according to the statute of distributions; and that in such division the widow is not entitled to any part, because she did not dissent from her husband's will.

Saunders for the plaintiffs.
Attorney-General for the defendants.

RUFFIN, C. J. The plaintiffs will, of course, have decrees respectively for their several particular legacies, according to the submission in the answer of the executors.

The questions respecting the legacies given to Francis M. will be better understood by confining our view to one of those legacies at a time.

The gift of one-seventh part of "all the balance of *my* negroes and stock," is undoubtedly, specific. *Everett v. Lane,* 37 N. C., 548; *Perry v. Maxwell,* 17 N. C., 488. That legacy, and the pecuniary one of $250, did not, by lapsing by the death of the donee, become undisposed of, but fell into the residue, which the will disposes of. The residuary clause is in general terms, embracing "all the balance of my money and other property"; and it is clearly settled that such a disposition carries every part of the personalty not given away, or that turns out, (429) in the event, not to have been effectually given away, whether the failure arise from the illegality of the gift or the death of the donee. *Sorrey v. Bright,* 21 N. C., 113; *Simms v. Garrott, Id.,* 393.

But it remains to be seen how the residue, consisting of those lapsed legacies and the rest of the property, is affected by the death of Francis M. Johnson, one of the residuary legatees. We think so much of the residue as that person would have been entitled to, had he survived his father, does not, by his death, go to the surviving residuary legatees, but lapsed and belongs to the next of kin.

A distinction prevails in England, in such cases between legacies given to two or more, jointly, or in common. The former, upon the death of one of the donees, survives to the others, whether the death be before or after the testator's. *Webster v. Webster,* 2 Pr. Wms., 347; *Morly v. Bird,* 3 Ves., 628. That is supposed to result from the right of survivorship incident to a joint tenancy. Whether that be the reason or not, or whether our Act of 1784, destroying the *jus accrescendi,* will have any effect upon the point here, it is not material to inquire in this case, since the words of this will clearly create a tenancy in common. As to that, the rule is well settled. If a personal fund be given to two or more, to be divided in certain proportions, and one of them die before the testator, what was given to that person lapses; and where the subject of such gift is a residue, the lapsed share is, necessarily, undisposed of, and belongs to the next of kin. For each of the donees is, by the terms of the gift, entitled to a distinct and determinate share of the residue; and, therefore, that share is not enlarged by the death of the donee of another share. *Page v. Page,* 2 Pr. Wms., 489; *Owen v. Owen,* 1 Atk., 494; *Ackroyd v. Smithson,* 1 Bro. C. C., 503. This gift is to "the wife and her six children, equally to be divided between them, share and share alike." There is, therefore, a clear tenancy in common; so as to bring the case within the general rule. Nor does it fall within the exception to that rule, which was laid down in *Viner v. Francis,* 2 Cox, 190, where the bequest was "to the children of the testator's deceased sister, M. C., to be equally divided (430) among them," and there were three children at the making of the will, but one died before the testator; upon which it was held, that the gift was not to those children *nominatim,* nor as if it had been "to *the three* children of M. C.," but it was to the children *as a class,* and the meaning was, that all or any of the described class, that should survive the testator, should take the fund. But this will is express, as to which children of the testator's wife should take the residue, namely, "her *six* children," which she then had, "equally to be divided between *them.*" The gift is not, therefore, to a class of persons, as such class might exist at any subsequent period, but to *certain* persons *then* in being, and as completely identified, each of them, as if each had been designated by his or her name, and the share of each of those persons is fixed, namely, at one-seventh part of the residue. Hence, the share of one can not be enlarged by the death of *Ackerman v. Burrows,* 3 Ves. & Bea., 54. The share of Francis M. Johnson in the residue, therefore, lapsed by his death, and belongs to the next of kin.

Another question is made as to the right of the widow to a distributive share with the next of kin, upon which there is now no doubt. Although, previous to 1835, the widow was excluded, as we have held in *Brown v. Brown,* 27 N. C., 136, and the cases therein cited, yet the act of that year, Rev. St., 121, s. 12, expressly gives her a child's part of the husband's personal estate, not disposed of in his will.

It will be perceived, that no directions are given touching the remainder in the personalty lent to the wife, and in the proceeds of the sale of the land, at her death or marriage, which is given "when the loan expires, to be equally divided among my wife's children." The pleadings raise no question on that part of the property; probably, because both parties thought the question was between the children of the second marriage alone, or, at any rate, that, if the others had an interest in the fund, it was so remote as not to be worth litigating now.

(431) For, the gift of that fund is not like that of the residue, "to *the six* children" of the wife, so as to be confined to those then alive, but to her children generally. It may, therefore, be a case within the rule in *Viner v. Francis,* and, if so, the whole remainder is vested in those of the children, who survive the testator, subject, perhaps, to open for her after-born children. Or it might, perhaps, be contended, that it is yet contingent, and will belong to such of the wife's children as shall be alive at the period of division. Even if the latter should be the law of the case, the children of the first marriage, and the granddaughter, Amaryllis, could take nothing therein, unless all the last set of children should die before their mother; so as, thereby, to leave this fund also undisposed of by the will. But whatever may have been the motive of the parties, it is to be observed that, in point of fact, no directions have been asked on this point, and, therefore, it will be unaffected by the decree.

PER CURIAM. DECREED ACCORDINGLY.

S. v. Shannonhouse, 29 N. C., 10; *Guyther v. Taylor, ante,* 328; *Tucker v. Tucker,* 41 N. C., 83; *McCorkle v. Sherrill, Ib.,* 176; *Henderson v. Womack, Ib.,* 441; *Washington v. Emery,* 57 N. C., 35; *Winston v. Webb,* 62 N. C., 23; *Twitty v. Martin,* 90 N. C., 646.

(432)

SAMUEL P. HILL et al. *v.* THOMAS D. JOHNSTON.

1. A, being indebted to certain infants, of whom B was the guardian, agreed with B that he would give his note to D for a debt which B owed the latter, and accordingly did so, taking from B a discharge for the debt due to his wards for that amount: *Held*, that C having no notice of this arrangement between A and B, was not responsible for the amount so received from A.
2. Merely signing a paper as an instrumentary witness creates neither a legal nor a natural presumption that such witness knew the contents of the paper.

CAUSE removed from the Court of Equity of CASWELL, at Fall Term, 1844.

The following is the state of the case as presented by the pleadings and proofs:

John H. Graves was, on 16 September, 1841, and for several years before, the guardian of the plaintiffs, Samuel P. Hill, Sarah J. Hill, and Maria W. Hill, and had also married their sister. At that time, James Mebane, as executor of the will of John Mebane, deceased, owed to the plaintiffs and their sister, Mrs. Graves, a considerable sum of money, on account of legacies given to them by his testator, who was their grandfather. James Mebane was also, with others, the surety for Graves, for his guardianship. The defendant, Johnston, was a shopkeeper, with whom Graves had dealings for several years for supplies for his family, and also for his said wards, respectively; on all which accounts the demand of the defendant upon goods exceeded $1,500, in September, 1841, and the defendant urged him to make some payment. Graves then informed the defendant that James Mebane owed him a considerable debt, and that he expected to receive a payment on account of it in some short period, and promised that, when he did, he would pay the defendant, in whole or in part; and the defendant then stated to him that if Mr. Mebane would give his bond to the defendant, in case it was not then convenient to him to (433) pay the money, the defendant would accept it, and discharge Graves. Accordingly, Graves and Mebane went together to the defendant's shop, on 16 September, 1841, and Graves then gave to Mebane a receipt for the sum of $1,008.27, expressed to be "in full of a balance due from him as executor of ..... Mebane, on account of my wife, and as guardian of Samuel P. Hill, Sarah J. Hill, and Maria W. Hill," and the defendant, Johnston, attested the receipt as subscribing witness; and, at the same time, Mebane gave to the defendant his

bond for the sum of $841.79, part of the said sum of $1,008.27, and settled the residue thereof with Graves, in some other way. In May, 1842, Mebane paid his bond to the defendant. During the dealings between Graves and the defendant, as above mentioned, the former was in the habit of making payments to the latter, in bonds taken by him for the hire of slaves belonging to his wards, and payable to him as guardian, amounting altogether to the sum of $495.75.

Graves had similar dealings with Harvey & Gunn, who were also shopkeepers in the same place, and gave to them his bond for a balance of $262.85, and made them a payment thereon in cash of $151.21, leaving a balance of $155 due on the bond, when Harvey & Gunn endorsed it to the defendant. In April, 1842, it became known that Graves was insolvent, and he executed to a trustee an assignment of certain property, in trust, to indemnify Mebane and his other sureties for his guardianship, and removed from this State; and James Mebane was then appointed guardian of the plaintiffs.

The bill was filed in January, 1843, and charges that, when Mebane gave his bond to the defendant, on the 16th September, 1841, he, Mebane, believed Graves to be solvent and fully able to answer to his wards for all their effects, that had or might come to his hands, and that the defendant then knew or believed Graves to be insolvent, and that he also knew the contents of the receipt given by Graves to Mebane, which the defendant attested, and that the money, or a large part of it, for which Graves had the demand against Mebane, was due for a (434) balance of the legacies to the plaintiffs. The bill insists, that the defendant holds all the money and bonds received by him from Graves, over and above the defendant's accounts for supplies to the plaintiffs, as trustee for them—and the prayer is, that an account may be taken of all the dealings, on account of the plaintiffs, with the defendant, and that he may be decreed to pay and to deliver over to their present guardian, James Mebane, all such money, and also deliver over the bonds that may be found in his hands.

The answer admits that the defendant became uneasy at the delay of Graves in making payments on his debt, when he urged him to it in September, 1841; but states that the defendant did not then suspect Graves to be insolvent, and, on the contrary, was induced to believe that he was solvent, inasmuch as he represented Mebane to be largely indebted to him, and as Mebane was nearly related to Graves, and the defendant knew that he was surety for Graves for large sums of money, besides for his guardianship, and as Mebane so readily assumed so large a

part of Graves's debt to the defendant. The answer states, that, in consequence of his belief, from that conduct on the part of Mebane, that Graves was entitled to credit he indulged him on the residue of his debt, and lost it.

The answer states, that, at the time Mebane gave to the defendant his bond, the defendant did not know on what account Mebane was indebted to Graves, and though he admits that he witnessed a receipt from Graves to Mebane, he states that he does not know the sum for which it was given, nor whether it expresses that the money was paid by Mebane, as executor of John Mebane, or not. The answer states that the arrangements between Mebane and Graves were not communicated to the defendant, and that the defendant considered that Mebane gave his bond, instead of Graves, either for his own accommodation, inasmuch as he could not conveniently then raise the money for which Graves was pressing, or to sustain the credit and for the accommodation of Graves, to whom he was a particular friend, and for whom he was bound as surety in many instances, as before mentioned. The answer then sets forth the defendant's account for supplies to the plaintiffs for several years, including those for 1842, and states the several (435) bonds received from Graves on account, which were payable to him as guardian.

The answer was put in at May term, 1843, and a replication taken to it, and at the same term a reference was made to the master, "to take an account between the parties."

At November term, 1843, the master reported, and submits to the Court, whether the defendant is chargeable to the plaintiffs for the sum of $841.79, received from Mebane as aforesaid; and, in case he should be chargeable, the master finds that, of the said sum, the plaintiffs were together entitled to $594.42 principal money, which he divides amongst the plaintiffs in proportion to their several legacies. The master finds the bonds, received by the defendant from Graves, to amount to $495.95, as stated in the answer, and that some of the debtors, to the amount of $53.75, are insolvent. The insolvent bonds belonged to the plaintiff, Samuel P. Hill; and of the good ones $162.25 also belonged to him; and the residue of the good bonds belonged to the plaintiff, Maria W. Hill. The master submits, whether the dealings with Harvey & Gunn are to be included in the amount. If they are, he gives the plaintiffs severally credit for their shares of the fragment of $151.21, made by Graves on that bond; and if they are not, then the master gives the plaintiffs severally, a further credit for the amount of the dealings of each of them with Harvey & Gunn, which was

included in Graves' bond. Upon the whole, the master finds that Sarah J. Hill (after deducting the sum of $10.44, as her share of the cash fragment to Harvey & Gunn) is indebted to the defendant in the sum of $181.44; that Samuel P. Hill (after deducting $10 as his share of the payment to Harvey & Gunn) had overpaid the defendant the sum of $41.78; and that Maria W. Hill (after a like deduction of $17.55) had overpaid the sum of $184.28.

The answer also states, that in the year 1842, the plaintiffs still dealt with the defendant, Samuel P. Hill, to the amount of $12.09; Maria W. Hill, $27.62; and Sarah J. Hill, (436) $60,23, making in all, the sum of $99.94. The master, although he says such dealings did take place in 1842, and that the accounts have not been paid, yet does not report the amount of them, nor assign any reason for not doing so.

The defendant took no proofs, and the plaintiffs took but a single deposition, that of John H. Graves, in February, 1844. The cause was then set for hearing and sent to this Court, and has been brought to a hearing on the pleadings, the deposition of Graves, and the report of the master on the inquiry ordered. Graves states, that, by agreement between Mebane, Johnston and Graves, the bond of Mebane was given to Johnston, as a mode of payment from Mebane to Graves, and from Graves to Johnston; that he did not inform Johnston, when the latter agreed to take Mebane's bond, how the money was due, except that it was coming to him from his wife's grandfather's estate; that, after Mebane had given his bond to the defendant, he, Graves, gave Mebane a receipt for that sum, and others paid by Mebane for him to other persons, but that it was not read to Johnston, nor by him, nor was Johnston informed by the witness or Mebane that Mebane owed that money, or any part of it to Graves, as the guardian of either of the plaintiffs, or otherwise, than on Graves' own account.

Badger for the plaintiffs.
Kerr for the defendant.

RUFFIN, C. J. The principal purpose of the bill is, to throw on the defendant the loss of the sum paid to him by Mr. Mebane, who has brought this suit, as the next friend and guardian of the plaintiffs, all of whom are infants. It is obviously the guardian's own bill, in the name of the wards, and brought with the view of relieving the guardian from a liability for

the sum paid by him, when he, at all events, knew that the use then made of it was a misapplication of the fund by the person, who was then the plaintiff's guardian, and for whom the present guardian was then surety. Thus viewed, the present suit is, certainly, not entitled to much favor, and as the infants have undoubted redress from any loss in the premises against their present guardian, either as the surety of (437) their former guardian, or as concurring in his breach of trust, there would be much ground for hesitating to grant relief against the defendant, as primarily liable, were it true, that he also knew that the fund belonged, even in part, to the plaintiffs. Mebane has surely no equity of his own against the defendants, and unless he were unable to make their legacy good to the plaintiffs—of which there is no suggestion—there seems to be no more propriety in the ward's insisting on payment from Johnston instead of Mebane, than there would be in their thus insisting against Johnston instead of Graves himself, were he upon the spot and fully able to answer the demand. It was the voluntary act of Mebane to become paymaster for Graves' debt to Johnston; and if, in so doing, he did not, in this Court, become discharged from his debt to the present plaintiffs, it would be difficult to maintain that the defendant became chargeable therefor to the plaintiffs, in such manner as to be liable to them, even before Mebane, their original debtor, and before Graves, the guardian for whom Mebane had bound himself as surety, and in whose *devastavit* he concurred. But the Court is relieved from the necessity of considering the case as turning on that point of equity, because we are of opinion that the defendant accepted Mebane as his debtor in the place of Graves, innocently, and without having any reason to believe that either of the plaintiffs had any interest whatever in the matter. It did not lie on the defendant to inquire what motive induced Mebane to assume the debt of Graves; and, among men of business, such an inquiry would be deemed impertinent and offensive. It was sufficient for the defendant, that he did not know nor have reason to suspect that the other parties were doing wrong in taking the money or legacy of the wards to pay their guardian's own debts; and, therefore, he can not be considered as intending to do wrong, by accepting payment of what one person owed him in property, which belonged to another person. Now, both the answer and the only witness examined in the cause (Graves himself, who is examined for the plaintiffs), state that the whole representation made to the defendant by (438) Graves and Mebane, before and at the giving of the bond,

was merely that Mebane owed Graves, and, says Graves in his deposition, "that the money was coming *to me* from the estate of my wife's grandfather," whose executor Mebane was. It is true, that in a receipt given at the time for a large sum, which includes this, Graves says that the whole sum, $1,008.27, was in full of a balance of the legacies to his wife and her brother and sisters from their grandfather, and that Johnston witnessed it. But that neither creates a legal nor a natural presumption that Johnston knew the contents. *Plummer v. Baskerville,* 36 N. C., 252. And the defendant says that he does not remember distinctly that he did witness a receipt at all, and, if he did, that he has no recollection of the contents of it, or that he ever knew them; and Graves is very positive that Mebane and he only read the paper, and that neither of them made the contents known to the defendant. Under such circumstances the plaintiffs can not follow this fund into the hands of the defendant. If Mebane had paid the debt to Graves in cash, and the latter had taken the coin or notes to the defendant in payment, it could not be contended that the plaintiffs could recover merely upon proof that it was the particular money received for their legacy by their guardian, without something to affect the defendant with a knowledge of it and with bad faith in the transaction; for if they could recover, when the defendant acted without bad faith in receiving payment of a just debt, no one would be safe in receiving money, and the course of trade would be arrested. There is no difference between that and the present case, in which Mebane gave a security for the money, as if it was simply a debt from himself to Graves or to the defendant, and without allusion in it, or intimation otherwise to the defendant, of any fact to the contrary. So far, therefore, as respects the sum paid by Mebane to the defendant, the bill must be dismissed; and, as that is the principal subject of controversy, and was no doubt, of this suit being brought, the bill must be dismissed with costs, to be paid by the plaintiff's next friend himself.

(439) As to the other part of the case, the plaintiffs, upon the authority of *Lockhart v. Phillips,* 36 N. C., 342, and other cases of that kind, were entitled to an account of the bonds belonging to them, which the defendants received from their guardian, and for a decree for what the defendant thus received that was not applicable nor applied to debts, which the plaintiff ought to have paid. But, as far as those bonds went in discharge of debts, contracted by the plaintiff for necessaries, or by their guardian for them, it was a proper application of them, and the defendant has, to that extent,

the right to retain the bonds or the money received on them. It is stated by the master, that, in his guardian accounts, Graves annually debited the several plaintiffs with their respective accounts to the defendant, which were transferred to Graves' own account at the end of the year, and included in his bonds given from time to time to the defendant. But that makes no difference, because Graves has never paid his bonds thus given on account of the plaintiffs, except, in part, by the transfer of the bonds he had taken as guadian, and with which he also charged himself to his wards in his guardian accounts. Therefore, Graves' bonds are to be regarded merely as securities for the debts really contracted for the plaintiffs, and those debts are to be considered as paid, only by the bonds belonging to the plaintiffs, as far as they extend. The money which Graves paid either to Johnston or to Harvey & Gunn, was, as far as appears, Graves' own money; and, therefore, it was applicable to that part of Graves' debt to those persons, which he contracted on his own account. Hence, the master erred in not charging to each of the plaintiffs his or her debts to Harvey & Gunn (which is included in the bond assigned by them to the defendant) without deducting therefrom or crediting the plaintiffs for any part of the payment of $151.21, made by Graves on that bond. That the defendant had a right to charge the plaintiffs with that debt, or, rather, their accounts included in the bond is clear from the consideration, that, while Harvey & Gunn held it, Graves might have transferred to them bonds taken by him as guardian, in payment; and, therefore, he might pay their assignee in like manner. Equity looks at the consideration of the bond, (440) as constituting the debt, and the bond as merely a security, or one of several securities. Now, it is nothing to the creditors, that upon the accounts between Graves and the plaintiffs, he might have been their debtor, if such was the fact in the case, for they had no means of ascertaining the state of those accounts, and, as they knew that the plaintiffs had contracted so much debt with them, there was an apparent propriety of their receiving payment of those debts of the plaintiffs, in money or bonds belonging to them, in their guardian's hands. According to the statements in the master's reports, there is, perhaps, a small excess of those bonds over and above the sums due by the plaintiffs, upon their dealings, to the end of the year 1841, after striking out the credits for parts of the sum of $151.21, paid to Harvey & Gunn. The omission of the master to report on the dealings of 1842, was probably owing to an opinion that those dealings did not con-

cern this controversy, because they were subsequent to the transfer of the bonds which the plaintiffs are seeking. But that would be a mistaken opinion, for, as those dealings were prior to this suit, they formed a just demand then against the plaintiffs, and they ought not to have a decree against the defendant to pay them the money when he has a just ground for a deduction or set off.

The only difficulty, which the Court has felt in the case, arises out of the circumstance that the bonds assigned to the defendants belonged to two of the plaintiffs only; so that, while the three plaintiffs are together, probably, indebted to the defendant, the balance may be due from one of the plaintiffs only, and to the other two, respectively, a balance may be due from the defendant. But under the circumstances of the case, we have not felt much embarrassed by that consideration. The plaintiffs have not relied on it, and those, to whom a balance may be due, could not, perhaps, insist on a decree in a case, in which they have imprudently united with a person, who has no claim against the defendant, in a joint suit for a matter, in which all three of the plaintiffs have several interests.

Indeed, we suppose the point of importance to the (441) plaintiffs is, whether there is, upon the whole, a balance due from the defendant; for, as the same person is guardian for all the plaintiffs, and there is no suggestion that each has not a competent estate in the guardian's hands to pay his or her debt, neither plaintiff could lose by the application of the effects of one for the benefit of the other. It could only affect the costs, and they have already been disposed of, and, moreover, ought not to be allowed to one plaintiff, who unites with another, against whom there should be a decree for costs. The Court would therefore have no hesitation in ordering the guardian, in case a balance be found against one of the plaintiffs, to bring it into court out of the estate of that plaintiff, in order to answer a sum that may be found due from the defendant to any other plaintiff. We suppose that these declarations will satisfy the parties as to the principles on which, in the opinion of the Court, the case turns, and that they can adjust the accounts without the expense of a further reference. But if it should turn out otherwise, the cause must be sent back to the master to make the proper inquiries, and state the accounts as now directed.

PER CURIAM. DECREED ACCORDINGLY.

(442)

WILLIAM LEIGH, Admr., Etc., *v.* ABSALOM B. SMITH et al.

1. Where a will is made by a *feme covert*, under a power, this paper must be proved as a will in a court of probate, before a court of equity will act on it. But when the court of equity is called to act on such an instrument, it must, notwithstanding such probate, be again proved before the court of equity that it was executed according to the power, that being a question a court of probate does not undertake to decide.
2. When a *feme covert* has a separate estate in property, she may make a will disposing of it and appoint an executor, and such executor shall be her general representative.
3. Where she has merely a power to appoint by an instrument in the nature of a will, the person she nominates in such an instrument as her executor is not such in the usual acceptation of the term, but is merely an appointee in trust, in the first place for her creditors, and, secondly, for those to whom she directs the property to go.
4. The appointees of property which a *feme covert* has a right, under marriage articles, to appoint to any person she thinks proper, are trustees for her creditors in the first instance.
5. An executor, or an appointee in the nature of an executor, is not bound to plead the statute of limitations, nor can the legatees or ulterior appointees compel him to do so.

Cause removed from the Court of Equity of NORTHAMPTON, at Spring Term, 1844.

The following is the state of the facts, as disclosed by the pleadings and proofs:

In March, 1817, Leonard Purdy and Sarah Smith, being about to intermarry, entered into a marriage contract, wherein it was stipulated, "that the said Purdy shall have during his natural life and fully possess and enjoy, without any molestation, all the negro property belonging now to the said Sarah Smith, together with the use of the land, etc."—"provided always, and it is the true intent and meaning of this covenant, that if the said Sarah should die without any child or children, during her marriage with the said Purdy, then, and in that case, she is, and by these presents, at liberty and vested with full and ample powers to give and bequeath the (443) said negroes to whomsoever she pleases." This is as much of the covenant, as it is necessary to set out. The marriage took place, and Mrs. Purdy died in the year 1818, without having any child by Leonard Purdy. Before her intermarriage with Mr. Purdy, Mrs. Purdy had been the wife of Etheldred Smith, upon whose estate she had administered, and the intestate, Richard Crump, whose representative the plaintiff is, had been one of her sureties to her administration

bond. The defendants are her children and grandchildren, by her first husband. Mrs. Purdy left behind her a testamentary paper, signed and sealed by her, and properly witnessed; in which she "gives and bequeaths" to her daughter, Rebecca Gary, then the wife of the defendant, Roderick B. Gary, and, after her death, to her children, a part of these negroes; and to the defendants, the two Smiths, others of them. Then follows this clause. "The whole of said negroes, hereby bequeathed, are subject to the life-estate of my husband, Leonard Purdy, agreeable to a marriage contract entered into between me and my said husband, and dated 29 March, 1817. I do hereby nominate, ordain and appoint my friend, William B. Lockhart, my executor, of this my last will and testament." This paper was duly proven in the County Court of Northampton, at the March term, 1820. Mrs. Purdy died ... day of ..... in 1818, leaving her husband alive.

During the life of Mrs. Purdy, an action was brought on her administration bond, against her and her husband, and the sureties thereto, by the defendant Roderick B. Gary, as guardian of his own children and of the defendants, the Smiths, to recover from them their distribution shares of their father's estate. A recovery was made in the year 1826, and the intestate, Richard Crump, paid his ratable proportion thereof, Purdy being insolvent—and the bill is filed to subject the negroes, in the hands of the defendants, to the payment of that portion. Before this recovery was made, an action had been brought by the defendant Gary to recover from William B. Lockhart, as executor of Mrs. Purdy, a debt which was (444) due him from Mrs. Purdy; a judgment had been obtained by him, and, under the execution, he had purchased the negroes in question, and held them as his until 1838, when the defendants having filed their bill against him as their guardian, this Court decreed that, as he was their guardian, he held the slaves in that fiduciary character; and decreed he should surrender them to the defendants. More than seven years elapsed, from the time the plaintiff's intestate paid the money, under the judgment recovered against him, as the surety of Mrs. Purdy on her administration bond, until the filing of this bill—and the defendants pray the benefit of the Act of 1715, passed for the protection of the estates of deceased debtors. Among other grounds of defense, the defendants rely upon the fact, that an action had been brought by the plaintiff's intestate, as one of the sureties of Mrs. Purdy, upon her administration bond, against Roderick B. Gary, upon his guarantee to them, to induce them to become such sureties—that

other suits had been brought by the other sureties against him, the said Gary, for the same cause, all of which had been compromised, and that the sum paid by Gary to the several plaintiffs, was received by them, under said compromise, included the demand now set up, and was in full of all demands against the estate of Mrs. Purdy. It further appears in the case that the present plaintiff, after the payment of the money to him by Gary, brought an action against William B. Lockhart, as the executor of Mrs. Purdy, and recovered against him the amount of his claim; the jury having found by their verdict that said Lockhart had no assets, the said negroes never had been in his possession, but were at the time of the plea and judgment in the possession of Gary, claiming them as his own property. The defendants aver that the said judgment was obtained by fraud, and in derogation of their rights. They further contend that, by the testamentary paper, called the will of Mrs. Purdy, the defendant Lockhart was not an executor thereof, and the judgment obtained against him was null and void, and did not compromise any of their (445) rights.

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

NASH, J. Upon examining the evidence in this case, the Court is satisfied, that, in the compromise of the suits brought by the sureties of Mrs. Purdy against Mr. Gary as a guarantee, nothing more was settled, than their claims against him; that nothing more was intended by the parties to be included, and that in fact it extended no farther. It did not embrace the claim, now urged by the plaintiff, and he is at liberty, notwithstanding said compromise, to urge his present suit. They are further of opinion that it is not necessary to decide upon the question, whether the recovery made by the plaintiff against William B. Lockhart, as executor of Mrs. Purdy, was obtained by fraud or not, as they are satisfied, for the reasons hereinafter stated, that the said recovery was a mere nullity. The important question presented by the case is, have now the defendants the right to plead the statute of 1715, in bar of the plaintiff's claim? William B. Lockhart, the executor, as he is called, of the will of Mrs. Purdy, is a party defendant and has not pleaded it. Can the other defendants, who are really the parties interested, do so? This involves the question, in what character is William B. Lockhart to be considered, is he the executor, strictly speaking, of Mrs. Purdy's will, or is he

merely an appointee to carry into execution the trust, which the law annexes to the appointment of Mrs. Purdy? It is deemed unnecessary, at this time, to enter into an elaborate history of the power of *feme coverts* to make wills, with or without the consent of their husbands. The paper produced in this case as the will of Mrs. Purdy is an execution of a power secured to her, when she was discovert, and in every respect capable, not only of binding herself, but of binding such persons as contracted with her. She, in pursuance of the power thus secured to her, executed, before two witnesses, the instrument she calls her will. Such a testamentary paper, before it can be available, either in law or equity, must be
(446) regularly proved before the proper tribunal. In a court of equity, such probate alone will not suffice, for the court of probate, in such cases, do not feel themselves called on to examine, whether the appointment is authorized by the power. There are other special circumstances connected with a testament which are not trusted to a court of probate, and which the grant of probate does not determine, but leaves open to the temporal courts. Upon the probate, therefore, before the ordinary, a court of equity does not act, but requires that the instrument shall be proved, before them, to be such as was required by the power. The witnesses, therefore, must be called to prove that the instrument, when the *feme covert* has power to appoint, was her act and is duly executed according to the requirements of the power.

In this case, the will of Mrs. Purdy has been admitted to probate before the appointed tribunal, and in this Court is admitted by the answers to be duly executed, under the power given her by the marriage contract, for only under it, as such, can they claim the negroes at all. The Court, is therefore, of the opinion that the will of Mrs. Purdy has been properly proved, and is a sufficient execution of the power secured to her. In her will she refers to the marriage contract, as governing the interests she conveys, and that is satisfactory evidence, that she considered herself as executing the power. What then is the character and power of William B. Lockhart under that paper? Is he in the sense, in which the law understands the term, an executor? We think not, we consider him here as but an appointee in trust to convey the intentions of the appointer, as either expressed by her or implied in law. By this paper, Lockhart, though called an executor, is not strictly and properly such, even in the view of a court of equity, because Mrs. Purdy had no separate *estate* in the negroes, which she could bequeath. When a *feme covert* has such estate, she may make a will and appoint an executor, and such executor

shall be her general representative. *Hulme v. Tenant,* 1 Brow. C. C., 16. *Fettiplace v. Gorges,* 1 Ves. Jr., 46. *Peacock v. Monk,* 2 Ves. Sr., 191. (447)

But, though it be true, that, in this case, Mrs. Purdy could not constitute Lockhart an executor, properly so called, it does not follow that his nomination is necessarily unmeaning, and to be rejected altogether. The paper is not a testament of personal estate, but it is an appointment under the power in Mrs. Purdy. It is an appointment of the whole property, over which she had a power, and she has no other property. Then the inquiry is, what is the meaning of such an appointment of Lockhart as executor, in such an instrument? It is apparent from reading the paper that Mrs. Purdy thought she was disposing of her separate property, and in that view she appointed an executor. But it turns out, the instrument can not operate in that way, but is only an appointment, and it is the necessary construction of it, that, as the property would have vested in Lockhart, by virtue of his appointment as executor, so he must be intended to take to the same extent, and for the same purposes, as appointee in the instrument. What else could she mean by nominating an executor, but that he should take the estate in that way, in trust for creditors in the first instance, and then for the several appointees mentioned in the instrument? It is said, there was no necessity for an executor, as the creditors have the same remedy against the children, as appointees. But there was the same necessity, as in ordinary cases of executors to wills. One is, that creditors may obtain satisfaction from a single source, instead of going against all the legatees, and also that the interest of the creditors and legatees may be protected by a competent person. Here the ultimate appointees were a married woman, children and unborn grandchildren, and the appointment of some person, as executor, to act *quasi* in that character, was convenient and useful. Under these considerations, we hold this appointment to be in the first instance to Lockhart, to pay the debts of Mrs. Purdy, and then for the use of the other appointees, as if he were regularly an executor, and they were regularly legatees. Equity holds that where an individual has a general power of appointment over a fund, and actually makes an appointment according to his power, the property ap- (448) pointed shall form a part of his assets in equity, for the payments of his debts, in preference to all claims upon him, by volunteers, either as legatees or appointees. Sugden on Powers, 2 Vol., p. 30, and the authorities there cited. Lockhart then being an appointee in trust, the creditors of Mrs.

Purdy could no more reach the property in his hands by an action at law, than if the appointment had been direct to the defendants. They could reach the assets only through the aid of a court of equity. The judgment at law, obtained by the complainant against Lockhart, was therefore void, and of no effect, and could not, as we are disposed to think, break, of itself, the running of the statute of 1715. Lockhart is a necessary party to this bill. To him is entrusted the right and the duty to take care of the property of the appointer, and, when called into a court of justice, to defend it. It is somewhat doubtful, whether the ultimate appointees are necessary parties. *Lash v. Hauser,* 37 N. C., 493. *Castleton v. Fanshaw,* Prec., Ch. 100. *Ex parte,* Dundney, 15 Ves., 498. But if they are necessary, it is because they are interested in the fund, and may have a right to see that the trustee or appointee makes all the defense he is by law bound to make, or because they are in possession of the fund. It is well settled, both in England and this country, that the executor may or may not at his pleasure, plead the statute of limitations. It is indeed more prudent, that he should do so, but he can not be compelled to plead it by a legatee. He is the *pars principalis* or *legitimus contradictor,* who is bound and authorized to act for all persons entitled to interest under the will as legatees. *Redmond v. Collins,* 15 N. C., 441. *Williams v. Maitland,* 36 N. C., 92. And the legatees are bound by his act: "he alone brings a bill for an equitable money demand of the testator. He is the only party necessary by a creditor for an account of the assets, neither the particular nor the residuary legatees being required, though their interest may be affected." *Redmond v. Collins, supra.* In this case, Lockhart, the appointee in trust,
(449) and a defendant, admits in his answer that he has never paid to the plaintiff the money claimed by him, and he does not plead the statute of limitations, and we hold that the defendants, who are the appointees, can have no right so to do. If the negroes had been in the possession of Lockhart, there is no question but he might have paid the debt due to the plaintiff, although barred by the statute, without exposing himself to the liability of paying over to the ulterior appointees. *Williams v. Maitland, supra.*

PER CURIAM. DECREED FOR THE PLAINTIFF.

Cited: Jones v. Blanton, 41 N. C., 120; *Rogers v. Hinton,* 62 N. C., 106; *S. c.,* 63 N. C., 84; *Halliburton v. Carson,* 100 N. C., 109.

(450)

JOHN R. WILLIAMS *v.* ROBERT McCOMB et al.

1. A testator devised as follows: "I will and bequeath to my eldest son, Samuel, my two tracts of land lying on both sides of McCullock's Creek, in the northwest of Charlotte town, and the half of the house I live in, and also one negro, etc. I also give unto my second son, James, the other half of this house I live in, and the lot it is built upon, with other appurtenances thereunto belonging, and my lot at the east side of the spring head": *Held, first*, that by the devise of a house, the land on which it is situated will generally pass, unless a *different intention* can be collected from the will; but, *secondly*, that the intention of the testator was to give Samuel one-half of the house, and by necessity, the ground occupied by that half, and to give to James the other half of the house and all the remainder of the lot and appurtenances.
2. The testator further devised as follows, after having given a negro girl to his daughter Mary: "I also will and appoint that if any one of the said children shall or do die before of age, or before they have lawful heirs begotten of their bodies, and are come of age, that in that case what is then found of their *legacy* shall go or be given to the next one or two that is living, and equally divided between the two living; if but one surviving, to get the whole": *Held*, that the word legacy, as here used, referred to both real and personal estate, and that, upon the death of James, under age and without issue, all his property went to his surviving brother and sister.

Cause removed from the Court of Equity of MECKLENBURG, at Spring Term, 1843.

The case, presented by the pleadings and evidence and proceedings in the cause, is fully stated by the Judge delivering the opinion.

Alexander and *J. H. Bryan* for the plaintiff.
Osborn and *Iredell* for the defendant.

NASH, J. Samuel McComb died in 1795, having previously made his last will and testament, duly executed to pass real estate. At the time the will was made, he had three children, Samuel, James and Mary. The latter afterwards married the plaintiff, and is, since dead, leaving children. Samuel McComb lived several years after making his will, and had another son, Robert, one of the defendants. By his will, Samuel McComb devised as follows: "I will and bequeath unto (451) my eldest son, Samuel McComb, my two tracts of land lying on both sides of McCullock's Creek, in the northwest of Charlotte town, and the half of the house I live in, and also one negro wench, etc. I also give unto my second son, James McComb, the other half of this house I live in, and the lot it

is built upon, with other appurtenances thereunto belonging, and my lot at the east side of the Spring Head." He then makes a bequest of a negro girl to his daughter Mary, then follows this direction, "I also will and appoint, that if any one of said children shall or do die before of age, or before they have lawful heirs, begotten of their own bodies and is come of age, that, in that case, what is to be then found of their *legacy* shall go or be given to the next one or two that is living, and equally divided between the two living, if but one surviving, to get the whole."

James died under age and without issue, leaving his brother Samuel and his sister Mary, alive. Robert McComb, the defendant, purchased from Samuel McComb his interest under the devise in the house and lots described in the clauses set forth above. The bill is filed for a sale of the lots, and for a division of the proceeds. The sale has been made under an order of the Court of Equity of Mecklenburg County, and the money is in the office awaiting the decree, as to the rights of the parties in the fund.

For Robert McComb, who stands in the place of Samuel McComb, it is contended here, that, by the devise of half of the house, one-half of the lot passed; on the other hand, the plaintiff claims, that under the devise to James, one-half of the house and the whole of the lot, excepting that portion on which Samuel's half stands, passed to him, together with the half of the back lot, being all of that lot owned by the testator. It is very certain that, by the devise of a house, land will pass. Croke Eliz., 89. *Clemans v. Collins,* 2 Term, 409. 2 Saund., 401, n. 2. 1 Tho. Coke, 173. The Touchstone, 74. And it is a general rule that the words made use of by a testator
(452) are to be understood when unexplained by him, so as to have their legal effect and operation. If, therefore, the devise to Samuel stood alone, it would have the effect claimed for it, because the law would infer, in that case, that such was the intention of the testator. But this legal inference lasts no longer, when, from what the testator has said in his will, such clearly appears not to have been his intention. To hold otherwise, would be binding up people to legal technicalities, and making their ignorance a trap for them, without allowing them, in the instrument, to explain themselves. *Crom v. Odell.* 1 Ball. & Bev., 472. *Loveacres v. Blight,* Cowper, 355. 2 Bal. & Beat., 413. *Beaumar v. Stock,* 2 Bal. & Beat., 413.

With a view to ascertain what is the meaning of a testator, every part of the will is to be considered, and such is the rule,

both in courts of law and equity. *Gittengard v. Stril,* 1 Swanst., 28. *Booth v. Blundell,* 1 Mer. 217, and *Pittman v. Stevens,* 15 East., 510. Let us test this devise by these rules: The testator's real estate consisted of two tracts of land, adjoining the town of Charlotte, and the house and lots. We say this was the whole of his real estate, because he devised no other, nor is there any evidence that he possessed or owned any other. To his eldest son, Samuel, he devises the whole of the land in the country, and one-half of the house in town, and to James, in a separate and distinct clause, he devises the other half of the house, "and *the* lot it is built upon, with other appurtenances thereunto belonging, and my back lot." It has been argued that the word "half," so clearly connected with the only word in the clause of giving, overrides the whole clause, and governs the word "lot" in the succeeding part. We do not think so. The words are, *"the lot,"* which import necessarily, the whole lot. This is strictly true, grammatically speaking. "The," is a definite article before nouns, which are specific or understood, and is used to limit or determine their extent. *The lot,* then, without more, means the piece of ground of an ascertained quantity, marked off in the plan of the town of Charlotte. But the testator goes on to be more specific, and adds the words, "upon which it is built." These latter words tell us what lot is devised, and the definitive article *the,* shows (453) the intention to be the whole lot. Why use the article *the* before "lot," if the testator meant to devise but one-half of it. Omit the article, and the half, according to that construction, might be meant. Nor does this construction at all interfere with *Anonymous,* 3 N. C., 161, nor with *Black v. Ray,* 18 N. C., 334. In both these cases, the things devised are all in one consecutive sentence, and followed by the words limiting the extent of the estate devised. No other construction could be placed on the words, with any regard to the ordinary rules of construction, as is observed by the Court in the latter case. But the testator in the two devises, we are now considering, has seemed to be desirous to leave nothing to conjecture as to his meaning. In the clause devising to Samuel a share in the house, he mentions nothing but *half the house.* In that to James he includes, "the lot upon which it is built, and with other appurtenances thereunto belonging," appropriately such buildings, rights and improvements, as are upon the land, and used with the dwelling house as appurtenances thereto. From the map, with which we are furnished, it appears there were on this lot several out buildings, and a part of it was a garden. The testator omits all these, when

devising to Samuel, and uses words which embrace them all, when devising to James. In giving a construction to a will, every part of it is to be considered, and no words ought to be rejected on which any sensible meaning can be put, "every string must give its sound," for the meaning of the testator must prevail, when it can be fairly found in our language, and is not in contradiction to any rule of law. *Edens v. Williams.* 7 N. C., 27; *Williams v. Lane,* 4 N. C., 246; *Clement v. Collins,* 2 Term., 503.

To support and strengthen the construction put on the devise in favor of Samuel, it has been further argued here that it is a rule of construction that every devise is intended for the benefit of the devisee, and that it must have been the intention of the testator here to make a devise to Samuel, (454) which would be useful to him. And, if the whole lot is given to James, the devise to Samuel will be without any benefit. The rule is correctly stated, and is supported by the authorities cited by the counsel. To which we answer, a Court of Equity must not reason from inconvenient results, and thereby be induced to put a forced construction on the words used, or give them such a meaning as was obviously not the intention of the testator. *Junes v. Johnston,* 4 Ves., 573; *Smith v. Streator,* 1 Marivale, 361, and *Bernard v. Montague,* 1 Mer., 431; *Hume v. Rundell,* 2 Sim. & Stre., 117. We do not mean to say, that, when the meaning is doubtful, the Court may not look to the inconveniences, which may result from one construction or another. It is true, that, in this case, it might have been more convenient to Samuel, and certainly more to his interest, to have one-half of the lot, as well as one-half of the house, but certainly it was a matter of interest to him, and much convenience to have a right to use one-half of the house, particularly as his land was adjoining the town, so that the devise is beneficial to him.

