ANNOTATIONS INCLUDE 171 N. C.

NORTH CAROLINA REPORTS

VOL. 40

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

FROM

DECEMBER TERM, 1847, TO DECEMBER TERM, 1848

BY

JAMES IREDELL

(Vol. V)

ANNOTATED BY

WALTER CLARK

(3 ANNO. ED.)

REPRINTED BY THE STATE
COMMERCIAL PRINTING COMPANY, PRINTERS AND BINDERS
RALEIGH
1917

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DURING THE PERIOD COMPRISED IN THIS VOLUME

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HON. THOMAS RUFFIN.

ASSOCIATE JUDGES:

HON. FREDERIC NASH. [2]HON. WILLIAM H. BATTLE.

[1]HON. JOSEPH J. DANIEL. [3]HON. RICHMOND M. PEARSON.

ATTORNEY-GENERAL:

[4]EDWARD STANLEY, ESQ.

[5]BARTHOLOMEW F. MOORE, ESQ.

CLERK AT RALEIGH:

EDMUND B. FREEMAN, ESQ.

CLERK AT MORGANTON:

JAMES R. DODGE, ESQ.

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[1]Died 10 February, 1848.
[2]Appointed May, 1848; commission expired December, 1848.
[3]Elected by General Assembly December, 1848.
[4]Resigned May, 1848.
[5]Appointed by Governor, May, 1848. Elected by General Assembly December, 1848.

JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

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Hon. John M. Dick	Guilford.
Hon. John L. Bailey	Orange.
[1]Hon. Richmond M. Pearson	Yadkin.
Hon. David F. Caldwell	Rowan.
Hon. Matthias E. Manly	Craven.
[2]Hon. William H. Battle	Orange.
[3]Hon. Augustus Moore	Chowan.
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Name.	*District*	*County.*
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John S. Hawks	Second	Beaufort.
[5]E. J. Stanley (Atto.-Gen. *ex officio*)	Third	Craven.
B. F. Moore (Atto.-Gen. *ex officio*)	Third	Halifax.
John F. Poindexter (Sol.-Gen. *ex officio*)	Fourth	Stokes.
Thomas S. Ashe	Fifth	Anson.
Hamilton C. Jones	Sixth	Rowan.
Burgess S. Gaither	Seventh	Burke.

[1]Elected to Supreme Court December, 1848.

[2]Appointed to Supreme Court May, 1848; reëlected to Superior Court December, 1848.

[3]Appointed May, 1848; commission expired December, 1848.

[4]Elected by General Assembly December, 1848.

[5]Resigned May, 1848.

CASES REPORTED

CASES CITED

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CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

DECEMBER TERM, 1847.

WILLIAM B. WESTALL v. SAMUEL AUSTIN.

1. A court of equity will not compel a purchaser to take a title substantially defective; but it is the privilege of the vendor to complete his title, and this he may do at any time before a decree, provided there has been no unnecessary delay.

2. The purchaser will not be permitted to deprive him of his right, by forestalling him. If *he* perfects the title, he has got all he bargained for, and can ask from the vendor nothing more than the expenses he has incurred in removing the defect.

CAUSE removed from the Court of Equity of YANCEY on affidavit of the plaintiff, at Spring Term, 1845.

The bill is filed to rescind a contract for the purchase of a lot of land in the town of Burnsville in the county of Yancey, and to enjoin the collection of a sum of money due therefor. When the town of (2) Burnsville was established, commissioners were, by the act of incorporation, appointed to lay off and sell the lots. A man by the name of Jeremiah Boon purchased one lot and John Blalock another. The plaintiff alleges that the lot purchased by Blalock was in the plat of the town numbered 24, and the one purchased by Boon, 25. The bill charges that on 15 September, 1838, the plaintiff purchased from the defendant Austin the lot 24 (as the lot purchased by Boon at the sale) for the sum of $245.75, payable at different periods, and secured by notes or bonds therefor; that he took immediate possession, and has continued it ever since. At the time of the purchase no conveyance was executed, but a bond to make one with full warranty when the purchase money was paid; and the plaintiff alleges that he has paid all the purchase money,

except fifty-one or two dollars, for which the defendant has obtained judgment against him, upon which an execution issued, and is now in the hands of an officer for collection. He further charges that in the summer of 1840 he understood that Austin, the defendant, was not the owner of the lot No. 40, but that Blalock was, who was about to sell it to another person. Upon examining the plat of the town, he discovered that Blalock had purchased the lot No. 24 and Jeremiah Boon lot No. 25, and for the purpose of securing his possession he purchased from John Blalock his title to the said lot, for which he gave him $60, and immediately applied to the defendant to rescind their contract, return the money he had paid, and surrender up the judgment and execution which was in the hands of a constable; all of which he refused, but tendered to the plaintiff a deed of conveyance for the lot No. 24, which he declined to accept. The bill prays for an injunction against the execution mentioned and for general relief.

(3) The answer admits the sale by the defendant to the plaintiff of the lot No. 24, and avers that he had a good and perfect title to it; that whether at the sale of the lots in the town of Burnsville John Blalock purchased that designated as No. 24, he does not know of his own knowledge, but always understood, until recently, that said lot had been purchased at the sale by one Jeremiah Boon, under whom he derives his title. At the time he sold to the plaintiff he believed, and still believes, his title to be good. Immediately after the sale by the commissioners, Boon took possession of the lot No. 24, and commenced improving it by erecting buildings on it, and the possession has been kept up by him and those claiming under him, continually, until the summer of 1840, when he, for the first time, heard of Blalock's claim. He admits the existence of the justice's judgment, and that the plaintiff requested him to desist from its collection. He admits the purchase by the plaintiff from Blalock, but alleges it was unnecessary; that he tendered to the plaintiff a good and sufficient deed before the bill was filed. The defendant has filed, as exhibits in the case, several deeds of conveyance, as exhibiting his title under Jeremiah Boon.

The plaintiff asks the aid of the court in two particulars: first, to enjoin the defendant from proceeding to enforce his execution against him, and, secondly, to rescind the contract.

N. W. Woodfin and J. H. Bryan for plaintiff.
Francis for defendant.

NASH, J. It is very certain a court of equity will not compel a purchaser to take a title substantially defective, but it is the privilege of the vendor to complete his title; and this he may do at any time before

a decree (Newland on Contracts, ch. 12, 227, 230), provided (4) there has been no unnecessary delay. 2 Story Eq. Jur., sec. 777.

The purchaser will not be permitted to deprive him of this right by forestalling him. If *he* perfects the title, he has got all he bargained for, and can ask from the vendor nothing more than the expenses he has incurred in removing the defect. In this case the plaintiff shows that his title, if at first defective, was made complete before the bill was filed. He, therefore, has got what he bargained for—a good and sufficient title to the lot No. 24. He is not entitled to have his contract with the defendant rescinded. All that he could ask is to be reimbursed what he paid to Blalock. But, from the view we have taken of the case, we do not think him entitled to this, as we are of opinion that his title under the defendant was a good one. At the sale of the town lots in Burnsville, among others were those numbered 24 and 25. The plaintiff alleges that the lot 24 was purchased by John Blalock, and the defendant, that Jeremiah Boon, under whom he derives title, bought it. Two depositions are filed by the plaintiff, those of W. L. Lewis and Jeremiah Boon. Neither of them directly asserts the fact. Mr. Lewis states that he was present at the sale, and he *thinks* John Blalock was the purchaser of 24, and he *thinks* No. 25 was purchased by Israel Boon for Jerry Boon. He further states that from the sale up to the purchase of the present plaintiff, which was in 1838, Jerry Boon occupied lot No. 24; that he had a shop and house upon it. Jeremiah Boon is requested to state which lot he purchased at the sale of the commissioners. His answer is remarkable. "Number 25 was what I always understood. I did not build on the lot I purchased." He is then asked: "Whose lot did you build on?" He answers: "It was No. 24, and belonged to Jack Blalock." He further states that he never improved his own lot, but lived on and occupied No. 24, until September, 1838. Jeremiah Boon did not bid off the lot. It was bought for him by Israel (5) Boon. Nor is there any evidence that he was present at the time.