We are called on to put a construction upon another clause in the will: the one directing the survivorship, or how the property shall be disposed of, on the death of either of the devisees. It is not pretended that Robert has any interest in the division of the fund, except as the vendee of Samuel, or, as one of the heirs of James, if the devise over is inoperative. Two objections have been urged against the survivorship; one is, that it is too remote; and the other, that the real estate can not pass a legacy. As to the first objection, we do not think it arises in the case; because it is limited over to the children or child *living,* which ties it up to the event of James's death, without leaving issue. James died before he was twenty-one, without

leaving issue. The property should go over, and the words of the will are satisfied. Upon the death of James, the limitation over to his brother, Samuel, and to his sister, Mary, took effect. But it is contended on behalf of Robert, that nothing survived but what was strictly a legacy, as the testator has made use of that word in this clause. The word "legacy" is (455) properly applicable to bequests of personal property, but may be extended to embrace other species of property not technically within its import, to effectuate the intention of the testator. This was a mixed fund, consisting of real and personal property. In the case of *Hardacre v. Nash,* 5 Term, 716, it was extended to embrace real estate, which was included in the clause. And so in *Hope v. Taylor,* 1 Dur., 268. In *Sibly v. Perry,* 7 Ves., 522, it was extended to annuities, and sec. 2d, Hoper on Legacies, 335. The language of the clause is, "what is to be found of their legacy, shall go," etc. In *Hardacre v. Nash* is, "but in case either or both of my children should die before the decease of my wife, then *those legacies* which are here left them shall," etc. In what the testator calls a legacy were embraced several freehold estates, and the Court, to carry out the intention of the testator, decided that the latter passed under this clause, as well as the personalty, to the widow. Here the testator uses the word "legacy," as embracing real property together with personalty, and he intended the whole should survive. In this view, the difficulty arising from the uncertainty of the words used, "what shall be then found," is removed. The land is, then, as it was in 1795.

We are of opinion, then, that under the will of Samuel McCombe, his son, Samuel, took but one-half of the house, and from necessity the ground upon which it stood, and that James took the other, together with the whole lot except that upon which Samuel's half stood, together with the half lot adjoining. That upon the death of James, his share in the lot survived to Samuel and Mary, to be divided equally between them, and that Robert McCombe, by virtue of his purchase, stands in the place of Samuel McCombe. Robert will then be entitled to the whole of the value of one-half of the house, and the one-half of the balance, and the plaintiff, Williams, will be entitled to a life estate in one-half of the value of the legacy of James.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Tucker v. Tucker, 40 N. C., 84; *McCorkle v. Sherrill,* 41 N. C., 177; *Cole v. Covington,* 86 N. C., 298.

At the session of the General Assembly of 1844-5, the Honorable FREDERIC NASH, of Hillsboro, who had been previously appointed to that office by the Governor and Council, was elected a Judge of the Supreme Court, in the place of the Honorable WILLIAM GASTON, deceased.

At the same session the Honorable DAVID F. CALDWELL, of Salisbury, who had previously received the temporary appointment from the Governor and Council, was elected one of the Judges of the Superior Courts of Law and Equity, to supply the vacancy occasioned by the promotion of Judge NASH to the Supreme Court Bench.

EQUITY CASES

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1845.

(457)

JOSEPH A. McLEAN et al. *v.* FREDERICK H. SHUMAN.

1. In a case between two parties on a money transaction, where the testimony seems to be nearly balanced, the determination may be safely placed upon the want of preponderating proof on the side upon which the error rests, and upon an exhibition in that party of a deficiency of the due caution which prudence requires him to use.
2. A bank that pays money to any person, as a loan, without any written check or receipt, and especially pays the money of one man to another, without taking something to charge him, ought to lose it, unless the facts can be unquestionably established.

Case transmitted from the Court of Equity of GUILFORD, at Spring Term, 1843, to the Supreme Court for hearing.

The bill states that the defendant is the agent of the Bank of Cape Fear at Salem, and that the notes negotiated there are made payable to the defendant. The notes are delivered to the defendant, to be offered for discount, and are generally sent by dealers, who reside in other places, to the defendant, a considerable time before they are discounted; especially when there are many applications. The plaintiff, McLean, lived in Greensboro, and on 10 September, 1839, he sent (458) a note, made by himself and other plaintiffs, as his sureties, for $400, to John C. Blum, of Salem, to be offered for discount; which came to Blum's hands and was by him delivered to the defendant. Understanding that Blum had left home on a long journey, and not having heard from him, the plaintiff, McLean, on 24 September (which was the weekly discount day), sent a messenger with a letter to the defendant, requesting him to send him the money on his note, if discounted,

and, if it was not, to let him know when it would be. The bill charges that the defendant sent thereto a verbal reply, that the plaintiff had no note in bank, but that, if he would send one, it should be discounted. On the next discount day (1 October) the plaintiff, accordingly, sent another note for $400, and got the money on it. In January following, the plaintiff discovered that the defendant held both of the notes for $400 each, and claimed the payment of both, which the plaintiff resisted upon the ground that but one of them had been discounted, and that he had received but one sum of $400, deducting therefrom the discount. Upon learning that the defendant claimed the two debts, the plaintiff applied to Blum to know whether he received the money upon the first note or could give any explanation of the matter, and was informed by Blum that he had delivered the note to the defendant, and that he never received any money on it, but left home about the time, and was absent for five or six weeks, and that some days after his return the defendant informed him there was some mistake in the bank with respect to the discounting for the plaintiff two notes for the same amount and the same sureties, very nearly at the same time, and asked him, Blum, whether he knew anything about it, and upon Blum's answer, that he did not, the defendant left him without saying more. The bill further states that the plaintiff applied to the defendant himself for some explanation of the transaction, and to be informed when and to whom the defendant paid the money, and the defendant then showed him an account in a book in the bank, purporting to be an account of new loans made by the bank on
(459) 17 September, 1839, in which the plaintiff's note, dated September 10th, appears as one of six then discounted, with a memorandum opposite to it, that the money was received by John C. Blum. The bill states that the plaintiff then asked the defendant whether he had any evidence that he had paid the money to Blum, and whether he had any recollection of it himself; and the defendant replied, that he did not remember paying Blum the money, and had no other evidence of it except his books, but that his books could not be mistaken. The bill further states, that, to a suggestion that possibly a mistake had been committed by the defendant by having counted the bills and set them apart in the expectation that Blum would call for them, and thereupon making a memorandum that Blum had received the money, when in fact he had not, and that it might be ascertained how it probably was by the state of the defendant's cash account, the defendant still replied that his books could not be mistaken, though he admitted, at the same

time, that he had a considerable surplus of cash beyond the sum required by his cash account, and admitted, also, that, in a list of debts due to the agency, which he had made out in November, 1830, the debt of the plaintiff was inserted at $400 only.

The plaintiff paid the note of 1 October, and, having been sued on that dated 10 September, 1839, he filed this bill against Shuman, the agent, to be relieved against it by injunction.

The answer states, that on 17 September, 1839, Blum presented for discount the plaintiff's note for $400, dated 10 September, at ninety days, and also a letter requesting the money to be paid to Blum; that it was discounted that day, and the proceeds paid immediately to Blum. The defendant admits, that, in a few days thereafter, the plaintiff's messenger, by the name of Thorn, applied with a letter for the money, and that the defendant, after looking among a file of notes, that remained in bank to be discounted, informed Thorn that the plaintiff had no notes in bank *to be discounted,* and directed him to say to the plaintiff, if he wanted *more* money he must (460) send *another* note; for, as the note offered by Blum had been already discounted, the defendant understood the plaintiff to want a new loan. The succeeding week the plaintiff sent a note for $400 by another agent, which was discounted. The defendant admits that he has none of the several letters of the plaintiff, directing the payment of the money to Blum and his other agents; and he says that it has been his invariable practice to destroy all such papers, because the possession of the note is the highest evidence of the debt, and that he has paid the money on it, without the aid of letters or orders for the money.

The answer then states, that, in confirmation of the defendant's remembrance of the whole transaction, the bank books sustain him, and that he is certain they are correct; that the discount book shows in his own writing, among the new discounts of 17 September, the note of the plaintiff of 18 September, at ninety days, and that the money was received by John C. Blum. The defendant admits that he prepared a list of debts to the Bank of Salem, in November, 1839, for the purpose of making his half yearly return to the principal bank, and therein at first he charged the plaintiff's debt at $400; but he says that he afterwards discovered his mistake by comparing the books, and corrected his return by making the debt $800, being for two notes of $400 each.

The defendant admits that there was an excess of cash on hand; but says that it had been accumulating for several years,

and that in the beginning of 1839 it was about $300, and that in closing the accounts of that year it was found to be about the same; which satisfies him that he paid this money to Blum, as the excess would otherwise have been about $700.

Replication was taken to the answer, and the parties proceeded to take proofs; and, when ready, the cause was transferred to this court for hearing.

John C. Blum, who was the cashier of the bank for eleven years immediately preceding the plaintiff's coming in, and who is now a director, was examined and states that he has (461) no recollection of having received or offered the plaintiff's note of 10 September, though he has no doubt, from the statements of both the plaintiff and defendant, that he did. He says, that, at the time, he was very busy in preparing to leave home for Philadelphia, to lay in a stock of merchandise, and having no interest in the matter, he did not charge his memory respecting it. He however denies positively having received any sum whatever on the plaintiff's note, on 17 September, or at any other time; and he says that he is absolutely sure he did not, for he had no excess of cash, and, if he had received the money he could not have forgotten it. The note of 10 September was shown him and exhibited, having on the back the word "offered," which he says is in the writing of the defendant, and is the usual memorandum on notes that are offered and approved, but not discounted on one offering day and are kept for another day, when they take their turn. He states that he received from the defendant on 17 or 18 September in the bank a small sum of money, which the defendant owed him upon their private dealings, and some exchanges, but none on any other account; and that he left home on 19 September, and was absent about five weeks. About two or three weeks after his return, the defendant told him that some error existed about McLean's notes, two appearing to be discounted for him for the same sum in a short time, and asked the witness if he recollected anything about it, and the witness informed him that he did not. To the question by the defendant: "When you returned from the North, was I not the first person who mentioned that some error in discounting McLean's notes had taken place?" the witness answers, that the defendant informed him that there was some error in the discounts for McLean, and that he was the first person who did mention it to him.

J. H. Dobson states, that, on 17 September, 1839, he was in the bank at Salem, and some money transaction occurred between the defendant and Blum, in which he thought the

defendant's conduct was similar to his acts towards (462) the witness in discounting notes for him before that time; which he explains by saying that the defendant counted out the bank notes in parcels of $100, and then took the discount from one of the parcels, and he says that on that occasion the defendant counted out four parcels, which Blum took; and he did not see Blum pay the defendant any money in exchange or otherwise. He says, upon cross-examination, that he did not know the sum paid to Blum, nor on what account, as the parties conversed in German, which he did not understand; and that upon discounting notes, defendant generally uses an interest table to ascertain the discount, and he can not recollect that he had it when he paid the money to Blum.

J. E. Thorne deposes, that, on 24 September, 1839, he went to the bank at Salem, for the purpose of ascertaining whether a note of his own had been discounted, which had been offered five or six weeks before. He carried a letter from the plaintiff to the defendant, requesting him to pay to the witness the proceeds of his note for $400, which had been sent to the bank the week before. He states that, after the defendant had read the letter, without making any remark, he searched in several places for the plaintiff's note, for some time; at first, in a drawer from which he had taken the deponent's note; then he looked carefully through a desk in another part of the room; and then mentioned "that he could not find any note of McLean's," that the defendant showed anxiety and searched the same places again, and took up several bundles of filed notes, or papers that looked like them, and examined them, turning up the end of each so as to see the name on it; and that, after he had made this second search, he turned to the deponent and said "that he had no note of McLean's in his possession"; and he said further, that "the money was ready, and if McLean would send the note he could have the money." Of all this the witness informed the plaintiff, on his return to Greensboro. The witness says that he is positive as to what occurred, because it was the first time he was ever in a bank, and the misunderstanding arose soon afterwards, that the circumstances were impressed on his memory.

Joseph Rankin states, that on 1 October he carried the plaintiff's second note in a letter directed to the (463) defendant, and requesting him to send the money by the witness; and that, as soon as the defendant read the letter, he took out of the desk a bundle of money and handed it to the witness, and when he began to look over it the defendant told him it was right, and that there was the sum of $400, except

that the discount was taken out. He says the money was right and in a single parcel.

A witness, W. J. McElray, states that he was in the bank when Thorn delivered the plaintiff's letter, and that he saw the defendant then look into a drawer, in which he usually keeps notes offered for discount, and after examining a bundle of notes, he thinks the defendant said, if Mr. McLean wishes a discount, he must send in a new bond. He can not state, whether the defendant did or did not say, that McLean did not owe any bond there; though he recollects nothing of it.

Mr. Gilmer, an attorney, states that at the request of the plaintiff he had, in December, 1839, an interview with the defendant and Blum, upon this subject; that Blum denied receiving any money for the plaintiff from the defendant; and that, when the witness informed the defendant of that denial, he showed the witness the entry of the discounts of 17 September, on which it appeared that Blum had received it. The witness asked the defendant if he had any recollection that Blum received the money, to which he replied, that he had not, but that he relied on his book. He said he would not have made the entry if he had not paid the money to Blum, and that his books could not be mistaken; but that Blum got the money, though he had never paid it to McLean. The witness also then told the defendant what Thorn said, which was what he has stated in his deposition; and the defendant admitted that he told Thorn "that McLean had no note in bank," but he said he meant that he had no note to be discounted. The witness told him that Mr. Shober, a director of the bank, had told him, that in the list of debts made out by the defendant, there was but one debt of $400 against McLean, and he requested the defendant to let him see that list, but he declined
(464) doing so, and said he had discovered the mistake, and that in the list sent to Wilmington, McLean's debt was $800.

Upon the foregoing evidence the cause was heard, and, as there was such a conflict between the recollection of Mr. Shuman and Mr. Blum, the Court was desirious to obtain further information upon the point, whether there was two discounts for the plaintiff, or only one, which an inquiry would afford; and it was referred to the master to make that inquiry, with directions to inspect the books of the agency containing all entries in relation to the notes, and all returns made by the agent to the principal bank, which would include the transactions of the agency of 17 September, and 1 October, 1839, or any other in which either of the notes, or the amount thereof,

or the profit upon the discount thereof, was or ought to be included, and to collate such returns with the books of the agency in their present state. The master reported copies of the entries on the discount book for 17 September and 1 October, on which the two notes of the plaintiff appear, and it is stated in the margin of the entry of the former day, that Blum received the money. The note is stated to be dated 10 September, at 90 days, and to be discounted 17 September for $400, with 92 days to run from that time, and the discount for 92 days is taken, to wit, $6.13. From the principal bank was obtained the return of the list of debts dated 30 September, 1839, which states McLean's debt to be $800; and also the half yearly statements of the "cash account," "bills and notes discounted," "profit and loss," and "account current," between the agency and the principal bank—all shewing exact balances. With respect to the "weekly returns" of the agent, the president of the bank states that they are mere generalities and give no details which could elucidate the subject of the inquiry, and he does not send them.

The master also examined the defendant upon interrogatories, and Mr. Shober, one of the directors.

Mr. Shuman states that no book was kept which shewed the notes offered, but only those discounted; and that notes not discounted often lie a great length of time (465) in his hands. He says that he did not carry the discounts weekly into the ledger, but that months elapsed without his posting the books, until it became necessary, in order to make his half yearly returns and settlements with the principal bank. That when, with that view, he was posting the accounts into the ledger in November, he discovered that there were two discounts for McLean, and upon seeing the second, it struck his memory that some difficulty had occurred about a note being inquired for as in his hands, and not being found among the notes offered for discount; and that, not having a suspicion of any dishonesty, he went to Blum, who had then returned home, and mentioned the difficulty, and requested him to tell the defendant what he recollected about it, to which Blum answered that he had no distinct recollection of any transaction of that kind. He states that he invited Blum to examine the books, which he promised to do; but that he did not, until the defendant was obliged to post them with a view to making up his accounts, and then he posted the second discount. His first list of debts was made out before that additional entry in the ledger, and was not altered until January, 1840, after this controversy had arisen; but the list sent to

Wilmington was made out after the posting was completed by adding McLean's second note.

He says that his half yearly accounts did not balance, but there was always an excess of assets—which excess was not taken notice of in the books. Finding the charges against him on the books, he merely balanced them. He is unable to say what was the excess in May, 1839, or November of that year, or at any time before May, 1842, since which time the surplus has been noted.

It was then	$ 849.68
In November, 1842	792.71
In May, 1843	1,400.12
In November, not noted.	
In May, 1844	1,343.52

Mr. Shober states that he was one of the board of
(466) directors on 17 September, and that McLean's note was offered on that day. It was approved by the board, but not discounted, as the amount, to which they meant to discount, was full before they came to McLean's, but it was approved and the defendant wrote "offered" on it, as a memorandum, that it was to be discounted at some other time, when the agent should have funds. But he says also, that the board was not particular with the agent; and that had he, after the adjournment of the board, received payments enough, the directors would have sanctioned his discounting the note that day. He says that it is the practice for dealers to deposit their notes with the agent, and leave them in his hands, for weeks and months for discount. That in examining the half yearly accounts, when there were large surpluses, he has several times discovered errors in charging debts as still outstanding, which he had been paid; so that, upon giving the proper credit on them, the surplus would be nearly exhausted.

J. H. Bryan and *Iredell* for the plaintiff.
Morehead for the defendant.

RUFFIN, C. J. This case presents one of those instances of unhappy misunderstanding between persons of equal respectability, which arises from the defects of memory and an extreme looseness in transacting business. The persons most concerned in feeling in the cause are the two witnesses, Mr. Blum and Mr. Shuman—for the latter, though the party, is really not so in interest, being the mere payee of the note in trust for the bank. It is admitted on all sides that the plaintiff

is entitled to relief in the premises from one or the other of those persons, as no part of the money ever came to his hands. The doubt in the case is, whether the defendant never paid the money to any one, or paid it to Mr. Blum. The defendant avers that he did pay it to Blum; and the latter as positively affirms that he did not. It is the unpleasant task of the Court to decide between them. But in making the decision it would be no less our inclination than our duty in every case, to proceed, as far as we may, upon grounds consistent with the integrity of persons, thus implicated in giving con- (467) tradictory accounts of the same transaction. Much more should the Court thus act between two persons, occupying stations in society so entirely equal, as the two gentlemen before us seem to do. The one is the cashier of a bank, and the other was the cashier for a long time, and he is now a director of the same bank. It is incumbent on the Court, then, to give both of those persons credit for their characters, in point of uprightness, if we can find any fair grounds of decision, compatible with such characters. And we believe that there are such grounds, on which we can give our judgment on sound legal principles, and leave each of these persons' reputation unimpeached, at least by us.

In cases, in which credit seems to be so nearly balanced, very often the determination may be safely placed upon the want of preponderating proof on the side, upon which the error rests, and upon an exhibition in that party of a deficiency of that due caution, which prudence required him to use. For in such a case, negligence, far from that grossness which amounts to fraud, may yet be sufficient to prevent a court from yielding to the evidence given by a party, who ought to have taken care to provide better evidence—especially when, according to the common course of business, it would have been proper and easy to provide conclusive proof. And we are free to say that this view of the present case seems to be decisive against the defendant.

On whom is the *onus* here? The defendant admits that it is on him, but he says the possession of the bond establishes everything until the contrary be proved. Therefore he contends that it changes the burden of proof. But we think quite the contrary, as the facts appear here. We acknowledge that, in ordinary transactions between individuals, the possession of a bond by the obligee is not only evidence of its delivery but of its justice. But here the witnesses state, and the defendant admits, that he came into possession of this note—payable to himself nominally, for another—not as his property,

but merely to offer to the bank for discount; and that
(468) notes are necessarily in all cases entrusted to his custody for that purpose, and that in many instances he retains them for months. This, then, takes away in this Court all force from the possession, for it would be monstrous, if every person, who sends in a note to a bank for discount, should be obliged to prove that he did not receive the money. It would reverse the common course of business. Generally speaking, indeed, the negative might be readily proved even in those cases, because the cashiers and clerks are competent witnesses between the bank and the dealer. Nevertheless, we believe it is the invariable course in all banks and branches, that we have hitherto known, to pay money upon the discount of notes, only upon the written order of the person entitled to it. Such orders are so necessary to protect the rights of dealers, and as vouchers, for the paying officers, that they have received the name of *checks,* which appropriately expresses their office. But when, as in this case, the paper, upon which loans are made, is in the form of a note payable to the cashier himself, who thus gets by possession a right of action, which is irresistible at law, and he can not be there called on to testify for a defendant, the necessity for some *check* on the cashier against unjust demands is so obvious that one is astonished to find that it was ever omitted. We believe it is common to dispose of bills of exchange at the bank counter, that is to say, by a stranger, who has no regular account at the bank, because bills are rather bought and sold by the ministerial officers than the subjects of proper discounts by the directors. But it argues culpable carelessness, to be without any formal written check for the proceeds of ordinary discounts. And, above all, when one man claims an authority to receive another man's money. The bank was bound in good faith, when the plaintiff went to ask the defendant, whether he could prove the payment of the money to Mr. Blum to be able to say, "Yes, here is his check, or here is your order and his receipt on it." Instead of that, the defendant could only say, "I destroyed your order, but here is my book, which says Blum received the money"; and when the
(469) plaintiff was looking out for evidence on which he could charge Blum, if necessary, the defendant informed him that he had no recollection of paying the money. So the defendant could not prove the payment, and the plaintiff would be completely at the mercy of the defendant and Blum. The plaintiff has a right to say to the bank or to the defendant, it is your own fault, that the receipt of the money by Blum can not be established, and as you have left me without remedy

against him, you ought to make the loss your own. It is true, that, if it appeared, that Blum actually received this money, he would be made to account for it, and the plaintiff would be bound to look to him as his agent. But the question is, did he get it? He says he did not, and the defendant says he did. How can we judge between them? But it is said the defendant is supported by his books. But that is not so, for he has no recollection to be refreshed. The books do not sustain the defendant, but he looks altogether to them. And here, again, we must say that, as a witness, the books are much less satisfactory than the defendant himself—for, plainly they are entitled to but little consideration. In the case of this very note, it is remarkable, that a gross error, either in fact or law, was committed; for 92 days interest was on 17 September taken off a 90 days note dated 10 September. Either the discount was entered as of the wrong day (as Mr. Shober's testimony renders probable), or usurious interest was taken. We endeavored to get the "weekly return" of that week, but the bank has not put it in, for the reason alleged, that it has no details, but consists of mere generalities. Now it was because it deals in generals that we wanted it, in order that we might see whether the *aggregate* of notes discounted that week, as then returned, and the discount on them would include or exclude this note, which *now* appears on the books of the agency among the discounts of that week; and the withholding such a document affords a presumption, that its contents, if produced, would benefit the opposite party. But above all, such large and fluctuating surpluses, for such long periods, prove completely that there was either such a want of attention or skill in keeping the books, that no reliance can be (470) placed on them. Indeed, Mr. Shober says the defendant has often kept debts on his list, as parts of the assets, after they had been paid. Now, it is just as easy to suppose that he entered the payment to Blum when he made the list of discounts, upon putting to itself the money for that purpose, and afterwards forgetting it, as that he should receive a debt and forget to credit the debtor. The defendant was wrong, when he said his books could not be mistaken, for he is obliged to own that there are undiscovered errors in them to more than three times this debt.

We do not take into consideration the evidence of Thorn and Dobson, which raise opposing probabilities, for we do not decide the cause upon the higher or lower personal credit of Mr. Shuman or Mr. Blum, because, without going into that, it is sufficient, if under the circumstances, the question of fact be

left doubtful to entitle the plaintiff to a decree. A bank that pays money to any person as a loan, without a check or receipt, and especially pays the money of one man to another, without taking something to charge him, ought to lose it, unless the facts can be unquestionably established.

PER CURIAM. INJUNCTION PERPETUATED WITH COSTS.

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(471)

THE GOVERNOR OF NORTH CAROLINA *v.* THE RALEIGH AND GASTON RAILROAD COMPANY.

1. Under the act of Assembly, Rev. Stat., ch. 26, directing how service of process shall be made on a corporation, the service on the president or other officer of a corporation may be in the county in which he actually resides, or in the one which is his official residence and where he carries on and attends to the business of the corporation.
2. And, per NASH, J., if the service of a process upon an officer of the corporation be not made in the proper county, but the sheriff returns it executed, stating on whom it has been served, the corporation can only take advantage of the irregularity in the service by a plea in abatement.
3. Where a plaintiff in equity is entitled to a judgment *pro confesso*, and the Court below refuses to grant his motion to that effect, this is such an interlocutory order as the Judge may permit him to appeal from.

This was an appeal from an interlocutory decision of the Court of Equity of WAKE, at the Spring Term, 1845, his Honor, *Judge Dick* presiding.

The following facts are agreed on between the parties. James Wyche was, for many years, a resident of Granville County, having his domicile there. In January, 1845, he was appointed president of the company, after which he came to Raleigh, where he spent the greater part of his time, at the office of the company, at their depot there; returning from time to time, to his family in Granville, where they had continued; that he had not changed his domicile to Wake with a view to his personal residence, but was here officially in the transaction of the business of his office; and while *so* here, the process in this case was served upon him at the time mentioned in the sheriff's return. It was further admitted that the persons, who, before Mr. Wyche, were presidents of the company, were domiciled in the county of Wake, had their families there and transacted their official business in the same house at the depot, in which

Mr. Wyche transacted his official business. A proposition had been made to Mr. Wyche, some short time before, by one of the counsel of the plaintiff, to accept service of process in Granville, which he declined, stating he would shortly (472) be in Raleigh, where he would accept service, or, if not, service could be made. When the sheriff called on him at his office, at the depot near Raleigh, he declined accepting service, and the sheriff executed the process and delivered a copy of the bill, and made his return accordingly.

Upon the return of the process to court, no answer having been filed within the time prescribed by law, the plaintiff's counsel moved that the bill be taken *pro confesso,* which the Court declined, being of opinion that the process had not been well served. Upon the prayer of the plaintiff, the Court granted him an appeal to the Supreme Court.

Whitaker and *Iredell* for the plaintiff.
Badger and *Wm. H. Haywood* for the defendant.

NASH, J. On behalf of the defendant, it is contended that there has been no legal service of process in the case, and that, if there has been, this is not one of those interlocutory orders, from which, it was in the power of the Court below to grant an appeal.

The difficulty in this case arises under the third and fourth sections of the 26th chapter of the Revised Statutes. The third section provides, that when a summons shall issue against any banking or other incorporated company, service on the president, or other head, or in his absence on the cashier or treasurer, or in the absence of both the president or chief officer, and the cashier and treasurer, then, on any director of such company, such president or other officer, being at the time of such service, in the county in which he usually resides, shall be deemed sufficient service of the summons. The fourth sections directs, that suits in equity against corporations shall commence by subpœna, and the service of such subpœna, and all interlocutory orders and decrees, shall be made in the same manner and under the same restrictions, as is provided for the service of a summons in a suit at law.

In giving a construction to a statute, it is necessary to look to the legislative will, as expressed in the act, if it can be ascertained. It is evident, that both in the third and fourth sections of the act, the object of the Legislature (473) was to facilitate the service of process, in cases against corporations. Instead, then, of the cumbrous mode of pro-

ceeding, known to the common law, the third section substitutes a summons, and the individual, upon whom the service is to be made, is pointed out. Thus, while the mode of commencing his proceedings is made easy to the citizen, the interest of the corporation is guarded. The individual who has been selected by the stockholders to guard their interest, and to manage their affairs, the one, who is to be supposed will be the best acquainted with the transactions of the institution, and best capable of defending it when assailed, is first pointed out as the object of the service of the notice, and after him, the officers next in dignity. But still farther to guard the corporation from vexations and harassing suits and actions, or rather to guard the several officers, it is provided this notice shall not be served upon him wherever he may be found in the State, but in the county in which he resides at the time of the service.

The fourth section places the service of the subpœna in equity upon the same terms as a notice at law. We can not, we think, with any propriety, give to these sections a literal exposition; it would lead to absurdities, which ought to be avoided if it can be done without a manifest violation of the law. Take this case, a person is chosen president of this corporation who resides in the county of Caldwell, at the foot of the Blue Ridge, he does not choose to remove his family to Wake County—he, as Mr. Wyche did, leaves his family at his place of residence, and comes to Raleigh, where he attends day after day and month after month, to the business of the corporation, and at its office, where most of its business is transacted, and where its books and papers are kept. The Act of 1844 requires a suit, instituted for the purposes for which this is, to be brought in the Superior Court of Wake. The process issues to Caldwell, where his family resides; the president is not there; he is in Wake where his official duty calls him.

(474) No cashier, or treasurer, or stockholder, resides in Caldwell County. The sheriff, of course, returns no proper officer to be found in his county, upon whom the subpœna can be served. From the next term of the Court, another subpœna issues to the sheriff of Wake, he goes to the office of the railroad company, there he finds the president, but he can not serve it upon him, because he is not in the county in which he resides. Must he then serve it upon a subordinate officer and return that he has so done, because the president could not be found, when he is actually in his presence. Again, the fourth section requires, not only that the subpœna must be served upon the president in the county in which he resides, but also, "every interlocutory order and decree." Suppose the

case fairly in court, and an interlocutory order requiring personal service be made; the president resides in Caldwell, but he is in Wake, not two hundred yards from the court-house, at the office of the company. According to the letter of the act, it can not be served upon him until he returns to Caldwell. We can not persuade ourselves that such was the intention of the Legislature, but that they contemplated a service, either in the county in which he actually resided, or in the one, where was his official residence, where he carried on and attended to the business of the corporation; and that in this case Mr. Wyche did officially reside in Wake at the time the process was served upon him.

The *Court* is therefore of the opinion, for the above reasons, that his Honor erred in ruling that the process had not been *well* served.

I am of opinion that there was error for another reason. The corporation is the real defendant, and the requirements of the act, as to the mode and place of service, are but directory to the officer, and when so made the service is declared sufficient, and the third section closes by enacting, on every summons, "served as aforesaid, the officer making it shall endorse distinctly on whom the same hath been made or executed, otherwise such return shall not be deemed valid." It is only then, when the returning officer fails to state distinctly in his return, on whom he has served the process, that the Legislature has declared the service invalid.

Here the officer has not erred in this particular, but (475) has distinctly told us, on whom the process was served. To the service of the subpœna upon the officer out of the county, in which he resided, no such consequence is annexed. Such a service, therefore, can not be treated as a nullity—as no service at all. The most that can be claimed is, that it is irregular, and, if so, sufficient to bring the defendant into court, and drive him to his plea. The Act of 1782, Rev. Stat., Ch. 32, sec. 4, requires that a subpœna in equity shall be served ten days before the sitting of the court, to which it is made returnable, and a copy of the bill be at the same time delivered to the defendant, "on failure of any of which requisitions the defendant may plead the matter in abatement, and the suit shall be dismissed." Here is a plain direction given by the Legislature, as to the manner in which the defendant shall avail himself of a return irregular or defective in those matters. *Anonymous,* 2 N. C., 331, and *Worthington v. Coltrane,* 4 N. C., 166. In these cases the Court say the plea in abatement is given by the Act of 1782, to a person, upon whom an irregular

service has been made, that is, a service written less than ten days before the return term. I conclude then, if a service within the ten days is irregular and not to be treated as a nullity, the service in this case is not a nullity, but requires a plea on the part of the defendant.

Upon the whole, the Court is of opinion the Judge erred in refusing to grant the motion of the plaintiff for a judgment *pro confesso* against the defendant.

We are further of opinion, it was such an interlocutory order, as authorized the presiding Judge in his discretion to grant an appeal to this Court. The refusal of the motion for a judgment *pro confesso,* was, in effect, putting the plaintiff's case out of court, and subjecting him to pay the costs which had accrued up to that time. His *interest,* therefore, was such as to entitle him to the exercise of the discretion, entrusted to the Judge by the law.

We do not think that, by the conversation in Granville,
(476) Mr. Wyche intended, or did waive, any right secured to him or to the corporation, which he represented, and that his subsequent conduct in refusing to accept service, was a departure from any principle of duty or propriety.

The interlocutory order of his Honor ought to be reversed, and this opinion must be certified to the Court of Equity of Wake County.

PER CURIAM. ORDERED ACCORDINGLY.

GEORGE CROWDER *v.* WILLIAM I. LANGDON.

1. A party to a contract, as where one partner purchases the interest of his copartner, can not have relief in equity upon the ground of a false representation by the vendor, when he had an opportunity of knowing the truth or falsehood of the representation complained of.
2. As to a mutual mistake in matters of fact, the general rule is, that an act done or a contract made under such mistake is relieved in equity.
3. But where the means of information are alike open to both parties, and when each is presumed to exercise his own judgment in regard to extrinsic matters, equity will not relieve.
4. In like manner, when the facts are equally unknown to both parties, or when each has equal and adequate means of information, or when the facts are doubtful from their own nature, in every such case, if the party has acted with good faith, a court of equity will not interpose.
5. When each party is equally innocent, and these is no concealment of facts, mistake or ignorance is no foundation for equitable interference.

This cause was set for hearing, and by consent transmitted to the Supreme Court, at the Spring Term, 1845, of WAKE Court of Equity.

The bill charges that the plaintiff, in January, 1837, entered into copartnership with the defendant and Thomas G. Whitaker, for the purpose of merchandizing, which was to continue ten years; one-half of the capital to be advanced by the (477) defendant, and the other half in equal portions by the plaintiff and Thomas G. Whitaker; that he is entirely ignorant of mercantile matters and illiterate, and soon became uneasy and desirous to close the business, and proposed to his partners to dissolve the firm. To this proposition the defendant, Langdon, refused his assent, and persuaded the plaintiff he could not retire from the firm without a violation of duty and subjecting himself to damages, and that the firm had done a very profitable business; that the defendant was to be the acting partner, and he had accordingly managed the business of the firm, laid in their stock of goods, and contracted the debts; that, having implicit confidence in his skill and integrity, he fully believed and relied upon his statements; and that the defendant availing himself of his superior knowledge of the business of the firm, of the plaintiff's ignorance and the confidence he knew he reposed in him, persuaded him, the plaintiff, to purchase from the defendant his interest in the firm; that, to induce him to do so, he made out a statement in writing, showing a large profit, to wit, $2,900 or $3,000, and this statement he averred to be true, and the plaintiff, trusting to his assertion and believing the statement to be true, did purchase from the defendant his undivided moiety in the firm, at the price of $1,000, which he paid to the defendant. By their agreement, the plaintiff bound himself to indemnify the said Langdon against all liability on account of the debts of the firm, and the said Langdon at the same time *assured* the plaintiff he would correct any errors that might exist in the statement. The bill further states that the plaintiff has paid all the debts due by the firm, and that he purchased out his other copartner, Thomas G. Whitaker, upon the same terms. The bill then charges that, instead of $7,200, the amount stated in the paper-writing as being the amount of the debts due from the firm, there were near $10,000 due, all of which were contracted by the defendant Langdon, and among them one for $5,646, due the Literary Fund, and represented in the statement to be $4,000, and also several which were not entered upon the books of the firm; that the statement was erroneous in the amount of debts set forth as due the firm, as many (478)

of them had been received by the defendant and the debtors not credited on the books, and that the plaintiff had been cheated into making the purchase of said Langdon, as the business was a losing one and not profitable. The bill prays that the contract, by which he purchased from the defendant his interest in the firm, may be set aside, and the defendant decreed to refund to him the $1,000 he paid him, and account with him for the assets of the firm, or that Langdon may account with him and pay him what he owes the firm, and also the debts of the firm which he collected before the sale.

The defendant admits the copartnership, and the sale by him to the complainant of his interest in the business, at the price of $1,100, and that he made a statement of the situation of the firm. He alleges that having heard that the complainant was dissatisfied, he expressed his entire willingness to dissolve the partnership, provided he should receive back the capital he had invested, namely, the sum of $1,000, with interest on it; denies that, by the articles or agreement of the parties, he was to be the active partner, but that Thomas G. Whitaker was to manage the business, and that he had nothing to do with it, for twelve months before selling to the defendant; and says that the statement, which he submitted to the plaintiff, was drawn up by the defendant, at the request of the plaintiff, and that he took it from the books and from the information of the plaintiff and Thomas G. Whitaker, and knew nothing more of the affairs of the firm, than as disclosed by the books, and nothing more than was known to the plaintiff. He did represent to the plaintiff that the firm had done a good business, and he so believed; for as far as he knew, nothing had been lost by speculation or bad debts, and the stand was known to be an excellent one, and he denies expressly, it was in his power, from the manner in which the books were kept and the entries made, to exhibit the true condition of the firm, and avers that, in making the statement, he had to rely upon information de-

(479) rived from the plaintiff and Whitaker, and this fact fully known to the plaintiff; that as to the outstanding debts mentioned in the statement, they were put down at a gross sum, made up from the books and the information of the plaintiff and Whitaker, the acting partner, he, the defendant, having no knowledge of them.

The plaintiff replied to the answer, and the cause has been sent here for trial.

The statement referred to by the parties, and called the blue paper, is an exhibit in the case. It contains a list of debts

due to the firm, but none of debts due by the firm. It states the situation of the firm as follows:

Value of goods, with 25 per cent on cost.....	$	3,631.07
Accounts		3,555.93
Value of store.....		300.00
Notes		1,480.00
Judgments		845.00
Cash		500.00
	$	10,312.10
The debts are charged at the round sum.....		7,500.00
Leaving a balance of.....	$	3,812.10

as excess of assets, above liabilities, except the stock, which was $2,000.

Thomas G. Whitaker, one of the firm, states that no entries appear upon the books in the hand-writing of Langdon after March, 1838, and that, after that time, the books were kept by him and the clerks, Langdon not having anything to do with them; that, in March, 1839, Langdon came to his house and brought with him the books of the firm, including those which had been kept by the witness and the clerks; that from the said *books.* Langdon, in conjunction with the witness, made the various estimates, which appear in figures on the blue paper, representing that the assets of the firm on hand amounted to $10,312.10 cents; that the indebtedness was computed at $6,000, from the memory of Langdon and the witness, the books not having entries of the debts from the firm; to which, at the suggestion of the defendant, was added in the esti- (480) mate $1,500; that Crowder was sent for by Langdon, and came before they got through the statement; that the $6,000 was borrowed of the literary fund, to pay off the debts due by the firm to the North for their stock of goods, and were applied to that purpose, and that he sold out his interest in the firm to the plaintiff. He says, also, that $600 was put down to cover bad debts, according to their conjectural amount; that, since the statement, it was found the debts of the firm exceeded $7,500. At the time when the estimate was made, the defendant and Langdon based their computation on what they *recollected* of their debts; that they spoke of the several items in the presence of the plaintiff, who seemed ignorant of the amount of indebtedness, and whose information, in relation to it, was principally derived from the defendant and Langdon; that the object of the meeting was to agree upon a dissolution

of the partnership, when each proposed to sell to the other; Langdon, from the start, saying he could not take less than his capital, and interest on it; and, after various propositions he proposed to Crowder to sell to him for $1,100; Crowder took him aside and asked his opinion, he advised him to take more time and not make a contract of the kind hastily. The parties separated for the night, under the belief, as he thought, that the partnership was to be dissolved, and he prepared notices to that effect. The next morning Crowder proposed to him to join him in purchasing Langdon out, which he declined, Crowder then said he had made up his mind to take the purchase. He told Crowder he thought the statement made the day before was correct, and in that estimate the Literary Fund debt was assumed to be $5,000.

Lewis Crowder, the son of the plaintiff, stated that he was a clerk in the store the first year, and that Langdon carried on the business for the first three or four months, and directed the manner in which the books should be kept, was present at the time T. G. Whitaker was, and Langdon said, if there was any error he could rectify it.

Henry Finch stated that he was also a clerk in the (481) store, and, for the last twelve months before Langdon sold to the plaintiff, Langdon had been absent and had nothing to do with the business, and that during that time Crowder or Whitaker, one or the other, was at the store every week; that from the books he could not understand what was the amount of debts due by the firm; that he assisted in making an inventory of the goods on hand just before the dissolution; T. G. Whitaker and Langdon being present part of the time, and the two sons of the plaintiff also assisted; that he heard the defendant say he had gone over the *books,* and there was no error in the amount he had given Crowder in his calculations. The defendant also examined the books, and found no mistake in the list of accounts due the firm. He can not tell why the proper entries were not made on the books. During the twelve months that Langdon was absent, Crowder and Whitaker, who are brothers-in-law, were frequently together and conversed about the business of the firm and examined the books. The plaintiff, Crowder, purchased out Thomas G. Whitaker, 30 August, 1841, and he witnessed the articles.

Allen Adams testifies only as to the note to the Literary Fund. It was originally for $6,000. He was the surety, and sometimes signed in bank, and the notes were sometimes brought to him by Whitaker, once by Langdon, and sometimes by Crowder's sons; were signed by the partners individually, and

renewed, he thinks, every three months, as well before as after the purchase by Crowder.

Willis Whitaker states that the parties met at his house as he understood, to consummate the trade between the plaintiff and the defendant. The former asked if they, Langdon and Whitaker, had brought the paper containing the calculations, and was answered they had not, as they did not consider it necessary. The plaintiff then asked if the calculations were correct, and was answered that they were substantially so, with some intimation from them, that from the data they had to go upon, there might be some small errors. He understood Crowder was to give Langdon $1,100 for his interest, and the agreement was drawn up by Whitaker at the request of the other partners, but not signed until the next morn- (482) ing. Crowder is an illiterate man, can read and write a little, but knows nothing of bookkeeping. Nothing was said about correcting any errors, and Crowder observed he supposed he was to have the goods at the New York cost, to which Langdon replied, he, Crowder, had his interest for $1,100. Witness had frequently heard Crowder say that he wished to get Langdon out of the firm, and has heard him say in the same conversations, he wished to get out himself, as he felt much uneasiness and anxiety, as to Langdon's connection with the firm, stating that he could not bring Langdon to a settlement, nor could he understand how he was managing the business of the firm.

Among the exhibits in the case, are the statement made by Langdon and called the blue paper, the articles of agreement between the plaintiff and the defendant, and the articles between the plaintiff and Thomas G. Whitaker.

W. H. Haywood for the plaintiff.
Miller and *Saunders* for the defendant.

NASH, J. The plaintiff places his claim to relief on two grounds: First. That Langdon, the defendant, availing himself of the confidence which he knew the plaintiff reposed in his skill and integrity, and taking advantage of his ignorance, induced him to believe that the paper called the blue paper contained a correct estimate of the debts due from the firm and those due to it; whereas, the former turned out to be much larger than expected, and that the defendant knew such to be the fact, and that many of the debts represented as due the firm had been received before that time by Langdon himself. And, secondly, that if Langdon did not know the extent

of the debts due from the firm, yet it was a mutual ignorance of matters of fact, entitling the plaintiff to have the agreement rescinded. We think that upon neither ground is the plaintiff entitled to relief. His allegation that Langdon availed himself of the confidence he knew he reposed in him, is repelled by the evidence in the case. To Samuel Whitaker, his own (483) witness, he, at different times, stated "he had much uneasiness and anxiety as to Langdon's connection with the firm, that he could not bring him to a settlement, nor could he understand how he was managing his business." Whatever confidence therefore he might have had in the defendant, when the partnership was formed, he had lost it before the arrangement was made; he evidently had his fears excited, and was put upon his guard by them. Nor is there anything in the case to show us that any fraud was practiced by Langdon. The books have been submitted to our inspection; Mr. Langdon is represented as a good accountant, and that he presented the mode in which the books should be kept. If they were left in the manner directed by him, they furnish little evidence of any knowledge on the subject. But it is shown by the evidence, that for the twelve months next preceding the sale to the plaintiff, the defendant had been absent and had nothing to do with the management of the business. The statement contained in the blue paper was drawn up by him, from the books, as testified by Thomas G. Whitaker, the other partner, and from information furnished by him and the plaintiff. In making that statement, the debts of the firm were stated by Langdon at $6,000, and so ignorant were the parties of the true situation of the business, that $1,500, were, at the suggestion of Whitaker, added on to the amount of the indebtedness of the firm, at a rough guess, and $600 for bad debts. This was all done in the presence of the plaintiff, Crowder. It has turned out that $1,500 was not a sufficiently large allowance, but that the debts were nearly $10,000. The plaintiff, though not skilled in bookkeeping, and though an illiterate man, certainly had capacity sufficient to see that none of them knew the extent of the indebtedness of the firm; and that he was incurring great risque. With this knowledge, such is his anxiety to get rid of Langdon as a partner, that, contrary to the advice of Whitaker, upon whom, as a connection and as a partner, he might surely rely, he would make his purchase. When Langdon first proposed to sell out to the plaintiff, Whitaker, upon his (484) advice being asked, "advised him to take more time and not to make a contract of that kind in haste." The next morning the plaintiff proposed to him to join in the pur-

chase, which he declined when the plaintiff said he had made up his mind to make the purchase. We can not then say that Langdon was, in the transaction, guilty of any fraud, or that he used any deception or artifice to induce the plaintiff to make the purchase. But it is argued, if there be no actual fraud, there was implied fraud, that when a person makes a false representation through mistake, when he might have informed himself, he shall be bound. Without going into an examination of the cases, to which our attention has been drawn, we do not think this case comes within the principle. Here the defendant is in fact guilty of no misrepresentation. He had had nothing ot do with the business for twelve months, and had been absent from the place where it was carried on. The books give him no information; are silent on the subject; neither can his copartners or clerks, one of whom is the plaintiff's son, assist him; at a venture he puts down the debts of the firm at $6,000; the acting partner tells him that will not answer, add $1,500 more: this is done, and in the presence of the plaintiff, who has all the time been living in the neighborhood of the store, was there every week or two, who had free access to the books, and frequent conversations with Whitaker, the acting partner, and his friend and near relation. The sum of $7,500, as being the amount of the indebtedness of the firm, is no where proved to have been asserted by the plaintiff, and when the plaintiff asks Whitaker and Langdon if the statement of the amount of the debt is correct, he is answered, "according to the data they had to go upon it was substantially so." There is then in fact no representation as to their amount. It was a mere matter of opinion, or a fact, equally open to the inquiries of both parties, both possessing equal means of information, and upon which, it is evident from the testimony of Samuel Whitaker, the plaintiff did not rely upon the opinion of Langdon, nor do we perceive in the facts proved any effort on his part to mislead the plaintiff, for the misrepresentation may as well (485) be by deed or acts, as by words, by artifices as well as by positive assertion. 3 Bl. C. 165. 2 Kent. Com. 484. 2 Story Eq., 201-2. We do not say the fact is not so, but that there is no evidence to prove it. But before the principle can be brought to bear upon Langdon, it is necessary to show, according to the case of *Pearson v. Morgan,* 2 Brow. C. C. 354, that he might have had notice of the truth or falsehood of the statement. To what source of information could Langdon have applied to get this notice? Did he not apply to that, from which alone he could now derive it? There is no written memorandum of the debts within his reach, and those, who ought to

have known, were as ignorant as himself. The principle then does not apply to him. One remarkable feature in this case is, that the plaintiff, who claims to get rid of his contract with Langdon, because the debts were so much larger than the blue paper represents them, purchases out his copartner, Thomas G. Whitaker, on 30 August, 1841, upon precisely the same terms. The purchase from Langdon was made 27 March, 1839, one year and four months before the purchase is made from Whitaker. Yet he gives Whitaker the amount of his capital, and guarantees him from all liability to pay the debts of the firm. If the plaintiff has made a hard bargain or a bad one, we can not relieve him. It appears to us, that so far from being anxious to get out of mercantile business, he had an uncommon desire to get into it. He goes into the firm, owning the one-fourth of the stock, and winds up by purchasing the whole. Neither upon the ground of mutual error, is the plaintiff entitled to relief. It was speculation on both parts. The plaintiff did not know the amount of the outstanding debts, nor did the defendant. The latter agrees, if the plaintiff will give him a certain sum, he will sell his interest in the firm. Suppose, instead of the deficiency found to exist, there had proved to be a large profit beyond that stated in the blue paper, could the defendant have been heard to say the contract must be rescinded; the profits have turned out much larger than he expected? The general rule unquestionably is, that an
(486) act done or a contract made under a mistake or ignorance of a material fact, is relievable in equity. 1 Story Eq., 155. But where the means of information are alike open to both parties, and when each is presumed to exercise his own judgment in regard to extrinsic matters, equity will not relieve. The policy of the law is to administer relief to the vigilant, and to put all parties to the exercise of a proper diligence. In like manner, where the fact is equally unknown to both parties, or where each has equal and adequate means of information, or when the fact is doubtful from its own nature, in any such case, if the party has acted with entire good faith, a court of equity will not interpose. 1 Fonb. Eq. B. 1, Ch. 2, sec. 7, n. v. 1 Pow. on Con., 200. 1 Mad. C. Pr., 62, 4. 1 Story Eq., 163. Where each party is equally correct and there is no concealment of facts, mistake or ignorance is no foundation for equitable interference. We have said, there is no ground to allege fraud against the defendant. Here the fact of the extent of the indebtedness of the firm was unknown to the parties; it was, from the circumstances of this case, doubtful in its extent, and each party had equal means of information.

The rule of *caveat emptor* must apply. If, however, we were satisfied that the plaintiff acted upon the statement contained in the blue paper, as the known and declared basis on which he contracted, we should be inclined to grant him relief. But it is not as manifest, he did not, or rather he did not act upon it, as containing the ascertained facts of the case. He could have done so, because he was present and saw and knew upon what data it was framed, and that its statements were the result of vague surmises of all parties. Further, that he did not rely on it is shown from the fact that he asked the advice of Whitaker what he should do. The paper, if correct, showed a clear profit of near three thousand dollars; if, therefore, he wished to purchase, and relied upon the paper, he would have needed the advice of no one, and further, when he consummated the contract, he did so, in the absence of the paper, after having called for it.

Another ground of relief claimed by the plaintiff is, that the defendant agreed to correct all errors. There (487) is no evidence to us of any errors in the contract. The defendant intended to sell his interest in the firm; the plaintiff to buy that interest, whether it was much or little.

PER CURIAM. BILL DISMISSED WITH COSTS.

Cited: Capehart v. Mhoon, 58 N. C., 180; *Wilson v. Land Co.,* 77 N. C., 452; *Day v. Day,* 84 N. C., 411; *McMinn v. Patton,* 92 N. C., 375; *White v. R. R.,* 110 N. C., 460.

BENJAMIN LOGAN *v.* SQUIRE SIMMONS et al.

1. Where a woman, who was about to be married, made a voluntary conveyance of all her valuable property on the day before the marriage, without the assent or knowledge of her intended husband, to a son by a former marriage, and it was agreed that this conveyance should be kept secret: *Held*, that a court of equity will consider it a fraud upon the expected rights of the husband, and will declare it void against him.
2. Such a fraud can only be relieved against in a court of equity, because, at law, the conveyance, being good against the wife, is also good against the husband, who claims through her.
3. Whether, if a woman, during the course of a treaty of marriage, make, without notice to the intended husband, a conveyance of any part of her property, such conveyance would in itself be fraudulent, *quære?*
4. It certainly would be fraudulent if designed to deceive the intended husband.

5. A knowledge of the facts shewn clearly to exist in the husband after the marriage, and acquiescence in anything done under the conveyance, can not purge the fraud and set up the conveyance, but it would be evidence tending to show a communication of the facts before the marriage.

This cause was commenced in September, 1841, in RUTHERFORD Court of Equity, and, having been set for hearing at Spring Term, 1845, was by consent of parties transmitted to the Supreme Court.

The following appeared from the pleadings and proofs in the case, to be the material facts:

On 12 February, 1818, the plaintiff intermarried with
(488) Phebe Simmons, in Rutherford County, where they both resided. She was a widow, and had, by a former marriage, four children, all of whom were grown and married, and had removed from their mother's. The defendant, Squire Simmons, was one of the children, and resided on the same tract of land, and five or six hundred yards from his mother. The exact difference between the ages of the plaintiff and Mrs. Simmons does not appear, but it was considerable, and it seems probable that she had a child as old as the plaintiff, and it is stated by the witnesses that she was not a robust woman, but of rather feeble health, and subject to occasional attacks of hystericks. The plaintiff had little or no property (it is said only one mare), but was a blacksmith, and industrious and skillful in his trade, though he sometimes drank too much, but not habitually, as far as appears; and his situation, habits and character, were well known by Mrs. Simmons, as he had been brought up, and then lived within a mile of her residence. Mrs. Simmons was in very moderate circumstances. She owed about $200 at the time of her second marriage; and she then owned and possessed two female slaves, of whom one was thirty-seven years old and had ceased childbearing, and the other was a girl, named Poll, about sixteen years old. Besides those slaves, she had one or two horses, a few cattle and hogs, some little household stuff, and implements of husbandry; and seems to have been entitled to dower in a small piece of land, on which she resided. On 11 February, 1818, Mrs. Simmons conveyed by deed of gift to her son, Squire Simmons, the two negroes absolutely and in possession, reserving, however, to herself, the first living child, which the girl Poll might have. After the marriage of the plaintiff, he resided with his wife, in the house previously owned by her, until her death in 1828; and he retained possession of the two slaves and several children, born, during that period, of the woman Poll. But soon

after the death of his mother, the defendant Simmons got the negroes into his possession, and set up a claim to them under the conveyance to him of 11 February, 1818. The plaintiff then instituted an action of detinue against Sim- (489) mons for the negroes, upon the ground that the conveyance to the defendant was a fraud upon his marital rights and void; and judgment was given therein against the plaintiff, in December, 1834, because the deed constituted a good title at law, and could be treated as infected with fraud, in a court of equity only. Upon that decision having been made, the plaintiff filed a bill in the court of equity against Simmons, impeaching the deed as fraudulent, upon the ground of the deception thereby practiced on him, and the defendant answered, and orders were made and proofs taken in the cause; but by a fire in 1839, the court-house of Rutherford was burnt, and all the papers and records of the court of equity, including the bill, answer and proofs in that cause, were destroyed. The present bill was filed in May, 1841, and charges that the plaintiff had addressed Mrs. Simmons for more than a year before the marriage, and that they had been engaged for several weeks, and that it was known to the defendant Simmons, that Mrs. Simhons had notoriously the possession and property in the slaves during the courtship and long before, and continued in the possession and apparent ownership of them at the time of the marriage, and that the plaintiff was thereby induced to believe, and did believe, that the slaves belonged to his said intended wife at the marriage, and would by that event be vested in him as a provision for his wife, himself and their family, if they should have any; and that the plaintiff knew nothing to the contrary until the defendant got the negroes into his possession after the death of his mother, when, for the first time, he discovered that the deed had been made. The bill further charges that it was expressly designed by the intended wife and her son, to deceive the plaintiff, as to the title of the negroes, as the plaintiff had, upon inquiry, ascertained that it was agreed between them at the making of the deed on the day before the marriage, that its existence should be kept a secret, and that the donor should still keep the negroes in her possession as the apparent owner; and that, accordingly, the deed was never published, but remained unknown by any (490) person, except the parties and the subscribing witness, until the defendant Simmons caused it to be proved and registered in March, 1828, during the extreme and dying sickness of his mother. The bill further states, that shortly before filing the present bill, the defendant Graham took a conveyance from

the other defendant for one of the children of Poll, by the name of Jacob; and that he, Graham, had been the attorney and solicitor for Simmons in the previous suits, and knew of the plaintiff's title, and paid no valuable consideration for the negro. The prayer is, that the deed from the wife may be declared fraudulent and decreed to be delivered up to the canceled, and that it may be decreed that the defendants convey to the plaintiff the said negroes and their increase, and account with him for the profits.

The answer of Simmons states that the match between the plaintiff and his wife was a very unfit one, as she was much older and exceedingly infirm, and that he had no property and was dissolute in his life; that the courtship was not of long continuance, and was unknown to himself or to the other children of the intended wife, as was also the marriage; and that her infirmities continued after the marriage during her life, and that the plaintiff treated her at all times with neglect and indifference, and sometimes with cruelty. So that the defendant states he fully believes the plaintiff's sole object in soliciting and consummating the marriage, was to get the slaves and other little property belonging to the other party.

The answer states that during the minority of the defendant, and after he came to full age, up to his marriage at five and twenty, he resided with his mother and attended to her and her affairs, and that she often declared, as was well known to the family, her intention to give the negroes to this defendant in return for his services; that the execution of this intention had been deferred from time to time; but that on 11 February, 1818, his mother told him, "that life was uncertain, and she wanted then to make him a bill of sale for her two negroes";

(491) and she then did so, and also delivered them into his hands, in the presence of John Parker, who became the subscribing witness to the deeds. The answer proceeds to state that the mother then told Parker to say nothing about the bills of sale for awhile, as she did not wish to offend W. K. Hunt, who had married one of her daughters, and who, she was afraid, would abuse his wife if he should know that she had conveyed the negroes to her son; and that there was no concealment for any other purpose spoken of. The answer further states that the defendant was unwilling to take the negroes away, "as his mother's condition required their services, and that after he got the deeds, he said to her that he would leave them and lend them to her until he should call for them." The answer denies that the defendant then knew or believed, that his mother intended to marry again, much less, that she

would marry the plaintiff; and also denies that he was present at the marriage, or had heard that it was to take place, and states that his first knowledge upon the subject was when he heard of it the day after its celebration. The answer states that the reasons for not registering the deed, at first, were that the defendant was ignorant of the legal necessity of it, and that he wished to comply with his mother's injunction on that point, on account of keeping it from her son-in-law, Hunt; and that, afterwards, he had another reason, which was, that he became desirous of saving his mother from the insult and violence she would probably receive from the plaintiff if he knew that she had made the deeds to him. But the answer further states that the deeds were never concealed from any one who desired to know the truth about the title; and that the plaintiff, during the coverture, became acquainted with their existence—for that, upon some occasions, he threatened to sell some of the negroes, and that his wife would tell him he could not sell them, for they belonged to her son, the defendant; and that his mother, when Poll had several children, told the defendant to take one of them, named Sol (which the bill states the plaintiff himself gave by parol to the defendant, but which the defendant denies to have received as a gift (492) from the plaintiff), and carry him, the said Sol, home, and raise him there, and that he did so, and the plaintiff acquiesced therein, and did not pretend to claim the said boy afterwards in the lifetime of his mother.

The answer further states that the present bill was not filed for more than two terms succeeding the burning of the court-house and the original bill and proceedings in the suit between these parties, and that such delay in filing the present bill is a bar to the same, as evidence of an abandonment of the plaintiff's claim. The answer also states that the defendant has had adverse possession of the slaves from 1828, and insists upon the statutes of limitation of 1715 and 1820, as bars.

The answer of the other defendant admits that he was of counsel for Simmons in the previous suits brought by Logan against him for the negroes, including Jacob, and states that, about eighteen months after the burning of the court-house, finding that the plaintiff had not renewed his suit, he took a deed from Simmons to the negro Jacob, on account of his fees in those suits, and took him into possession. And it insists on the laches of the plaintiff in filing his present bill, and on the statute of limitations in the same manner as the other defendant's answer does.

The parties have taken many depositions; but, except so far

as their contents are embodied in the beginning of the statement of the case, the only material parts are the following: Parker, the subscribing witness to the deeds from Mrs. Simmons (who makes his mark), deposes, that after she had executed the deeds and delivered them and the negroes to her son, he, the witness, asked her if she was going to cut herself out of the negroes altogether, and she replied, "Squire says he will lend them to me until he called for them"; and then her son said, "Yes, mother, you shall have the use of them your lifetime, or until I call for them"; that Mrs. Simmons, at the same time, said she always intended Squire to have the negroes, because he had been such a particular good boy to her; and that she further said, she did not wish anything said (493) for a while about the bills of sale, but to keep them secret, because her son-in-law, W. K. Hunt, and Squire Simmons were not at a good understanding, and she was afraid of a disturbance. The witness states that he then took the bills of sale and kept them until they were proved for registration in March, 1828, and did not make them known; and that his residence was within a mile of Logan's during that time.

A witness deposes, that upon one occasion the plaintiff, being intoxicated, was correcting one of the negroes, and that his wife interfered and he struck her with a whip; but by several witnesses it is stated that he was an affectionate, kind, and attentive husband, and during his wife's illness, procured such medical advice as she desired.

One of the persons, who was present at the marriage, states that it took place at Mrs. Simmons' house, on 12 February, 1818, and that neither of her children was there, and that there were only two others besides himself and the parties; but it is stated by several witnesses, among whom is the sheriff of the county, that it was understood in the neighborhood for several days that the marriage was to be then celebrated.

A witness, by the name of M. Curry, states that a year or two after the marriage, the plaintiff employed him to shingle his house, and the witness proposed also to build a piazza to it, when the plaintiff replied, "as soon as your old aunt dies, it don't belong to me." The witness then said "I know that, but you have got property enough with her to leave the children good buildings." To which the plaintiff again replied, "none of the negroes here are mine, they belong to Squire Simmons." And the witness said thereupon, "surely you did not know this before you married this old woman, because you could not have married her for love," and the plaintiff

answered, "Yes, I did; she was a pretty likely old woman, and I thought we could do pretty well together."

Another witness, Hides, states that four years after the marriage, upon an inquiry of the plaintiff, why he should be working from home, when he had so many negroes there,
(494) the plaintiff said to the witness, "there are negroes enough there, but they are not mine, and I am as hard put to it as you are."

Hunt, the son-in-law before spoken of, states that he lived within a mile of the parties during the period of the coverture, and that the plaintiff treated his wife well; and that, until the deeds to the defendant Simmons were registered, he never heard of their existence, nor of any claim to the negroes but that of the plaintiff, who, as he believed, became the owner of them by his marriage.

Alexander for the plaintiff.
Osborne for the defendant.

RUFFIN, C. J. It is a principle of equity, which is found in almost every text writer, and has been stated by many Judges as undoubted law, that conveyances by a woman previous to her marriage, in fraud of the rights, with which the law would invest the husband upon the marriage, must be set aside. It seems agreed by all, that such conveyances are not invalidated upon any ground of policy, merely, for, if that were so, it would apply as well in a court of law, as in equity, and we have held, in a suit at law between these very parties, *Logan v. Simmons*, 18 N. C., 13, that the deed binds the husband at law, because it binds the wife. In so holding, we were supported by the unvaried current of precedents, and the clear declarations of the eminent Judges, *Mr. Justice Buller,* and *Lord Thurlow,* who gave opinions in the case of *Strathmore v. Bowes,* 2 Bro. C. C., 345. 1 Ves. Jr., 22. If avoided at all, then it must be on the ground of fraud. Consequently, the conveyance of a woman before her marriage is not only good at law, but it is *prima facie* good also in equity, as fraud is never imputed without evidence. The question is in such cases, what constitutes the fraud, what design will be fraudulent, and what is evidence of such design? The law, says *Lord Thurlow* in the case cited, conveys the marital rights to the husband, because it charges him with all the burdens, which are the consideration which he pays for them; and, therefore, they are rights on which a fraud may be com- (495)
mitted. Out of that right arises a rule of law, that the husband shall not be cheated, on account of his considera-

tion. Now, the rights, thus spoken of, are not present rights, that is, existing at the time of the conveyance; for, a fraud on rights of that kind, the common law would redress. They are prospective rights—those that the husband expects to enjoy upon the contemplated marriage by the law of the land. A husband, being bound to pay his wife's debts and to maintain her during coverture, and being chargeable by the law with the support of the issue of the marriage, and bound by the ties of natural affection also to make provision for the issue, it is in the nature of things, as a matter of common discretion, that a woman's apparent property should enter materially, if not essentially, into his inducements for contracting the marriage, and incurring those onerous obligations. It is also to be assumed by a man proposing this relation to a woman, that she too has a view to their means of livelihood after marriage, and feels an interest in the provision that, between their joint stocks, can be made for a family. Every woman therefore must suppose that the man, who is about to marry her, expects she will not put away her fortune, at least the visible part of it, and thereby diminish his ability to discharge his duties and legal obligations to herself, her creditors, and her future family. And if she, after allowing him to form such expectations, deliberately defeats them by a conveyance of her property, and draws him into marriage by a deception on that point, it would seem that it could be nothing less than a fraud on the husband. He is disappointed of what the law promised him, and of what she held out to him, he would get. In such case it may be well argued, that a concealment of the conveyance would amount to a fraud, upon the principle of *suppressio veri* being in bad faith, when a person, towards whom it is practised, has an interest in knowing the truth, and has no ground to suspect anything that has not been avowed. A very respectable writer, Mr. Roper, Husband and Wife, 1 Vol., 163, entertains the opinion that any disposition by the wife, made after (496) the courtship began, without the intended husband's knowledge and concurrence, is within the mischief and principle laid down by the courts. And *Lord Thurlow* uses this language: "If a woman, during the course of a treaty of marriage, make, *without notice* to the intended husband, a conveyance of any part of her property, I should set it aside, though good *prima facie, because affected with that fraud.*" That was said, too, on a rehearing of the case, which had been before heard before Judge *Buller,* who had said, that "fraud," as applied to cases of this nature, is falsely holding out an estate to be unfettered, and that the intended husband will, as

such, be entitled to it, when in fact it is disposed of from him; but I do not think there is any case which says, that such a conveyance shall be void, merely because the wife did not disclose it to the husband." Concluding with saying, "therefore, it is necessary to show other facts, and that the husband is actually deceived and misled." It seems also very clear, that in the modern case of *St. George v. Wake,* 1 Coop. Sel. Ca., 129, *Lord Brougham* leans to the opinion expressed by *Mr. Justice Buller,* though that case did not require him so to hold. On the other hand, *Lord Thurlow* again said in *Ball v. Montgomery,* 2 Ves. Jr., 194, that he "would set aside a deed, as in fraud of the marriage, if *concealed* from the intended husband; for if a woman, previously to marriage, conveys her property *without the privity* of the intended husband, it will be a fraud." And the case of *Goddard v. Snow,* 1 Russell, 485, decides, that when a woman assigned a sum of money, which the intended husband did not know she was entitled to, and concealed from him both her right to the money and her settlement of it, the deed was void. It appears, therefore, that it is a point yet open, and on which respectable opinions are much divided, whether concealment by the wife, merely, where there is no active expedient adopted to keep the intended husband in ignorance, and where he makes no inquiry, is *per se,* a fraud. We do not purpose to give any judgment of this Court on it, because we do not think the present case requires us to (497) do so, and we think it safest not to go out of the case into a field of doubtful disputation. We may say this, however, because, though not essential to the decision, it has some bearing on it. That much, we should suppose, might depend, among other things, upon the species of property, as being visible, or not, such as debts, money or stocks, and, if the former, whether it was in the actual possession of the woman, since the possession of tangible property is in itself a sign held out of ownership, and, if continued up to the time of the marriage, is calculated in the nature of a false token to deceive and mislead. The effect of concealment may, moreover, be allowed to be more stringent in this country than in England; because there it is the general habit of society to have settlements on marriages, in which professional persons are employed; and that almost necessarily leads to inquiries into the particulars of the fortunes on both sides, and each one, therefore, is to be presumed to have no other expectation, than what is secured in the settlement. But here settlements are very rare, and never are made by persons in the condition of life of the parties here; because our people look to the law as establishing their relative rights

and duties upon a proper basis, and do not therefore make those minute inquiries, which would be necessary to the framing of a settlement, but the intended husband expects to get all the wife has—that is, that she will let him get by the marriage all she would keep for herself and within her own power, if she had not contracted the marriage.

But we have said, that it does not seem to us necessary to determine whether concealment by itself amounts to fraud in cases of this kind. We say so, because we think, in the case before us, there is much more than concealment; that the plaintiff was actually deceived and misled as to the wife's circumstances, and her right to the negroes in question, by a set contrivance and agreed purpose between her and her son. It was essayed in the argument to make out, that the witness, Mr. Curry, proved that the conveyance was communicated to the plaintiff before the marriage, because the plaintiff said (498) "Yes I did," in reply to the observation of the witness, "that surely he did not know that the negroes belonged to Squire Simmons, before he married, because he could not have married for love." But it is obvious that the remark of the witness embraced two distinct points; that of the plaintiff's knowledge of the state of the title, and that of his motive for marrying; and it does not follow that the plaintiff meant to affirm both of them. Indeed, the whole reply of the plaintiff shows that he was confining himself to the latter, and meant by "Yes I did," to say, that he did marry for love; for he *adds*, "she was a pretty likely woman, and I thought we could do well together." But a clear refutation of the argument, resting as it does upon an ambiguous phrase of the witness, is the absolute silence of the answer upon the point. It is no where pretended in it that the plaintiff was, in the remotest degree, privy to the conveyance. So far from it, the answer clearly implies the contrary, for it says, that the plaintiff's motive for the marriage was the base one of getting the negroes, at the expense of sacrificing himself in a match with an old woman, for whom he had no affection. And it further says, that one reason why the defendant did not register his deeds was, that he did not wish the plaintiff to know of their existence, for fear he would ill-treat his mother. Besides, the subscribing witness and the son-in-law, Hunt, both say that the deeds were kept secret until their registration. There is no doubt, therefore, that the plaintiff was in entire ignorance upon this point at the time of his marriage. He so avers in the bill; and, although he can not give direct evidence of the truth of a negative averment as to his own information, yet these are the cir-

cumstances he lays before us, and the inability of the defendant to state on his oath even a belief on the point, much less to give proof of a communication to, or suspicion by the plaintiff, that his wife, who was continuing in possession of them, had conveyed away the slaves. What opportunity had he to know it? The deed was made on one day, and the marriage took place the next; and the plaintiff did not see his intended wife until he went to be married in company with a (499) witness, who has been examined in the cause, and from whom not even an inquiry is made on the subject, though he must have heard of these deeds, if the plaintiff did, at that time. Then, if the plaintiff was kept in ignorance, was he purposely kept in ignorance, that in that state he might go on and consummate a marriage, which the woman believed he would not contract if he should be informed of the conveyance? Was that her motive for her conduct, in order that the plaintiff might, under a deception, enter into the marriage? Who can doubt it? Although the plaintiff may have married without affection, and for the base motive of lucre alone, and his subsequent conduct speaks favorably for him in that respect, yet we are obliged to believe that he would not have proceeded in the marriage if he had been told what was industriously withheld from him on this subject. His opinion of his intended wife's feelings towards him would have so changed, and the gross imprudence of contracting a marriage, when he had nothing but a trade, and she had conveyed all her property of any value, would have presented itself in so glaring a light that he must not only have hesitated, but stopped short. That the other parties must have been aware of; and they acted, therefore, in a way effectually to deceive him. The conveyance was executed the day before, lest, if sooner done, it might get wind. It was prepared by we know not whom, and executed in the presence of a single witness, and he illiterate; and, moreover, in order to prevent *him* from acting the part of an honest neighbor by the plaintiff, that witness is particularly charged not to disclose it, "to keep it secret for awhile." It is said, indeed, that a different reason was given for wishing nothing to be said of the deeds—namely, that it might be kept from the ears of Hunt, a brother-in-law of the defendant, and not friendly with him. But that is a shallow pretense; for what difference could it make to Hunt, whether his wife was cut off by a deed, made to her brother on one day, or by her mother's marriage with the plaintiff, which was to take place on the next day? The time when these deeds were made proves conclusively that they were made with a direct view to (500)

the approaching marriage; and the circumstances that they include all or nearly all of the property the woman owned, shows that they were made, not *bona fide* to advance a child, but to defeat both the marital rights and the *actual expectations* of the intended husband; expectations, raised, upon the possession and enjoyment of the slaves by the wife, as well as upon the common course of women in similar situations, and defeated, not merely by the concealment of the parties, but by their taking means to engage another person to unite in keeping the plaintiff in ignorance. We think such a case clearly within the rule, as most strongly expressed by Mr. Justice *Butler*. There are other facts besides concealment barely. The husband has been actually deceived.

It has not been contended that a knowledge by the husband, after the marriage, can purge the fraud and set up the deeds; for clearly it could not. A knowledge shown clearly to exist after the marriage, and acquiescence in anything done under the deeds, would be evidence to show a communication before marriage. That is all the effect it could have. But there is nothing of that kind here. Mr. Curry and Hicks state circumstances, from which we may infer, that the plaintiff had heard, after he married, of some sort of claim of the defendant; but we have no distinct information on the subject, and it is more than probable that all he went on was what his wife told him (as mentioned in the answer), when he would threaten to sell some of the negroes. That, it seems, was within two or three years after the marriage; but it was not calculated to make any impression on the plaintiff, when he discovered that the son, to whom the wife said the negroes belonged, did not claim them, but the plaintiff himself kept them; and Parker states, that he never made known the deeds to the son and his bailment to his mother, until 1828.

The marriage, though not very fit in point of equality of age, does not appear to have been so unequal as to give a character of baseness to the plaintiff's motives; and there is no evidence of his resorting to any deception or unfair means of gaining the consent of the other party. It is true, (501) also, that the plaintiff did not settle anything on the woman, nor bring an accession to the common stock; and, therefore, she might have reserved some reasonable share of a considerable estate to her own use, or give it *bona fide* to a child. But it can not justify such reservation and gift of all the little she had, as this party virtually did, leaving to the husband only the burden of raising young negroes for the son. There is nothing whatever on which the idea, that the plain-

tiff at any time abandoned his claim, can rest; for he has, though sometimes in a wrong direction, been in hot pursuit of the slaves, ever since the defendant took possession. For the same reason the statutes of limitation do not affect the case, even i fthey apply to it. As to the short intervals between the burning of the court-house and the filing of this bill, nothing can be made of it by the defendants; for there was no decree in the former suit, and it may, indeed, be considered, to this purpose, as pending now, and that the present pleadings, made necessary by accident, are but substitutes for those consumed.

The deeds to the defendant, Simmons, must therefore be declared fraudulent, and the plaintiff entitled to the slaves conveyed in them and their subsequent increase; and the defendants be decreed to deliver to the plaintiff the slaves mentioned in the pleadings, and such others as may have been born, as are in their possession, respectively, and to account for the hires and profits, and pay the costs of this suit. The defendant, Mr. Graham, having come in under the other defendant, as he did, must, of course, abide by his fate.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Tisdale v. Bailey, 41 N. C., 360; *Long v. Wright,* 48 N. C., 292; *Bank v. Spurling,* 52 N. C., 402; *Taylor v. Dawson,* 56 N. C., 93; *Spencer v. Spencer, Ib.,* 406; *Ferebee v. Pritchard,* 112 N. C., 86.

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(502)

WILLIAM D. JONES *v.* CHARLES HAYS et al.

1. A defendant can not be examined as a witness in a cause without the previous order of the Court.
2. Where a guardian gives several successive bonds for the faithful discharge of his trust, the sureties on each bond stand in the relation of co-sureties to the sureties on every other bond; the only qualification to the rule being, that the sureties are bound to contribution only according to the amount of the penalty of the bond in which each class is bound.

Cause transmitted from the Court of Equity of BUNCOMBE, at Fall Term, 1844

The bill was filed in April, 1837, against William Hawkins, Charles Hays, and Mallory B. Paton, and the case is as follows: In 1827 William Hawkins was appointed the guardian of Benjamin Hawkins, an infant, and gave a bond in the sum of $3,000, with Charles Hays as his surety. In 1831 the guardian renewed his bond in the penalty of $1,000 with the plaintiff, William D. Jones, as his surety. In 1834 Hawkins was

removed from the guardianship, and the defendant, Patton, was appointed in his stead. Hawkins was then insolvent, and, at their request, he conveyed to Hays and Jones a tract of land in October, 1834, by a deed absolute upon its face, and expressed to be in consideration of the price of $800, but (as admitted by all parties) as a security to them or either of them against loss by their having been his sureties.

Soon after his appointment, Patton instituted a suit on the bond given by W. Hawkins and Jones, and reference was made in it to audit the guardian's accounts and report the balance. It was found that the sum due to the ward was $1,121.20, which exceeded the penalty of the bond then sued on by the sum of $121.20. Expecting such a result, Patton had before sued out a writ on the bond given by Hawkins and Hays, for the purpose of recovering that excess of $121.20. Hays, (503) as well as Jones and Patton, was present when the auditor ascertained the sum due, and then insisted that he was not liable for the excess aforesaid, or for anything whatever, upon the ground that he had been discharged by the renewal of the guardian's bond; and upon being told by Patton that he should hold him responsible, and had ordered a suit against him, he told Patton that he need not sue him for that, he would consult counsel, and if he should be advised that he was liable for the excess of $121.20, he would pay it without suit. Afterwards, Hawkins discharged that sum of $121.20, by assigning to Patton a bond which had been given for rent of the ward's land, and which he had on hand; and the suit against Hays was discontinued. In the suit brought against Hawkins and Jones, however, there was a report and a judgment thereon for the penalty of $1,000, by confession.

The bill charges that the default of W. Hawkins occurred chiefly before the plaintiff became his surety, and while Hays was bound for him; and that he discovered that such was the fact in the taking of the accounts before the commissioner, and there insisted that he was not liable for the *devastavit* before his time, but that Hays was, or, at all events, that Hays and he were responsible as sureties for the whole; and that he informed both Patton and Hays that he would resist the recovery against him alone, except for such sum or a due proportion as he might be legally and equitably liable for. And the bill further states that Hays then proposed that the plaintiff should allow the judgment to be entered for the sum due the ward, as far as the penalty of the bond would cover it, and that if he, Hays, was liable for any part of it, he would pay it, and that it should be referred to two respectable counsel to

determine the question of his liability, and of the extent of it. And that Patton joined Hays in urging the adoption of that course; and that the plaintiff, induced thereby, suffered the judgment to be taken against him.

The bill then states that Hays has refused to agree to any reference to counsel or to pay any part of the debt, and that the plaintiff has been compelled to pay, and has paid, the whole debt, except the sum of $377—for which latter (504) sum, he gave his bond to Patton, who recovered judgment thereon, and threatens to raise the money on execution.

The prayer is, that the necessary accounts may be taken in order to ascertain the several periods of the principal's *devastavits,* and that Hays may be decreed to make good those of his own time, or the liabilities of the respective sureties may be declared according to equity, and Hays decreed to reimburse the plaintiff as may be found right, and that in the meantime Patton may be enjoined from proceeding at law.

The answer of Hays denies all knowledge of a default by Hawkins before the plaintiff became his surety, and states his belief that the whole occurred afterwards. Thereupon he insists that he is not liable for any part of the deficiency, at least, within the penalty of the new bond. He denies any proposal or agreement between him and the plaintiff, of the nature stated in the bill, for a reference to counsel to determine the question of his liability to the plaintiff, or for any part of the sum of $1,000; and states that his only agreement was with Patton in respect of the excess of $121.20, and that only, and avers that, as to all besides this last sum, he positively denied his liability to any person, or in any form.

The answer further states that, afterwards, the plaintiff came to a settlement with Hawkins, upon the footing that the plaintiff was solely liable as his surety, and therein took the mortgaged land as an absolute purchase at the sum of $700; and that for a balance then found due, of something more than $400, the plaintiff took the note of Hawkins payable to himself, and made Hawkins a promise not to sue him within five years, and to allow him to remove from the state. Hawkin's insolvency is admitted.

Hawkins' answer admits his default as found by the commissioner, and says that it all occurred after he gave his last bond, when, by misfortunes, he became insolvent. He admits that the plaintiff has satisfied the judgment by payments, and by giving his bond to the ward after he came of age. And he (505) states that he transferred to the plaintiff a bond for $135, as a payment to him, and also conveyed to him

the land absolutely at $700, and that he and the plaintiff then came to a settlement, and he gave the plaintiff his note for a balance due to him, exceeding $400 a little, which the plaintiff still held and had sued on.

Patton's answer denies all collusion with Hays, and all knowledge of any agreement of Hays to pay any part of the debt, or to refer the question of counsel, and denies also any persuasion of the plaintiff on his part to suffer judgment to go against him. He says Hays denied his liability altogether. He further states, that at the time of taking the accounts, the ward, B. F. Hawkins, was nearly of age, and was present and allowed by this defendant to act for himself in the premises; that, after the sum due was ascertained, the plaintiff requested indulgence, and the young man, B. F. Hawkins, replied that he should want a small part of the money upon coming of age, but that he would not need the residue, and that if the plaintiff would then give him a new bond with sureties, he would indulge until he should need the money; that the judgment was taken on the report, because every one believed the plaintiff liable for it; and that, within a few weeks, the ward came of age, and the plaintiff made the required payment to the ward, and then gave a new bond with surety to B. F. Hawkins himself for about $800; and that, on that bond, said Hawkins has recovered judgment by confession, and received a payment of about $500 from the plaintiff; and that he, Patton, has no interest in the matter, but has long ago settled with his former ward, and that the balance is due from the plaintiff on the judgment in the name of B. F. Hawkins, rendered on the bond given to the said Hawkins himself.

Upon the coming in of the answer of Patton, the injunction was dissolved, which had been granted on the bill. Replication was taken to the answers, and the parties proceeded to take testimony, and the cause was transferred to this Court for hearing.

(506) No counsel for the plaintiff.
Francis for the defendants.

RUFFIN, C. J. The bill must, of course, be dismissed with costs as to the defendant, Patton, who has no interest, real or nominal, in the judgment, and against whom nothing has been proved.

The other two defendants, Hawkins and Hays, allege as one point of defense, that the plaintiff, after discharging the judgment against Hawkins and himself, came to an account with Hawkins and took from him a note in satisfaction of the

balance due to him; and, therefore, they insist that the present suit can not be sustained, not against Hawkins, because from him the plaintiff has taken a new and substantive legal security in satisfaction of the former demand, and not against Hays, because the plaintiff has given up his remedy against the principal, and thereby discharged the surety.

How far the taking of a promissory note from the principal might operate as a satisfaction of the previous debt of the principal or discharge a co-surety, if agreed to be a satisfaction, we need not decide, for although the question is raised in the answers, the defendants have failed to establish the fact by evidence. Two depositions have been taken in reference to this part of the case. The one is that of William Hawkins himself. But he is competent to prove a fact, which, if it operate at all, must operate to his own discharge in this suit, as well as that of the other defendant. Besides, there was no order for his examination; and without that, a party can not be a witness for another. *Lewis v. Owen,* 16 N. C., 290; *Bell v. Jasper,* 37 N. C., 597. The other witness is G. W. Candler, who states that Jones and Hawkins made a settlement, shortly before this suit was brought, in relation to the matter in which the former was surety for the latter's guardianship; and that he, the witness, thinks that in the settlement Hawkins gave Jones a note for the balance between them, and that receipts were passed between them; but that he can not recollect the amount of the note, and he does not know the nature of the receipts given. He states that it was his understanding of the settlement that Jones was to have Hawkins land, (507) but at what value he is unable to fix; and that Jones claimed that he had before purchased it at a sale made for other debts, but at what price the witness does not know. No order has been moved on the plaintiff to bring in the note or receipts alleged to have been given to him, nor any notice to him to produce them before the witness; and the defendants have declined or omitted to offer the receipts given by Jones to Hawkins, as pretended by them. It would be exceedingly loose to proceed on evidence of the uncertain character of this witness' testimony, in respect to the contents of written instruments, some of which are in the possession of the defendants themselves, or one of them, and the others accessible to them by proper means. It may be, that, in the very receipts given by the plaintiff to Hawkins, it is expressed, that the note of the latter was intended as an adjustment of the accounts and striking a balance, and was not taken in satisfaction of the precedent debt; and that supposition is the less improbable,

as the present suit was brought almost immediately afterwards. Certainly, if it should appear hereafter, that the plaintiff actually holds the note of Hawkins in the premises, and should entitle himself to a decree against Hays as a co-surety, Hays would be entitled to participate in the benefit of that security. But at present, as a bar to the bill, the defendants have failed to establish by proper proof that the plaintiff took Hawkins' note in satisfaction, and not as a collateral security for the benefit of himself and his co-surety equally, or, indeed, that he took the note at all; and, therefore, the plaintiff's case depends upon his original equity.

As far as the plaintiff rests his equity on the special agreement of Hays to assume the default of the guardian in his time, or any aliquot part of the deficit, or to refer it to counsel to adjust the respective liabilities of the parties, the plaintiff must fail, as the whole allegation is denied in the answer, and there is no evidence to overrule the denial.