If he had been, it is likely he would have been able to state with certainty which lot he did buy. But it is very strange, believing, as he professes he did, that lot 24 was purchased by Blalock, he should, evidently with the knowledge of Blalock, have immediately taken possession of it and erected buildings on it, and that he should have continued that possession, unquestioned by Blalock or any one else, from the time of sale, in 1834, up to 15 September, 1838, the day when Austin sold to the plaintiff. Attached to these depositions is a plat of the town of Burnsville in which it appears that the name of Jack Blalock is written on No. 24, but it is nowhere stated by whom this plat was made, or when, or that it was the one used by the commissioners. It therefore contributes but little to the strength of the plaintiff's claim. On behalf

of the defendant two depositions are filed: those of John McEllers and Joseph Shepherd. The former states that he was one of the commissioners appointed to lay off the town of Burnsville, and the crier at the sale, and that he made it a rule to stand upon the lot he was selling, and that he thinks and is satisfied that the lot No. 24 was the one purchased by Israel Boon for Jeremiah Boon. He further states that a short time after the sale he met with John Blalock in the town of Burnsville, who said that he had purchased the lot Jeremiah Boon was improving, and that he had made a certificate of purchase, and that *he* replied to him he was still under the impression that the lot below was the one he sold to him, and that the mistake was between him and the other commissioners in making out the certificate, and that Boon was at the time at work on his own lot. Mr. Shepherd was another of the commissioners, and believes lot No. 24 was purchased by Jeremiah Boon. This is all the testimony in the case, and, limited
(6) as it is, satisfies us that Jeremiah Boon was the purchaser of the lot marked No. 24. It is difficult to believe, if it were not so, that Boon, without any contract with Blalock, would have improved the lot he did not buy, and that Blalock would have laid by from 1834 until October, 1840, the time when he took his conveyance from the commissioners and sold to the plaintiff, nearly six years, and see Boon improve and use the lot as his own, unquestioned and undisturbed. The difficulty was created, no doubt, as suggested by the commissioner, Mr. McEllers. No question is made that whatever title to the lot in dispute was in Jeremiah Boon was regularly vested in the defendant Austin, and has by the deed filed by him been conveyed to the plaintiff, who refused to receive it, not because of any defect, but because it was much more convenient to get the lot, with its improvements, for $60, than for the sum of $245.

PER CURIAM. Bill dismissed with costs.

Cited: Ramsour v. Shuler, 55 N. C., 491; *Barcello v. Hapgood,* 118 N. C., 732; *Van Gilder v. Bullen,* 159 N. C., 296.

JAMES M. DONNELL ET AL. v. JAMES MATEER'S EXECUTORS.

1. A. devised to his daughter, then the wife of one of the plaintiffs, as follows: "I give to my daughter M. one negro boy H." and five others by name, "to wait and serve her lifetime, and after her death to her bodily heirs": *Held,* that, there being no words in the will to explain "heirs"

to mean "children," the legacy vested absolutely in her, and she dying soon after the death of the testator, went to her husband as her administrator.

2. The testator also devised: "I leave $300 in the hands of my executors, to pay out to her as they see that she needs, if my estate will afford it": *Held*, that this devise vested in her an absolute right to the $300, and though she died a short time after the death of the testator, the legacy went to her husband as her administrator.

3. A legacy to a son-in-law does not, by virtue of our statute, Rev. Stat., ch. 122, sec. 15, when the son-in-law dies in the lifetime of the testator, vest in the child of such son-in-law.

4. Where there is a will and undisposed of residue, in the division of that residue among the next of kin nothing that has been advanced by the testator, either real or personal, in his lifetime, nor anything bequeathed in the will, is to be brought into *hotchpotch*.

CAUSE removed by consent of parties from the Court of Equity of ROCKINGHAM.

James Mateer made his will on 4 April, 1844, and appointed his sons, Andrew and John, his executors. At that time, and at the time of his death, which happened in May, 1845, the testator had three children, namely, the two sons above mentioned and a daughter named Margaret, then the wife of Joseph D. Watson. He had also a grandson, James M. Donnell, one of the plaintiffs, who was the only child of the testator's deceased daughter, Polly, by her husband, Joseph Donnell. This grandson and the three children were the testator's next of kin.