We hold, however, that independent of any agreement upon the subject, the plaintiff and the defendant Hays stand in the relation of co-sureties for Hawkins, and liable to con-
(508) tribute to each other for any sums paid by one of them on account of defaults of the guardian, no matter when such defaults occurred, whether wholly before Jones became the surety, or after that event. The office of guardian is not for a definite period of three years, or temporary at all, that is to say, within the nonage of the ward. The act of assembly, Rev. St., Ch. 54, in the first section, authorizes a father to appoint a guardian for his child, for such time as he or they shall remain under 21 years of age, or for any less time. The second section confers on the courts of law the power to appoint guardians, where the father has not, and requires them to take good security from the guardian "for the estate of the orphan by them committed." Under the Act of 1762, the guardian was only required to give bond once for all, at his appointment, unless under the power thereby specially conferred, to make rules from time to time for the better ordering and securing the orphan's estate, the Court should require the guardian to give other and further security, or, unless at the instance of the sureties of a guardian, the Court should compel him to give sufficient other or counter security, or appoint some other guardian. It was, therefore, in its creation, one office for the whole minority of the ward, unless it was expressly for a shorter period, or unless subsequently shortened by an order of removal. The sureties, given at first, continued through the term, and could be relieved only by the removal of the guardian, or getting counter securities from him, by

way of indemnity. But very often the sureties became insolvent, and therefore, had no interest in the conduct of their principal, and took no steps against him, though he was wasting the estate and becoming insolvent. To correct this evil and protect the interest of wards, the act was passed in 1820, "further pointing out the duty of guardians," which makes it the duty of guardians to "renew their bonds every three years *during their continuance* of the guardianship," and making it the duty of the courts to *remove from office* such guardian as may fail so to do, and appoint a successor to him. The case of guardian and of his successive bonds, is therefore precisely like that of clerks and their bonds, as to which (509) it has been held, that the office was not annual, though the bond be given annually, but that all the bonds, given through the several years for which the office continues, are cumulative securities for the performance of the duties of the office, and particularly for the payment of money received at any time before or after the giving a new bond. *Oates v. Bryan,* 14 N. C., 451. This is expressly the doctrine laid down as to guardian bonds in *Bell v. Jasper,* 37 N. C., 597. That case came first before the Court in the name of *Foye v. Bell,* 18 N. C., 475, in which he held that the first sureties were liable to the ward, although, as between the different sets of securities, the latter might be bound to contribute to exonerate the former. Whether the one set would be so bound to the other, was not then to be determined. But Bell was compelled to pay the recovery against him at law, and then filed his bill against his co-sureties in the bond, to which he was a party, and also against the posterior sureties in the second bond, for contribution; and by the whole court it was held that all the bonds were but securities for the same thing, and, therefore, that there must be a contribution between the different sureties. Each was held bound for the *entire* guardianship; the only difference between them being (upon the authority of *Deering v. Winchelsea,* 1 Cox, 318) that the liability of each was not equal, but in proportion to the penalties of the several bonds, in which the respective sureties bound themselves. Consequently, in this case, the sum for which the defendant Hays is liable, when compared to that the plaintiff ought to pay off the deficit of the insolvent principal, is as $3,000 is to $1,000, and so it must be declared. And it must be referred to the master to inquire what sum the plaintiff has been compelled to pay as surety for William Hawkins in the premises, and what payments on account thereof he has received from Hawkins, what balance is due to the plaintiff in

respect thereof, and how the same is secured. And the master will also inquire, whether Hawkins continues to be insolvent, or is able to pay the balance that may be found to be due to the plaintiff, or any part of it, and how much, and (510) where he resides.

PER CURIAM. ORDERED ACCORDINGLY.

Cited: Jones v. Blanton, 41 N. C., 120; *Hughes v. Boone,* 81 N. C., 207; *Bright v. Lennon,* 83 N. C., 187; *Dudley v. Bland, Ib.,* 224; *Pickens v. Miller, Ib.,* 547; *Machine Co. v. Seago,* 128 N. C., 161.

JOHN FISHEL et al. *v.* GEORGE HAGE.

Where a testator in his will, after giving some small legacies, gave to his wife "all his estate, be it real, personal, or perishable," and by a codicil devised to his wife a leasehold estate in the town of Salem, for his wife "to inherit and keep in possession during her life, and to dispose of as she pleases, under the rules and regulations of the town of Salem": *Held*, that, whatever might be the effect of the provisions of the codicil, if it stood alone, yet even if that did not give the wife the absolute interest in the leasehold estate, as the estate would then remain undisposed of, after the death of the wife, she would be entitled to it under the general residuary clause of the will.

Cause transferred from the Court of Equity of DAVIDSON, at Spring Term, 1845, by consent of the parties.

The following facts appeared in the case:

John Adam Fishel made his will on 7 October, 1839, and therein bequeathed to certain of his brothers, sisters, nephews and nieces, legacies of one dollar each. Then came the following clause: "I give to my wife Catherine, all my estate, be it real, personal, or perishable, which I will have belonging to me at the time of my decease, including all notes, bonds, tenements, negroes, book debts and demands, and all moneys and property of every kind and description, to have and to hold the same and every particle thereof to her sole use forever, after payment of my funeral expenses, debts and legacies." The testator afterwards executed a codicil dated the 2 June, 1841, which is expressed in the following words: "Since (511) I made this my will, some change in my property has taken place, to wit: I have exchanged my plantation for a house and lot in Salem, which I wish my beloved wife

to inherit, and keep in possession during her life, and to dispose of as she pleases, under the rules and regulations of the town of Salem."

The defendant is the testator's executor, who proved the will upon the death of the testator, in the latter end of 1843. The house and lot in Salem are stated in the pleadings, and an agreement of the parties filed in the cause, to have belonged to William Henry Van Vleck in fee, and that the testator agreed with him for a lease of the premises from year to year, as long as the parties should agree at the yearly rent of seventy-five cents, with the following terms and conditions: That the lease should be forfeited, if the rent should remain unpaid for forty days after it shall fall due; or if the lessee should mortgage or dispose of the premises to any person who is not accepted by the lessor; or if the lessee erect any building thereon against the will of the lessor; or if he should purchase, hire, board, or retain any person with him, or in his service, contrary to the will of the lessor, and the lessor covenanted, that in case the lease should become forfeited or otherwise determined, he would pay the value of such improvements as the lessee might have erected on the premises, and if the parties could not agree as to the value, that it should be ascertained by arbitration. It is stated that those are the terms on which all the houses and lots in Salem are occupied; and that it is the custom, when a lessee dies, for his executor to sell the lease to some one accountable to the proprietor, and to account for the proceeds as assets.

Upon the death of the testator, the defendant assented to the legacy to the widow, and she thereunder kept possession of the premises until her death, which happened in the early part of 1844, when, she having died intestate, the defendant also administered on her estate, and sold the premises by the consent of Mr. Van Vleck, for the sum of $412, which he claims as assets of the widow.

The bill was filed in March, 1844, by the several persons to whom the legacies of one dollar were be- (512) queathed, and who are also the next of kin of the testator, and claims payment of the said legacies, and also the proceeds of the sale of the said leasehold premises as belonging to the estate of the testator, and undisposed of after the death of the widow.

Clemmons for the plaintiffs.
Shober for the defendant.

RUFFIN, C. J. We need not advert to the terms in which

the leasehold is given to the wife in the codicil, for if it be admitted that she had thereby only a life-estate, with a general power of appointment, which failed because she did not choose to execute it, yet the plaintiffs have no right to the premises, as the next of kin, but they vested in the wife by reason of the universal gift in the will. This property was but a chattel, and therefore passed by the will, though acquired afterwards, and although it may have turned out, in the event that has happened, that it is not well disposed of in the codicil, yet it is by the will itself, as such is the settled operation of a general residuary clause. In this will, the gifts to the wife are as universal and unlimited as possible. As respects, therefore, those premises, the bill must be dismissed, and as that is the only real subject of controversy, it must be dismissed with costs. We presume the small pecuniary legacies to the several plaintiffs will be paid on application. If not, they may move for a reference to take an account of the estate, so as to shew assets for their satisfaction.

PER CURIAM. DECREED ACCORDINGLY.

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(513)

WILLIAM W. DANIEL *v.* ANDREW JOYNER et al.

1. Where A B C D E and F were sureties on an administration bond, and judgment was recovered at law against them and their principal, and A and B had the judgment assigned for their benefit; and then the principal and the other sureties filed an injunction, which was dissolved and judgment rendered in the court of equity against all the plaintiffs in the injunction bond and their sureties: *Held*, that A and B, the sureties who did not join in the bill for an injunction, were not bound to contribution to the other sureties, parties to the injunction bill, though A and B were original sureties for the debt; because, the principal having joined in the injunction suit, the others who were united with him were his sureties in that suit, to the exclusion of A and B.
2. Where A, being the principal in a bond, gave a deed in trust, one of the provisions of which was that the trustee should "save harmless B," who was his surety in the bond, and another that the trustee, "whenever required by the creditors of A or by any surety who may be threatened with loss by reason of his suretyship, shall proceed to sell sufficient property to answer the ends of this deed in trust": *Held*, that the trustee was not bound to wait until the surety was actually damnified, by having been compelled to pay the money, but that it was the duty of the trustee to relieve him from his responsibility whenever he had the funds in hand for that purpose.

This was a bill for a perpetual injunction. The Court of

Equity of HALIFAX, in which the bill was pending, at Spring Term, 1845, his Honor, Judge *Dick* presiding, ordered the injunction to be dissolved, and from this order, by leave of the Court, the plaintiff appealed. At the same term by consent of the parties, the whole case was set for hearing upon the bill, answers and exhibits, and transmitted to the Supreme Court.

The following facts appeared in the case:

James Halliday died intestate, and his widow Anne administered on his estate, and gave bond in the sum of $100,000, with Andrew Joyner, Michael Ferrall, Redding J. Hawkins, Robert C. Bond, James Simmons, Joseph L. Simmons, John G. Purnell, George W. Gary, and James Frazier, her sureties. Afterwards, the said Hawkins and Mrs. Halliday intermarried, and he wasted a very considerable part of the (514) estate. Edward Hall, a creditor of the intestate, brought suit on the administration bond against Hawkins and his wife, and against the sureties and in May, 1843, recovered a judgment thereon for $6,649, with interest and costs, as the damages for the breach of the bond. In October, 1843, a bill was filed in the court of equity against Hall, and Joyner, and Ferrall, by Hawkins and his wife, and the other six sureties, on the administration bond, alleging that Joyner and Ferrall had procured an assignment of the said judgment to some person in trust for them, and that they were the equitable owners of it, and that they caused Redding J. Hawkins to be arrested on a *capias ad satisfaciendum* issued on the said judgment, and had then discharged him from arrest, whereby the said judgment had been satisfied in law. For that and other reasons therein set forth, it prayed an injunction against further proceeding at law on the judgment by Hall or by Joyner and Ferrall, and the injunction was accordingly granted. An injunction bond was then entered into by Hawkins, Bond, James Simmons, Joseph L. Simmons, Purnell, Gary and Frazier, as principals, and by William W. Daniel, the present plaintiff, and one Nathaniel Edwards, as their sureties. The injunction was subsequently dissolved, and judgment rendered thereon for the amount of the recovery at law, and the interest and costs in equity. Joyner and Ferrall sued out in the name of Hall a *fieri facias* from the court of equity, which was levied on the property of George W. Gary, sufficient to satisfy the debt, but the sheriff left it in Gary's possession and did not sell it. Gary then filed a bill against Joyner and Ferrall, and obtained the usual preliminary injunction against raising a larger sum out of his property on the judgment than $1,050; and then Joyner and Ferrall directed the sheriff to levy the residue of the debt

on an *alias fieri facias* from the property of the plaintiff, Daniel. Edwards, the co-surety with the plaintiff, had become insolvent and left the State. Hawkins and Frazier were insolvent and possessed no property, and Purnell had also left the State, and had no property here. Before he went
(515) away, however, he deposited in October, 1844, with Joyner, as a security for his proportion of the said debt, a bond on some other person for $1,319.12, on which the sum of $800 was collected, 21 October 1844. In February, 1844, both James and Joseph L. Simmons became insolvent, and made assignments to Mark H. Pettway of considerable property in trust to sell, and among other things, "to save harmless William W. Daniel and Nathaniel Edwards, sureties for the said Joseph L. and others, in an injunction bond in the suit of equity in Halifax, R. J. Hawkins and others, against Edward Hall and others." The deed in another part of it is thus expressed: "And in order to accomplish the objects of this conveyance, the said Mark H. Pettway shall, whenever required by any of the creditors of the said H. or by any of the sureties, who may be threatened with loss by reason of his suretyship, proceed to sell sufficient property to answer the ends of this deed of trust." Pettway sold all the estates conveyed to him, and the proceeds are insufficient to pay the debts. The present plaintiff applied to him to pay to his relief on the execution now served on the plaintiff property, the parts of the Messrs. Simmons as sureties, or such proportion thereof as this debt is entitled to, respect being had to the other debts secured by the deeds. But Pettway declined applying anything, as the other creditors secured in the deed insisted, that the trust was not to secure this debt, but specially to save the plaintiff harmless, and that no part of the fund was applicable to that purpose until the plaintiff shall have suffered, and that he will not suffer at all, inasmuch as Gary is also bound to indemnify him, and he is able to do so.

Joyner, Simmons, and the other sureties in the administration bond, filed a bill in the court of equity against Hawkins and his wife, in which there was a decree that the defendant should bring into court a number of bonds and securities for money belonging to the estate of the intestate Halliday, amounting to about $14,000, and they were placed in the hands of Joyner as a receiver, to be collected and applied in the payment of the debts, and in due course of administration.
(516) The present bill was filed against Pettway, Joyner, Ferrall, Bond and Gary, 5 April, 1845, and besides setting forth the matters before stated, charges that Robert C.

Bond had assigned to Joyner a bond of the Raleigh and Gaston Railroad Company for $1,000, as a pledge for the security for his part of this judgment.

And the bill insists that Joyner and Ferrall are bound to contribute their equal share of the recovery by Hall, now belonging to them, with the other solvent sureties, after applying thereto such part of the effects now in the hands of Joyner, as receiver, as is properly applicable to the same.

The prayer is, that the necessary accounts may be taken in order to ascertain the funds in Joyner's hands as a receiver, and the proportion thereof that ought to be applied to this debt, and that such application may be decreed; that the sums for which each of the sureties for Mrs. Halliday's administration (including Joyner and Ferrall, and also James and Joseph L. Simmons, and Bond and Gary) may be liable on this debt, be then ascertained, and that Joyner and Ferrall may give credit thereon for their proportion thereof as two of the original sureties, and Pettway pay out of the trust funds in his hands the proportions thereof, which fall on James Simmons and Joseph L. Simmons, as two of the original sureties, and also such sums as that fund may be liable to pay as an indemnity to the plaintiff as the surety of the Messrs. Simmons and others, in the injunction bond; and that Joyner and Ferrall account for the funds in their hands, derived from Purnell and Bond, as aforesaid; and that Bond and Gary may be required to pay their said proportion of the said debt, and fully to indemnify the plaintiff as their surety in the injunction bond, by paying what may be found due on the debt, after applying a due share of the Simmons trust fund. And the prayer further is for an injunction in the meantime.

The answer of Pettway submits the construction of the deeds of trust to the Court, and to dispose of the fund under the directions of the Court. He says it can not be yet ascertained what debts are chargeable upon the fund, they are very uncertain, and the accounts are now in the master's (517) office in another cause.

The answer of Joyner and Ferrall states, that, being restrained by an injunction from proceeding against Gary for more than $1,050, and Messrs. Simmons having assigned their estates, and the other defendants being insolvent (except R. C. Bond), they had no alternative but to have their execution served on the plaintiff's property for the residue of the debt. As to the said Bond, the defendant Joyner answers, that in February, 1843, Bond placed in his hands a Raleigh and Gaston Railroad bond for $1,000, as an indemnity to him and

Pettway, for being his sureties for $250 to the bank, and for $247.50 to one Mabry, and to one Summrell for $442; that Bond paid the debt to the bank, but the others remain unpaid; and that last winter, the said Bond requested Joyner to pay his proportion of the debt to Hall, proposing to pledge the residue of the railroad bond as a security, but that he, Joyner, declined it, as the whole of his visible property had been conveyed in trust for honest purposes in November, 1841.

The defendant Joyner further admits that he was appointed receiver, and took into his hands the securities for debts as before mentioned, to be applied for the equal benefit of all the sureties for the administration to discharge claims on the estate for which they were liable; that he has not collected a large part of the debts, though he has been diligent in his efforts to do so, and that the sums which have been collected have been duly applied towards the payment of a judgment obtained on the administration bond by the only child of the intestate, for $6,070 and costs, for her distributive share of the estate, and towards the payment of a judgment obtained by John Y. Mason, a creditor of the intestate, on the same bond for $3,243.50; and that those two judgments have large balances still due on them, and the payments on them go in exoneration of the sureties for the administration equally.

These defendants insist that as between them and the obligors in the injunction bond, including the plaintiff as
(518) their surety, they are not bound to contribute any part of the sum originally recovered by Hall.

They admit that the judgment was entitled to a credit for the sum of $800 collected on the bond received from Purnell, and they say they had directed the sheriff to give credit therefor, and that the plaintiff could have been informed thereof, if he had applied to either of them or to the sheriff.

Upon the coming in of the answers, and on the motion of Joyner and Ferrall the injunction (which had been granted on the bill) was dissolved, except as to the above mentioned sum of $800, and the plaintiff was allowed to appeal. Subsequently in the term, the parties set the cause down for hearing on the bill, answers, and the exhibits of the deeds of trust made by the two Simmons, and it was transferred to this Court.

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

RUFFIN, C. J. There are only two questions of any conse-

quence in these causes. The one is, whether Joyner and Ferrall, who were two of the original sureties for Mrs. Hawkins' administration, remain liable to contribute to the payment of this judgment, in exoneration of their original co-sureties, or of the plaintiff, as one liable to their responsibilities and entitled to their rights. Upon that point we have not much to add to what was said on it in the opinion given in *Hawkins v. Hall, ante,* 280. It appears distinctly now upon the present bill, that Joyner and Ferrall are the owners of the judgment at law; Mr. Hall having assigned it to a trustee for them. The object, then, in the former equity cause, was to obtain a perpetual injunction against the judgment, upon the ground, that by the acts of Joyner and Ferrall, in conducting their execution against the body of Hawkins, the debt was satisfied, and, therefore, those two persons could not equitably raise their shares from the co-sureties, who were plaintiffs in this suit, nor even raise the whole from the principal debtor, (519) Hawkins. We need not perplex ourselves with considering the extent of the rights and obligations of the parties to that bill, and of the sureties for the injunction, if it had been a bill by one portion of the sureties against another merely. For that was not the case. Hawkins was one of the plaintiffs in the bill, and, besides occupying the character of one of the co-sureties, he filled that of principal, having married the administratrix, and in her right got the possession of the assets, and then wasted them. Unquestionably, then, he had no right to contribution from the original co-sureties, who were the defendants, nor from any who united with him in the suit. But upon a dissolution of the injunction, if he had been the sole plaintiff, the defendants in equity would have had a right to a decree against him and *his sureties* on the injunction bond for the whole debt, without abatement. Now, because, the other persons, who were also sureties in the administration bond, happened or chose to join with him in that suit, it did not release him from the obligation to pay the whole, or impair the rights the defendants would have had against him, if he had sued alone. On the contrary, by their joining in a common suit and injunction bond, each and all of those plaintiffs undertook that what may be decreed against each or any of them, shall be paid by him or them, against whom it is decreed, or that the others will pay it. Therefore each one of the obligors in the injunction bond is surety for each and all of the others; and, in respect to this debt, they, severally and as a body, engage with Joyner and Ferrall, that they will make the liability of any one and each of the plaintiffs in the suit a common

one upon them all. They sink their character of co-sureties with Joyner and Ferrall for Mrs. Hawkins, and assume the new one of joint and several sureties for Hawkins himself to Joyner and Ferrall. Therefore, those of the sureties, who joined in the bond with Hawkins for the injunction between them and the other two original sureties, Joyner and Ferrall, thereby made this debt their own, because it was exclusively a debt of Hawkins to those persons, and he was bound (520) to pay them the whole of it without abatement. They were endeavoring to aid Hawkins in throwing the whole loss of it upon Joyner and Ferrall; and in doing so they took the risk, in case of failure, of the whole loss falling on themselves, as it has done.

We are clearly of opinion that the plaintiff's construction of the deeds of trust to Pettway is the proper one. At law a party, who claims under an indemnity, must necessarily shew that he has been damnified; for, until that, he has no right to the money, and the law will not trust him with the application of it, as he might not make it, and then the original debtor would still be bound for the demand. But there is no such impediment to the action of the court of equity, for here the application of the money to its ultimate destination may, under the direction of the Court, be immediate, without passing through the hands of the party indemnified. And as it is manifestly just, that one, who holds a fund for the indemnity of another, should not keep it back to the prejudice of the other, and to serve no good purpose of the owner of the fund, or of the party entitled to the indemnity, there can be no plainer equity, than that which compels him to apply it promptly. The trust is to be executed in the spirit in which it was created, for the equal benefit of all the *cestui que trusts*, and not so, by sticking to the letter, as to exclude one, merely to enlarge the dividend of another. It is true that Gary and Simmons, and all the other plaintiffs in the former suit, who gave the injunction bond, are principals to the present plaintiff, who became the surety of all of them jointly; and therefore he could look to Gary alone. But he could not do so in conscience, any more than he could claim the whole indemnity from Simmons. It would not be right and equitable to act so by either; but he is properly endeavoring to obtain from each a contribution precisely in the same proportion, in which in equity they would be decreed to pay the debt, as between themselves, taking into consideration the insolvency of the principal, Hawkins, and some of the co-plaintiffs. Still there will probably be a deficiency in the assets of the Simmons' to pay their

shares, which will, of course, fall on Gary, who is bound, as long as he has the means to protect the plaintiff from (521) ultimate loss. We should thus have thought, if the question was upon the first provision of the deed, "to save W. W. Daniels harmless." But the maker of the deed seemed to be aware of the keen casuistry of losing creditors and sureties, and to remove all doubt of his intention, he expressly provides for the relief of those sureties, "who may be threatened with loss." Therefore the proper proportion of the trust fund, to which the plaintiff would be entitled against Simmons, if he had paid the debt, must be ascertained, and the trustee directed to apply it in exoneration of the plaintiff.

We do not perceive any misapplication of the funds in the hands of Joyner, as receiver, according to his answer, inasmuch as the debts, to which he has applied that money, are the common debts of all the sureties, whereas we have seen that the present debt, as far as Joyner and Ferrall are concerned, has been made the separate debt of the other parties, though among themselves, as a portion of the original sureties, it is still to be regarded as the debt of the principal. But be that as it may, this fund furnished no reason for keeping up the injunction, for two reasons. One is, that Joyner is to administer it under the direction of the Court, which appointed him to the office of receiver; and there the plaintiff's application will be properly made. The other is, that the answer states there is nothing in hand from it, and the defendant ought not to be tied up until it can be collected. Let the plaintiff pay the debt now, as it is due; and if he be entitled to anything from the receiver when the fund comes into court, he will get his share. The same may be said in respect to the residue of the fund received from Purnell. When in hand, it must be applied. Of course the plaintiff is entitled to his decree against Gary and Bond; and the extent of the decree against the former will depend upon the result of an inquiry (if asked for) as to Bond's ability to discharge his own share of the liability.

Our opinion on the appeal from the order dissolving the injunction is, that it is not erroneous; and upon the (522) hearing the decree is to be according to the directions herein given.

PER CURIAM. DECREED ACCORDINGLY.

JOHN HOWELL et al. *v.* MARY HOWELL et al.

1. In order to obtain a writ of sequestration and *ne exeat* at the instance of the remaindermen against the tenant for life of personal property, it is not sufficient that the remaindermen state their fear that the property will be removed beyond the jurisdiction of the State or destroyed; they must also show reasonable and sufficient grounds for such fears.
2. An executor may, (and it is his duty so to do,) before he assents to or delivers a legacy to a tenant for life of chattels, require such legatee to sign an inventory of the chattels, admitting their reception, and that he is entitled to them only for life, after which they will belong to the person in remainder.
3. A bequest of a chattel to A for life, and after A's death to B, does, upon the assent of the executor, vest the *legal* interest in the remainder in B.
4. And if B be a married woman, such legal estate may be sold by her husband, though he may die, leaving his wife surviving him, before the expiration of the life estate.
5. A husband can not however, assign his wife's *equitable* interest in a chattel, in which she has not the right of immediate enjoyment.

Cause removed from the Court of Equity of CLEVELAND, at Fall Term, 1843.

This cause came on, upon a motion to set aside the (523) sequestration and *ne exeat,* which had been ordered by a Judge out of court upon the bill and affidavit of the plaintiffs. The following is the case as presented by the bill and answers.

John Howell, by his last will and testament, devised the whole of his estate, both real and personal, to his wife, Mary Howell, during her life or widowhood, and after her death or widowhood he points out how the property shall be divided. Joshua Howell and John Howell are the executors of the will, and assented to the bequests to Mary Howell. The bill is filed to compel Mary Howell and the other defendants to give security for the forthcoming of the property upon the termination of the life-estate. The plaintiffs state "that Mary Howell is old and infirm, easily imposed on by shrewd and designing men—that she is not now managing the estate, so as to secure the rights and interests of the remaindermen—that Jesse Spurling, the father of some of the plaintiffs, and husband of Elizabeth Spurling, one of the plaintiffs, sold and conveyed to one Joshua Beam all the interest of his said wife Elizabeth, in the negro Jude and her children, and that since his death, the said Beam hath taken possession of the negroes; and the plaintiffs are *fearful* that the said Beam will make way with, dispose of, or convey the said negroes beyond the jurisdiction of the Court. The

bill further states that Mary Howell has delivered over the whole of the property to one John Tucker, who manages it for her, and has the negroes in possession or has hired them out; and that one of them is hired to work in a gold mine, whereby his value will be impaired, and that they have been informed that said Tucker has made some efforts to remove the negroes out of the State; that he claims as his own some of the other property belonging to the estate—that he is a cunning, artful, and tricky man, and that the property is not safe and secure under his management and direction. The bill further charges that Betsy Howell, one of the daughters, and a legatee under the will of John Howell, intermarried with one Clayton Ledford, who has got into his possession the negro (524) woman Minty and her four children, and claims them as his own; and the plaintiffs are *fearful* that he will make way with the negroes, so as to defeat the remaindermen of their rights. The bill then charges that Mary Howell is committing waste on the lands devised to her for life, by permitting her servants to cut down and destroy the timber, trees, etc."

The defendants file separate answers. Mary Howell denies expressly that the estate in her hands has been mismanaged, or is wasting, but avers it is now more valuable than when she received it; admits that she has put into the hands of Ledford, who married Betsy Howell, the negro woman Minty and her four children, the eldest not more than six, he paying five dollars a year to her; that she has also hired to Joshua Beam the negroes bequeathed to Elizabeth Spurling, and that she does not believe either of them claims any interest in the negroes except as hires—denies she has, or that they have, as far as she knows, any intention to remove the negroes beyond the jurisdiction of the Court. And, as to the waste of the land, she avers that the tenant was put on it by Joshua Howell, one of the executors, and one of the plaintiffs. Ledford admits the possession of the negroes by hire, from Mrs. Howell, and Beam does the same, and each of them denies, that during the life of Mrs. Howell, they claim the negroes in any other way than as hirers under her, and reserves the question, as to what will be their title, after the death of Mary Howell. Joshua Beam admits he purchased the remainder in the negro Jude and her children, after the death of Mary Howell, from Jesse Spurling, the husband of the plaintiff, Elizabeth Spurling; and that he is *now* in possession, under Mary Howell's life-estate, having hired them of her. He denies any intention to remove the negroes beyond the limits of this State, or that he ever said so. John Tucker admits his agency under Mrs. Howell, and says

that the property has been well managed and is now more valuable, than when it came in his possession; denies all title to the property or any portion of it, except his annual (525) stipend, and all intention, or that he has made any preparation to remove it or any portion of it. The bill prayed a sequestration and *ne exeat,* which was granted. Upon the filing of the answers, replication was taken by the plaintiffs, the case set for hearing and transmitted to this Court.

No counsel for the plaintiffs.
J. H. Bryan for the defendants.

NASH, J. The principles, which govern a court of chancery, in granting *ne exeats or sequestration,* in cases of remaindermen seeking redress in cases of this kind, are fully laid down and established in the case of *Sutton v. Craddock,* 16 N. C., 134. Formerly, the court of chancery considered the remainderman as entitled, as a matter of right, to security from the tenant for life for the forthcoming of the property. But it was found that great oppression and injunstice were very often operated. Such security is not now granted, simply *quia timet,* but only when a case of danger is *shewn* to exist. Wms. Exrs., 859. *Toley v. Burnall,* 1 Bro. C. C., 279. The bill must shew, not only that the complainant fears the property is in danger, from some act or contemplated act of the tenant for life, but it must set forth the grounds, upon which the apprehension rests, that the Court may see that the applicant has good cause for claiming its aid.

In all cases of a devise of personal chattels to one for life, with remainder over, the tenant for life will be entitled to the possession of the chattels, upon giving an inventory of them, admitting their reception, and that he is entitled to them only for life after which they belong to the person in remainder. And an executor may exact such an inventory: indeed, it is his duty to take it before he assents to the bequest for life. *Slaning v. Styles,* 3 P. Williams, 336. *Luke v. Burnett,* 1 Atk., 471. In this case the executors assented to the legacies generally, as they set forth in the bill, without requiring any inventory from Mary Howell, the tenant for life, nor do they now ask for it. The plaintiffs charge in their bill no (526) specific acts of the defendants, upon which they ground their fears of the safety of the property, but such only as the tenant for life, and those actually in possession had by law a right to do. They do charge, it is true, that they fear the

property will be removed beyond the jurisdiction of the Court, but they produce no proof of acts done or declarations made by the defendants to sustain their allegation, and it is met by a full denial from all the parties defendant. Mrs. Elizabeth Spurling and her children are made parties complainant to the bill, upon two grounds: the *first,* that Jesse Spurling, the husband of Elizabeth, could not, during the continuance of the particular estate, dispose of the negro Jude and her children, so as to defeat his wife's estate; and, *secondly,* that Mrs. Spurling herself had but a life-estate in Jude, the remainder being in her children. And if either proposition be true, then the plaintiffs have a right to the aid of this Court in securing the property, for it is very evident from the answer of Joshua Beam, that his purchase from Jesse Spurling was of the negroes themselves, and not simply a remainder. There can be no doubt that the devise of the negro Jude, after the life-estate to Mary Howell, is in this State good, as an executory devise, and, upon the assent of the executor, vests the estate for life in the first taker, with a legal remainder over. It is, therefore, a vested remainder in the remainderman, and subject to all the liabilities of such an estate. This doctrine has been too long established in this State, and is sustained by too many decisions of this Court to be now disturbed or questioned. *Dunwoodie v. Carrington,* 4 N. C., 355; *Ingram v. Terry,* 9 N. C., 122; *Alston v. Foster,* 16 N. C., 337; *Jones v. Zollicoffer,* 4 N. C., 645. These cases establish the principle that an assent by an executor to a life-estate is an assent to the estate in remainder, and that the latter is a vested legal estate. The estate of Elizabeth Spurling, therefore, in the negro Jude was not an equity, nor a mere possibility, but a vested remainder in a chattel not consumed in the use, and therefore (527) capable of being assigned. *Burnett v. Roberts,* 15 N. C., 81. Could Jesse Spurling assign the negro Jude, so as to defeat the claim of his wife, Elizabeth? Mary Howell, the tenant for life, is still in being and Elizabeth Spurling has survived her husband. That a husband may assign every chattel interest of the wife, whether immediate or expectant, which from its nature is assignable, as if the interest was the husband's in his own right, is established in England by the highest authorities. 3 Thomas Coke, 333, *note* m. 1 Roper on Property, 236. The only exception to the rule is, where the property is so limited to the wife, that it can not possibly come into possession during the coverture. In *Burnett v. Roberts,* the husband had sold the property, absolutely, before the life-estate expired, and they both lived until after that event took place. In the present

case the husband died before the tenant for life, leaving his wife still living. Is the case thereby altered as to the operation of the principle? We think not. The Chief Justice, in delivering the opinion of the Court in the case last referred to, intimates very strongly that it would not; but the point, not arising, was not decided. The question was fully presented in the subsequent case of *Knight v. Leake,* 19 N. C., 133. William Hicks, by his will, bequeathed to his daughter Frances, for life, a negro girl named Grace, with remainder to her children. Frances, the legatee for life, was married to Moses Knight, who took possession of Grace and her child Bob, the subject of the controversy, with the assent of the executors. A judgment was obtained against Knight and Caleb Curtis and Daniel McIntosh; and the *fi. fa.* issuing on that judgment was levied on Bob. Mrs. McKnight, the tenant for life, was then alive, as well as her four children, who were entitled to the remainder in Bob. Two of these children, the wives of Daniel McIntosh and Caleb Curtis, were plaintiffs in the action.

At the sheriff's sale under the execution, the defendant
(528) purchased Bob; and the action was in detinue to recover him. It was contended on behalf of the plaintiffs, that the husbands, McIntosh and Curtis, had not such an interest, as was liable to be sold under a *fi fa.* The Court decided the rule of law to be, that "all vested legal interests of the debtor, which he himself can legally sell, in things, which are themselves liable to be sold under a *fi. fa.,* may be so sold." In this proposition, in relation to the case before them they assume, that the husband had such an interest as he could sell. In a subsequent passage they leave nothing to inference, but declare that a husband, *jure mariti,* has such an interest over the vested legal interest of his wife in a chattel, real or personal, of which a particular estate is outstanding, that he can sell such interest so as to transfer it completely to the purchaser. Such, the Court says, is not the effect of an assignment by a husband of his wife's *equitable* interest in a chattel, in which she has not the right of immediate enjoyment. It is perfectly well settled that a vested remainder in a slave, dependent upon the estate for life in another, is a vested *legal* interest. We hold, then, that Jesse Spurling had such an interest in the woman Jude and her children, as enabled him to sell and convey them; and that his vendee, Beam, acquired by his purchase, the transaction being freed from other objections, a complete title; and that Mrs. Spurling has no interest in them and consequently no claim to the aid of this Court. We are not unapprized that in some recent cases in the English courts of chancery, this

doctrine is denied as a principle of equity. Such, however, we consider as the settled law of North Carolina. It is much more important to the community at large, that the laws governing the transmission of property should be permanent and fixed, than how they are fixed. A contrary decision would unsettle the law, upon a very important subject, with which the profession is now familiar. We do not mean to say that, when satisfied a previous decision is wrong in principle, we are under any obligation still to proceed in error. But, (529) when a train of decisions in our own courts of Supreme jurisdiction, has established certain principles as law, we do not feel called on to repudiate them, because another tribunal, however high, has decided otherwise. We see no good reason in this case for disturbing a settled principle.

Have the children of Mrs. Spurling any interest in Jude and her children? We think they have not. Their claim rests upon the following clause in the will of their grandfather, John Howell: "And what shall come to my daughters, Elizabeth and Polly, give and bequeath them during their natural lives, and after their death to their children." If this clause is to be considered as governing the bequest of Jude, then the children have an interest, which it is the duty of the Court to protect. But it has no connection with that bequest. The bequest of Jude is a specific legacy, standing, as far as the children are concerned, by itself; but accompanied by specific bequests to all the other children of the testator. After making these specific bequests, the testator proceeds to dispose of the residue of his estate, upon the death of his wife: "And after my wife's death, the plantation whereon I now live to be equally divided between my four children" (naming them), "and the rest of my estate to be equally divided between my children" naming them, of whom Elizabeth was one). Then follows the clause in question. Its location and phraseology evidently confine its operation to the share of Elizabeth in the *residuum,* and has no bearing or effect on the bequest of Jude. The words "share" and "comes," could relate only to the share or portion of the *residuum,* to which Elizabeth might be entitled. Of what this *residuum* consisted, we are not informed, whether of land, other than the home plantation, or of negroes or other personal property. In this share of the *residuum,* in whatever it may consist, Elizabeth has but a life-estate, with remainder to her children. The time for its enjoyment, either to the mother or the children, has not yet arrived, as Mary Howell is still alive. And there is no prayer in the bill (530) that the latter should furnish an inventory of the prop-

erty that came to her hands, or is now in her possession. After gaining possession of the negro Jude by the three children, by contract with Mary Howell, the executor having assented to the legacy to her, Jesse Spurling had the right in law, if he did so, to sell the negroes to Joshua Beam, and the latter would acquire by such purchase a perfect right to them. If he did not purchase the absolute title, but only the life-estate of Mary Howell, the plaintiffs have no right to complain, inasmuch as he swears, he had no intention whatever to remove the negroes beyond the jurisdiction of the Court, and the plaintiffs have entirely failed to sustain their allegations by proofs.

Polly Howell intermarried with Daniel King, both are alive and plaintiffs in the bill. To Polly, the testator left a negro woman, Hannah, and she is included with Elizabeth Spurling in the before recited clause, as to her *share* of the surplus. We are not informed what has become of Hannah, but suppose she is still in the possession of Mary Howell. She and Tucker, her agent, both swear they have no intention, and never had, of removing the negroes, and there is no proof in contradiction.

The negro Minty is given by the will to the testator's granddaughter, Betsy Howell, who intermarried with Crayton Ledford. The answer of Mary Howell states that she had put the negro Minty and her children into the possession of Ledford, he paying her five dollars a year; and, as we understand it, she surrendered up to him her life-estate in those negroes. This she had a perfect right to do, and Ledford's title to them is complete, and he has a legal power to dispose of them as he pleases.

As to the two executors, John and Joshua Howell, they have no right to complain. They have not shewn by proofs that their property is in any danger, and the answers deny it.

The bill further charges that the defendant Mary Howell put tenants on the land, who have committed waste. The
(531) waste is denied by the answer, and not supported by the testimony.

Upon the whole we are of opinion that the complaint of the plaintiffs is unfounded, that the sequestration improperly issued and must be withdrawn, and the bill dismissed with costs, to be taxed against the plaintiffs, excepts the infants. In taxing the costs, the master will allow one Solicitor's fee to the defendant Beam, and one for all the other defendants.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Hurdle v. Riddick, 29 N. C., 89; *Arrington v. Yarborough,* 54 N. C., 78, 80, 81; *Cox v. Bank,* 119 N. C., 305.

FLORA MARTIN et al. *v.* LYDIA McBRYDE et al.

1. In a suit by several joint legatees against the executor for distribution of the fund out of which the legacies are to be paid, if one of the legatees be dead, it is good cause of demurrer that the personal representative of such legatee is not made a party, either plaintiff or defendant.
2. It is not sufficient to allege in the bill that such legatee has no representative, for it is the duty of the plaintiffs to procure a representative; nor does it make any difference that the plaintiffs are the next of kin and entitled to the share of such deceased legatee.
3. Where a bill is filed by persons in the character of legatees, and it neither sets out in its body the contents of the will, nor is a copy of it annexed, a demurrer by the defendants will be sustained, for the Court can not see that the plaintiffs are legatees.

This was an appeal from an order of the Court of Equity of MOORE, at Spring Term, 1845, his Honor, Judge *Pearson* presiding, overruling a demurrer, which had been filed by the defendants, and directing them to answer over. (532)

The plaintiffs state in their bill that William Martin died in 1819, having made his will in writing, in which he appointed several persons his executors, all of whom died intestate, except Archibald McBryde and Atlas Jones, who are also dead; that the defendant, Lydia McBryde, is the executrix of Archibald McBryde, and Samuel Lancaster, the other defendant, the executor of Atlas Jones. The will of William Martin was duly proved, and they state that a copy of it is annexed to their bill, which they pray may be taken as a part thereof. They allege that William Martin died, entitled to a large estate, real and personal, which came to the hands of his executors, and that, since the death of McBryde, a portion of it, to wit, two bonds have come into the possession of his executrix, the defendant, Lydia McBryde. They further state that they, together with Flora Martin, who is dead without issue and intestate, and without any representative, are the devisees and legatees under the will of William Martin. It appears, further, that Atlas Jones survived Archibald McBryde. The plaintiffs pray an account of the assets of Martin in the hands of the defendant Lydia McBryde, and a general account from the executors of A. McBryde and A. Jones. No copy of the will of Martin is attached to the bill, nor does any such copy appear among the exhibits of the case. A demurrer to the bill was filed by the defendant, Lydia McBryde, and overruled by the Court, from which, by leave, the said defendant appealed.

No counsel for the plaintiff.

J. H. Haughton, Mendenhall, Strange and *Winston* for the defendant, Lydia McBryde.

NASH, J. A demurrer is filed on the part of the defendant, Lydia McBryde. Several causes of demurrer are assigned, but as two of them are, in the opinion of the Court, decisive of the case, it has not been thought necessary to notice the others, and no more of the case, made by the bill, is stated, than (533) is required to shew the application of the demurrer.

The third special cause of demurrer assigned is, the want of parties. The bill alleges that Flora Martin is a legatee, under the will of William Martin, and that she is dead, and no person representing her is made a party. From the frame of the bill we are to suppose that, if legatees at all, they are jointly so. One object of a court of equity is to do complete justice to all persons interested in the matter in controversy before it. It is, therefore, a general rule that all persons interested in the subject ought to be made parties to the suit, either plaintiffs or defendants. This rule, however, admits of several qualifications, as where some of the parties are out of the jurisdiction of the Court, or where they are so numerious that it would be very inconvenient to make them all parties. Mitf. Pl., 164, 166. 2 Mad., Ch. 178. The bill will be sustained, if the excuse for not making them parties appears on the face of the bill. So, when a party interested is dead, his representative must be brought in, and, if there be none, he, who seeks a division of the fund, must procure a representative. *Branch v. Branch,* 5 N. C., 132; *Shaw v. Shaw, Ib.,* 334; *Bryan v. Green, ante,* 167; 2 Mad., Ch. 178. In this case it is shewn in the bill that Flora Martin is a legatee under the will. It is not sufficient to authorize the Court to proceed without her representative to state that he has none. The plaintiffs ought to have procured one. Nor is it sufficient that the plaintiffs are, or may be, her next of kin, and are entitled to her personal property. They are not the only persons interested in her estate. If there are creditors, their claims are of superior dignity and are first to be attended to. We would observe, the case comes before us, as by appeal, and there is no motion to amend by making parties or otherwise.

Another cause of demurrer has been assigned; that the bill is defective in its frame. A demurrer in equity is similar to one in law, and is an appeal to the Court, whether the defendant shall be compelled to answer the bill. It is for cause apparent upon the face of the bill. The plaintiffs have made the will

of William Martin a part of their bill, without annexing a copy, nor does the bill set forth any part of the con- (534) tents of the will, except the appointment of executors, nor that the plaintiffs are next of kin. The bill is therefore defective in its frame. We can not see, as the plaintiffs profess to shew, nor does the bill shew that they are the legatees of William Martin. If the will had been set forth, it might have appeared that, under it, they have no interest.