The will contains the following dispositions, amongst others: (8) "I give to my daughter Margaret one negro boy, Harvey (and five others by name), to wait and serve her lifetime, and after her death, to her bodily heirs. Also, I leave $300 in the hands of my executors to pay out to her as they see that she needs, if my estate will afford it. Item: I give to my son-in-law, Joseph Donnell, $25 as a memorial."

By other clauses the testator gave to his grandson, James M. Donnell, five negroes specifically, and the sum of $75; and to each of his two sons he gave land and personal legacies. He also gave legacies to his wife, and to several of the children of each of his two sons, and of his daughter Margaret. The testator's wife died before him, as also did Joseph Donnell, and some of the grandchildren, to whom legacies were given.

The will has no residuary clause, and there are several slaves and other personal property undisposed of, besides the legacies lapsed by the deaths of legatees before that of the testator.

The testator in his lifetime gave and conveyed to his two sons the land devised to them respectively.

Shortly after the death of her father, Mrs. Watson also died, leaving an only child, John H. C. Watson, and her husband, surviving; and the husband took administration of her estate.

The bill is filed by Joseph D. Watson as administrator of his late wife, and James M. Donnell, the grandson, against the executors and devisees, Andrew and John Mateer, and against John H. C. Watson; and it prays that the plaintiff Watson may be declared entitled to the six slaves and the $300 left to his intestate, and for the delivery and payment thereof to him; and that the plaintiff Donnell may have a decree for the legacies to him, and also for that of $25 to his father,

(9) which he claims, as representing his father. It prays also for an account and distribution of the residue of the personal estate.

Kerr and Iredell for plaintiffs.
Morehead for defendants.

RUFFIN, C. J. The pleadings raise several questions, but there seems to be no difficulty in either of them.

That which is of most consequence to the parties respects the disposition of the six slaves to Mrs. Watson. It is a gift to her for life, and then "to her bodily heirs." That has been so often and so recently decided to pass the whole property to the first taker as to leave now no question at all upon it. In *Allen v. Pass,* 20 N. C., 207, there was enough in the will to enable the Court to see that the testator meant "heirs of the body" for "children," and we gladly availed ourselves of that circumstance to uphold the disposition and intention of the testator. But there is nothing in the context here to control the technical meaning of the term "bodily heirs," and therefore we are obliged to receive them in that sense, as meaning the class of persons who, by law, take property by inheritance or succession from another. Thus understood, they are not words of purchase, but of limitation, in disposition of this kind as well as in conveyances of land. The authorities were all consulted in *Ham v. Ham,* 21 N. C., 598; and in *Floyd v. Thompson,* 20 N. C., 616, the doctrine was reaffirmed, and the reasons given why the courts cannot receive such words in any other sense. There have been several other cases to the same effect, and one of them as late as last term, that of *Coon v. Rice,* 29 N. C., 217. It must, therefore, be declared that these slaves belong to the plaintiff Watson, as administrator of his late wife, and not to their son.

The next question respects the sum of $300, left in the hands

(10) of the executors for Mrs. Watson. The executors contend that it was not an absolute gift to her, but was intended for her personal comfort, if requisite for that purpose, in the opinion of the

executors, and that, as she lived but a few days longer than her father, and had no need of any of the money, it sunk into the residuum. But we all think that the condition annexed to this gift is that it must be raised without interfering with any other disposition in the will. It is admitted that may be done, as there is a considerable residue undisposed of after answering all other purposes. This, then, becomes a gift at all events. The testator intended, perhaps, to intrust the executors with a vague sort of discretion as to the time of payment, but not with the discretion of withholding the payment altogether. The daughter had an absolute right to demand the whole sum, at some time; and therefore it is a vested and transmissible legacy, and belongs to the administrator.

The plaintiff Donnell claims that the small legacy of $25 to his father did not lapse by the death of the father, but survived to him by the act of 1816, and the answer of the executors yields that the claim is well founded. But that is a mistake; though being in a matter of law merely, it will not hurt. The act has within its purview a testamentary gift to a child only. Rev. St., ch. 122, sec. 15. Neither its words nor spirit take in a son-in-law or daughter-in-law. The reason why the estate given to a child shall, upon the death of the donee in the life of the testator, go to the issue of such child, is that the issue of the child is necessarily the issue of the testator, and the Legislature presumed an intention or, rather, a wish of the testator that the issue should stand in the place of the original donee, rather than the gift should fail altogether and that branch of the testator's family be without a provision. But that cannot apply to a gift to a son-in-law, since that would let in issue by another marriage, strangers to the testator, to whom it cannot be supposed he would intend a bounty. This (11) sum, therefore, is part of the residue.