The interlocutory order, overruling the demurrer, ought to be reversed, the demurrer sustained, and the bill dismissed without prejudice.

PER CURIAM. ORDERED TO BE CERTIFIED ACCORDINGLY.

Cited: May v. Smith, 45 N. C., 199; *Mitchell v. Mitchell,* 132 N. C., 352.

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LEONIDAS CHRISTMAS et al. *v.* PETER MITCHELL et al.

1. An inquisition which merely states that the party is "of unsound mind," does not show, even *prima facie*, that he is an idiot.
2. But any inquisition as to lunacy or idiocy is but presumptive evidence, in a suit *inter alias partes*, and may be rebutted by contradictory evidence.
3. The ancient presumption of law that one who was born deaf and dumb was an idiot, does not now exist.
4. If it did, it might be repelled by evidence.
5. Where one was born deaf and dumb, but had his intellectual faculties, though these were not improved by the modern system of education for persons of that class: *Held*, that he was not within the exception of the statute of limitations, which only excepts him who is *non compos mentis*.
6. When a bill is amended, introducing new matter or a new charge against the defendant, the latter may make such defense to this new charge as if it were now the foundation of an original bill.
7. To enable the purchaser of a legal title, without notice of an equity affecting it, to avail himself of that defense in a court of equity, it must not only appear that he had no *actual* notice of the equity, but, also, that he could not, by the ordinary means which a prudent man would have used, have obtained information of such equitable encumbrance.
8. Therefore, where executors, to whom slaves were bequeathed in trust, voluntarily conveyed them to one not entitled, and the person claiming to be purchaser without notice from the person so not entitled, knew that the slaves were devised to the executors but did not know how the executors conveyed to his vendor: *Held*, that he ought to

have examined the will and the conveyance from the executors, that he was bound by their contents, in construction of a court of equity, and therefore was answerable for the equities attaching to the legal estate, as shown either by the will or by the deed of conveyance.

9. The doctrine of constructive notice applies in this State, not only to lands, but also to slaves, where a deed of conveyance is required in all cases except where the slaves are actually delivered and the money or money's value paid, or in the peculiar case of a gift of a parent to a child, accompanied with the death of the parent without a will.
10. This doctrine of constructive notice applies, also, as to other subjects of personal property, where a purchaser knows his vendor derived his title under a deed, will or other writing.
11. Gross negligence on the part of him who deals with an executor will, in equity, be considered notice of the abuse of the executor's authority.

This cause was transmitted, by consent of parties, from the Court of Equity of WARREN, at Spring Term, 1845.

(536) The following case now appeared upon the pleadings and evidence; the case having been before this Court at a former term, when, certain questions having been decided, the Court ordered the case to be remanded, with leave for the plaintiffs to amend their bill.

The original bill in this case was filed in 1833, and such proceedings were had therein, that this Court, at the June term, in 1837, made a declaration of the rights of the parties, as they were then presented. At the same term a decretal order was made, remanding the case to the Court of Equity for Warren County, with leave to the plaintiffs to amend their bill. At the Fall term, 1842, of Warren Court, the bill, as it now appears, was filed. It appears that Buckner Davis died in the year 1820, having made his last will and testament, wherein he devised and bequeathed as follows: "I appoint my friends, Gov. James Turner, Peter R. Davis and Stephen Davis, executors of this my last will and testament, and guardians for my children, as hereafter named. I give and devise to my said friends, James Turner, Peter R. Davis and Stephen Davis, jointly and severally, all the estate of which I may die seized and possessed, be it real, personal or mixed, to have, use, regulate and manage and control, without accountability or responsibility to any of my said children hereinafter named. And, accordingly, I give to my said friends, jointly and severally, full power and authority to sell, lease, hire and to dispose of the whole of said estate or any part of it, and jointly to execute good, valid and sufficient titles thereto, in fee simple, *to the purchaser or purchasers,* in the event of their, or either of

them, deeming a sale of any portion of it necessary to the welfare of my children hereinafter named." The testator by another clause in his will, recommended to his executors to afford to his daughter, Betsy C. Christmas, the mother of the complainants, a support out of a tract of land therein named, and certain negroes, whose names are set forth in the will, and by a subsequent clause he recommends to his said friends, after the death of the said Betsy C. Christmas, to give the whole of said negroes and other property to her children. After the death of said Buckner Davis, the will was properly (537) proved, and the two Davises alone qualified as executors thereof. James Turner never did in any manner interfere with the estate of the testator, and died in 1824. The bill charges that Peter R. and Stephen Davis, received the said negroes, not for their own use and benefit, but in trust for Betsy Christmas, and, after her death, for the plaintiffs who are her children. And they charge that the said Peter R. and Stephen Davis, in violation of the trust reposed in them, conveyed said negroes to Thomas H. Christmas, but without any valuable consideration, as appears by the deed made by them to him, and that he, Christmas, therefore held them in trust for the plaintiffs; that certain of the negroes, whose names are set forth in the bill, were subsequently sold, either by the said Christmas, or by the sheriff, under executions against him, to the defendant Peter Mitchell, who purchased with full notice of the title of the plaintiffs, and that said Christmas held as their trustee, and that therefore said defendant holds them in trust for their use and benefit. It states, further, that Peter Mitchell has sold one of the said negroes by the name of Tom, to persons who have carried him out of the State, and that he received for him $800, and that their mother, Betsy C. Christmas, is dead, and that Thomas C. Christmas is dead, insolvent, and intestate, and that no one has or will administered to him. It prays that the defendant Mitchell may be decreed to convey to the plaintiffs the negroes so conveyed to him, with their increase, and account with them for their hires; and also to account with them for the value of Tom. It alleges further, that Leonidas Christmas is a lunatic of unsound memory. Peter Mitchell, in his answer, alleges that he purchased the negroes mentioned in the bill, at public auction, in the town of Warrenton, of Thomas H. Christmas, and gave for them a full and fair consideration, in 1827, and immediately took them into his possession, and has so held them ever since, except Tom, whom he sold; that, at the time of his purchase and before, he had understood that the negroes had been in the possession of Buckner

(538) Davis, and, after his death, that they came with the rest of his property, into the hands of Peter R. and Stephen Davis, his executors. From general rumor he had understood that Buckner Davis, by his will, had given all his property to his executors, and left his children entirely dependent on them. But of the will itself he had no knowledge; he had never seen it, or heard it read, nor had he any knowledge of its contents, and he denies any knowledge of the title of Buckner Davis to the negroes. He admits that, before his purchase, he knew that the executors had delivered the said negro slaves to Thomas H. Christmas, and that he was in possession of them as his own property, but he did not know, nor had he any information of the consideration, upon which the said delivery had been made, or whether the transfer had been made in writing, or by manual delivery, or in what other mode. He had understood that the whole of the negroes of the testator had been given to the executors, and he did not doubt, that in their character, as such executors, they had, by law, full power to dispose of the same; and that he was confirmed in this belief, by the fact that the executor, Peter R. Davis, was present at the sale, and persuaded him to purchase them. He denies that he had any notice of the plaintiffs' equity, unless, in the opinion of the Court, the facts above set forth amount to such notice, which he is advised they do not, and he therefore insists that he is a purchaser for the full and valuable consideration paid, without any knowledge or notice of the equity of the plaintiffs, and he claims the benefit thereof, as if the same were specially pleaded in law. The defendant further insists, that, if the transfer or conveyance by the executors to Thomas H. Christmas was a violation of their duty as trustees, it is one for which they are personally liable, and which does not at law or in equity affect his title. The answer admits the sale of Tom at the price set forth, but alleges that the sale was made in Richmond by an agent, and that if held to account for his value, he ought to be allowed the expenses of the sale. The answer denies that Leonidas Christmas, one of the plaintiffs, is a lunatic, or of unsound mind, but that at and before (539) the time of his coming of age, he was in the possession of a sound and reasonable understanding. The defendant denies that this is an amended bill, but affirms that it is in its nature an original bill, as to him, and does not relate to any time previous to the actual exhibition thereof. He therefore claims the benefit of the statute limiting the time within which actions should be brought, and for quieting titles to slaves, as if the same had been specially pleaded in bar. The answer

further alleges that the plaintiff, Buckner Davis, has conveyed to Peter R. Davis and Stephen Davis, all his interest in the said slaves, and prays that the conveyances may be produced. The death of Thomas H. Christmas, insolvent and intestate, is admitted, and of Mrs. Davis, the mother of the plaintiffs, and that they are her only children. The defendant White denies that he has or ever had any interest in the negroes purchased by Peter Mitchell, that the latter bought them for himself, and not for the firm of Mitchell and White.

Replication was taken to the answers, and the cause, being set for hearing, was removed by the parties to this Court.

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

NASH, J. There is no controversy at this time between these parties, as to the title of Buckner Davis, the grandfather of the plaintiffs, to the negroes in question, or as to the character in which they were held by the defendants, Peter R. and Stephen Davis, his executors. Upon a former occasion, the Court has declared in this case that they did belong to Buckner Davis, and not to his children, and that the executors held them in trust for Mrs. Elizabeth Christmas, during her life, and after her death, in trust for the plaintiffs. The questions now presented for our determination are: First. Is Peter R. Davis a purchaser for a valuable consideration, without notice of the plaintiff's equity. Secondly. Is the plaintiffs' claim barred by the statutes of limitation. And thirdly. Was Leonidas Christmas, at the time he came of age, an idiot or (540) lunatic, or person of insane mind, so as to come within the exceptions contained within the acts.

Upon the last point the plaintiffs have produced in evidence the inquisition of a jury, duly ordered by the County Court of Warren, and duly summoned by the sheriff, who say that "we believe him to be a man of unsound mind," etc. This inquisition is imperfect, in not stating when the mind of Leonidas Christmas became unsound—whether it was before he came of age or after. They do not find him an idiot; which, if unexplained, might be considered as existing with his birth, but of unsound mind, which may be produced by various causes, and exist at different periods, and is not, when it does exist, permanent in its character. It is therefore insufficient in itself, and does not decide one important point referred to the jury. But if there were no objection to the inquisition, it would still be open to be rebutted by the defendants by contradicting evi-

dence. It is itself, but presumptive evidence to the Court, of the fact it alleges. *Armstrong v. Short,* 9 N. C., 11. The plaintiffs and defendant Mitchell, have, therefore, introduced evidence on this point. The witnesses, on the part of the defendant, are Jane Green, Tabitha Jordan, Lewis Y. Christmas, James W. Jordan, E. W. Best, Thomas E. Green, Dr. P. C. Pope; and the latter is examined by the plaintiffs to the same point. All these witnesses say Leonidas is not an idiot, but do not think him capable of attending to business, requiring information. The two first say he is not capable of doing any business, because he can not understand. Leonidas, it is admitted, has been deaf and dumb from his birth, and is therefore ignorant and uninformed, no efforts having been made to instruct him. But all the other witnesses unite in saying his mind is naturally good, and the testimony of Lewis Y. Christmas and Dr. Pope is very strong and satisfactory. The former says, I don't think he labors under any mental infirmity, but owing to his entire deafness, he is incapable of any business. Again he says I think he could be learnt any mechanical business, but owing to his entire deafness, he could not be
(541) made to understand any intricate business, such as law suits, or things of that character. Dr. Pope says, "I know him well enough to know he is not an idiot; he is deaf and dumb, and the amount of his information is very small, but I believe he has a natural capacity to learn, but there have been no pains taken to instruct him; therefore, I think him incapable to transact the ordinary business of life." With these two last witnesses, substantially agree Mr. Best, Mr. Green and Mr. Jordan. The expression used in our statutes for the protection of persons of this description is *non compos mentis.* Such persons are not barred by the statute, until three years after coming to sound mind. According to *Lord Coke,* 1 Inst., 405, page 246, the term, *non compos mentis,* embraces defects of mind of four sorts: 1. An idiot, one who is an idiot, or of non sane mind from his nativity. 2. One who wholly loseth his memory and understanding, by sickness, grief, or other accident. 3. A lunatic who sometimes hath his understanding and sometimes not; and 4, he who by his own vices, for a time depriveth himself of his memory and understanding. The mental infirmity of Lenoidas, if it exist at all, is of the first description, which has relation to the power and capacity of the mind to receive instruction, and not to the amount of instruction or information actually received. With the exception of two, all the witnesses agree in the ability of Leonidas to learn, if proper efforts had been made. Formerly,

one who was born deaf and dumb, was considered, in presumption of law, an idiot. 1 Hale P. C., 34. This presumption of law, if it still exists, like every other presumption, yields to proof to the contrary, and *Lord Hardwick* decreed an estate to one born deaf and dumb, upon his answering, properly, questions put to him in writing. *Dickenson v. Blissott,* 1 Dick., 268. But science and benevolence have together rectified the public mind, as to such persons, and it is no longer, in common understanding, any evidence, that an individual is an idiot, because deprived from his birth of the power of speech and hearing. No one, who has witnessed the wonders worked in modern times, in giving instruction to unfortunate persons in this class, would, after hearing the testimony in (542) this case, doubt that Leonidas Christmas might have been instructed, not only in the mechanic arts, but that his mind might have been enlightened to receive the high moral obligations of civil life, and the still more profound truths of our holy religion. We are constrained then to say, that he does not come within the exception contained in the statutes.

The next inquiry is, do the statutes of limitation protect the defendant? The evidence shows that Leonidas Christmas was the oldest of the children of Elizabeth C. Davis; and that he was born 20 November, 1817, and of course that he came of age 20 November, 1838. At October Term, 1842, of Warren Court of Equity, leave was granted to plaintiffs to amend their bill; and the present bill, called in its caption an amended bill, was filed; at which time Leonidas had been of age near four years, and is consequently barred by the statutes.

According to the same evidence, Buckner Christmas was born 30 June, 1819, and became of age 30 June, 1840. Of course not more than two years and four months had elapsed after he came of age before this bill was filed, and the other plaintiffs are younger than he is. They then are not barred, because at the time the defendant, Mitchell, purchased they were infants; and the statute had never commenced running against them or any person, under whom they claim. The defendant, Mitchell, contends, that this is not an amended bill, but an original one, and that the statutes of limitations must be computed from the filing this, and not of the former bill. The plaintiffs contend it is an amended bill, and constitutes, with the original, one suit. In the view we have taken of the subject, it is not of much importance to decide this question. We are of opinion, however, that it is an amended bill. But it introduces new matter, or rather, a new charge against the defendant, Mitchell. It is true that the deed of release or bargain and sale, executed by the executors,

Peter R. and Stephen Davis, was an exhibit in the origi-
(543) nal bill, and constituted a part of it; but the object of the bill was to obtain from Mitchell and White the reconveyance of the land mentioned in the deed, and prayed no relief against Mitchell, as to the negroes. This bill makes this charge, and prays relief against him upon this ground. When a bill is amended, the defendant may make such defense as he thinks proper. Red. P., 323. So far, then, as this bill seeks relief against Mitchell on account of these slaves, it is an original charge brought against him for the first time, and he is entitled, as to the statute of limitations, to consider it an original bill. But we repeat, it is an unimportant question here, because it introduces a new charge against the defendant, Mitchell.

It is lastly insisted on by the defendant, Mitchell, that he is a purchaser for a full and valuable consideration, without notice of the equity of the plaintiffs. If this be so, he will be entitled to be quieted in his possession of the slaves; for in that case his equity will be equal to that of the plaintiffs, and they will not be entitled to the aid of the Court.

It can not be questioned that Thomas H. Christmas, from whom he, the defendant, Mitchell, purchased the negroes, knew of the equitable claim of the plaintiffs, and was a mere volunteer, and therefore held the negroes precisely as Peter R. and Stephen Davis did, in trust for the plaintiffs, but it does not therefore follow that the defendant, Mitchell, who is a purchaser for a valuable consideration, knew of their equity. And, indeed, his case is so far stronger than Thomas H. Christmas's, that he is not a purchaser from an executor, but from an individual, who was in the quiet possession of the slaves, claiming them as his own. Notwithstanding this, however, if he purchased knowing the fiduciary character, in which his vendor stood to the plaintiffs, or under such circumstances as ought to have put him on his guard and caused him to make inquiry, he will be held as a trustee for the plaintiffs. The defendant, Mitchell, admits that, at and before his purchase of the negroes in dispute, he had understood and believed they had been in the
possession of Buckner Davis, and were so at his death,
(544) and passed with the *rest of his property* into the possession of his executors, and that from common rumor he had understood that Buckner Davis had appointed Peter R. and Stephen Davis his executors, and had given them the whole of his property, and left his children entirely dependent upon them; but of the nature of his title he had no more knowledge than of the contents of his will. He further admits, that before and at the time of his purchase, he had understood and believed

that the said executors had *delivered* said negro slaves to Thomas H. Christmas, and that they were in his possession, but upon what consideration, or whether they were conveyed by deed or merely by delivery, he did not know, but doubted not that, as executors, they had by law full power to dispose of them.

It has been argued before us, that as Thomas H. Christmas dealt with and took from the executors the negroes in dispute, Mitchell had a right to suppose the executors were rightfully disposing of them. There can be no doubt but the power of an executor over the assets is very large, both at law and in equity. And it is so, to enable him to execute the trust committed to him, and to prevent the inconvenience and danger, which would result to those dealing with him. If, therefore, the transaction is nothing more than a sale of a part of the assets for money advanced at the time, the vendee can never be affected by the fact that it was the intention of the executors to appropriate the money to their own use, or that they did actually misapply it. *McLeod v. Drummond,* 17 Ves. Jr., 153; *Kean v. Roberts,* 4 Mad., 190. In other words, the purchaser is not obliged to look to the application of the purchase-money. But here, Thomas H. Christmas is not a purchaser, but a mere volunteer, and held the negroes in trust for the plaintiffs. Peter Mitchell denies he had notice, *in fact,* of the equity of the plaintiffs. Do not the circumstances, admitted by him in his answer, together with others appearing in the case, fix him with implied notice; are they not such as would have put a man of ordinary prudence upon an inquiry as to the title of the property he was about to purchase? Among the exhibits filed in the (545) case, is a deed of trust given by Thomas H. Christmas to Thomas Bragg, dated 9 March, 1827, to secure to Peter Mitchell and John White a debt due to them. In the answer to the original bill filed by the defendant, Mitchell, he admits that this deed was made by his request. It conveys a tract of land, which is described by metes and bounds; the deed then as a further description states, "which land the late Buckner Davis, by his last will and testament, left to the use and support of his son, Peter M. Davis." Although, then, the general rumor in the neighborhood was, that Buckner Davis had willed to his executors all his property, and left his children dependent on them, here was direct notice to the defendant, Mitchell, that such common rumor was false, that Buckner Davis had not acted the unnatural part attributed to him; that he had not devised all his property to his executors, and left his children destitute; that he had placed his land in their hands as trustees for Peter M. Davis, one of the children. We will not say this

deed was notice to Peter Mitchell of all the trusts in the will, but we do say, it was sufficient to put him on his guard, and impose upon him the duty and necessity of inquiring into the title of his vendor and of the executors. *Maples v. Medlin*, 5 N. C., 219. But again: another exhibit in the case is the deed from Peter R. and Stephen Davis to Thomas H. Christmas. The doctrine of constructive notice arises out of the duty, as an act of common prudence, in every purchaser, to see that his vendor has *prima facie* a good title; and, therefore, he will be affected with notices of the contents of such deeds or documents, as the vendor must produce to make out his title. Hence, Mitchell should, in this case, have called for the conveyance from Buckner Davis's executors. That deed states that the testator had disposed of the negroes by his will, as his property, and that the executors gave them up, and thereby conveyed them to Christmas upon a claim of property by him, which, upon the face of the deed was manifestly unfounded in law, and to which the executors ought not to have yielded. The
(546) Court has heretofore so declared upon that deed, and that Christmas became a trustee for his children, upon the face of his own title, having, without any consideration, taken from the executors a deed for their testator's property, stated in the deed to have been bequeathed by the testator. In the same manner, and for the same reason, it would have been actual notice to Mitchell if he had seen it; and in law, it is constructive notice of its contents, and by consequence of the contents of the will, if in law he ought to have called for it, in order to make out a good title. That it was so necessary, we think clear. If Thomas H. Christmas had purchased the negroes, and could have shown that to Mitchell, then he would have had an apparent title, as slaves can pass in this State in that mode. But such was not the case; he was a mere volunteer, and had not had the possession one year. Therefore his deed was indispensable, to give him any appearance of title, under the executors of Buckner Davis, from whom Mitchell admits he knew Christmas claimed. It is said, indeed, that this doctrine of constructive notice applies only to real estate, because that can not pass by parol. But slaves are within the same reason, in those cases in which a good title *inter vivos* can be made only by deed, to wit, gifts, which was the case here. Besides it is a mistake to suppose that it does not apply to all cases of personalty, where a purchaser knows his vendor derived his title under a deed, will, or other writing. He must look to these documents themselves, and not trust to any representation of the party. This is fully established in *Hill v.*

Simpson, 7 Ves. Jr., 152. In that case, Elizabeth Smith, by her will, bequeathed to her executors all her personal estate, securities for moneys, goods and chattels, in trust for certain legatees, among whom were the plaintiffs, and appointed the defendants, Simpson and Wright, her executors. At the time of her death, certain stocks and annuities were standing on the books of the bank, in the name of John Smith, of whom Elizabeth Smith was the executrix. Simpson alleging the stock to be his, by the will of Elizabeth Smith, transferred it to the defendants, Moffat & Co., his bankers, as a security for such money as he then owed them, or might thereafter (547) owe them. The bill was filed against the executors and against Moffat & Co. to compel a reconveyance of the stock. The bankers denied that at the time of the transfer they knew or suspected the stock did not belong to Simpson, absolutely, either as executor or devisee of Elizabeth Smith. There was no evidence in the case. The master of the rolls, in closing his opinion, observes, "Hitherto I have supposed the assignee of the executor have seen it was not true; common prudence required that they should look at the will, and not take the executor's word, as to his right under it. If they neglect that and take the chance of his speaking the truth, they must incur the hazard of his falsehood. The rights of third persons must not be affected by their negligence. I do not impute to them direct fraud, but they acted rashly, incautiously and without the common attention used in ordinary course of business. It was gross negligence not to look at the will, under which alone a title could be given to them." This case decides two principles, one of which is important in the one before us; the one, that a general pecuniary legatee has a right in equity to follow assets, and the other, that gross negligence, on the part of him, who deals with an executor, will in equity be considered notice of the abuse of his authority, although in the transfer of personalties. The master of rolls uses very strong language. We will again repeat we are satisfied the executors in this case acted under an honest mistake, and that when Mr. Davis, at the sale of the negroes, assured the defendant, Mitchell, he might safely purchase, he honestly believed so, nor would we impute to the defendant, Peter Mitchell, anything more than gross negligence. He knew of the existence of Buckner Davis's will; he ought to have examined it, and not relied upon the representation of the executor of Christmas; if he had so examined, he would have seen that the executors were but trustees, and could not, ample as their powers were, rightfully alienate the fund entrusted to them, but for the purposes of the

(548) trust. He ought to have called on Thomas H. Christmas to exhibit to him his title to the slaves, if he had any; if he had, he would have found that he occupied precisely the position of the executor, and held the negroes, subject to the same trusts. Mr. Mitchell, then, has been guilty of gross negligence, as, in equity, renders him chargeable with notice of the equitable rights of the plaintiffs, and he holds the slaves in trust, for them (1 Mad. Eq., 288; *Scott v. Tyler,* 2 Dick, 725) with the exception of Leonidas Christmas, whose claim is barred by the statute of limitations. Peter Mitchell is not a trustee created by an act of the parties, but declared so by equity, in which case the statute is a bar. *Falls v. Torrence,* 11 N. C., 412; *Edwards v. University,* 18 N. C., 325.

The defendant, Peter Mitchell, in his answer, calls upon the defendant, Peter R. Davis, to file two certain deeds executed to him by the plaintiff, Buckner Christmas. Two have been filed by him, and we are to presume they are those called for, as no suggestion to the contrary has been made. We have examined them, and find they have no effect or bearing upon the case now before us.

There must be a reference to the Master, to take an account of the hires of the negroes in the possession of the defendant, Mitchell, and in taking said account he will allow the defendant all just charges for raising the young negroes, also the hire of Tom, to the time of his sale, the price at which he sold, and the expense incurred by the defendant in making the sale; the bill is dismissed as to White with costs.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Parker v. Davis, 53 N. C., 462; *Dowell v. Jacks,* 58 N. C., 420; *Cogdell v. Exum,* 69 N. C., 466; *Ruffin v. Cox,* 71 N. C., 256; *Martin v. Young,* 85 N. C., 158; *Gill v. Young,* 88 N. C., 61; *Outland v. Outland,* 118 N. C., 141; *Gillam v. Ins. Co.,* 121 N. C., 373; *Reynolds v. R. R.,* 136 N. C., 349.

(549)

AARON CHRISTMAN et al. *v.* THOMAS B. WRIGHT et al.

A guardian, having personal surety for a debt due to his ward, may exchange that personal for real security; and, if he does it *bona fide*, he is not responsible to his ward. And if this real security should prove insufficient, the ward can not resort to the sureties in the original bond for the debt.

Cause transmitted from the Court of Equity of SURRY, at Spring Term, 1845.

The following facts constitute the case:

The plaintiff, Christman, was the guardian of his brother, Moses Christman, and, as a part of his estate, had in his hands the bond of Thomas B. Wright, one of the defendants, to which Armstrong and Martin, the other defendants, are sureties. At November Term, 1838, the said bond was by the plaintiff given up to the defendant, Wright, who, at the same term, executed and delivered to the plaintiff his bond for the amount of the first, without any surety, but executed a deed of trust for a tract of land called Mount Airy, to one Jackson Williams, to secure to the said Christman the payment of the said last-mentioned bond. At the time this second bond and the deed of trust were executed, several judgments had been obtained in the County Court of Surry, of which Armstrong, the defendant, was clerk, and of the existence of which he was apprised, and under these, or some of them, Mount Airy was sold. Other judgments to a very large amount were obtained in other courts against the said Wright. At the time this arrangement took place, Wright was in the possession of a very large property, which, upon sale, produced upwards of $40,000, all of which was sold, and left Wright entirely insolvent. No part of the property of Wright was appropriated to the payment of the plaintiff's debt or any part of it, nor did he make any effort beyond taking the deed of trust, to subject any portion of it to the payment of his claim. Moses Christman is dead, and the other plaintiff, Hayne, is his administrator. The plaintiffs charge, that Christman was induced to give up the bond, which he held upon the defendant, Wright, and to make (550) the arrangement he did in November, 1838, through the fraud of the defendants, particularly of the defendant Armstrong; that he and Martin, becoming acquainted with the heavy responsibilities of the defendant, Wright, and being alarmed for their own safety, conspired together with Wright to induce him to give up the bond, in which they were sureties, and take the single bond of Wright, secured by the deed of trust; that Armstrong knew of the judgments obtained in Stokes and Rockingham, and also those in the county of Surry, and that the liens of the latter would overreach the deed of trust, and render it of no account to him; and Armstrong first proposed the arrangement to him, and, after much persuasion, he was induced to accede to it, from his entire confidence in the integrity of Armstrong, and of his knowledge of business, he himself being young and not much acquainted with business,

and he asks that the old bond may be set up, and Armstrong be decreed to pay it, Martin being insolvent.

The defendants, Armstrong and Wright, deny positively that the arrangement was made by their advice or at their suggestion. The defendant, Armstrong, alleges that, until Friday morning of Surry County Court, he had not any idea that Wright was at all embarrassed; that he was a man of large property. At that court judgments to the amount of $5,000 were entered up against him, and Wright told him he expected to be pressed and sued, as well for his own debts as for those where he was surety, and that he must tell Christman to bring his bond to court, and they, the obligors, must confess a judgment on it to Christman; that he accordingly did so inform Christman, who appeared not inclined to take a judgment, and, after some time, himself proposed, in the place of the judgment, to take a deed of trust on the Mount Airy estate. To this, he, Armstrong, positively refused his assent, observing, if he was to be held bound for the debt, a judgment must at that court be confessed by them all; that Wright was at first unwilling to give the trust, but yielded to the wishes of the plaintiff, Christman, who appeared to prefer the security of the trust,
(551) to the personal security of the defendants, Armstrong and Martin; and accordingly, at his instance, the arrangement was made, and the old bond surrendered up; that the Mount Airy estate was worth at least $10,000. He denies that he had any knowledge at that time of the Stokes and Rockingham judgments against the defendant, Wright; admits he knew of those obtained in the County Court of Surry; and avers that, to his belief, the plaintiff, Christman, also knew of their existence, for one of them was obtained by him; but he avers that he had the utmost confidence in the ability of the defendant, Wright, to pay them out of the money he believed he had on hand, and out of the debts due him. He alleges, that if the plaintiff, Christman, had lost his debt, it is by his own negligence; as, although the Surry judgments overreached the trust, yet he could easily have had the executions issuing on them levied on other property of Thomas B. Wright, of which there was an abundance, whereby the Mount Airy estate would have been freed from the lien and rendered available to discharge his claim. Whereas, he suffered those executions to be levied on it, and made no effort to relieve it, and suffered it to be sold; and the balance of Wright's property was sold to discharge judgments subsequently obtained. He further states, that in most of the judgments obtained at the November Term of Surry County Court, the defendant, Wright, was but a

surety to principals, who were themselves able to pay, or, in cases where he was co-surety with others, they were also able to pay; and that he was well justified in believing that Wright would be able to discharge his liability without any sale of property. He denies that it was at his suggestion, or that of Wright, that the arrangement complained of was made, or that either of them used any persuasion to induce the plaintiff to enter into it, or that he was guilty of any concealment whatever.

The answer of the defendant, Wright, is very much in accordance with Armstrong's. He states, that, becoming uneasy about his circumstances, he was anxious to secure his sureties in the bond to Christman, and told the plaintiff and his sureties, that, in order to secure them, they must all confess judgment on the bond; and that he explained to Christman (552) why he wished it, and why it would be better for him, Christman, to take the judgment than the trust, as he would thereby bind the property to all of them. But that Christman preferred the trust on the Mount Airy estate, taking his bond without a surety; that at the time the arrangement was made, he was possessed of property, which was afterwards sold under executions, most of them subsequently obtained, for more than $40,000. He denies all fraud or combination with the defendants to induce the plaintiff to enter into the arrangement; but that it was his own voluntary choice.

Boyden for the plaintiffs.
Morehead for the defendants.

NASH, J. The plaintiffs' claim to the interference of this Court is founded, not on the fact, that he has changed a security, which was substantial and valuable, for one that has proved illusory, but upon the alleged fact that he has been induced to do so by the fraudulent conduct of the defendants. We say the plaintiff, because we consider the administrator, Hayes, as a mere looker on, without interest in the ultimate result; for let this case eventuate as it may, the interest he represents is safe, as long as his co-plaintiff and his sureties are able to discharge the debt; provided at least the plaintiff, Christman, did not act *bona fide*. It is a question of loss between the plaintiff, Christman, and the defendant, Armstrong. At law Christman has no claim, and he can not expect this Court to deprive Armstrong of a defense which completely protects him; to take from *his* shoulders a load which the law has placed there, without making out a clear case entitling him to equitable relief; and the only evidence in the case is the answers.

His equity is fully and completely denied, by the answers. This is not the case of a defendant bringing forward new facts to set up an equity in himself, to repel that of the plaintiff; but one where the answers deny the facts, upon which the *whole* equity of the bill rests. The answers expressly deny all (553) fraud and combination and conspiracy to impose on the plaintiff, or that it was at their instance the arrangement was made. And the defendant, Armstrong, denies that he concealed from the plaintiff anything concerning the matter, it was his duty to disclose; he denies that he knew anything of the existence of the judgments in Stokes and Rockingham. Nor indeed does it appear, by evidence, there were, at the time the new arrangement was made, any such judgments in existence. Looking into the case as presented by the bill and answers, it is not difficult to satisfy ourselves as to the real truth of the matter. The plaintiff did not wish to collect the money due his ward. If he did, he knew it would be necessary to loan it out again, as he was obliged to keep it out at interest. He concluded landed estate was better than personal security; and, in general, his reasoning would have been right; in this instance, it has proved fallacious. It is in the province and duty of a guardian to exchange one security for a debt due to his ward for another, which he deems better, and if the latter should fail, it is no ground for recurring to the parties bound in the former. He can not be permitted to resort to his old security, and thereby saddle Armstrong, who is but a surety, with the loss he must himself abide.

PER CURIAM. THE BILL DISMISSED WITH COSTS.

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(554)

WILLIAM ACHESON et al. *v.* ROBERT McCOMBS et al.

A testator devised to his daughter, Jane, a negro woman, and to such children as Jane might thereafter have, the issue of the negro woman that might thereafter be born. The executors assented to the legacy; and afterwards Jane had two children, and the negro woman had issue, two boys, which were taken by Jane's husband out of the limits of this State, and have never been returned: *Held*, that the executors were not responsible for their loss; that their assent to the legacy to Jane vested the legal title in those in remainder whenever the contingency should happen, and that the executors therefore had no further control over the property.

Cause transmitted from the Superior Court of Law of MECKLENBURG, at Spring Term, 1844.

The facts of the case appeared to be these:

James McCombs, on 15 May, 1842, made his will and appointed the defendants his executors, and bequeathed as follows: "As for my negro woman Hannah, that I let my daughter Jane Kerr have the use of, and the increase of the said Hannah that she shall have after this date, I give to my daughter Jane's increase, that she may bear after this date, and the said Hannah to remain with my said daughter Jane until done bearing, then at her own disposal." The testator's daughter, Jane Kerr, after the date of her father's will, had issue two daughters, Mary, who married William Acheson, and Elizabeth Kerr, and they are the plaintiffs. The slave Hannah, after the date of the said will, had two sons. Hannah with her children remained as they were directed by the will to remain, with the testator's daughter, Jane Kerr. And the executors assented immediately to the said legacy. William Kerr, the husband of Jane, and the father of the two plaintiffs, Elizabeth Kerr and Mary Acheson, left his wife and went to unknown and foreign parts, and carried, or caused to be carried, (555) out of the jurisdiction of the court the said two negro boys, the children of Hannah. The bill seeks to subject the executors of the said will to account for the said two negro boys. The defendants in their answer insist that the testator's daughter, Jane, had a legatory interest in the slave Hannah, at least for her life, as it was uncertain whether Hannah would cease to have children before the termination of the life of Jane; and that the assent of the executors to her legacy for life in Hannah, who at that time had no children born that could pass by the said clause in the will, was an assent to all the subsequent takers of a legacy, limited over by way of remainder or executory devise, and turned all their estates that were in remainder, as well as the life-estate of Jane, into legal estates as soon as the contingency happened on which they rested.

Osborne for the plaintiffs.
Alexander for the defendants.

DANIEL, J. We think the law is as contended for by the defendants, and that it is a complete answer to the demand of the plaintiffs. *Dunwoodie v. Carrington,* 4 N. C., 355; *Alston v. Foster,* 16 N. C., 337; *Burnett v. Roberts,* 15 N. C., 87; *Etheridge v. Bell,* 28 N. C., 87. But this rule would not hold when, after the death of the first taker, the executor has by the will a trust to perform, arising out of the property, which must therefore be subject to his control, and of course

he must have the legal title. *Ibid.* S. P.; *Allen v. Watson*, 5 N. C., 189. By the will of James McCombs, his executors were not placed as special trustees of the increase of Hannah for the benefit of the after born children of the daughter, Jane Kerr. It is to be regretted that some person had not acted as next friend to Kerr's children.

But we must say that the plaintiffs have no equity to make the defendants account for the said negroes, which were vested in the plaintiffs without any further act by the executors.
(556) And the bill must be dismissed with costs.

PER CURIAM. BILL DISMISSED WITH COSTS.

Cited: Hurdle v. Riddick, 29 N. C., 89.

BENJAMIN RADCLIFF *v.* BARTHOLOMEW ALPRESS & CO.

1. When a bill states a fact which is in the defendant's own knowledge, he must answer *positively*, and not as to his remembrance or belief.
2. But as to facts not within his knowledge, he must answer as to his *information* and *belief*, and not to his information and hearsay merely, without stating his belief.
3. When he answers he hath neither knowledge nor information, his belief is unimportant, and he need not state it. It is sufficient for him to state that he does not know, nor has he heard or been informed of the facts charged in the bill, save by the bill itself.
4. An answer made by a principal upon the information of his agent in the matters in contest, which information he avers he believes to be true, is clothed with all the authority and has all the effect of one made upon the personal knowledge of the defendant.
5. When a fact has been found by a verdict of the jury in a suit at law, the losing party can not, without some explanation, have the matter retried in a court of equity.

This was an appeal from an interlocutory order of the Court of Equity of BUNCOMBE, at Spring Term, 1845, his Honor, Judge *Manly* presiding, by which order it was directed that the injunction granted in this case by a judge in the vacation should be dissolved.

The bill sets forth that the sons of the plaintiff, Hillary and Thomas Radcliff, lived in Georgia, and had purchased from the defendants, through their agent Ebenezer W. Tollman, a number of clocks, and, to secure the payment, executed and delivered to the agent, Tollman, their promissory note
(557) for the sum of $550; that after this note was delivered

to the agent without the knowledge or consent of the said Hillary and Thomas, or either of them, it was altered by affixing a seal to the signature of Hillary Radcliff, and striking out the word George and inserting the word Alpress; that, in this condition, it was presented to the plaintiff by Tollman for his signature, who, at the same time, told him his sons requested him to execute it, and that he, Tollman, accepted it only upon condition he should do so; that the plaintiff, accordingly, did execute it in the Spring of 1840, but that, at the time he did so, he had no idea that the forgery had been committed upon it in the manner set forth. The bill further states that the clocks, the consideration of the note, were defective, many of them totally worthless, and an entire loss to the sons of the plaintiff, besides freight, peddler's hire, etc. In his amended bill, as it is called, the plaintiff further charges that the forgery was committed by the agent Tollman, as was expressly proved on the trial at law by two witnesses, and that the defect in the clocks was known to the defendants at the time of the sale. The bill then sets forth that upon the said note the plaintiff had been sued and judgment recovered against him by the defendants, and prays for an injunction, and concludes with a general prayer for relief.

The defendants admit that Ebenezer Tollman was their agent in the sale of the clocks mentioned in the bill to Hillary and Thomas Radcliff, and in accepting the bond the subject of the complaint. They say that, as to the circumstances attending the transaction, they are personally ignorant and know nothing, except through their said agent; that they believe the statements made to them by their agent to be true, and aver they are so; that the complainant had, before the sale of clocks to his sons Hillary and Thomas, agreed with the said Tollman that he would be their surety, and had accordingly executed a note or bond for a previous sale of clocks to them, which bond had been discharged by Hillary; that upon the sale of clocks now in controversy, Hillary Radcliff himself delivered to said Tollman the bond complained of, and at the (558) time of its delivery there was a seal annexed to the name of the said Hillary, but none to that of Thomas, and that the word "George" had been erased and the name "Alpress" inserted; and they aver that after the said bond went into the possession of their said agent, it was in no respect whatever altered from what it was when he received it, except in the signature and seal of the plaintiff. They aver that their agent did not urge the plaintiff to execute the bond, as the surety of his sons, as it had been previously agreed he should do so,

and without such understanding and agreement their agent would not have accepted the bond of the said Hillary and Thomas in payment for the clocks, as Thomas had no property and Hillary very little. As to the clocks they state they were made in their shop, and before being sent off for sale they were set up and run down, that defects might be rectified; that this was their usual custom, and if any defect existed they were not conscious of it; they did not believe any did exist, and if they had been put up by a person of competent skill, they would have worked well, and as proof of this that clocks made by them at the same time with these had been sold in the neighborhood, and they worked well. Upon the coming in of the answer, on motion of the defendants by their counsel, the injunction previously granted was dissolved, from which interlocutory order the plaintiff appealed to this Court.

Francis for the plaintiff.

Badger for the defendants.

NASH, J. The equity of the plaintiff's bill consists in this, that by the alteration of the note, after it had been delivered by Hillary and Thomas Radcliff, without their knowledge and consent they were discharged from all responsibility on it, and he was deprived of all recourse to them, upon being made to pay for it; and if the facts were so, unquestionably such would be their effect. It would have been a gross fraud upon him,

(559) which would have given him a clear right to ask the aid of a court of equity. Is this equity met and repelled by the answer? If so, the injunction can not stand. For, as the motion to dissolve must be heard upon the bill and answer where the latter fully meets the allegations of the former and denies them, as it is oath against oath, equity will not longer deprive the defendant of the benefit of his judgment at law.

He is still, however, at liberty, by continuing over his bill as an original, to pursue his equitable redress, and so enforce his equitable rights if he have any; but he is driven to his proofs, and can no longer rely upon his own oath. This principle is so familiar that it can not be necessary to cite authorities to sustain it. We think the answer does fully meet the allegations of the bill. It is true the defendants were not personally cognizant of the facts; they were not present when the bond was executed by Hillary and Thomas Radcliff, nor when it was executed by the plaintiff. They can not, therefore, of their own knowledge, say what was its condition at either of those periods. All they know upon the subject, they derive from

their agent; they state information given by him and assert their belief in its truth, and *aver* the facts to be as stated by him; they therefore adopt his statement and make it theirs. It is a rule of chancery practice, that when a bill states a fact, which is in the defendant's own knowledge, he must answer positively, and not as to his remembrance or belief, but as to facts not within his knowledge, he must answer as to his *information* and *belief,* and not to his information or hearsay merely, without stating his belief. When he answers he has neither knowledge nor information, his belief is unimportant, and he need not state it. It is sufficient for him to state that he does not know, nor has he heard or been informed of the facts charged in the bill, save by the bill itself. *Woods v. Morrell,* 1 John Ch., 107; Cooper Eq. Pleading, 314; *Morris v. Parker,* 3 John Ch., 297; Hoffman Chancery, 265. And it is very proper the rule should be so; otherwise every one, acting or contracting through an agent, would in all matters of injunction be very awkwardly situated. The rules of chancery practice, then authorize the principal when called into (560) court to answer a bill to adopt the information of his agent and make his statement his own. It follows that such an answer must be clothed with all the authority, and have all the effect, of one made upon the personal knowledge of the defendant. According, then, to the answers filed in this case the bond in question was by Hillary Radcliff, one of the obligors, delivered to the agent Tollman, and, when so delivered, was precisely in the situation in which it was when the plaintiff executed it; and it is expressly and positively denied that any *alteration,* in any particular, was made in it after it came into the possession of Tollman. This denial in the answer is strengthened by some singular discrepancies in the bill. It is first alleged that *after* the said note was executed, a seal was attached to the name of Hillary Radcliff without the knowledge or consent of the said Hillary, and the name "George" stricken out, and the name "Alpress" added thereto. The bill then proceeds—"Your orator further charges and alleges the truth to be, that *previous* to the erasure and insertion, in the Spring of 1840, the agent presented the note to your orator, at Asheville," etc., "your orator never for a moment supposed that a forgery had been previously committed on the said promissory note by the addition of a seal, and the erasing the name, as before set forth. There is in this statement a confusion and want of clearness sufficient to excite distrust and throw discredit on it. We are first told, that. when the note was presented to the plaintiff in the Spring of 1840, there was no erasure or

substitution; and then we are informed that, when he executed it, he had not the slightest idea a forgery *had been* committed on it by adding a seal, and by the erasure or substitution. In *McFarland v. McDowell,* 4 N. C., 15, the Court decided, that when the facts, on which the plaintiff's equity rests, are by the answer positively denied, or the truth of them is rendered doubtful, by the facts and circumstances set forth in the answer, and the defendants swear they have no knowledge of the facts set forth in the bill, and that they do not believe them, so that, upon the whole, the plaintiff's equity is (561) rendered doubtful, the injunction must be dissolved.