Finally, the plaintiffs contended that in the division of the residue of the personal estate the gifts during the testator's life, and by his will, of realty and personalty must be brought in. But the contrary is most firmly settled as law. There is no hotchpotch upon a partial intestacy. *Norwood v. Branch,* 4 N. C., 400, went only the length of saying that upon the particular language of our statutes there was a distinction between advancements of realty and personalty, and that devises of land must be brought into the division of the undisposed of land. But with respect to a personal residue, it has been always held that it is to be divided equally amongst the next of kin, without regard to gifts, either in the lifetime of the testator or by his will; and, indeed, it has been recently held that the law is the same as to land not disposed of by the

will. *Cowper v. Scott,* Pr. Wm., 119; *Edwards v. Freeman,* 2 Pr. Wm., 440; *Watson v. Watson,* 14 Ves., 318; *Johnson v. Johnson,* 39 N. C., 9.

PER CURIAM. Decreed accordingly.

Cited: Worrell v. Vinson, 50 N. C., 94; *McMichael v. Hunt,* 83 N. C., 347; *Leathers v. Gray,* 101 N. C., 166; *Marsh v. Griffin,* 136 N. C., 335; *Wool v. Fleetwood, ib.,* 469; *Perry v. Hackney,* 142 N. C., 374.

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(12)

WILLIAM AMIS, ADMINISTRATOR, ETC., v. LEWIS AMIS, EXECUTOR, ETC.

A testator devised as follows: "I direct that my children remain with my wife, to be raised and educated out of my estate. And as one child may become of age and marry, to have allotted off to such child as much of my estate as I have given to my daughter Betsy, and put her in possession of. If my wife should die my widow, I direct that *at her death* my estate, of every description, be equally divided between all my children, considering, in the distribution, the part which each child may have received at its marriage or when it came of age. In educating my children, I direct that my son Lewis be continued at college until he graduates; and should the *income* of my estate justify it, I wish my two sons James and Joseph to receive a like education—the best education the *income* of my estate will afford. I wish all my daughters to receive a good English education. Should the *income* of my estate fall short of giving them a good practical education, I wish them to receive one, *even at the expense* of the capital of my estate."

1. *Held,* that upon the death of the widow the estate was to be divided among the children according to the directions of the will.

2. *Held, secondly,* that up to the time of the widow's death the infant children were to be educated out of the annual profits of the estate, free from charge and without accounting for it; and after her death the expense of the education of the children then uneducated was to be defrayed out of the income of the portion allotted to each of the said children respectively in the division, if sufficient for that purpose; but if not sufficient, each of the legatees must contribute in proportion to their shares.

3. *Held, lastly,* that the property allotted to the several children to make them equal to that given to Betsy is to be valued according to the prices of such property at the time of the advancement to Betsy.

CASE removed from the Court of Equity of GRANVILLE at Fall Term, 1847, by consent of parties.

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

No counsel for plaintiff.
Gilliam for defendant.

NASH, J. The bill is filed to procure a construction of the (13) will of Joseph Amis, deceased. By his will the testator devised as follows: "I direct that my children remain with my wife, to be raised and educated out of my estate; and as one child may become of age, or marry, to have allotted off to such child as much of my estate as I have given to my daughter Betsy, and put her in possession of. If my wife should die my widow, I direct that *at her death* my estate of every description be equally divided between my children, considering, in the distribution, the part which each child may have received at its marriage, or when it came of age. In educating my children, I direct that my son Lewis be continued at college until he graduates; and should the income of my estate justify it, I wish my two sons, James and Joseph, to receive a like education; otherwise, the best education the *income* of my estate will afford. I wish all my daughters to receive a good English education; should the *income* of my estate fall short of giving them a good practical education, I wish them to receive one, *even at the expense* of the capital of my estate." The bill sets forth "that doubts and difficulties have arisen between the plaintiff and defendant as to the proper construction of the will; that it is uncertain whether it was the intent and meaning of the testator that the estate should be divided, at all events, at the death of his widow, or should be kept together, in the hands of his executors, until the education of his infant daughters should be completed; whether or not the said infant defendants should be educated out of the estate *free from charge,* and *without accounting therefor* in the distribution of the same; whether or not the *whole* of the income of the estate (if the same should be required to give to the infant James such an education as by the will is contemplated and directed) may be applied to that purpose, so as to throw the education of the infant defendant, Judy F. Amis, entirely upon the capital of the estate; whether the property to be allotted off to each of the testator's other children, in order to make them equal to his daughter Betsy, as directed by the will (14) should be valued according to the prices of such property *at the time of the allotments,* respectively, or according to the prices of such property *at the time the advancement was made to Betsy;* and whether or not those of the testator's children to whom allotments or advancements have already been made are entitled to any part of the hires which have been received on account of such of the negroes as shall be allotted to the other children." These are the points to which our attention has been directed, and upon which our opinion is required, and relate to the

state of things as they exist since the death of the widow. We will proceed to answer them in the order in which they are propounded.

Mrs. Amis, the widow, is dead, and without having again married. This is the *event* upon the happening of which the testator *directs* a division of his property shall be made. It was evidently his desire and intention that his children should remain with their mother while she continued his widow; if she married, her house would acquire another master, to whose support he had no wish the property of his children should contribute. Neither, in the case of her death, would it likely be in the power of the executor to keep them together; at least, in that event, his great inducement for having them kept together with their mother would be taken away. But it is sufficient that the testator has expressly said that upon her dying his widow, the property shall be divided. He had no intention of binding up the estate any longer.

In answer to the second inquiry, we say that up to the time of the widow's death, when the general division was to take place, the infant defendants were to be educated out of the general profits of the estate, free from charge, and without accounting for it; and it is reasonable it should be so. The elder children, who had come of age, or married, had received their education out of that fund. If the infant children were,

(15)

upon a division, made to account for the sums expended upon their education, it would, to that extent, be a diminution of their portion, and give to the elder children, who had received allotments, an increased share, and so far destroy that equality designed by the testator. He has moreover said that until the death of the widow the property should be kept together for the *joint* education of all his children. It was, in truth, given to her for that purpose. The will does not expressly provide what fund shall defray the expense of educating such of the children as might not have completed their education at the death of the mother, but we think it is not difficult to ascertain the intention of the testator, upon a reasonable construction of his language. He had two purposes in view: The one was the proper education of his children, at all events, and to that he devotes the whole profits of his estate after the maintenance of the family, and even a part of the capital if necessary, and to this end is the direction that the estate shall be kept together during the life of the wife, with certain slight exceptions. While thus kept together, the children would be educated in succession, as they grew up and the profits accrued, which the testator thought was probably an adequate provision for that purpose. If any surplus of income should remain after answering those purposes, it would, of course, be an accumulation for the benefit of all the children while in a course of education. The testator's other purpose was that his estate should not be kept together longer than his wife lived, but be

divided at his death. There would, of course, after that event, be no general profits out of which the children could be educated. But it does not follow that they were not to be educated according to the plan laid down in the will, nor that the expense should be defrayed out of the capital of the estate, leaving the profits of the share allotted to each child to accumulate for his or her benefit, nor that the expense should be limited to the profit of the particular child's share, or, if greater, that it should be paid exclusively out of the capital of (16) that share. The two provisions for the education out of the estate and, at the same time, for the division of the estate, are to be reconciled as far as possible. This can be more nearly effected, after the division, by appropriating the profits of each share to the nurture and education of the child to whom it is allotted, and, if that should be deficient, making it adequate by an equal contribution from all the other shares, than in any other method. For the share of the child is to bear its proportion of the burthen; and if the profits of it be sufficient for the education of the owner, it bears no more than its due burthen by having the profits so applied. So, if they be deficient, then it and all the others must pay an equal quota towards its supply, for the child is to be educated at all events, provided the profits of the whole, as to the sons, be sufficient. As the bill throws no doubt upon that point, we suppose they are sufficient. As the fund is to be, or rather may have to be thus raised, in part, by contribution from all the children, the most convenient mode of doing so is to have an estimate of the amount that will probably be required for the education of each of the infant children, after deducting the profits of each of their respective shares, made by the master, and at once to set apart a fund in the executor's hands to meet it. Should it not all be expended, the residue will be divisible when the estate shall be finally settled, or at any time when it shall be ascertained that it will not be needed for their education.