Here are the material facts of the bill expressly denied, and the circumstances, as they are alleged to have occurred, set forth in the answer and doubts, to say the least, as to the truth of the allegations of the bill, excited not alone by the contradicting statements of the answer, but also by the contradictory averments of the plaintiff. According then to the rule in McFarland's case, the injunction must be dissolved. But again, the fact of the forgery, according to the plaintiff's own shewing, has been submitted to a jury in a trial at law, and the verdict negatived the charge; and this, although the plaintiff, produced two witnesses, according to his allegation, to show that the alterations were in the handwriting of the agent Tollman. The plaintiff, as far as we can see, acquiesced in the verdict, nor does he now complain of it, or give any explanation why the jury so found, whether from a want of testimony, or any error in point of law on the part of the presiding Judge. Without any explanation he comes into a court of equity and asks for a new trial. We think he is not entitled to it. *Peace v. Nailing,* 16 N. C., 290. With respect to the insufficiency of the clocks, we do not consider any question upon that point as arising in this case. The bill is not framed with that view. It does not ask to have the contract rescinded, nor does it offer to return the clocks still on hand, or to account for those sold, nor are the proper parties, the purchasers of the clocks, before the Court. In truth, it is a question in which the plaintiff has no concern. He places himself solely upon the ground of the fraud charged to have been practiced on him, in procuring his execution of the bond.

The interlocutory order heretofore made in this case, dissolving the injunction, ought to be affirmed.

PER CURIAM. ORDERED TO BE CERTIFIED ACCORDINGLY.

Cited: Grantham v. Kennedy, 91 N. C., 154.

(562)

THOMAS WADDILL *v.* CHARLOTTE D. MARTIN.

1. Where a planter had been in the habit of permitting his slaves to cultivate patches of corn, cotton, etc., and of selling the product and paying over to them the proceeds, and where he died while the crop was under cultivation: *Held*, that the executor was justified in pursuing the same course as to such crop, and in paying the proceeds to the slaves.
2. But this must be done *bona* fide, and, like the pharaphernalia allowed to a wife, the amount paid over must be proportioned to the estate and condition of the deceased.

This was a bill filed in ANSON Court of Equity, by one executor against a co-executrix for an account and settlement of the estate of their testator. It was referred to the Master to state an account, and the case now came before this court upon exceptions to the Master's report. The matter of these exceptions is stated in the opinion here delivered.

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

RUFFIN, C. J. James H. Martin was a wealthy planter of Anson County, who made his will and a codicil to it, in which he appointed the plaintiff, a son-in-law, his executor, and the defendant, his widow, his executrix, and then the testator died in July, 1836. Both the plaintiff and the defendant took probate of the will; but the plantations were chiefly managed through the latter part of 1836, and during 1837 and 1838, by the plaintiff, who received in the proceeds of crops, etc., the sum of $16,442.65. Dissensions having then arisen between the plaintiff and the defendant, about the management of the estate and the administration of the assets, the plaintiff filed this bill, praying, for reasons set out in it, for the appointment of a receiver and for a settlement of his accounts, as executor, and also for a settlement of that of the defendant, as executrix. By orders made at different times, receivers were appointed, until, finally, the management of the estates was, by consent, placed in the hands of Mr. Parsons, a second husband of the original defendant, Mrs. Martin. It was then (563) referred to commissioners to audit and report the account of the administration of the plaintiff; and to the report made, the defendants, Parsons and wife, have excepted.

The first exception is to a credit allowed to the plaintiff, of $143.97 (with interest thereon), which the plaintiff received for certain cotton made by the negroes of the testator in 1836, and

paid by him to the negroes. The facts respecting this item, as reported, are these: The testator, who was a considerable slaveholder, had been for many years in the habit of allowing his negroes to make small crops of cotton and other things, in patches of their own and for their own use. He did not, however, permit them to sell the cotton themselves, but required them, as they picked it out, to bring it to his gin; and the testator had it ginned and carried to market and sold with his own, and then, after deducting a due proportion of the expenses, the testator paid to the negroes the cotton made by them, to enable them to purchase small articles of comfort for themselves and their families. In the year 1836, the testator's slaves had, by his permission, planted and cultivated their patches of cotton on his land; in autumn, they gathered it and delivered to the plaintiff at the gin, to be prepared and sold for them by him, when he should sell that belonging to the estate. It was accordingly sent to market and all was sold together, and entered by the commission merchants in the accounts of the estate; so that the plaintiff in his own account as executor, gave the estate credit for the proceeds of all the cotton. But when he paid to the negroes their share of the money, viz, the sum of $143.97, he debited the estate therewith by way of cross entry. It is to that sum, as a credit to the plaintiff in his account current, that the present exception is taken.

The Court is of opinion that the exception should be overruled. The practice of the testator, as a master, and the conduct of the plaintiff, as executor, conform to the usage, and a most beneficial usage, which is almost universal throughout North Carolina; and we have never known or heard of (564) an attempt hitherto to charge an executor in favor of a legatee or even creditor, with the little crops of cotton, corn, potatoes, ground peas and the like, made by slaves by permission of their deceased owners. Executors are not chargeable with anything but that which they ought to have received; and it has never been considered that the negro's little crops, growing or made, were assets, any more than the little sums of money which they might have received for the crop of the preceding year, if any remnant were left in their chests, or their poultry, or their dog, or their extra clothing. Those petty gains and properties have been allowed to our servants by usage, and may be justified by policy and law, upon the same principle that the savings of a wife in housekeeping, by sales of milk, butter, cheese, vegetables and so forth, are declared to be, by the husband's consent, the property of the wife. It is true a slave can not have property; and upon that the argument for

the exception is built. But it is equally true that a married woman can have no property in money or personal chattels in possession; but they belong in strict law to the husband, and actions in respect to them must be in the husband's name. Nevertheless, the wife may claim them against the executor. Now we do not say that negroes can hold anything against the executor, because they and what they have belong, as property, to the executor. But we do say that an executor is not bound to strip a poor negro of the things his master gave him, nor to take away his petty profits from a patch, with the proceeds of which the slave, with the ordinary precaution of a prudent and humane master, may be induced, and in a measure compelled, to buy those needful comforts of food and raiment, over and above the allowances of the owner, which promote his health, cheerfulness and contentment, and enhance his value. In many instances, what the slave, with a pride that makes him happy, buys for himself, would, if not thus procured, be of necessity supplied directly by the master; so that, in point of fact, leaving to the negro the spending of his money at his own pleasure, is then a pecuniary saving to the estate, and these slight indulgencies are repaid by the attachment of the slave to the master and his family, by exerting his indus- (565) try and honesty, and a spirit to make and save for the master as well as for himself. In fine, experience has proved so fully the advantages of these minor benefactions to a dependent race, which humanity at first prompted, that there is scarcely an owner of slaves who does not act as this testator did, and no executor, we believe, ever acted otherwise in such a case, than the plaintiff did. Of course it will be understood that we can not intend to shield a person, whether he be master or executor, in a case of *mala fides* in attempting to cover property from creditors or legatees under the pretence that it belongs to the slaves. Like paraphernalia, beyond the party's circumstances, it would be disallowed. But there is no suggestion that the plaintiff did not act *bona fide;* the only argument being, that he was obliged to take whatever the negroes had, be that little or much. We do not think so, for the reason given. Indeed, there are a number of statutes which, in regulating trading with slaves, recognize a sort of ownership by slaves of certain articles, by permission of the master, forbidding them to have certain other articles or to sell or buy them; which shews that there is an universal sense pervading the whole community, of the utility, nay, unavoidable necessity, of leaving to the slave some small perquisites, which may be called his and disposed of by him as his, although as against a wrongdoer the

property must be laid in the master, for the sake of the remedy, and although the master, if he will, may take all. Here the sums received by the negroes were but a pittance *per capita;* not more, probably, than the ducks, chickens and eggs of the same number of slaves would have brought, nor half as much as their Sunday finery would. The exception prefers an ungracious claim, and as we think an unfounded one; and it must be overruled.

The second exception is, that the commissioners have allowed all the commissions to the plaintiff, whereas Mrs. Parsons is entitled to a part of them. The answer to that is, that the account before us is not one of the whole estate, but only
(566) of the administration of that part which come to the hands of the plaintiff. It does not appear that the executrix had anything whatever to do with the transactions embraced in this account. When her administration accounts come to be taken, she will be allowed such commissions, as may be proper, on what she received and disbursed. This exception is also overruled.

A third exception is to a credit allowed the plaintiff for the sum of $1,306.25 paid on a bond given by the testator to one Asa Hubbard. The facts in relation to the debt in question appear in the evidence to be as follows: A purchase was made by the testator from Hubbard of a house and lot in Wadesboro at a price exceeding $3,000; which purchase was for the benefit of the plaintiff, Waddill, who occupied it as a tavern. The testator gave his bonds for the purchase-money, and, on 25 April, 1832, he made his will, and, after giving his daughter, Mrs. Waddill, a tract of land and some slaves, adds thus: "If Thomas Waddill pays for the house and lot I bought of A. Hubbard and has no account against my estate, then I also give said house and lot to my daughter, Eleanor Waddill, including all the furniture." Afterwards the plaintiff paid Asa Hubbard the purchase-money of the house and lot, except a sum, which with the interest amounted, at the time of payment, after the testator's death, to $1,306.25; and the testator made a codicil to his will, 1 May, 1836, and therein devised thus: "Instead of leaving the tavern house and lot in Wadesboro to my daughter, Eleanor, I leave it to my son-in-law, Thomas Waddill—provided he has no accounts against my estate." It is very clear, from the evidence, that the purchase of the house was for Waddill; but as the testator was to be bound for the purchase-money as surety for Waddill, he preferred giving his own bonds for the price and taking the deed to himself, as his security. The debt, therefore, was really Waddill's; and so he

treated it, up to the testator's death, by making the payments instead of the testator. Hence, probably, upon some understanding between those parties, the devise of the house and lot was to Waddill's wife on condition of the payment by him of the whole of the purchase-money. It is said, (567) however, that the condition is dropped in the disposition to Waddill himself in the codicil. But that is not so. It is not, indeed, expressly repeated, but it is virtually; for the codicil leaves the property to him "instead of leaving it to his wife." That is, it merely substitutes the husband for the wife; and consequently upon the same terms, of paying the purchase-money. The testator did not mean to give more by the codicil than by the will, but only to change the devisee. The payment of the residue of the purchase-money, which was unpaid at the death of the testator, was incumbent upon the plaintiff himself, and he had no right to charge the estate with it. The third exception is therefore allowed.

In the account the plaintiff charges the estate with the sum of $40, "advanced to Mrs. Martin, and also with the sum of $111.79, Thomas Waddill's account." To these two items the defendants take a fourth exception, because they are not supported by any evidence. And such being the fact, this exception is also allowed.

PER CURIAM. DIRECTIONS TO THE MASTER GIVEN ACCORDINGLY.

Cited: *Washington v. Emery*, 37.

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(568)

NATHANIEL J. KING et al. *v.* ZACHARIAH TRICE et al.

1. Where one purchased land *bona fide*, without notice of any fraud or trust, he is entitled to the benefit of his purchase, although there may have been fraud in the transaction by which his vendor acquired the legal title.
2. A debtor, after his arrest upon a *ca. sa.*, may transfer his property *bona fide*, for the purpose of discharging any debts he may think proper.
3. A bill can not be filed to obtain satisfaction of a debt out of the debtor's property, while the creditor is proceeding at law against the debtor's person by a *ca. sa.*
4. Although instruments may be referred to as exhibits attached to the pleadings, yet their contents should be sufficiently set forth in the bill or answer to which they may be attached.

Cause transmitted from the Court of Equity of ORANGE, at Spring Term, 1844.

The following case appears from the pleadings:

The bill is entitled, "the bill of complaint of Nathaniel J. King, Charles R. Yancy, and John Blackwood, to the use of Hurt, Patterson and Wills, merchants in the town of Petersburg, in Virginia, against Zachariah Trice, Richard Henslee and James C. Turrentine." It begins, however, in the stating part of it thus: "Humbly complaining showeth unto your Honor, that your orators, Hurt, Patterson and Wills, became the owners or assignees of a claim on the defendant, Zachariah Trice, for which they gave a valuable consideration, and on which a judgment was rendered against the said Trice in the Superior Court of Orange County, at September Term, 1839, for the sum of $1,132.19 cents, with interest until paid, and costs." The bill then states, that a *fieri facias* issued on the judgment, which the sheriff of Orange returned to March Term, 1840, "nothing found"; and that thereupon a *capias ad satisfaciendum* issued, returnable to September Term, 1840, on which Zachariah Trice was arrested by the sheriff, and that he gave bond for his appearance to take the benefit of the act
(569) for the relief of insolvent debtors, filed a schedule and gave notice to the plaintiffs; and that the schedule included nothing but his interest or resulting trust, "in certain property which he alleged he had previously conveyed to James C. Turrentine."

The bill then states, that, previous to rendering the judgment, Z. Trice executed to Richard Henslee a deed of trust for all his estate, real and personal, to secure the payment of debts to the amount of $21,000; and that the said deed was made by the said Trice to cover his property from the said execution and to defraud his creditors, as the conduct of the said Trice afterwards proved. For that the said Trice procured a sale to be made by Henslee under the deed of trust, at which the property ("which was very valuable, consisting of lands and negro slaves") was put up for sale and purchased by irresponsible persons for the use and benefit of the said Trice. The bill then further states, that after the *ca. sa.* had been served as aforesaid, and a few days before the return day thereof, the said Trice, on 3 September, 1840, executed a deed of trust to James C. Turrentine, then and at the filing of the bill on 18 September, 1842, the sheriff of Orange, "in which he conveyed most, if not all the property, which he had previously conveyed to Henslee and which the latter had pretended to sell under the deed of trust to him; thereby shewing conclusively that the

said deed to Henslee was fraudulent, and, therefore, null and void, and that your orators writ of *fieri facias* legally attached on the said property." The bill then states that the plaintiffs are advised that they are entitled to have it so declared by the Court and to have the said judgment satisfied out of the property; and accordingly the prayer is for a decree to that effect, and that Turrentine may be restrained from applying any part of the estate to the satisfaction of the debts mentioned in the deed of trust to the prejudice of the plaintiffs.

By an amended bill it is stated that at the sale made by Henslee (as mentioned in the original bill) Noah Trice became pretended purchaser of the Dillard plantation, lying on the road from Hillsboro to Raleigh, but really pur- (570) chased with the money of Zachariah Trice, and in trust for him. And that on 3 September, 1840, in order to complicate the title of his property and to defeat the plaintiffs, the said Zachariah executed a conveyance to Samuel Strayhorn for the Dillard plantation for the pretended consideration of $1,600, and procured said Henslee and Noah Trice to join in the same. The bill charges that, although the sum of $1,600 is mentioned as the consideration in the deed to Strayhorn, yet nothing was paid, and Strayhorn accepted the conveyance upon a secret trust of Z. Trice, or as a security for some small debt, which Z. Trice owed him, or for which he was Z. Trice's security. And then it prays for a discovery from Noah Trice and Samuel Strayhorn, and for satisfaction out of this tract of land, and for general relief.

In respect to the place called the Dillard plantation, it is stated in the answers of Zachariah Trice and Noah Trice, that, at a sale made by Henslee, the said Noah, at the request of Zachariah, became the purchaser thereof at $1,600, paid by him to Henslee; but that he purchased in trust for Zachariah, who privately furnished the money. And those defendants and Strayhorn state that Zachariah Trice was the guardian of certain infants, and that Strayhorn was his surety, and that judgment was obtained on the guardian bond for about $984.83, and Strayhorn was compelled to pay on 29 February, 1840, the sum of $1,416.33, and afterwards the sum of $1,031.92, and $89.95, making in the whole the sum of $2,537.30, on the said judgment; and that the said plantation was sold to him by Zachariah Trice, *bona fide,* at the price of $1,600, in part payment of his said advances for Z. Trice, and that such price was the fair value of the land; and that he took the deed on 3 September, 1840, from Henslee and both the Trices, in order to have a good title from both the legal and equitable owners,

Strayhorn denies positively any trust between him and Z. Trice, or any fraudulent purpose to defeat any creditor of Z. Trice, and he says that his sole object was to obtain a payment
(571) from Trice and save himself, as far as he could; and further, that except a small balance of about $80, which was found to be due from him to Z. Trice, upon a settlement of other accounts between them, the said land is the only payment he has received or can now expect to receive, as Trice has become hopelessly insolvent.

The defendant Turrentine answers that Z. Trice told him on 3 September, 1840, that he had executed to him as trustee a deed to secure the payment of his debts as therein mentioned; and requested him to accept the same and execute the trusts; but after considering the subject several days, he declined to act, and has never done so further than, at the request of the persons interested, that he joined in an assignment of the property to one Riley Vichers, as trustee in his place.

The Trices and Henslee admit that Z. Trice executed a deed of trust to Henslee for all or nearly all his property, as stated in the bill.

There is but little evidence in the case. It is confined to the liability of Strayhorn and his payments for Trice, and supports Strayhorn's answer almost literally. It is proved that he purchased the Dillard plantation at $1,600, and gave Z. Trice his acquittance for that sum in part of the money he had paid for him.

No counsel for the plaintiff.
Norwood for the defendants.

RUFFIN, C. J. As against the defendant, Strayhorn, the bill may be dismissed upon the merits of his case, as stated in his answer and fully established by his proofs. Upon the question of the good faith of his purchase and the promise of a fair price, the Court must make a declaration in his favor: for the agreement as to the price of $1,600, in part of the debt to Strayhorn is proved, and there is no evidence to impeach it on the score of inadequacy. Admitting, then, the deed from Z. Trice to Henslee, and his sale to Noah Trice were fraudulent, yet Strayhorn is not to be affected thereby, as he was no
(572) party to those transactions and has the conveyance of all three of those persons, made *bona fide* and on a valuable and adequate consideration. The prior fraud is purged as to him. *King v. Cantrel,* 26 N. C., 251. But if that were not so, the bill would be dismissed as to Strayhorn, as it must

be as against all the other defendants, upon the intrinsic weakness of the case stated in it. As far as we can collect, from the statement of the bill, any principle on which it was intended to be founded, it can not be supported at all. The case the writer of the bill seems to have aimed at making is, that the plaintiffs might have had their *fieri facias* served on certain property, fraudulently conveyed by their debtor to Henslee, and that they would have done it, and obtained satisfaction thereof, had they then known of the fraud: but that, from a want of knowledge of the fraud, they were induced to have or allow their *fieri facias* to be returned *nulla bona,* and sue out a *ca. sa.* and have their debtor arrested; by which means they are likely to lose their debt, as the debtor after his arrest has made another conveyance of his property, and is endeavoring to procure his discharge as an insolvent debtor. Upon this case the plaintiffs ask to be preferred to the last purchaser and to have the same benefit of their *fieri facias,* which was returned *nulla bono,* as if the property had been seized under it; because, as they say, it was not their fault that it was not levied, and they have done nothing to discharge the lien created by it and the law. It is to be observed, in the first place, that the debts said to be secured in the deed to Turrentine (against which relief is sought) are not denied, nor that deed impeached as fraudulent, or as inoperative for any reason, but the two following. The one, that the plaintiffs might have seized the property for their debt, on account of the fraud in the conveyance to Henslee; and the other, that this deed to Turrentine was made to secure other creditors, to the exclusion of the plaintiffs, after Trice had been arrested on the *ca. sa.* As to the first reason, the case is against the plaintiffs, upon the ground already mentioned in respect to the case of Strayhorn. According to the plaintiffs' own argument, the property remained in Z. Trice, as to his creditors notwithstanding (573) his deed to Henslee. Consequently he could convey it *bona fide* to his creditors or to a trustee for them, and that would be good against the plaintiffs, if done when they had no lien by the execution on it. That was the case here, for the *fieri facias* had been returned, according to the bill, and the debtor was under arrest, on the *ca. sa.* And the second point is equally clear against the plaintiffs, as we have very recently held in the case of *Cheek v. Davis,* 26 N. C., 284.

But laying aside all the preceding considerations, there is one complete answer to the bill, which is common to all the defendants. It is this: the bill was filed for the purpose of obtaining satisfaction out of the debtor's property, while the

creditor was proceeding upon an execution executed upon the debtor's person. No such proceeding can be allowed, either at law or in equity. The taking the body in execution is *prima facie* a satisfaction of the debt. Although a doubt may be made upon that point, when the debtor is discharged from actual custody by giving an appearance bond under the insolvent debtors act, yet, it is clear that, while the proceeding is carried on under that act against the person, so as to compel him to pay the debt, or go to prison, if he be insolvent or do not take the regular steps to entitle him to swear out, the creditor can not also entitle himself to execution to create a lien on the legal property of the debtor. There can be no foundation for relief in the court of equity out of that property, or indeed, his equitable property. The law deems an execution against the person an adequate remedy, while it is subsisting, to all purposes. In this case the bill shows such an execution, and as far as appears, the proceedings on it are not concluded. Therefore there is no jurisdiction here, since at law the plaintiffs are actually prosecuting a plain and perfect remedy.

The case has been treated hitherto, as if the bill were otherwise well framed, than in stating a defective equity. But it is drawn with so little skill or so very carelessly, that (574) if the plaintiff's equity, as to its principle, had been ever so clear, the Court could not have relieved them for want of a proper statement of facts. It is not even certain who are the plaintiffs. King, Yancey and Blackwood are mentioned in the title of the bill as suing to the use of Hurt, Patetrson and Wills, but how they come to do so can not be conjectured, as the name of King, Yancey and Blackwood is no more heard of. Then who Hurt, Patterson and Wills are can not be told, for the Christian name of neither of them is given. Again they are said to be assignees of a claim on Z. Trice, on which a judgment was rendered; but what is the nature of the claim, whether a debt by bond or a demand of some other sort, or whether they be the legal or only the equitable assignees, or from whom they got the assignment, or in whose name the judgment was taken, in no manner appears. And besides those, the bill is radically defective in not stating and describing the property conveyed by the debtor, or of which the satisfaction is sought. Here the statement is, that Trice made a fraudulent conveyance to Henslee of valuable property, "consisting of land and negroes." And afterwards the Trices and Henslee conveyed the Dillard plantation to Strayhorn, the defendant, and "the other property" to Turrentine. It is true the bill states, that copies of the deeds the plaintiffs have

ready to produce, and they pray they may be considered parts of the bill. But they are not exhibited with the bill, and there is therefore nothing in the pleadings, from which the precise subjects of litigation can be ascertained. Indeed, if they had been exhibited, that would not dispense with a description of the subjects in the body of the bill, or a statement of so much of the contents of the instruments as may be necessary to establish the party's title. The purpose of annexing exhibits is not to enable the pleader to make the pleadings mere skeletons, not in themselves containing the facts and points in controversy, but to obtain an admission of their genuineness from the other side, and for greater certainty as to their contents and as aiding in the construction from the context. The Court, as is well known, seldom adverts to matters of (575) form, and, indeed, perhaps culpably, has been indulgent to very loose pleading in equity; and we very reluctantly make any observations on such points. But we feel constrained to animadvert on such very defective statements, as are found in these pleadings; and especially to let it be known that, in pleadings drawn hereafter, we shall expect so much of the deed or will, as constitutes the party's title, to be set forth in the body of his pleadings so that the title may be seen in the pleadings and not merely in the proofs.

The bill must be dismissed with costs; and in taxing them a Solicitor's fees must be included for each of the defendants, Strayhorn and Turrentine, and one for all of the other defendants together.

PER CURIAM. DECREED ACCORDINGLY.

Cited: *Wilson v. Land Co.*, 77 N. C., 456; *Saunders v. Lee*, 101 N. C., 6.

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(576)

DAVID KERNS *v.* WILLIAM CHAMBERS et al.

1. Where, to a bill praying for an injunction, the defendant admits the equity, but seeks to get rid of it by setting up an equity of his own, the injunction must be continued to the hearing.
2. Our act of Assembly, Rev. Stat., ch. 32, sec. 12, limiting the time within which injunction shall be granted to stay executions on judgments at law, does not apply to cases where the cause for the injunction originated in the conduct of the defendant after the rendition of the judgment.
3. A surety receives from his principal bonds on other persons, sufficient to discharge a debt for which he and a co-surety are responsible, and,

for his personal convenience, delays the collection of these bonds, the parties not being insolvent. He then obtains an equitable assignment of the judgment against his principal, his co-surety and himself. Equity will not permit him to enforce the collection of one-half of this judgment against his co-surety, until he shows that he could not by reasonable diligence have collected the bonds so received by him.

This was an appeal from an interlocutory order of the Court of Equity, at Fall Term, 1844, his honor, Judge *Manly* presiding, directing an injunction, which had been granted by a Judge in the vacation, to be dissolved in part.

The following is the substance of the bill and answers:

The plaintiff, by his bill, charges that he, together with the defendant, Chambers, Charles Verable, and Christian Brinkle, executed a bond to the defendant Goss, as sureties for one Samuel Kerns, all of whom resided in the county of Rowan, except Goss, who resided in Davidson; and suit was brought against all the obligors, in the county of Davidson, and judgment obtained against all except Kerns, who had been discharged as a bankrupt; that previous to the trial of the suit, Kerns, the principal in the bond, delivered to the defendant Chambers, funds sufficient to pay off and discharge the whole debt due the defendant Goss; that these funds consisted of a note on R. W. Long for $260, and one on Thomas Mull for $740, and the balance in cash, the whole amounting to $1,086.50.

After the rendition of the judgment, it was, as he is (577) informed and believed, paid off and discharged by the defendant Chambers, and is now kept alive by a combination between him and the defendant Goss, to compel him, the plaintiff, to pay the whole of it, as an execution has been issued on it and been levied on a tract of land belonging to the plaintiff. The bill charges that the defendant Chambers received from R. W. Long the money due on his bond, and that he either had or might and ought to have received the money due from Mull, and that the judgment of Goss has been satisfied by the funds of Kerns, the principal in the bond. It further alleges the entire insolvency of Kerns, of Verble, and of Brinkle, and prays for an injunction, which was granted.

The defendant Goss admits such of the allegations of the bill as directly concern him, except as to any combination to oppress or injure the plaintiff in taking the judgment; admits, that after obtaining the said judgment he accepted the bond of the defendant Chambers, and by the directions of said Chambers, he assigned it to one James Ellis, and that he has no interest in it. The answer of Chambers admits the statement of the parties to the bond and the insolvency of all the

parties to it, except himself and the complainant; that a suit was brought upon it to Davidson County Court, and a judgment obtained; that the amount due upon the bond was larger than that stated by the plaintiff. This defendant admits that he gave his bond to the defendant Goss for the amount of the judgment, and took an assignment of it to James Ellis; that an execution has issued and been levied on the land of the plaintiff, but that it was not his intention to raise upon it more than one-half the judgment, after deducting all credits he was entitled to. The defendant Chambers admits, further, that Kerns, the principal in the bond, put into his hands the two notes or bonds mentioned, the money to be applied, when collected, to the discharge of Goss's bond; that the amounts are correctly set forth in the bill, and that he has received from R. W. Long the amount due upon his note or bond, and always intended to give the plaintiff the benefit of it, to the amount of his interest in it; he says, that as to the bond of Mull, he never has collected it; that Mull lives in Mississippi, (578) where it is difficult to collect money, and that he owes him on his own account ten thousand dollars; and he has been afraid to press the collection of the bond transferred to him by Kerns, fearing, if he did so, to lose all that Mull owed him. He further states that Kerns had transferred to a trustee all his property to secure the payment of his debts, among which was this one to Goss, and that the notes or bonds of Long and Mull were given originally for purchases made at the sale of the trust company, were not under the control of Kerns, and that, therefore, Kerns had no right to appropriate them to the payment of the Goss debt, but the money upon either, when received, was to be appropriated to the whole of the debts secured by the trust.

The answers both insist, that the bill be dismissed for want of parties. The representative of Ellis, the assignee of the judgment, who is dead, it is alleged, ought to be made a party, and they further insist that the injunction should be dissolved, as having improvidently issued, more than four months having elapsed after the rendition of the judgment before the filing of the bill. Upon the coming in of the answers, the injunction was dissolved as to one-half of the judgment, and the plaintiff appealed.

Boyden for the plaintiff.
Alexander and *Osborne* for the defendants.

NASH, J. No more of the pleadings is stated than is necessary to bring into view the principles upon which this Court

founds its decree. The plaintiff's equity is, that he and Chambers, the defendant, being the joint sureties with others to Goss, the other defendant, for Kerns, the latter put into the hands of Chambers funds sufficient to discharge the debt, and that therefore, as between them, the debt is discharged. To meet this allegation, the defendant Chambers replies; he admits that he had received from Kerns two bonds, one on R. W. Long, which was paid, and the other upon Thomas Mull, of Mississippi, the latter not collected, and the reason he assigns is, that Mull is indebted to him to a much larger amount,
(579) and he has been deterred from attempting to coerce the collection of either claim for fear of losing both. It is not denied that Mull is solvent and able to pay all he owes to Chambers. We do not consider this as any answer to the plaintiff's claim. It is manifest that the reason why the Mull debt has been delayed in the collection is, to accommodate and secure the interest of the defendant Chambers. If he chooses to indulge Mull, for any cause, he has no right to ask that the plaintiff shall be compelled to join him in the indulgence. In other words, with funds in his hands to pay the debt, he has no right to sell the property of the plaintiff to pay any portion of it. We consider him, as to the purposes of this debt, as having appropriated the Mull bond to his own use. The bond havnig been placed in his hands by the principal in the debt for the joint benefit of the sureties, the plaintiff, one of them, and the only responsible one except the defendant Chambers had a right to be consulted in its disposition, and the defendant ought at least to have brought the bonds and money into court and submitted them to its disposition. Another defense upon these bonds is offered by Chambers in his answer. He alleges that Kerns, being greatly indebted to secure his creditors, made an assignment of all his property to a trustee, and among the debts so secured was the Goss debt. He further alleges that the bonds of Long and of Mull were given for the purchase of part of the trust property, so conveyed, and that it was not in his power nor in that of Kerns to direct it entirely to the satisfaction of the Goss debt, but that the other creditors, whose debts are secured by the deed of trust, are entitled to their reasonable portion of it. It is not necessary any opinion should at this time be expressed upon the question raised; it is sufficient for us to say, that, in this stage of the case, the defendant can take no benefit by the objection. It has been repeatedly decided by this Court, that when, to a bill praying for an injunction, the defendant admits the equity, but seeks to get rid of it by setting up an equity of his own, the injunc-

tion must be continued to the hearing. *Lindsay v. Etheridge,* 21 N. C., 36.

That is the case here. If the objection can avail the defendant, it must be upon the hearing of the cause. (580)

We do not agree with the defendants that it was necessary to make the representative of Ellis a party. It is evident from the answer of Chambers, that the whole interest in the judgment in equity is in him. Ellis paid nothing for it. It is not assignable at law, and at law it is still the property of Goss. The defendants are mistaken in supposing that this case comes within the operation of our act, limiting the time within which injunctions can be granted. The plaintiff's right to ask for an injunction arose after the rendition of the judgment, when he discovered that the defendant Chambers had made a wrong application of the funds placed in his hands by Kerns, for the payment of the Goss debt. This was made manifest to him by the levy of the execution on his land. As long as the judgment was Goss's there was no equity against it. Until then he could not know whether those funds would be so appropriated or not. We do not think the statute operates upon this case at all.

We are of opinion there was error in the interlocutory decree heretofore pronounced in this case, and the same must be reversed, with costs in this Court, so far as it dissolved the injunction for one-half of the sum recovered, and the injunction must be continued to the hearing.

PER CURIAM. DECREED ACCORDINGLY.

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

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(581)

JAMES RICHMOND *v.* SOLOMON VANHOOK et al.

1. A testator bequeathed to his wife a large amount of real and personal property, for her natural life, and after her death to A. The wife died in the lifetime of the testator: *Held*, that the legacies to the wife did not lapse by her death, but that on the death of the testator they vested immediately in the remainderman.
2. Among other legacies, the testator bequeathed certain negro women and *their children.* They had children at the time of the execution of the will, and several born afterwards and before the death of the testator: *Held*, that these afterborn children did not pass under this bequest, but that they remained undisposed of by the will.
3. Some of these negroes undisposed of by the will had been placed by the testator in his lifetime in the possession of one of his sons, where

they remained until the testator's death: *Held*, that there being only a partial intestacy, this could not be construed an advancement, so as to entitle such son absolutely to the negroes on the testator's death, under the provisions of the act of Assembly, Rev. Stat., ch. 37, sec. 17. To constitute such an advancement, there must be entire intestacy of the parent.

4. The testator bequeathed a desk with all that was in it: *Held*, that, by this bequest, all that was found in the desk at the testator's death, whether there at the time of making the will or placed there subsequently by the testator, passed to the legatee.

Cause removed from the Superior Court of Law of CASWELL, at Spring Term, 1845, by consent of the parties.

The bill states that John Richmond died in the year 1841, having, in 1830, duly made and published his last will and testament, and which, after his death, was duly proven, and letters testamentary granted by the proper court to the defendant Vanhook. By his will the testator devised as follows: "I give to my beloved wife, Mary Richmond, my dwelling house and all near outhouses, and three hundred acres of land whereon I now live; also I give her one negro man, Gabe, and one negro woman named Hannah, and one named Nicey and her children, and one named Isaac, and my chest and *all* that is in it, (582) and all my household and kitchen furniture, and all my beds and furniture, and three head of horses, and ten head of cows, and all my hogs and sheep, which property I give her during her natural life or widowhood, and at her death the above named property to return to John Currie Richmond"; that at the date of the will, Nicey had five children, and between the date of the will and the death of the testator in 1841, she had five more. Elizabeth, one of Nicey's children, before the making of the will, had one child, and Francis, another of Nicey's children, had two children born after the date of the will, and Harriet had one born since.

The bill further sets forth, that by the 2d clause in the will, the testator gave to the complainant bequests and bounds, a part of the tract of land which by the first clause he had given to his wife for her life, and also several negroes, among whom were three negroe women, to wit: Dinah, Suckey and Esther, each of whom have had children since the date of the will. By the 3d clause, the testator devises as follows: "I give to my son John Currie Richmond, the *balance* of my land not willed before; also I give him one negro woman named Sylvy and her five children; one named Riah and her child; also I give him my desk and all that is in it." And by the 4th clause, he gives the balance of his stock not willed, and his books, equally to be divided between his two sons, the plaintiff, James

C. Richmond, and the defendant John Currie Richmond; that Sally, the child of Riah, named in the 3d clause, and Sylvy, have each since the date of the will, had several children. The bill further sets forth that at the date of the will the testator had two tracts of land, one of which was by the 1st and 2d clauses, divided between the plaintiff and the widow; and the other, by the third clause, was given to the defendant John C. Richmond, and that he also had a large personal estate, which came to the hands of the executor, and most of which he had delivered over to the other defendant; and among other things, was a large sum of money, consisting of specie and bank notes, all of which the defendant, John C. Richmond, took possession of, claiming it as his, either under (583) the first clause, giving to Mrs. Richmond the chest with all that is in it, or under the similar bequest in the third clause of the desk, directly to himself; that he claims all the property, real and personal, devised by the first clause to Mrs. Richmond for her life, because, she having died in the lifetime of the testator, the devise over to him became an immediate devise; whereas the bill alleges, that in consequence of the death of Mrs. Richmond, during the life of the testator, the devise to her became lapsed, and either sunk into the residuum, or the testator died intestate as to it. And that the plaintiff was entitled equally with the defendant to the property so bequeathed, they being the only children and next of kin of the testator. The bill then alleges that the defendant John C. Richmond, by virtue of the legacies to him, claims all the children of the negro women mentioned in the first and third clauses, born since the date of the will, whereas the will gives none but those that were in being at the time the will was made, and that all such after-born increase are subject to distribution between the plaintiff and the defendant John C. Richmond. The bill prays an account of the estate, and that the plaintiff may be decreed to have one-half of the property bequeathed to Mary Richmond, and one-half of the negroes born since the date of the will, and of the money, etc.

The defendants, by their answer, admit the allegations of the bill, as to the will of John Richmond, and that the first, second and third clauses thereof are correctly set forth, that the names of the children born to the negro women named in the first and third clauses after the making are correctly set forth; they admit the death of Mrs. Richmond before that of the testator; deny that the legacy to her lapsed in consequence thereof; but assert that it became an immediate bequest to the defendant John C. Richmond; and that, by the will, the

defendant John C. was entitled, not only to all the negroes mentioned in the first and third clauses of the will, but also to all the increase born to any of the negro women since the date of the will. If in this construction they should be mistaken, the defendant John C. Richmond then claims the chil-
(584) dren born between the making of the will and the death of the testator, as an advancement; the testator having put them into his possession during his life, and if they are not disposed of by the will then, as to them, the testator John Richmond died intestate. The answers further admit that the defendant John C., with the consent of the executor, took into his possession all the stock of cattle, horses and sheep, as bequeathed in the first clause, and also all the money on hand, and bonds and notes. He claims the latter under both the first and third clauses, as they were kept by the testator in the desk bequeathed to him, and were there found at the death of the testator. The defendant Vanhook states that he had handed to the plaintiff the $150 bequeathed him in the second clause of the will, and also the sum of $11.7 3-4 his portion of the sale of the stock and books mentioned in the fourth clause, which he had refused, and that he has the money and is ready to pay it. An inventory is filed with the answers, which is alleged to contain a true statement of all the personal property of John Richmond, which came to the hands of his executor.

Upon the coming in of the answers, the parties mutually agreed that the Clerk and Master should take an account of the number of slaves born between the making of the will by the testator John Richmond and his death, their names and values; and also of the personal estate, other than the slaves which has come to the hands of the executor, and his disbursements.

The cause being regularly set for hearing, was sent to this Court.

Morehead for the plaintiff.
Kerr and *Norwood* for the defendants.

NASH, J. The facts in this case are not controverted; and our only business is to put a construction on the will of John Richmond. It is contended by the plaintiff, in the first place, that by the death of Mrs. Richmond during the life of the testator, the legacy to her is either lapsed, whereby it
(585) falls into the residuum; or the testator has died intestate as to the property contained in it; neither proposition is true.

It is a general rule that where a legatee dies before the testator, the legacy lapses. But there are several exceptions to it, all of which are enumerated. 1 Roper Legacies, 320 to 341. The exceptions are founded on the manifest intention, as apparent in the will of the testator, that it shall not lapse, but go to some other person. Thus in Eales and England, Precedents in Chancery, 200, the testatrix gave to B three hundred pounds with a declaration of her will, that B should give the £300 *at his death* or sooned, to his daughter C. B. died before the testatrix, leaving C surviving him. The Court declare that the legacy to B did not lapse, but that C took it on the death of the testatrix. And the bequest was compared to one made to B for life remainder to C, in which case C's right to the legacy could not be questioned. Here the bequest to Mrs. Richmond, in the first clause, is to her for life only, with remainder, as expressed in the third clause, to the defendant John C. Richmond. There is in fact nothing to lapse. The remainderman is to take whenever the wife, Mrs. Richmond, dies. And upon the death of the testator, John C. Richmond took all the property, immediately, by virtue of the third clause of the will.

The next question raised by the pleadings is, what negroes passed to John C. Richmond by the will. It appears that in the first clause, the testator gives Nicey *and her children,* and by the third, Sylvy and her *five children,* and Riah, and her child. Both Nicey and Silvy, and Riah, and her child, named Sally, have had several children since the making of the will, and before the death of the testator. The plaintiff alleges that, under the will, John C. Richmond can take none but those named in it, and who were in being when it was executed; and that the children and grandchildren born between that time and the testator's death are not disposed of by the will, and that they either fall into the residuum, if there be one, or the testator has died intestate as to them, and they are of course to be divided among the next of kin, him- (586) self and the defendant John C. On the part of the defendant John C. it is contended, if the will does not carry the after-born children, then it is a case of partial intestacy, and the testator having, in his lifetime, put them into his possession, it is, under the Act of 1806, Rev. St. ch. 37, sec. 17, an advancement.