The third inquiry is, in substance, answered in replying to the second. We will, however, state that by the will the whole of the income, if needed, was a fund for the education of James, irrespective of the effect it might have upon that fund in the education of Judith. The probability of such a result was certainly in the mind of the testator; the provision is: "If the income of my estate *falls short* of giving them (James and Judith) a good education, I wish them to receive it, even at the expense of the capital of my estate." The education (17) of Judith is a charge upon the whole estate.

Upon the fourth inquiry, our opinion is that the property allotted to the several children, to make them equal to that given to Betsy, is to be valued according to the prices of such property at the time of the advancement to Betsy. A little reflection will show the necessity and pro-

priety of this rule. If in order to make a division it were necessary to convert the whole estate into money, or there was money sufficient on hand to comply with the directions of the will in this particular, how much would each legatee be entitled to receive, in the first instance, and preparatory to a division? Betsy's advancement was valued at $1,300, and that sum, in money, would be the amount each child would be entitled to receive; nothing more, or less. This is a legacy, but in truth it is an advancement, and is to be valued as such.

The last inquiry is also substantially answered in responding to the second. After each allotment the child so advanced had no claim during the life of the widow upon the income arising from the property unallotted. The whole income of the will was devoted to the maintenance of the wife and children and the education of the latter as far as was needed. They have had their maintenance and education out of it, up to the time when they ceased to be members of the mother's family.

The bill sets forth that there are debts still outstanding, and claims in the South to be collected, which will be expensive, and the estate is burthened with an annuity to S. Downey of $50.

In directing a division now, it will, of course, be understood that the division is only to be of such parts of the estate as are in hand, reserving a proper fund for the payment of the annuity, and debts,
(18) expenses, and charges of administration, and for supplying the deficiency, if any, of the profits of the shares of the respective infant legatees for their education, as before pointed out. And it must be referred to the master to take an account of the estate and estimate what fund ought to be reserved for those purposes and what part of the estate, upon this basis, may be properly divided now, and of what it consists, and to make the division and allotment accordingly.

PER CURIAM. Decreed accordingly.

GEORGE W. RUSS v. ENOCH HAWES.

1. Every bill must state the ground upon which it asks the interference of the court. It will not do to state one and prove another.

2. Care must be taken to put in issue in the bill whatever is intended to be proved by the plaintiff; otherwise, he will not be permitted to give it in evidence.

3. The statement of the case and the prayer for relief, together, constitute the essence and substance of the bill.

4. When the father made an entry of the land in his own name, and afterwards directed the entry in his son's name, and, in the meantime, another entry was made: *Held,* that the son was not entitled to have a grant to the second enterer, prior to his own, set aside.

CAUSE removed by consent of parties from the Court of Equity of BLADEN, at Fall Term, 1847.

The bill alleges that on 17 January, 1843, the *plaintiff* made an entry in the office of the entry-taker of Bladen, of 400 acres, and caused it to be surveyed, when it was ascertained that there (19) were but 16½ acres liable to entry; that he caused a plat to be made, and procured a grant to issue, on 5 January, 1844. The plaintiff charges that the defendant, on 23 January, 1843, made an entry of 150 acres, which covered the entry of 16½ acres made by him, and procured a grant for it, dated 29 February, 1843; that at the time he made his entry and procured his grant he well knew of the entry previously made by him. The bill prays a conveyance of the land by Hawes to him. The defendant admits the making of his entry and procuring his grant, but denies that, at the time of his entry, he knew that the plaintiff had made a previous entry of the same land, and denies that the entry of 17 January, 1843, was made by the plaintiff, but alleges it was made by George Russ, the father of J. W. Russ.

Strange for plaintiff.
D. Reid for plaintiff.

NASH, J. Under the present frame of the bill the plaintiff cannot obtain the relief he seeks. He alleges that the entry of the 16½-acre tract was made by *him;* it appears from the entry itself, and from the testimony on file, that it was made by George Russ, and in his name.