We are of opinion that, under the two clauses referred to, John C. Richmond took only the negroes mentioned in the will, and that all the children born after the date of the will are undisposed of by it. If there was a residuary clause, the

after-born slaves would fall into it. *Jones v. Jones,* 1 N. C., 482. But the testator has created no residuum. The fourth clause of the will is a special bequest of particular articles. As therefore, there is no residuum, the testator, as to the after born slaves has died intestate. The question raised by the defendant under the Act of 1806, has never, until now, been directly before the Court. But there can be but little doubt how it would have been decided, if it had been so presented, as to call upon the Court for an opinion. In *Stallings v. Stallings,* 16 N. C., 298, the then Chief Justice expressed an opinion that, under the Act of 1806, when a person puts a slave into the possession of his child and suffers it to remain there until his death, it will be an advancement to the child, not alone in the case of an intestacy properly so called, but also where, having made his will, he omits to dispose of that particular slave, which is a partial intestacy. In that case there was no will, and consequently the question did not arise. It is but the opinion of a most respectable and reflecting Judge, and entitled to the highest consideration; and wherever in subsequent cases it has been alluded to, it has always been so treated. In *Hurdle v. Elliott,* 23 N. C., 176, the Court, in delivering its opinion says, "the question we are now considering, as a general one, is a very important one, and requires much consideration." The opinion does not profess to discuss and much less decide it, and yet, in a very few lines, the argument against

(587) the *dictum,* in *Stallings v. Stallings,* is summed up, with a precision that leaves no doubt as to what would have been the opinion of the Court if they had then decided it. In commenting on the words, "he or she dying intestate," as contained in the Act of 1806, the Court says, "the objections to the doctrine of a partial intestacy being within the act, are not few nor trivial." It then enumerates some of them, as that the act speaks of intestacy, without qualification; next the act speaks only of such gifts as may grow into advancement upon the death of the parent, and there is no such thing as advancement or hotchpotch in personalty upon a partial intestacy. Suppose a father put a negro into the possession of his son, and after by his will give the son the negro for life. Here, by the *will,* the testator dies intestate as to the remainder; is the son to take the life estate under the will, and the remainder by way of advancement, in direct opposition to the will? Though the Court does not decide the question, yet the reasons urged against it have an authority little less binding. They show the point had been well and maturely considered, and upon a review of them, we consider

them decisive. The Court says, however, that the question is open to discussion, and they invite it. The counsel on this occasion has not favored us with an argument in support of his position. Again, in *Freeman v. Knight,* 37 N. C., 75, the Court strongly intimates its dissent to the *dictum* in *Stallings v. Stallings.* It is to be remarked, that in both *Hurdle v. Elliott,* and *Ford v. Whidbee,* 21 N. C., 21, the Court treats the question of bringing legacies into hotchpotch with advancements, as one too plain to be argued or disputed. And yet hotchpotch, or accounting for what has been received from a parent by a child, lies at the foundation of the doctrine of advancement, equality being the object of the law. In a case then of partial intestacy, the doctrine of advancement can not exist; property put into the hands of a child by a testator, and not otherwise disposed of by the will, though remaining in the possession of the child at the time of the parent's death, is still the property of the estate of which the testator has died intestate, and as such must be distributed under the law among the next of kin. (588)

We are of opinion that John Richmond died intestate as to all the negroes born after the making of his will and before his death, whether in the possession of the plaintiff or the defendant John C. Richmond, and that they must be divided equally between the two next of kin. As regards the money, bonds and notes, which at the death of John Richmond were found either in the chest, bequeathed in the first clause, or in the desk bequeathed in the third, we are of opinion that the defendant John C. Richmond is entitled to the whole, whether put there by the testator at the time the will was made, or put there by him since. The bequest is of the chest and all in it—and so also of the desk.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Person v. Twitty, 28 N. C., 117; *Taylor v. Bond,* 45 N. C., 19; *Tillman v. Tillman,* 59 N. C., 208; *Diocese v. Diocese,* 102 N. C., 454.

(589)

JAMES D. BUTLER et al. *v.* ACHILLES DURHAM et al.

1. A clerk of a court has no right to *certify* a record and thereby authenticate it under his private seal.
2. A guardian bond is not a record, and, before it can be read as evidence in any case, it must be proved like all other bonds.
3. Where a ward brings a suit in equity against the sureties of his guardian, all who have been sureties to that guardian, either in the first or renewed bonds, should be made parties, that their respective portions of contribution for the declaration of their principal may be adjusted by the court in one suit.
4. The principle is settled that, where the intention is manifest, a court of equity will always relieve against mistakes in agreements, as well in the case of a surety as of others.

Cause removed by consent of the parties from the Court of Equity of RUTHERFORD, at Spring Term, 1845.

The plaintiffs allege in their bill, that in the year 1821, Berryman Hicks was, by the County Court of Rutherford County, duly appointed the guardian of the infant children of Richard Blanton deceased, and that they are such children or their legal representatives; and that the said Hicks as such guardian, gave his bond with the defendants his sureties therein, dated 16 April, 1823; that said Hicks took into his possession the property of his wards, and several different times renewed his guardian bonds. The bill further shows that Hicks was, by the proper tribunal, removed from his guardianship in 1827, and one George Blanton appointed in his place, who, soon thereafter, instituted a suit at law against the former guardian and his sureties, the present defendants on the bond of 1827, in which he failed, for the reason that the sureties thereto were justices of the peace of Rutherford County, at the time the bond was executed, and which said bond was for that reason void at law. The bill charges, that although the bond is void at law, it is good in equity, and prays it may be

(590) set up against the defendants in their favor, and they be decreed to account with and pay over to them their respective shares of the estate, which came to the hands of their former guardian, Berryman Hicks, or which ought to have come. The bill further shows that Hicks removed beyond the limits of this State, is dead, intestate and insolvent, and has no representative.

The defendants, by their answer, admit the appointment of Berryman Hicks, as stated in the bill, and that the names of the wards are correctly set forth. They state, that in 1821, when Berryman Hicks was first appointed guardian, he gave

a bond with the defendant, Achilles Durham, and one Burwell Blanton, as his sureties, and that they are entirely solvent, and all able to pay; and the plaintiffs have against them full and complete redress at law; that the bond which they gave in 1823 is void at law for the reason assigned, but that there was no mistake in the matter, as it was known to the Court at the time that the sureties were magistrates of the county. They further allege, that in the year 1826, the guardian Hicks renewed his guardian bond, and gave as his surety, one George Champion, and they insist, if they are answerable in equity for the guardian Berryman Hicks, that the said George Champion and Burwell Blanton, the surety to the bond of 1821, ought to have been made parties defendants. They further insist that a judgment was obtained in Rutherford Superior Court, at the ——— term thereof, by George Blanton, after he was appointed guardian of the plaintiffs, part of which was raised by a sale of the property of Hicks, and that they urged the then guardian, Blanton, to take a *ca. sa.* against the body of Hicks, which he refused. They rely upon and claim the benefit of the statute made for the protection of sureties to guardian bonds.

Upon the coming in of the answers, replication was taken, and the cause set for hearing and transmitted to this Court.

Alexander for the plaintiffs.
Osborne for the defendants.

NASH, J. The defendants have taken no evidence to sustain the allegations of their answer. Among the papers of the cause, we find copies of what are stated to be the (591) guardian bond, given by Hicks in 1821, and also in 1827. These papers are certified by the Clerk of Rutherford County Court, as copies of the bonds filed in his office. We know of no law authorizing the Clerk to *certify* any paper, and thereby authenticate it under his private seal. These papers do not profess to be authenticated as records, under the seal of the Court. A guardian bond is not a record, and, before it can be used as evidence in any case, it must be proved like all other papers of a similar kind, by the subscribing witness, if there be one. The bill states, there were several other guardian bonds given by Berryman Hicks, but it does not tell whether the sureties to them were or were not the same with those, who executed the bond of 1823. The defendants allege they were different, but have furnished us with no proof of the fact.

The same answer may be given to the protection sought by

the defendants, under the statutes of limitations. The answer does not set forth when the children came of age, nor is the defective statement aided by anything in the bill, nor is there any evidence on the subject. The main, indeed the only, question raised in the case is, as to the right of the plaintiffs to come into this Court to set up against the defendants a bond, which is shown by the bill, and admitted by the answer to be void at law. This question was decided by this Court in all its length and breadth in *Armstead v. Bozman,* 36 N. C., 123. In that case, as in this, the plaintiff rested his equitable right upon the alleged fact that the bond executed by the parties was intended by them to be a good and valid bond, but through a mistake it was rendered void at law, and, for precisely the same reason that some of the obligors were likewise obligees. Notwithstanding this objection, the bond was by the Court set up and the sureties held liable under it, on the ground that it was a clear mistake in matter of fact. The same doctrine is held in the case of *Crosby v. Middleton,* Precedents in Chancery, 309. We consider the principle as settled, that where the intention is manifest, a court of equity will
(592) always relieve against mistakes in agreements, as well in the case of a surety as of others. *Weser v. Blakely,* 1 John. ch. 607. The plaintiffs are entitled to the relief they ask.

It is further stated in the answer, that the last guardian, George Blanton, recovered a judgment against Hicks, and that by the sale of the property of the latter, a part of the judgment was discharged, and the whole would have been paid by Hicks, if Blanton had taken out a *ca. sa.* against him, as he was requested to do. It is sufficient to say, this is a matter which does not affect the right of the plaintiffs to call upon the defendants, nor do the defendants furnish any evidence of their allegation. Before the master, when the accounts are taken, the defendants will be at liberty to show any payments, which have been made by Hicks, or raised out of his property.

Unquestionably, all the sureties of Berryman Hicks, whether parties to the same bond or to different bonds, ought to have been made parties to this suit, that the Court, in its final decree, might have adjusted the loss between them. As the case stands we do not know that there are any other persons interested in the matter, but those who are before the Court. The only effect, however, will be to throw the whole burthen in the first instance on the defendants, leaving them to their remedy against the sureties to the other bonds, if there be any.

The case must be referred to the master to take an account

of the estate belonging to the plaintiffs, which came to the hands of their guardian, Berryman Hicks, and of his administration of the same.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Jones v. Blanton, 41 N. C., 119; *Short v. Currie,* 53 N. C., 43.

(593)

JOHN T. MAXWELL *v.* MATTHEW WALLACE.

An entry-taker can not appoint a deputy, nor can the acts of one in the capacity of a deputy be rendered valid by the subsequent acquiescence of the entry-taker in what he has done.

Cause removed by the consent of the parties from the Court of Equity of MECKLENBURG, at Spring Term, 1845.

This bill was filed to compel the defendant to convey to the plaintiff a tract of land, therein described, and to enjoin him from prosecuting a suit at law, brought to recover possession of it. The facts of the case are as follows: The plaintiff, intending to enter the land in question, went, on 17 February, 1842, to the house of the entry-taker, who was absent, and applied to his wife to take from him an entry thereof. She at first refused, but, at length, made an entry upon the entry-taker's book to that effect, and on 8 June following, the plaintiff obtained a grant for the land. On the same day, and before the plaintiff procured this entry to be made, and with his knowledge, the defendant applied to the entry-taker to enter the same land for him, and paid his fee, and the entry-taker promised so to do upon his return to his house, and which he accordingly did, and the defendant took out a grant, prior in date to the plaintiff's. When the latter procured the entry-taker's wife to make the entry for him, he handed her a paper describing the land, but it was not signed by him, nor was it left at the house of the entry-taker, but was carried away by him and handed to that officer, about three weeks thereafter. The entry-taker proved that his wife had often taken locations for him, and that he had authorized her to enter them on his books in his absence, but that this was the first she had ever made, and that when he made the defendant's entry, he saw the entry of the plaintiff made by his wife, and the (594) defendant's entry next to it. The defendant had brought an action of ejectment against the plaintiff to recover posses-

sion of the land. An injunction was granted, and, upon the coming in of the answer, replication was taken.

Osborne for the plaintiff.
Alexander for the defendant.

NASH, J. In the view we have taken in this case, it is unnecessary to inquire into the title of the defendant; it being very clear, we can not grant to the plaintiff the relief he seeks. Unless his grant is founded upon a valid entry, such as the law recognizes, however imperfect the defendant's grant may be, the plaintiff can not ask the Court to compel him to convey the land to him. Sec. 4, ch. 42, Rev. Stat. directs the justices of the peace in every county, to elect *one* good and sufficient person to receive entries of claims of land, within such county respectively, and sec. 13 requires the claimant of any land to produce (the language is, *shall* produce) to the entry-taker, etc. It is not pretended in this case that the plaintiff did make an entry of the land with the entry-taker, but it is said his wife was the agent or deputy of the latter to act for him, and that he subsequently recognized and adopted her act. We know of no power in an entry-taker to appoint a deputy or agent, to perform his duties. The law has made them personal to himself, and that it did not intend he should have any such power, is evidenced by the fact, that, in sec. 7, the power is given to the surveyor to appoint a deputy. Sec. 4, which requires the appointment of *one* entry-taker, also requires the appointment of not more than *two* surveyors for the county. We think it is manifest, the Legislature intended to confine the power to receive entries in each county to *one* person. And among several other reasons, to avoid the very evil exhibited by this case, a double entry of the same land by different persons. It (595) would further be difficult, if not impossible, for the legislative will, as expressed in sec. 13 to be complied with, in the case of there being *two* persons entitled to receive entries. By that section the entry-taker is required to endorse on every entry the date when made, and to enter a copy thereof in a well bound book, and "every entry to be made in the order of time in which it shall be received, and numbered in the margin." Suppose the entry-taker to appoint several agents or deputies; for if he may appoint one, he may a dozen; and the same piece of land to be entered on the same day with each. How is the priority to be ascertained, and in what order are they to be spread upon the book? It is evident much confusion and uncertainty would be produced, which is now avoided by confining the power to receive entries to one person. It fol-

lows as a necessary consequence, if he can not appoint a deputy, he can not by any recognition of his, make that lawful, which is in itself unlawful. If he could, the priority and certainty which the law recognizes and requires, would not depend upon the action of the parties, but upon the will and pleasure of the entry-taker. The plaintiff's claim to relief rests upon the assumed fact, that he made an entry before the defendant, as required by law, and upon it procured a grant for the land to issue to himself; and that the defendant, with a knowledge of his priority, made an entry of the same land. As he has never made an entry, such as the law requires, his equity has never arisen.

PER CURIAM. BILL DISMISSED WITH COSTS.

Cited: Harris v. Norman, 96 N. C., 62; *Pearson v. Powell,* 100 N. C., 88.

(596)

HENRY WELLS *v.* ROBERT P. WELLS.

1. A agreed with B that, in consideration of a certain sum, he would convey to B a certain tract of land, and the purchase-money was secured by notes payable in three years. It was further agreed that B should take possession of the premises, and should pay, annually, for three years a certain portion of the crop; and if B paid for the land by such annual installments in three years, the deed in fee was to be given; if not, the annual payment was to be considered as rent, and at the end of the three years the land was to be surrendered by B: *Held,* that if the annual payments amounted at the expiration of *four* years to the price originally agreed to be given for the land, the bargainee claiming that they should be so applied, although the bargainor insisted that the payments should be considered only as payments of rent, the bargainee was entitled to a conveyance of the premises.
2. The time mentioned in the contract for completing the purchase of land is not usually considered in a court of equity as of the essence of the contract.

Cause removed from the Court of Equity of BUNCOMBE, by consent of the parties, at Fall Term, 1844.

The following facts were disclosed by the pleadings and proofs.

On 10 November, in the year 1836, the defendant, for the consideration of $300, executed in writing, under his hand and seal, an agreement with the plaintiff, to make him a good title in fee to a tract of land of one hundred acres, more or

less, it being the land which the defendant purchased of David Roberts, lying in Buncombe County, on the waters of Haw Branch. The purchase-money was secured by notes of hand, payable in installments in three years from the date of the agreement. It was, at the same time, by a separate instrument, further agreed by and between the parties, that Henry Wells was then to be let into possession, and to hold the place for three years, by paying 125 bushels of corn per annum as rent; "but that the said 125 bushels of corn per annum is to go to pay for the place at cash prices, if the said Henry Wells pays for the place in three years; if not, the annual payment of the corn is to be the rent, and the said Henry Wells is (597) to give up the possession of the place to Robert P. Wells, with all improvements, etc." The plaintiff in his bill states, that he has paid to the defendant and his assignees of the said notes, the principal money and interest; that the entire payment was completed in 1840; that he then called for a legal conveyance of the said land from the defendant, which he refused to execute. The prayer of the bill is for a specific execution of the said contract.

The defendant in his answer, admits the written contract of purchase or lease as stated in the bill. And he further says that the plaintiff failed to pay the notes within the three years; that on 11 November, 1839, it was further agreed between them, that the payments which had been made should go as rent, and not as payments on the notes; and that it was then further agreed on, if the plaintiff would go on and pay off the said notes, independent of the rent already paid, that the defendant would let him have the land, and execute a deed for the same, but he says that the consideration was intended to be $350, and $300 was by mistake inserted in the written agreement. There is a replication to the answer.

Badger for the plaintiff.
Francis for the defendant.

DANIEL, J. There is no proof in the case of any mistake having been committed, in inserting in the agreement $300, as the consideration for the land. There is proof that the defendant, on 11 November, 1839, demanded a surrender of the possession of the land, on the ground that all the purchase-money had not been paid within the time stipulated. To which demand the plaintiff refused to yield, and said he did not want to give it up, he had done too much work on it, that he would keep the place and pay for it. He then said that he would let

what he had paid go as rent, according to the written articles. All the advancements in money, stock, and corn, which the plaintiff had made for three years, the defendant (598) insisted to retain as rent, and also to force the plaintiff to pay beside in full the notes and interest, which had been originally given for the purchase of the land. This unreasonable demand was made on the very next day after the time for full payment had expired. It is plain from the terms of the original written contract, that the plaintiff intended to hold on upon the land, as a home, if he could by any means pay for it, and if he found out that it would be impossible for him to raise the purchase-money, that he should then have the liberty of being considered as a tenant for three years, at the rent of 125 bushels of corn per annum. The plaintiff, on 11 November, 1839, refused to abandon his contract of purchase. The parol agreement, extorted that day from him, was unreasonable and without any consideration in this Court; for the time mentioned in the contract for completing the payment of the purchase-money is generally not, in this Court, of the essence of the contract. Indeed, the defendant was, himself, not in a condition to rescind the contract of purchase or declare it at an end, as he did, upon the ground of its not having been literally performed by the plaintiff in making payment to the very day. For, before that time, the defendant had assigned one of the bonds for $100 to another person, who took it without recourse to the defendant, and on the sole credit of the plaintiff, who duly paid it. After having thus virtually received one-third of the purchase-money, over and above the sums which he now claims to keep as rent (which of themselves amount to nearly one-half of the purchase-money), the defendant can not be permitted, in this Court, to insist on the forfeiture of either of his payments or the land by the plaintiff, when the latter has since paid, or is willing to pay, the whole purchase-money agreed on, and the interest accrued thereon.

It therefore seems to us that the plaintiff is entitled to a decree for a specific execution of the contract, if he has paid the purchase-money as stated by him in his bill, or if he shall now pay what may be found due by a report of the master.

We are of opinion that a reference must be made to uncertain whether the consideration money has been (599) paid, and if not, what sum remains unpaid.

PER CURIAM. DECREED ACCORDINGLY.

ISAAC LYERLY *v.* CLAUDIUS B. WHEELER et al.

1. When a defendant admits the plaintiff's equity on the facts on which it is founded, but sets up an equity in himself of a distinct nature and counterbalancing that of the plaintiff, he must sustain his answer by proofs.

2. An answer, after replication, is not evidence for the defendant, except as it is made so by the discoveries called for in the bill, and which are responsive to direct charges or special interrogatories.

Cause removed from the Court of Equity of ROWAN, at Spring Term, 1845, having been set for hearing upon the bill and answer.

The facts, being the same as those reported in the former case, are succinctly referred to in the opinion delivered in the present case.

Alexander for the plaintiff.
Boyden and *Osborne* for the defendants.

NASH, J. When this case was formerly before us, it was on a motion to dissolve the injunction and remove the sequestration previously granted. *Ante,* 170. These motions were refused; and, the cause being remanded to the Court of (600) Equity for Rowan County, a general replication was filed to the answer. It is now here for final hearing, without any testimony on either side. The plaintiff in his bill states, that he had lived with the defendant several years as a clerk, during which time he had accumulated considerable property, consisting of money and notes, and other evidences of money due, which, together with what he had on hand when he went to the defendant's, amounted to the sum of $——, that he slept in a room over the shop of the defendant, and the defendant's brother in the same room; that on the night of the———the brother made some triffling excuse for sleeping in another room, and about midnight he was roused from his sleep by the entrance of the defendant, with a candle in one hand and a knife in the other. After lowering the window curtains, he came to his bed, charged him with having robbed him and threatened to kill him, if he did not give up all his property, which he did. The bill asked for an injunction and sequestration, both of which were granted. The bill further charged that the brother had been removed from the room by the defendant, that there might be no witness to the transaction. The defendant admits by his answer, that, being fully

satisfied in his own mind of the dishonest conduct of the plaintiff, of his having plundered him, he took occasion to call upon him at a late hour of the night, and charge him with having plundered and stolen from him a large amount; but denies he threatened to kill him, if he did not give up the property, but told him he should expose and prosecute him; that the defendant had been acting as his clerk for several years, and it was his settled and solemn conviction, that he was, during that period, robbed by him, from time to time, of a large amount of property, greatly larger than what he took from him. And that he was induced to pursue the course he did, in order to save the reputation of the plaintiff and the feelings of his friends and relations. In the opinion delivered in the case, upon the hearing of the interlocutory order, the Court says "the rule of equity is, when an answer to a bill for an injunction admits the plaintiff's equity, but seeks to get rid of it by a new equity of his own, the injunction must (601) be continued to the hearing, when the defendant will be at liberty to sustain his equity by testimony, if he can. The defendant has taken no testimony, and the case is to be heard now, as it was upon the defendant's motion to dissolve the injunction. If upon the bill and answer, then the Court, by the rules of equity, could not dissolve the injunction, neither can they now, without testimony, give the defendant a decree If they could, they were very idly employed in continuing the injunction to the hearing. The very reason assigned by the Court for their decree, points out the necessity, on the part of the defendant, of sustaining his equity by proper testimony, before he can obtain a decree in his favor. An answer, after replication, is not evidence for the defendant, except as it is made so by discoveries called for in the bill, and which are responsive to direct charges, or special interrogatories. *Gillis v. Martin,* 17 N. C., 473. It is not like one charging and discharging himself in the same breath, standing as one admission as if he had said, true I took the property from you, under the circumstances mentioned, but immediately returned it to you. But here the defendant admits the truth of the plaintiff's charge, and introduces new matter or new facts, constituting in his opinion, his justification; and which is not responsive to any allegation of the bill. This new and irresponsive matter must not rest, for its proof, upon the defendant's oath, but must be sustained by proof *aliunde. Lady Ormodo v. Hutchinson,* 18 Ves. Jr., 47.

We do not mean to be understood as saying, if the defendant had sustained, by proof, his allegations against the plaintiff,

that we should have permitted him to retain possession of the fruits of his violence. The circumstances, as detailed by himself, show a spirit of outrage and disregard of all lawful restraint, that can not be countenanced in a court of equity. If the plaintiff had been guilty of the acts which he alleges, but which he does not charge as facts, the courts of justice are open to him, and the evidence, which satisfied his (602) mind, might have satisfied the minds of a jury of his country. Those courts are still open to him. But he must, in the meantime, place the plaintiff in the situation, in which he was, before he forced from him his property. There is one feature of the case, which gives to the defendant's conduct a peculiar atrocity. It is the fact, alleged by the plaintiff and not denied by the defendant, that he caused his brother to remove from the room of the plaintiff, where he had before then slept, on the night selected by him for the transaction. He took care to remove out of the way the only person, who could have witnessed the deed, and if he is now without evidence to sustain his statement of the transaction, it is his own fault. A deed so conveyed by fraud and violence, can not be countenanced by any court.

An argument is urged for the defendant, that he gave the plaintiff his bond for $4,869, and that this was a substantive contract, legalizing what had before been done. But the defendant admits that was a mere matter of form; for that he gave the bond to enable the plaintiff to satisfy his friends that the defendant owed him that sum, and, at the same time the plaintiff executed to him an acquittal and release of the bond. That release, if genuine, can amount to nothing as a defense in this cause, as it is clear that not a cent was paid by the defendant; and, indeed, this paper, under the circumstances, must be considered as having been obtained by the same means the others were, namely, by what, in this Court, is considered nothing less than overpowering moral, if not physical, duress.

The plaintiff must, therefore, be declared entitled to the several bonds and other securities obtained by the defendant from him, as mentioned in the pleadings. And it must be referred to the master to ascertain what they were, and what sum or sums of money, if any, the defendant has collected thereon; and who has the custody of the same; and let it be declared that the defendant is liable to pay to the plaintiff such sum or sums of money, if any, which he may have received on any of the said securities, and to reassign to him such (603) of the securities as yet remain uncollected. And let it be further declared that the plaintiff shall bring into

court the bond given to him by the defendant for the sum of $4,869, dated 3 October, 1842, mentioned in the pleadings, in order that the same may be cancelled.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Melvin v. Robinson, 42 N. C., 82; *Hughes v. Blackwell,* 59 N. C., 76, 77; *Longmire v. Herndon,* 72 N. C., 631.

SAMUEL MARTIN *v.* HENRY HARDING, Admr., Etc.

1. A creditor, may, by a proper bill, obtain accounts of the real and personal estates of his deceased debtor, and a decree for payment of his debts out of the proper fund.
2. But if he chooses to go on at law, and has the plea of "full administered" found against him, or confesses it, there is no ground for relief as against the executor or administrator, in equity, to set aside the verdict and judgment thereon, where the executor or administrator has been guilty of no fraud in misrepresenting the state of the assets.

This was an appeal from the Court of Equity of BEAUFORT, at Spring Term, 1843, his Honor, Judge *Bailey* presiding, overruling a demurrer, which had been filed by the defendant to the plaintiff's bill.

The bill alleged, that some time in 1836, one Tilen Godley died intestate in the county of Beaufort, possessed of some personal property; that at June Term, 1836, of the county court of the said county, letters of administration on the estate of the said Godley were duly issued to Henry Harding, the defendant; that the said Godley, at the time of his (604) death, was justly indebted to the plaintiff in the sum of $97.97 cents, and that, after the death of the said Godley, and the taking of the administration by the said Harding, the plaintiff sued out a warrant, returnable before a single magistrate, in his name as plaintiff, against the said Harding, as administrator of the said Godley, for the recovery of the said debt: that, on the trial of the said warrant, the administrator pleaded "fully administered," when the plaintiff, having established his claim, the justice gave judgment in his favor for the sum of $97.97 cents, with interest and costs, and returned the papers, as required by law, to the next term of the County Court of Beaufort; that, at the said term, the said Harding pleaded "fully administered," when the plaintiff admitted the

plea, and the judgment of the justice was affirmed, and a *scire facias* issued against the heirs; that a judgment on this *scr. fa.* was obtained against the heirs; that executions isued on this judgment, from term to term, when the sheriff finally returned, that the lands had been sold for $25, enough to pay the costs, but not enough to pay any portion of the debt; that there are no other lands, descended to the heirs, on which an execution can be levied. The bill then states that no portion of the said debt has been paid; that, about the year 1840, a large amount of personal property, consisting of slaves, bonds, notes, money, etc., of the estate of the said Godley, came to the hands of the said Harding, as administrator, to be administered, and that he has now in his possession an amount thereof, more than sufficient to pay all the just debts of his said intestate. The bill then averred that the plaintiff had now no remedy at law against the said administrator, and prayed that he might, out of the assets, so received since the judgment at law, be decreed to pay to the plaintiff his debt, etc., and for further relief.

To this bill a general demurrer was filed by the defendant, for want of equity in the plaintiff, and, the Judge below having overruled the demurrer, an appeal was, by leave of (605) the Superior Court, granted to this Court.

Rodman for the plaintiff.
Shaw for the defendant.

DANIEL, J. We think that the Judge should have sustained the demurrer. The plaintiff admits in his bill, that, at law, he confessed the truth of the defendant's plea of *plene administravit*. He then could proceed in one of two ways, either to take a judgment *quando,* or sue a *scire facias* against the heirs to subject the land. He deliberately chose the latter course. And the circumstance, that the land did not produce enough to satisfy his judgment, may be to him a misfortune, but we can not see that it is one of those *mistakes,* that a court of equity can relieve against. *Tatum v. Tatum,* 36 N. C., 113, is not an authority for the plaintiff. There the two slaves *given* by the debtor to Dudley Tatum, who afterwards became administrator to the debtor, were sought to be subjected by the creditor, only after all the other assets, and all the lands, which had descended to the heirs of the debtor, had been exhausted. The said gift of the two slaves by the debtor. then and then only, was ascertained to be void and fraudulent, under the statute, as to the creditor seeking payment of his debt. The donee of the two slaves had, in equity, a right to stand behind

all the general assets, and also all the lands descended to the heirs, until they were exhausted, before he should be called on to surrender the said slaves to pay creditors. He stood like a specific legatee, and had a right, in equity, to call in aid all the general assets, and also all the lands descended to the heirs, to pay debts, before he should be compelled to give up those slaves to the creditors of his donor. And, furthermore, in *Tatum v. Tatum,* the defendants did not rely, in their answer, upon what had been found on the issue in the court of law.

A creditor may, by a proper bill, obtain accounts of the personal and real estates of his deceased debtor, and a decree for the payment of his debt and those of others (606) of the proper fund. *Simmons v. Whitaker,* 37 N. C., 129. But if he chooses to go on at law, and has the plea of fully administered found against him or confess it, we see no possible ground for relief, in equity, against the verdict and judgment thereon, where the executor has been guilty of no fraud in misrepresenting the state of the assets. It is not sufficient, for example, as a ground for coming into equity, that the creditor has discovered that the executor had assets at the time of the trial at law, which he did not disclose and the creditor did not then know of or prove; for the executor is not bound to give evidence against himself at law, and there were methods by which the creditor might have had the discovery, if he had thought proper to resort to them. But if he proceeds upon his own judgment, at law, the result must bind him, as in every other case of concluding persons by verdicts and judgments. For the present bill is merely an attempt to get a new trial of the plea of fully administered, or rather to avoid the effect of the present plaintiff's admission of it, without showing fraud by the administrator, and upon the mere ground that he had not fully administered. The effect of sustaining the bill would be, that a finding upon that plea concludes the executor, but in no instance concludes the creditor; and that the creditor, after taking his chances, at law, of fixing the executor with assets, because he may not be able to prove some disbursement, and the chances having turned out against him, may then ask that discovery and relief from a court of equity, which he might at first have had for himself and all the creditors. There is no precedent of such a bill that we know of, which supplies a strong argument against it. The question of "fully administered" is in its nature a legal one, and though courts of equity, for the sake of the discovery and the better remedy in taking the accounts and applying the assets, does assume jurisdiction of it at the proper period, yet, after the

parties have submitted the question to a legal tribunal and had its decision on it, the court of equity ought not to (607) undertake to revise that decision, or try the question, *de novo,* a second time.

PER CURIAM. REVERSED AND DEMURRER SUSTAINED WITH COSTS.

Cited: Carrier v. Hampton, 33 N. C., 311; *Wilson v. Leigh,* 39 N. C., 100; *Powell v. Watson,* 41 N. C., 96; *Stockton v. Briggs,* 58 N. C., 314; *Wadsworth v. Davis,* 63 N. C., 252; *Wilson v. Bynum,* 92 N. C., 723; *Wilson v. Pearson,* 102 N. C., 310; *Guilford v. Georgia Co.,* 112 N. C., 43.

RICHARD PARISH, for himself and others, *v.* DIXON SLOAN et al.

1. Where a plaintiff files a bill to secure the payment of his own debt out of property he alleges to have been fraudulently conveyed by his debtor, and states that he files it for his own benefit and for that of other creditors, whom he does not make parties, this is no cause of demurrer.
2. When a fact, assigned as the cause of demurrer, does not appear in the statement of the bill, the demurrer will, of course, not be sustained.
3. Equity will not permit a plaintiff to demand, in the same bill, several distinct matters, differing in *nature,* against several defendants, but will in such cause sustain a demurrer for multifariousness.
4. But when one general right is claimed by the plaintiff, though the individuals made defendants have separate and distinct rights, yet they may all be charged in the same bill, and a demurrer for that cause will not be sustained.

This was an appeal by permission of the Court, from an interlocutory order of the Court of Equity of SAMPSON, at Spring Term, 1845, his Honor, Judge *Pearson* presiding.

The plaintiff states in his bill, that, at the July Term of Duplin County Court, he obtained a judgment against (608) Dixon Sloan for the sum of $395, upon which an execution issued, and that no property of said Sloan, either real or personal, could be found to satisfy it.

The bill then states that Arna B. Chesnut, George W. Robinson and David Murphy, are, each, judgment creditors of the said Sloan, and that no property can be found with which to satisfy them.

It charges that, Dixon Sloan being largely indebted, executions were duly issued, and were levied on certain negroes,

whose names are set forth, and which, on 19 May, 1841, were sold by the sheriff of Duplin, when certain of them were purchased by the defendant Faison, and the remaining by Daniel C. Moore. On the same day, Dixon Sloan bargained and sold others of his slaves to the said Faison, upon an agreement that he, Faison, should convey the negroes purchased by him, at the sheriff's sale, to David D. Sloan, one of the defendants, in trust, for the use of Catharine Sloan, the wife of the said Dixon, during her life, and after her death, to the use of her children, the other defendants. This transfer, it is alleged, was made in fraud of the creditors of the said Dixon, and to cover them from all executions against him, the said Dixon.

The bill further charges that Dixon Sloan was indebted to divers other persons, and that John C. Moore, being his surety, a mortgage deed was, on 20 July, 1841, executed by the said Sloan, conveying a number of negroes to the said Moore, to secure and pay said debts; and that, on 1 April, 1842, the same Dixon Sloan mortgaged by deed to the said John C. Moore, other certain negroes, for the purpose of securing another creditor. It then charges that all the debts, so secured by said mortgage, were paid by the said Moore, by the sale of a few of the said negroes so conveyed. The bill prays that the plaintiff and the said Arna B. Chestnut, Robinson and Murphy, may have satisfaction in the first place, out of the negroes mortgaged to John C. Moore, which remain in his hands after discharging the debts so secured: and if that fund should prove insufficient, then out of the negroes conveyed to (609) David D. Sloan, by Faison, in trust for Mrs. Dixon and her children.

To this bill the defendants severally demur, and for cause of demurrer say: 1. That Arna B. Chesnut, George W. Robinson and David Murphy, are not parties to the bill, and yet the plaintiff Parish prays relief for them; and 2. That the bill charges that the sale, made by the Sheriff of Sampson, was fraudulent and void, as against the creditors of the said Sloan, as being made without consideration, though it alleges the sale was made to pay debts due from him; and 3. That the bill is multifarious in this, to wit, that it seeks to subject the equity of redemption of said Sloan in the slaves mortgaged to Daniel C. Moore to the payment of the plaintiff's claim, and also the slaves sold by the sheriff of Duplin to William Faison, although the titles of the several defendants to the two sets of slaves have no connection whatever, and the several defendants have no interest in common, in the matter in controversy. No more of the bill is set forth, than is required to

show the application of the several causes of demurrer assigned. The demurrer was overruled, and the defendants allowed an appeal to this Court.

Warren Winslow for the plaintiffs.
Reid for the defendants.

NASH, J. The cause first assigned in the demurrer is answered by the demurrer itself. It is, that the plaintiff has asked the Court to provide for the relief of Chesnut, Robinson and Murphy, who are not parties to the bill. A demurrer is an allegation of a defendant, which, admitting the matters of fact alleged by the bill to be true, shows that, as they are therein set forth, they are insufficient for the plaintiff to proceed upon, or oblige the defendant to answer. Now the plaintiff asks relief for himself, upon a state of facts, which, if true, clearly entitles *him* to relief. His officiously asking the aid of the Court, for others, who are not parties to his bill, and do not ask it for themselves, certainly ought not, and can (610) not, deprive him of his right. It is an equitable, as well as legal maxim, that *utile per inutile non vitiatur.* This is an insufficient cause of demurrer to the whole bill, being too broad. The second cause assigned is, as to the sale made by the sheriff to Faison. The demurrer alleges that the bill charges that sale to be fraudulent, though made to pay the just debts of Dixon Sloan. The statements of the causes of demurrer are nothing more than references to the bill, and an enumeration of the objects appearing on its face; and, hence, the first question in considering a cause assigned in a demurrer ever is, is it true? Does the bill contain the statement as alleged in the demurrer? Redes., p. 156.

Upon examination it clearly appears that the bill did not intend to charge, and in fact does not charge, that the sale by the *sheriff* was fraudulent. The charge is, that the conveyance of Faison to David Sloan, in trust for Mrs. Sloan and her children, was in fraud of the rights of the creditors of Dixon Sloan. From anything appearing on the face of the bill, Faison is a *bona fide* purchaser of the eight negroes, at the sheriff's sale; and the allegation of fraud, in this particular, is confined to his conveyance to David D. Sloan. The fact then is not stated in the demurrer, and the bill is free from the objection.

The principal cause of demurrer, is the third assigned, and is for multifariousness. Equity will not permit a plaintiff to demand, in the same bill, several distinct matters, differing in *nature,* against several defendants, for this would be to expose

each defendant to unnecessary cost. The pleadings would necesarily be spread out by the statement of the several claims of the other defendants, with which the co-defendants could have no connection. In such a case, the bill is demurrable. But when one general right is claimed by the plaintiff, though the individuals, made defendants, have separate and distinct rights, yet they may all be charged in the same bill, and a demurrer for that cause can not be sustained. *Buckle v. Atlas,* 2 Vern., 37; *Seymor v. Bennett,* 2 Atk., 484; *Adair v. N. R. Company,* 11 Ves., 444; *Carlisle v. Wilson,* 13 Ves., 294; *Duke of Norfolk v. Myers,* 1 Mad., 83; 1 Jac. and (611) Walk., 369.

Thus, where the plaintiff claims a general right to the sole fishery of a particular river, he may file his joint bill against all persons claiming several rights in the fishery, as occupiers of the land adjacent to the river, or otherwise, *Mayor of York v. Pilkington,* 1 Atk., 282. So also for the infringement of a copyripght or patent. *Dilley v. Doig,* 2 Ves. Jr., 486. These cases show that, when one general legal right is claimed against several distinct persons, though their rights are different and distinct from each other, they may still all be joined in the same bill. In this case the plaintiff claims one general legal right against all these defendants. His allegation is, that all the negroes are the property of Dixon Sloan, so far as he is concerned, and constitutes one fund for the payment of his debts. The deed made by Faison to David Sloan, being for a valuable consideration proceeding from Dixon Sloan, it is as if Dixon Sloan had himself made the conveyance. It is a voluntary settlement, made by him, upon his wife and children, and is therefore fraudulent and void against his creditors, provided their debts can not be paid without resorting to it. *Morgan v. McClelland,* 14 N. C., 82. The bill charges that the plaintiff is such a creditor, and states that, at August term, 1835, of Sampson County Court, Dixon Sloan was appointed guardian of the infant children of ——— Chestnut, and gave bond with the plaintiff as his surety. On 17 November, 1841, suit was brought on the bond against the plaintiff and Sloan, and a judgment obtained, and the execution levied on the property of the plaintiff, and he was obliged to pay it. He, therefore, claims to be substituted to the rights of the wards of Dixon Sloan, and as a creditor at the time the conveyance was made by Faison. And the demurrer admits these facts. The negroes then, so conveyed to David D. Sloan, remain liable to pay the plaintiff's claim, provided other property of the said Dixon can not be found subject to the debt. The mortgages

to John C. Moore, for all that appears on the bill, were made *bona fide;* but it is alleged that the debts secured by (612) them have been paid by Moore out of the proceeds of the mortgaged negroes, and that several of them still remain in his hands unsold. If so, a trust has resulted to Dixon Sloan, and John C. Moore holds the unsold negroes as his trustee. *Harrison v. Battle,* 16 N. C., 537. In such case, after the payment of the debts secured by the mortgage, the bargainor's interest is, in equity, subject to the payment of his debts. It was necessary for the plaintiff, before he could subject the slaves in the hands of David D. Sloan, to show that there was no property of Dixon Sloan, out of which his claim would be satisfied. To do this, John C. Moore was a necessary party. It is, indeed, highly to the interest of the wife and children, that they should be made parties, as they are enabled, thereby more effectually to guard their own interests, by seeing that the funds in the hands of John C. Moore is properly accounted for, and properly applied, in exoneration of that held by their trustee, David D. Sloan.

PER CURIAM. DECREE AFFIRMED WITH ONE SET OF COSTS.

Cited: Haggie v. Hill, 95 N. C., 306; *Fisher v. Trust Co.,* 138 N. C., 225.

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(613)

JAMES M. SMITH *v.* THOMAS HARKINS et al.

1. An individual can not, of his own authority, establish a free bridge or ferry across a stream, so as to impair the profits of a toll bridge or ferry authorized by the county court and already erected and used by another individual.
2. The property in such a franchise, though granted for the benefit of the public, is private in the individual grantee, and he may not only sue at law to recover damages for an infringement, but equity will enjoin an unauthorized interference with his rights.
3. The county court is the sole judge of what the convenience of its county requires in relation to roads and bridges, and can take such order in relation to them as in its discretion it may see fit.
4. Where the person claiming an exclusive franchise to a road or ferry can not show the original order granting it, but shows that he and those under whom he claims have enjoyed it for more than forty years, and that the county court has fixed the rate of toll on it, his title to it can not be disputed.

5. The fact of the county court fixing a rate of toll is, perhaps, conclusive evidence that the bridge or ferry was established by the county court, the proper authority, according to our act of Assembly, Rev. Stat., ch. 104, sec. 1, for settling and establishing roads and ferries.
6. Forty years omission, by the owner of a ferry, to furnish the public with the service due from him, must amount to a surrender of his right to the exclusive franchise.
7. The act of 1806, Rev. Stat., ch. 104, sec. 28, which allows a bridge to be built instead of keeping a ferry, can only apply to a ferry actually existing and in use at the time of substituting the bridge for the ferry.
8. When a public road is laid out, the overseer is only required to construct such causeways and bridges as can conveniently be done by the hands allotted to him, in the time ordinarily employed or required in working on a public road.
9. Bridges over a large stream, or ferries, must be established by the county court.

Appeal from an interlocutory order of the Court of Equity of BUNCOMBE, at Fall Term, 1844, his Honor, Judge *Battle* presiding, directing an injunction, which had been granted in the case, to be continued to the hearing.

The bill was filed in May, 1844, and a supplemental bill on 15 June, 1844. They state, that upwards of forty (614) years before, a public ferry was established across the French Broad River in Buncombe County, on the State road, leading from Asheville to Waynesville, in Haywood County, to Macon and Cherokee counties, and to Georgia; and that it is situated about 1 1-4 miles from Asheville, and was originally granted and owned, and kept by Edmund Sams, who then owned the lands on which the ferry was established, and afterwards sold the land and ferry to one John Jarrett, who, in the year 1830, sold the same to the plaintiff: that Sams, Jarrett, and the plaintiff have, in succession, during the periods of their respective ownerships, continually kept the ferry up and well provided with boats and hands and transported all passengers, as in duty bound; that in 1801, the County Court of Buncombe rated the said ferry as the ferry of the said Sams, who was then in possesion of it; and a copy of the order is exhibited with the bill. The bills then state, that in 1833, the plaintiff, then owning and occupying the land and ferry, and believing the public convenience and his own interest would be promoted by having a bridge instead of the ferry, erected a good and substantial bridge, and hath continually kept the same in good repair for all such passing, as is required by the public, at rates fixed by the county court in April, 1834, a copy of which order is exhibited also, which allows the tolls to the plaintiff, as the owner of the bridge.

The bills state, that besides the sum paid originally as the purchase-money for the land and ferry, the plaintiff has laid out in the building and repairing the bridge, the sum of $2,000; and that the road on which it is situated is much traveled, and the bridge greatly resorted to for passage by wagons, carts, carriages, and passengers on foot and horseback, and yields the plaintiff much profit. The bills further state, that the defendant Dever, and, as the plaintiff believes, other persons, whose names are not known to him, have subscribed funds and entered into an agreement among themselves to erect a new and free bridge over the French Broad River, about two miles above the plaintiff's bridge, and have employed the other (615) two defendants, Harkins and Culbertson, to build the same, and they had collected timber for that purpose at the spot, and had commenced the bridge. The bills further state that there is no public road established on either side of the river to the place, where the projected bridge is to stand; but that the persons, through whose land a road would pass on the west side of the river, had applied to the county court and obtained at the preceding term an order appointing a jury to lay one off, but that it had not yet been done; and that no order had been obtained by the defendants or any other person from the county court for the building of the new bridge, and that the defendants were proceeding in the work without any lawful authority. The bills then charge that the plaintiff's bridge is a good and sufficient one, and duly attended to, for the accommodation of the public; and that the distances between any given points on the different sides of the river, to and from which persons desire to pass, will not be materially different either way, except to a few persons, resident on the opposite side of the river above the bridges, who may wish to pass to or from Asheville; and, therefore, that the new bridge is not needed and will not be useful to the public, except in the single particular of enabling persons to cross the river without paying to the plaintiff the reasonable tolls allowed him by the county court. The bill further states, as evidence that the new bridge would not be useful, that prior to the establishment of Sams' ferry, there was a ferry at or near the point, where it is intended to build the new bridge; but that Sams' ferry proved so much more convenient than the other, and the roads to it were so much nearer and better, that very soon the other ferry was discontinued and the roads to it abandoned, and that they have remained out of use about forty years. And the bills further change that the sole object of the defendants in erecting the said bridge, is to make it free, with the

intent to divert the travel from the plaintiff's bridge, and thereby diminish his tolls and profits, and impair the value of his franchise and property.

The exhibits referred to in the bill are orders of the county court, as follows: (616)

"At a court, etc., on third Monday of January, 1801. Ordered, that Edmund Sams' ferry be rated as follows: Wagon and team, $0.50, etc."

"At a court, etc., on, etc., April, 1834. Ordered, that the following rates of toll be allowed James M. Smith for crossing his bridge, to wit, etc."

The prayer is, that the defendants may be restrained by injunction from building the bridge and allowing persons to cross thereon. And, upon the usual affidavit of the truth of the allegations of the bill, the injunction was granted.

The answers admit that Sams, Jarrett, and the plaintiff, were successively in possession of the ferry across the French Broad River, up to 1833, and that then the plaintiff built his bridge at the same place; but state that the defendants do not know that the ferry was established forty years before, according to law, nor that Sams sold it to Jarrett, nor Jarrett to the plaintiff; and that as to those matters, the defendants are unable to state any belief. The defendants admit, that in 1833, the plaintiff built his bridge, and that it was required by the public convenience and had been long before; but they deny that the plaintiff's motive for building it was to promote the public convenience, but, rather, his private profit by the tolls and the use of it in passing to and from his mills and other estates on both sides of the river. The defendants admit that the bridge of the plaintiff was well built, and is kept in good condition; but say they believe the first cost and repairs ought not to have exceeded $1,600, and that the same has been long ago reimbursed to the plaintiff; for that, besides the use of it by the plaintiff and his people, he has in eleven years received in money, by way of tolls, the sum of $4,800, which exceeds the sum of $400, in annual income.

The defendants further say, that the upper ferry formerly kept at the place, at which they propose to build a bridge, was the first that was established on the river, and was granted to Joshua Jones; and to the answer is annexed a copy of an order of the County Court of Buncombe, made at (617) April term, 1799, as follows: "Ordered, that Joshua Jones' ferry be established and rated as follows, to wit, a loaded wagon, etc.," and they deny that it was ever annulled or discontinued according to law; but admit, "that for many years

no regular ferry boat had been kept there." They further state that the roads to the public were occasionally used by persons living in the neighborhood at such times as the river was fordable; and "that eight years ago the county court granted the said ferry to one Robert Murray, who had purchased from Jones the land on which the ferry had formerly been; but that such order was, by omission of the Clerk, not entered of record. The defendants further state, that since the bill was filed, the county court had passed orders for a road, on each side of the river to the place where the said bridge is to be erected, and a jury has laid each of them off to the river and made a report, which was approved by the Court, and that there were overseers appointed to open them and keep them up as public highways.

The defendants further state that a bridge at the place of Jones' old ferry would be highly useful to the public; and the answers set out in detail the several public places, to which the road by that place would be nearer and better than that by the plaintiff's bridge. They say, that, in consequence thereof, a subscription had been made to build the projected bridge and the defendants engaged to superintend or do the work; and that it was and is intended, if allowed to be built, a free bridge. They admit that it will divert a part of the travel from the plaintiff's bridge; but they say that it will not diminish his receipts more than $220 yearly; so that he will still have an income from tolls of $150, and his own passage, which is valued at $150 more, making $300 annual gain or saving; and, therefore, the defendants insist that the erection of the bridge would not be such an injury as the court ought to restrain, inasmuch as the plaintiff would still be well compensated for all outlays and the performance of all duties to the
(618) public. The answers further state, that, at the solicitation of the community, Robert Murry agreed to permit a bridge to be built over the river in lieu of the ferry, to which he was there entitled; and that under such permission the contract was made with the defendants, Harkins and Culbertson. And the answers frankly submit that the defendants have a right to build the bridge over the river, as a part of the highway or road authorized by the county court; and that, although they have no authority to receive pay for passing the bridge, they have the right to build at their own charges a free bridge for the accommodation of the public by the consent of the owner of the land on each side of and in the river; or, at all events, at the point designated in lieu of the ferry established there, upon the permission of Murray, the owner of the ferry.

The plaintiff read a deed from Edmund Sams to John Jarrett, dated 7 January, 1817, for a tract of land, situate on the French Broad, and containing 350 acres on both sides of French Broad, described by metes and bounds, some of which appear to be the same with parts of the boundaries described in the first deed.

Badger for the plaintiff.
Francis for the defendant.

RUFFIN, C. J. In deciding on this appeal it is to be borne in mind, that the question did not arise on the hearing of the cause, whether there should be a perpetual injunction; but the question is, merely, whether the injunction shall be continued to the hearing.

It is a doctrine of the common law, that if a ferry be erected so near an ancient ferry on the same stream as to draw away its custom, it is a nuisance to the owner of the old one. 3 Black., 219. And it was held by this Court in the case of *Long v. Beard*, 7 N. C., 57, that in such a case an action lies for the owner of the first ferry, against the owner of the new one, although the latter be a free ferry; for the in- (619) jury to the plaintiff was not in the gains of the defendant, but in drawing away the travel, and thereby diminishing his tolls and the value of his franchise. The reason for this, as given by Mr. Blackstone, is, that the owner of a ferry is bound to the public to keep it in repair and readiness for the ease of the citizens; and that he can not do, if his franchise may be invaded, or if the income of the ferry may be curtailed by diverting passengers by means of a rival unauthorized establishment of a like kind. Therefore, although the public convenience is the occasion of granting franchises of this nature, and, for example, the ferry established, or the road chartered, is *publici juris*, yet the property is private; and, consequently, an injury to it may be the subject of an action. For no person could be expected to serve the public by bestowing his time, labor, and money in establishing a ferry or erecting a bridge, if its value could be immediately destroyed by the caprice or malice of private persons in adopting means of drawing away the custom to some establishment of their own. It is, then, truly the interest of the public, as well as an instance of the private justice due to an individual, that the public grant of franchises of this kind should be protected by being held to be exclusive in the grantee, unless legally and duly ordered other-

wise by the public authorities. Hence, not only did the common law give redress for an invasion of the franchise of a ferry by an action: but upon its being found that such redress was not adequate, equity interposed the more effectual remedy and restraint of injunction. It is obvious, that, from the difficulty of proving the extent of the injury from time to time, and from the constant litigation arising out of the repeated invasions of the right, that must be naturally expected from a rival erection, the relief in equity is highly salutary, and, indeed, is the only remedy that has any pretensions to be deemed adequate. The cases are numerous of redress in that method. In a case in the Exchequer, *Lord Hale* presiding, the owner of land on both sides of the Thames set up a ferry three-quarters of a mile from an ancient ferry, and there was
(620) a decree to suppress it on the bill of the owner of the old ferry. 2 Austruth, 608. The doctrine has, indeed, been extended to all exclusive grants or franchises, of which one is in the actual possession, and there is no fair doubt of his title. *Bush v. Western,* Pre. Ch. 530; *Whitchurch v. Hide,* 2 Atk., 391; *Croton Turnpike v. Ryder,* 1 John C. C., 611; *Newburg Turnpike v. Miller,* 5 John C. C., 101. The same principle was acted on in this State in *Long v. Beard.* 6 N. C., 337; *S. c.,* 4 N. C., 684. It is true, that there the defendant received pay and therein expressly violated the statute; but the relief would have been granted without that circumstance, upon the general principles stated in the latter part of the opinion. And, in *Newburg Turnpike v. Miller, supra,* the remedy by injunction was used to suppress a free bridge, in a case like the present. We consider, then, the law of the case quite well settled. The only questions, further, are, whether the plaintiff is entitled to the franchise, of which he is in possession; and whether the defendant has shown any right to disturb the plaintiff or divert his custom.

It is true, the plaintiff doth not show an express grant to himself, or even to any one, under whom he claims, to keep a ferry over the French Broad. But by the Acts of 1779 and 1784, the power to appoint and settle ferries and to rate them is conferred on the county courts; and, therefore, the rating of Sams' ferry in 1801, can be no less, by implication, than the settling it then, or, at the least an admission that it had been before done by some order not now found; for as the appointing and the rating are legally to be the acts of the same body, the rating a ferry, as then existing, imports that it thus existed by leave of that Court, and, therefore, legally existed. Then the bill states, that, from that day to this, Sams, Jarrett,

or the plaintiff has, in succession, been in the uninterrupted possession under that grant and subsequent conveyances. The answers admit the possessions as charged, and they do not deny the grant nor the mesne conveyances, but say only that the defendants have no knowledge nor belief on those points. But an injunction can not be dissolved on an answer of that kind; which barely hesitates to admit the plain- (621) tiff's title, and will not venture to deny it. We have said, indeed, that we consider the grant of the ferry, originally, sufficiently established by inference from the recognition of it by the county court. But if there were any doubt of that, the subsequent exclusive and notorious enjoyment for forty-four years places the title above all question, if the different possessors have been in on the same title. As to Sams and Jarrett, it explicitly appears to have been so; for the deed of the former to the latter expressly conveys the ferry. As far as we can collect from the description in the deed of Jarrett to the plaintiff, the and conveyed includes that on which the ferry was established, which, if that be true, passed with the land. The plaintiff swears that such is the fact. It is probably so, judging from the admissions in the answers, that from the date of that deed Jarrett left, and the plaintiff has been in possession. It may be necessary, perhaps, on the hearing, that the plaintiff should establish this point more distinctly, as he may do by a survey and other means. But as he has had no opportunity yet to take proofs, and the motion to dissolve the injunction is heard on the pleadings and exhibits alone, and the answers do not deny the title, we must assume for the present, after so long a possession, under apparent color, that the plaintiff's title is good, especially as the county court has also in 1834 rated the bridge built by the plaintiff in lieu of the ferry, therein calling the plaintiff the owner. It is next to be observed, in order that it may be understood that the right to the ferry gives the plaintiff the right to the bridge and to demand tolls at it, that the Act of 1806, Rev. St., Ch. 104, sec. 28, expressly authorizes the proprietor of a ferry, who shall prefer building a good bridge, instead of keeping the ferry, to do so, under the same right and in the same manner by which the ferry is held, with a proviso, that the tolls may be regulated by the county court, so that a greater advance on the tolls above the ferriages than 25 per cent be not allowed.

It is further to be considered, whether the defendants have shown any right in themselves, to encroach on that of the plaintiff by drawing away travel to another ferry (622) or bridge. They allege such right upon several grounds:

First. They say that they have the privilege of making themselves useful to their fellow-citizens by the donation of a bridge, that may be passed without toll; and that even then the plaintiffs' tolls will not be diminished more than about one-half, and that the income will still be a fair remuneration for his outlay on the bridge. This pretension has been already considered in discussing the grounds, on which both law and equity give a remedy to the proprietor of a franchise like the plaintiff's. The case of *Newburg Turnpike v. Miller, supra,* was that of a free bridge, and it was put down. So, in *Long v. Beard,* 7 N. C., 57, the ferry was laid in one count to be free, and the judgment was affirmed; and to the argument, that such a ferry was for the public good, it was replied that the public could think nothing for its good, which was an injury to an individual by ruining his property. Private persons may dedicate their land or other property to the public use; but not so as to impair and injure exclusive rights previously granted by the public to a citizen. To authorize such an inference they must show, not only their own willingness to promote the convenience of the community, but the acceptance thereof by the regular organs of the public, the constituted authorities. Without such sanction, the action of individuals is not only officious, but must be deemed to be opposed to the will of those authorities, the true public, in a legal sense. For the making and regulating roads, ferries and bridges, are the proper subjects of political action, and are necessarily governed by the will of the law-making power, or of those to whom it may be delegated. In such a case as this, authority to erect a new bridge might well be refused, upon the grounds of the gross injustice to the plaintiff, who had already laid out his capital for the accommodation of the public, upon the good faith of the public. Besides, although the defendants might be willing to build a bridge at present, what security is there, that they would keep it up? The immediate effect of their bridge is to render the plaintiff's too unprofitable to be
(623) worth his care, and it goes down. When the new bridge decays, the plaintiff or any other person can not be expected to trust the public faith so far as to build another toll bridge, which may again be rendered of no value by a rival free bridge, and the defendants will be under no obligation to rebuild their bridge; and thus the charge will be thrown directly on the public or county treasury, or the public will be without a bridge altogether. The truest policy, therefore, as well as good faith to the plaintiff, might forbid the county court from granting the defendants an order for their bridge; and we

must take it, that the defendants so understood, else they would have applied for an order. For it can not be doubted, that in our law the whole subject of ferries and bridges is under the control of the several county courts. From the nature of the subject, the necessity for a new ferry or bridge is, like that for a road, to be judged of by the public authorities, and that decision must be final. *Charles River Bridge v. Warren Bridge,* 11 *Peters,* 420. But in this State, the jurisdiction is expressly conferred on the county courts, by the Acts of 1779 and 1784, and others, to appoint and settle ferries and lay out roads "where necessary," and to build bridges at the expense of the county, and to contract for the building of toll bridges, and to regulate the rates of ferriage and tolls. Therefore, whoever sets up a ferry or builds a toll bridge knows, that he does so subject to the future action of the county court or Legislature, in authorizing other ferries or bridges at other points on the same stream, though so near his own as to interfere with his tolls. But one may very willingly trust to the benign respect of the regular tribunals of the country for the claims on their consideration, from the hazards of his adventure, and the benefits derived from it to the public, who would not lay out a penny on the work, if every individual or voluntary association of individuals might, of their own head, oppose to his a rival establishment, which would draw away all his profits, or a considerable part of them: and the more considerable the part the greater the injury, although a fair profit might be left on his outlay, as that is a consideration for the Court in fixing the rate of tolls, and not for private persons. (624)

But it is further insisted for the defendants, that they have the authority of the Court for building a bridge. First, they rely on the right of an old ferry belonging to Jones at this point, and since, as they say, vested in Murray, who permits them to build the bridge, instead of building it himself, as he might do under the Act of 1806, as the proprietor of the ferry. Upon this part of the case, it sufficiently appears that in April, 1799, Jones was entitled to a ferry: his title was then declared by the county court; and the bill admits that he kept up the ferry until that of Sams was established, and for a short time afterwards. But the bill states that, then 1801, Jones found his ferry so unprofitable, as to let it go down, and that it was not used by the public for the last forty years and more. The answers almost admit the truth of that allegation. They deny, indeed, that it was "annulled or discontinued *according to law,*" by which they mean, we suppose, that it was not suppressed by order of the Court, and they would infer therefrom,

that the title continued. But it is distinctly admitted, "that for many years no regular ferry boat had been kept there," and not a fact is stated to show that the "many years" do not embrace the whole period of non-user stated in the bill. The answers are too vague and equivocal to allow the Court to found on them any contrary conclusion. Therefore, the franchise of Jones must be clearly understood to have been abandoned by him; forty years omission to furnish the public with the service due from him, as owner of a ferry, must amount to a surrender of his right to the exclusive franchise. This is the clearer from the admitted fact, that Murray himself, who is said to be the present owner of the land, applied to the Court eight years ago for a new order to him to establish a ferry; which shows that the former right was considered by every one as no longer existing. We hold, therefore, even if the defendants had connected themselves with Jones, that they could not justify their proceedings under his title; for, without clear evidence that Jones kept up his ferry within the long period of forty years, we should hold that he could
(625) not build a bridge at the place, much less authorize the defendants to do so.

It can hardly be necessary to say that the claim set up under an alleged order of the county court in favor of Murray himself can not be sustained; for we can receive no evidence of the order, but the minute of it in the record, and it is admitted there is none such. If one had been made and omitted by the Clerk, there would be a ready way to supply the omission. But there has been no action upon that order, even if it appeared to have been made; and the Act of 1806, which allows a bridge to be built instead of keeping the ferry, can only apply to a ferry, actually existing and in use at the time of substituting the bridge for the ferry.

Neither can the defendants derive an authority to build the bridge from the establishment of a public road to the river, on each side of it, supposing, even, that the river itself would thereby be made a part of the highway. In the first place these defendants do not appear to be the overseers of those roads, nor to be acting by the consent of the overseers. But the overseers themselves would not, under a mere order laying out a road and appointing overseers, be authorized to build a bridge over such a stream as this. The act, secs. 14 and 15, directs an overseer to build causeways and necessary bridges "through swamps and over small runs, creeks, and streams," and authorizes him to cut poles and other timber to enable him to comply with the duty of making and repairing the bridges and

causeways. It is apparent, that only such bridges are meant as can be conveniently built by the overseer and his hands in the time ordinarily employed in working on the road. And when the overseer and hands can not conveniently make it, the Court is to contract for the building at the charge of the county, s. 22, or contract for the building of a toll bridge by a grant of tolls to the builder, at the rate or for the terms agreed on, s. 26. A fair construction of the act therefore requires, that, in cases where the overseer and hands can not, as a duty, be required to build a bridge, the order of the Court is proper and necessary to justify the building of the (626) bridge or the establishment of a ferry; and the appointment of overseer is no more an authority to build a bridge in such a case than it would be to set up a ferry. Before a bridge can be built over a large stream, interfering, as it may, with the rights of the owners of ferries or other bridges, the public mind must be consulted; and, in this respect, the public mind is, by the statute, kept by the county court. It may, moreover, be mentioned, that in the case of the *Newburg Turnpike v. Miller,* 5 John C. C., 101, a public highway had been laid out which embraced the free bridge; yet that did not help the defendants, and the bridge was closed.

Upon the whole, therefore, we hold very clearly that the projected acts of the defendants are unauthorized and, if perpetrated, would be highly mischievous to the public and injurious to the plaintiff; and that the injunction was properly continued to the hearing. And we direct this to be certified to the court of equity.

PER CURIAM. ORDERED TO BE CERTIFIED ACCORDINGLY.

Cited: Carrow v. Bridge Co., 61 N. C., 119-20; *Toll Bridge Co. v. Flowers,* 110 N. C., 385; *In re Spease Ferry,* 138 N. C., 222.

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(627)

JOHN H. HAUGHTON et al. *v.* LEVIN LANE et al.

1. It is a general rule that gifts by will, to take effect at an indefinite period, will be considered as vested at the death of the testator; and if there be a tenancy in common, with a clause of survivorship, the death of the testator is, in general, the era to which the survivorship refers.

2. This general rule, however, is subject to be controlled by the intention of the testator, when it is clearly expressed in the will; but the Court will not, upon doubtful expressions, depart from the rule.

Cause removed from the Court of Equity of CHATHAM, by consent of the parties.

The bill is filed to procure a division of certain property bequeathed to the plaintiff, Eliza Alice, together with others, by the last will of Thomas Hill, deceased. By his will, Thomas Hill devises, as follows: "I give and bequeath to my four daughters, to wit, Maria, Margaret, Susan and Eliza Alice (or the survivors of them), to them and their heirs forever (at the death of my aforesaid wife), my plantation Hailbron, in the county of Chatham, and *my* house and lot on Market street, in Wilmington, to be equally divided between them. I am aware that I have only a life-estate in the said house and lot in Wilmington aforesaid it being maiden property, yet there being an understanding between my wife and myself, and trusting she will not object to this disposition—I have made it. Though in case she should think proper to give the aforesaid house and lot in Wilmington, as aforesaid, to any one of my sons, it is my desire that the lands bequeathed by me to him, should be equally divided among my daughters, heretofore mentioned, or to the survivor or survivors of them. It is my will and desire, and I wish it understood, that my wife have the entire use and benefit of my Hailbron Plantation, in Chatham aforesaid, during her life, as also my house at Hyrnham, and one hundred acres of cleared land, most (628) contiguous to the same, if she should wish to cultivate it separately." There is no other devise that bears immediately upon the question raised by the pleadings. The bill sets forth that, at the time of the death of Thomas Hill, the four daughters were alive, and that Maria intermarried with William H. Hardin, of Fayetteville, and Susan with William D. Mosely, then of this State, and that said Maria and Susan died during the lifetime of the widow, Mrs. Susannah Hill, each of them leaving several children, who are alive, and that Mrs. Hill has since departed this life. The bill claims, that by the terms of the devise to the four daughters, those only are entitled to its benefit, who were in being at the termination of the life-estate, and that as Maria and Susan died before the period, though alive at the death of the testator, their children are not entitled to any portion; but that it is to be divided between the plaintiffs and the defendants, Margaret, one of the daughters, having married the defendant, Levin Lane, and Eliza Alice, the plaintiff, John H. Haughton.

To this bill a demurrer is filed for the want of parties. The demurrer was, by the Judge below, sustained, and the bill dismissed, and the case brought here by appeal.

Badger for the plaintiffs.
Iredell for the defendants.

NASH, J. We concur with his Honor in opinion, that the bill can not be sustained. From no part of the proceedings do we learn, with distinctness, whether Mrs. Hill dissented from the will, nor is it at all important, it should have been stated, except as it might have sustained the statement made by the testator, and assisted in elucidating his intentions. It is not without some difficulty we have satisfied our own minds as to the true construction of the devise, to the four daughters, as to the time when it vests. It is a general rule, that gifts by will, to take effect at an indefinite period, will be considered as vested at the death of the testator. 2 Madd., Ch. 18; 2 Madd., 489; *Gaskell v. Harman,* and if there be a devise in common, with a clause of survivorship, as in this case, the death of the testator is, in general, the era to which the sur- (629) vivorship refers. *Cox v. Hogg,* 17 N. C., 121. This general rule, however, is subject to be controlled by the intention of the testator, where it is already expressed in the will, but the Court will not, upon doubtful expressions, depart from the rule. *Gaskell v. Harman,* 6 Ves., 159; *Innes v. Mitchell, Ib.,* 461. In this devise, there is no precise and definite period fixed by the words used, at which it shall take effect. And according to the rule cited, it vested in the four daughters, or to such of them as were alive at the death of the testator, but not to be enjoyed until the death of their mother, Mrs. Hill. Is there anything in the will to control this operation of the rule? On the contrary, do not the provisions of the devise show such to have been the intention of the testator? The words are, I give to my four daughters (and to the survivors of them) in a parenthesis, to them and their heirs, forever (at the death of my wife), etc. The most that can be claimed, in behalf of the construction which the plaintiffs contend for is, that it is left *uncertain* to which period the testator intended to limit the vesting of the devise, whether to that of his own death, or to that of his wife; and we have seen, that doubtful and uncertain expressions, from which an intention can only be inferred, are not sufficient to set aside the general rule. But we think, from these expressions, it was the intention of the testator only to postpone the time when his bounty was to be enjoyed by the devisees. This construction is strengthened by the fact, that it is only through this devise, the widow can claim a life-estate in the Hailbron Plantation, and thereby interpose her interest between the vesting and the enjoyment of the remainder

of the daughters. Again: the testator gives to his four daughters, *his* house and lot on Market street, in Wilmington, and then proceeds to say that it was his wife's property, and he had only a life-estate in it, but that there was an understanding between them touching it, and expressing a confident trust that she would not object to the disposition he had made of it. But he provides, if she *should* give the house and lot in Wilmington to one of his sons, that then, the land which he
(630) had devised to that son, should be equally divided among his daughters, or the survivors of them. The devise to his sons of land are immediate; and it was evidently his intention, that, if his wife dissented from the will, and gave the house to either of the sons, the daughters should have the land given to that son, as the son himself would have had it, and the survivorship there mentioned is evidently confined to the time of his death. We take it for granted, as the bill is silent on the subject, that the widow did not dissent, but took under the will what was left her. We are therefore of opinion, that as all the daughters survived the testator, they all took a present vested interest, and upon the death of Mrs. Hardin and Mrs. Mosely, their children succeeded to their respective shares: That they have an interest in the fund sought to be divided, and ought to have been parties to the bill.

The demurrer is sustained, and the bill dismissed, and as we are satisfied, that the bill was brought simply to ascertain to whom the property belonged, no costs are allowed to either party; each will pay his own costs.

PER CURIAM. BILL DISMISSED.

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(631)

OSMOND F. LONG et al. *v.* JOHN BARNETT et al.

1. As one, when he is about becoming a surety with others, may stipulate for a separate indemnity from the principal to himself, and the co-sureties would only be entitled to a surplus after his reimbursement; so, after two persons have become sureties for a common principal, they may, by agreement between themselves, renounce their right to take benefit from any securities they may respectively obtain, and each undertake to look out for himself exclusively for an indemnity from the principal, or for contribution from another co-surety.

2. When a surety files his bill against a co-surety for contribution, and the latter sets up an agreement which is a bar to the former's claim, that agreement must be proved at the hearing. It can not be the subject of reference to the master.

Cause removed from the Court of Equity of ORANGE, at Spring Term, 1845, by consent of the parties.

The following appeared to be the facts of the case, as presented by the pleadings and proofs:

John McMurray became indebted to the bank of the State of North Carolina, in the sum of $12,900, and in July, 1837, gave a promissory note therefor, with William McMurray, one of the plaintiffs, John Barnett, the defendant, and one Samuel Mitchell, as his sureties. The principal, John McMurray, then died; and his executors gave a new note to the bank for the debt with the same sureties. Samuel Mitchell removed to Mississippi; and, after certain payments had been made by John McMurray's executors, and a payment by the defendant of $500, the bank sued William McMurray and Barnett, and between them the debt was paid. The bill is filed by William McMurray, O. F. Long, J. Webb and J. W. Norwood, and states that the estate of the principal debtor is insolvent and that all the assets were exhausted in the payments made on the debt by the executors, and that Samuel Mitchell, after his removal to Mississippi, became insolvent and died there, and that there has been no administration on his (632) effects in this State; and further, that the payments made by the plaintiff, McMurray, exceeded those made by the defendant on the debt, and therefore, that the defendant is bound to contribute towards the satisfaction of the same, so as to make their loss equal, as co-sureties.

The bill then states, and the answer admits, that the plaintiff McMurray has assigned by deed to the plaintiff Long, all his demand on and against the defendant in the premises, in trust to secure and satisfy certain debts, which said William McMurray owed the other plaintiffs, Webb and Norwood. The prayer is, that the defendant may be declared liable to contribute, and decreed to come to an account in the premises and to pay to the plaintiff, Long, such sum as may be found due.

The answer states that the defendant, before 29 July, 1839, paid in part of the debt out of his own funds the sum of $500, and that there remained a balance of $10,604, for which the bank then took a judgment: That of that sum the plaintiff McMurray paid, on 15 June, 1840, the sum of $4,878.50 only; and that the residue of the debt was paid by the defendant: That the payments made by the defendant before that day, and interest thereon up to that day, and the sum paid on 15 June, 1840, together, amounted to the sum of $6,332; which is an excess of $1,453.50, above the sum so paid by William McMurray. The answer states, that soon after John McMur-

ray's death, it was apprehended that his estate would not be able to pay the debt, and that the loss would fall on the sureties; and that at his own expense, the defendant went twice to Mississippi to see Mitchell (who also had funds of J. McMurray's in his hands), and obtained from him the means of paying the debt; and that he received from him the funds that reduced the principal, after discharging the interest, to $11,104, on 29 July, 1839, which were applied accordingly for the benefit of William McMurray and himself; that in December, 1839, the bank pressed the payment of the judgment; and that upon the communication thereof to these two parties, they,

(633) William McMurray and the defendant, came to an agreement that they should divide the debt and each one be liable for his half, and that if the defendant would immediately satisfy to the bank the sum of $5,000, part of the debt, and supposed to be about his half, and endeavor to obtain indulgence to William McMurray for his half, the said William McMurray would undertake to pay that half; and that they came to the further agreement, that, in case such arrangement should be made, the defendant should be at liberty to obtain from Mitchell or from John McMurray's estate in his hands, or otherwise, such sums as he could, and apply them to his, the defendant's, own use, until he should be indemnified, and that, if there be a surplus after reimbursing the defendant, then, and in that case only was William McMurray to claim any part thereof. The answer then states that the defendant immediately obtained a discount at the bank for $5,000, and applied the proceeds, and other cash, to discharge that much of the debt, and thereby procured indulgence to William McMurray, until June following; and that before the expiration of 90 days, he paid his said note for $5,000.

The answer then admits, that at different periods from 13 March to 25 December, 1840, the defendant received from Mitchell various sums, amounting altogether to $3,482, and from John McMurray's effects in Mississippi, $2,500; and the defendant claims to retain them by way of reimbursing the moneys so paid by him, either under the agreement before mentioned, or because in law he had, after the payments made by him, a separate demand in respect thereof, against the estate of the principal, and also against the co-surety, Mitchell, and the plaintiff William McMurray had no just claim to participate therein.

The answer denies that Mitchell died insolvent, according to the defendant's information and belief, and says that the assets are sufficient to pay thirty or forty per cent of his debts,

including his debt to the estate of John McMurray. The answer also denies that John McMurray's estate is insolvent; as it has a claim against the estate of said Mitchell for a sum between $8,000 and $12,000; of which the pro- (634) portion thereof above mentioned, may be recovered by due diligence.

The answer states that Mitchell was indebted to the defendant upon other transactions, to the amount of $19,000, and insists that he hath a right to apply to the satisfaction of that demand in the first place, so much of the money received from Mitchell.

The answer also states that William McMurray, at the time he made the assignment to the plaintiff Long, and before, was indebted to the defendant for money paid for him as his surety; and insists that he could not make the assignment, unless subject to the deduction of the defendant's said demand for money paid, or which the defendant was liable for as his surety. The answer also states, that by a prior deed, W. McMurray assigned all his demands against the estate of John McMurray and Mitchell, or accounts of the sums paid by him in the premises, to a trustee to secure certain debts to the defendant and others; and insists that those claims must be satisfied before the plaintiffs can claim anything under the assignment to Long.

The answer was replied to, and the cause set down for hearing and transferred to this Court.

Venable and *J. H. Bryan* for the plaintiff.
E. G. Reade and *Iredell* for defendant.

RUFFIN, C. J. As one, when he is about becoming a surety with others, may stipulate for a separate indemnity from the principal to him, and the co-sureties would be only entitled to a surplus after his reimbursement. *Moore v. Moore,* 15 N. C., 358. So, there can be no doubt, that, after two persons have become sureties for a common principal, they may by agreement between themselves renounce their right to take benefit from any securities they may respectively obtain, and each undertake to look out for himself exclusively for an indemnity from the principal, or for contribution from another co-surety. But the defense fails in this case, because the defendant has not established the alleged agreement between W. McMurray and himself. It behooved him to establish it (635) on the hearing, and he can not ask, that it should be made, in part, the subject of the inquiry before the master, which, otherwise, is a matter of course in cases of this nature. For the alleged agreement is, in its nature, a bar to the right

of contribution, and, therefore, to a reference in order to take the accounts that may be necessary to exhibit the advances by each of the co-sureties, the sums reimbursed to them, and every other matter that is requisite to the ascertainment of the sum to be contributed by the one surety to the other. Consequently, the existence of the agreement can not be made a point of the reference, but must be disposed of before a reference can be directed. As the defendant has given no evidence of the agreement, it must be declared that he has failed to establish it.

It follows that the usual inquiries must be directed, including all the dealings as mentioned above and in the pleadings, and the sums received by the defendant as mentioned in the answer, or that may be established by the plaintiffs; so that it may appear how much one of these parties is in advance more than the other. The points made in the answer, as to the defendants' right to seek satisfaction, after he had paid one-half of the debt from the principal or from Mitchell, as for a separate demand, or as to the application of the payments received from Mitchell to other debts due to the defendant, or as to his right, if anything should be found due from him to William McMurray, to retain the same in satisfaction of other demands the defendant has against William McMurray in the first place: Those points, we say, will more properly come up when the report shall be made, ascertaining all the facts involved in those positions. At present it would be premature to give any precise instructions to the master, seeing that those are all proper points of fact for an inquiry, and they do not distinctly appear in the pleadings or evidence. But without making any specific declaration thereon, but merely in aid of the master, we may properly state that there can be no doubt that the assignment to the plaintiff Long can operate only to transfer the balance due to the assignor from the defendant. If William McMurray were to sue the
(636) defendant for this demand, the defendant would be entitled to a deduction or set-off for such sums as William McMurray owed to him; and he can not give to his assignee a right for more than he could, himself, recover. *Winborn v. Gorrell, ante,* 117; *Moody v. Sitton,* 37 N. C., 382. Nay, even if the defendant had not actually paid the debts for which he was the surety of William McMurray, yet upon the insolvency of William McMurray, the defendant was, in respect of his liability as his surety, entitled to retain for his indemnity any debt he owed William McMurray, and the latter could not assign to another creditor, nor even to one for value then paid, his demand on the defendant. *Williams v. Helme,* 16 N. C.,

151. So, a prior assignment of this demand to a trustee for the defendant, and others, will be entitled to the preference, as far as the debts thereby secured remain unsatisfied.

As to the application of the money received from Mitchell, the rule is, that it is to be made according to the direction given by Mitchell at the time of payment, if any were given by him, either expressly or to be collected from circumstances. But if none such were given, then the defendant hath the right to apply those payments.

It must not be supposed that the Court has passed over unobserved, the circumstance, that after the death of John McMurray, his executors gave a note for the debt, with the same sureties; and that they are not parties to this suit, nor charged and admitted to be insolvent. *Prima facie,* by giving such a note, the persons who were the executors made the debt their own; but, clearly, both the sureties now before the Court considered it otherwise, and treat the executors in the pleadings in this cause, as not binding themselves, but only giving a note *as* executors for the purpose of keeping the debt afloat, apparently for the benefit of delay to the sureties. For the answer admits that, notwithstanding the new note, it was understood that the sureties would be obliged to pay the debt, and that it would be mostly their loss. Hence, neither the bill nor the answer so much as mention who were John McMurray's executors, but merely state that the executors gave the (637) note after the death of the testator, on which the judgment was taken; and no objection taken on this point at the bar. As to the insolvency of John McMurray's estate, though not distinctly admitted to be absolute, it is sufficiently admitted to send the case before the master. The answer states that the estate is partially insolvent; and the only thing suggested against entire insolvency, is the supposition that it has a demand of $10,000 or $12,000 on Mitchell's estate, and that the latter estate is further supposed able to pay some dividend on its debts, according to the laws of Mississippi. From the nature of these admissions, the question of the solvency of John McMurray's estate can only be ascertained, if the parties insist on it, by taking accounts of the estates of John McMurray and Mitchell, in order to ascertain the extent of their insolvency, which to some extent is admitted. Therefore, there must be a reference to the master to take all the accounts involved in the cause, with directions to state such special matters as the parties may require.

PER CURIAM. DECREED ACCORDINGLY.

Cited: Comrs. v. Nichols, 131 N. C., 505.

IN THE SUPREME COURT OF NORTH CAROLINA.

THURSDAY, 25 January, 1844.

On the opening of the Court, the Attorney-General rose and said:

The request of my brethren in attendance at this term, makes it my duty to inform your HONORS of their proceedings, on hearing, to them, the afflicting intelligence of the death of the HON. WILLIAM GASTON, your associate on the Bench of the Supreme Court of the State, and to ask that the same may be placed on the minutes of the Court.

Judge GASTON, at the meeting of the Court, had every appearance of health; giving to the community a confident expectation that his services would be prolonged, yet for many years. Our hopes are at an end—the calamity is sudden, unexpected, overwhelming! It hath pleased a merciful providence to cut short his existence. On Tuesday, Judge GASTON came into Court—in health—went through a case requiring close and constant application. His notes demonstrate his attention. At the usual hour, the Court adjourned. At 8 o'clock, in the evening of that day, his death was announced; the members of the bar, and the officers of the Court, except a few, not having heard of his illness.

I can not speak of Judge GASTON as he deserves to be spoken of. His eulogy is on the lips of the whole country. The force of his example will perpetuate his praise.

The ways of Heaven, how unsearchable are they. To teach us our nothingness, as well to wean us from life—our most useful citizens, our nearest relations, and our dearest friends are snatched away, impelling us to rely only on Him, who pervadeth and sustaineth all things.

You, sir, know (addressing himself to the Chief Justice), the manner of his death. Sorrow often produces its consolation. I was present when Judge GASTON died. That he lived constantly mindful of the grave, I have no doubt. The evening before he departed this life, in conversation with a friend, he mentioned that death had to him no terrors—that the years he had numbered, were but so many steps in the completion of the journey assigned him by his Master, and that he rejoiced that his armor would soon be put off. Up to the moment of his dissolution, his mind was cheerful—entertaining, and instructing his friends on moral subjects, his last sentence impresed upon them the absolute necessity, to enable us to be either useful here, or happy hereafter, of an abiding belief

in a Being, present every where, knowing the intent, and understanding the imagination of the heart—who is Almighty, bringing man into judgment after death, rewarding him for his deeds. Before his voice had died on the ear—"he was not"! "He has gone to his rest!"

The Attorney-General then presented and read the following:

At a meeting of the members of the Bar of the Supreme Court of North Carolina, held at the court room in the Capitol, on Wednesday, 24 January, 1844:

On motion of Mr. Henry, the Hon. William A. Graham was called to the chair, and Charles Manly, Esq., appointed Secretary. The Chairman announced that the meeting was called, in consequence of the sudden death, on the evening of yesterday, of the Honorable WILLIAM GASTON, one of the Judges of the Court, and to take such action as this melancholy event rendered proper. And thereupon, on motion of the Hon. Mr. Strange, Mr. Badger,, Mr. Henry, Mr. Manly, Mr. Bryan, and Mr. Mordecai, were appointed a committee to consider and report to the meeting, the action proper to be taken thereon. Mr. Badger subsequently reported from the committee, the following preamble and resolutions:

This meeting of the members of the bar of the Supreme Court have learned, with profound grief, the melancholy and totally unexpected bereavement, which the Court and the country have sustained in the death of the Honorable WILLIAM GASTON. Struck down suddenly by the hand of God in the midst of his judicial labors—dying, as he had lived, in the enlightened and devoted service of his country—endued by learning and adorned by eloquence, with their choicest gifts—ennobled by that pure integrity and that firm and undeviating pursuit of right, which only an ardent and animating religious faith can bestow and adequately sustain; and endeared to the hearts of all that knew him, by those virtues which diffuse over the social circle all that is cheerful, refined and benevolent, he has left behind him a rare and happy memory, dear alike to his brethren, his friends and his country.

While we are conscious of our inability adequately to express our feelings on this mournful occasion, it is yet in some degree consolatory to offer to the memory of our beloved and venerated friend, the usual tribute of affection and respect. Therefore,

Resolved, That in the death of the Hon. WILLIAM GASTON, late a Judge of the Supreme Court, the Bench, the Bar, and the whole people of North Carolina, have sustained a loss which can neither be supplied nor forgotten.

Resolved, That the members of this meeting will wear, and

that they recommend to their professional brethren throughout the State to wear, the usual badge of mourning for thirty days.

Resolved, That the surviving Judges be respectfully requested to attend, and that the members of the bar will attend, the funeral of the deceased.

Resolved, That the Chief Justice be respectfully requested to transmit a copy of these proceedings to the family of the deceased, and to express to them the sincere condolence of the members of the meeting, in the loss they have sustained.

Resolved, That the Attorney-General be requested to present these proceedings to the Supreme Court at their next meeting, and request that they be entered upon the minutes of the Court.

And the said preamble and resolutions having been read, were unanimously adopted, and the meeting adjourned.

CHARLES MANLY, *Secretary.* WILLIAM A. GRAHAM, *Chairman.*

Whereupon, Chief Justice RUFFIN, on behalf of the Court, responded:

The Court unites with the Bar, in lamenting the calamity which has fallen on us; and is ready to concur in whatever may honor the memory of our deceased brother, or express a sympathy with his bereaved family.

The loss, indeed, is that of the whole country; and it will doubtless be deeply felt and deeply deplored, by the whole country. But to us, who have been connected with him here, it is peculiarly severe.

Having been closely associated in private intercourse, and in the discharge of a common public duty, for the last ten years, we have had the best means of knowing and appreciating his personal virtues, his abilities, his attainments, and judicial services.

We know that he was indeed a good man and a great Judge.

His assistance, in the discharge of our official duties, is cheerfully and gratefully acknowledged by us, who have survived him. In our opinion, his worth, as a minister of justice, and expounder of the law, was inestimable; and we feel that, as a personal friend, his loss can not be supplied.

The Court directs the proceedings of the Bar to be entered on the minutes, and will, in the other respects, comply with the requests expresed in them.

The Court then adjourned.

E. B. FREEMAN, *Clerk.*

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PRACTICE AND PLEADING.