The force of this fact is attempted to be evaded, in the argument before us, by showing that George Russ acted as the agent of the plaintiff, and the deposition of the former alleges the fact to be so; and he further testifies that he so told the entry-taker at the time, and that he wished the entry made in his son's name. When he discovered the mistake, some six months thereafter, he mentioned it to the entry-taker, and told him, if it could, it ought to be altered. Admit these facts all to be true, still it does not strengthen the plaintiff's claim to (20) the relief he seeks; he has not placed his equity on that ground. Every bill must state the ground upon which the plaintiff asks the interference of the court. It will not do to state one and prove another. Whatever is essential to the rights of the plaintiff must, if within his knowledge, be alleged positively and with precision, and the facts so set forth constitute the *case,* to which alone the Court can look, and

the only ground for relief. Mitford Pr., 42; *Skinner v. Bailey,* 7 Day, 342; *Flint v. Rives,* 3 Ves., Jr., 342. Care must be taken to put in issue in the bill whatever is intended to be proved by the plaintiff; otherwise he will not be permitted to give it in evidence. 1 Ves., 483; 11 Ves., Jr., 240. The reason is, the Court must pronounce the decree *secundum allegata et probata.* The statement of the case and the prayer for relief, together, constitute the essence and substance of the bill. Cooper's Eq. Pl., 4 to 9. The depositions of the two other witnesses, Francis C. Lewis, the entry-taker, and Thomas Lewis, his brother, and who was present and aided in making the entry, are on file. They prove that the entry was made by George Russ, the father, and in his own name, and that he did not direct it to be made, in the name of his son, the plaintiff, nor was his name mentioned. The alteration in the entry, made by the entry-taker at the request of George Russ, twelve months after the original entry was made, cannot affect the decision of the case; and we mention it for fear it might be supposed we had overlooked it.

The bill must be

PER CURIAM. Dismissed with costs.

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(21)

ALFRED ELLINGTON ET AL. v. JAMES CURRIE ET AL.

1. Where a bill seeks to recover slaves, and alleges that a deed for them to the plaintiffs was signed and sealed by the father to whom they belonged, but was never actually delivered, but goes on to state that the deed was duly proved and registered at the instance of the father: *Held,* that this amounted to a delivery and conveyed the legal title, so that the plaintiffs' remedy was at law and not in equity.

2. Equity will not interfere with the operation of the statute of frauds at the instance of either party to a fraudulent conveyance.

CAUSE removed from the Court of Equity at ROCKINGHAM, at Spring Term, 1846, by consent of parties.

James Patrick, the elder, had three children, named Mary, James the younger, and David S.; and on 17 May, 1842, he executed three deeds of gift to them. By one he conveyed to his daughter Mary a slave called Louisa, and several articles of household furniture. By another he conveyed to his son James a negro called Clem, and sundry articles of furniture, and plantation utensils and stock. By the third he conveyed to his son David S. three negroes called Theny, Livey, and Demanda, and some furniture and other chattels. The three children were at the time infants, and lived with their father, and he kept the

negroes in his possession after he made the deeds of gift, and used them as he had done before, up to the time of his death, which happened in February, 1844. He died intestate, leaving his three children surviving him; and the defendant Currie took administration of his estate and took into his possession the slaves and other things so conveyed to his children by James Patrick. The daughter Mary intermarried the plaintiff Alfred W. Ellington. The son James died intestate after his father, and Alfred W. Ellington administered on his estate. And the defendant Currie was appointed the guardian of the son (22) David S., and has all the negroes in his possession.

The bill is filed by Ellington and his wife against Currie and David S. Patrick. It states that at the time James, the father, executed the deeds of gift he was very much in debt, and that he made the deeds, "and caused the same to be registered with a view to keep his creditors from selling the slaves," but that he never delivered either of them, or intended to make any difference between his children, and that neither of the deeds has been found among his papers, or elsewhere, since his death. It states further that "the defendant Currie is assured that his intestate did not intend to divide the negroes among the children by means of said deeds, and that he had no purpose but to keep them out of the reach of his creditors, and went no further towards vesting the title to the slaves in his children than to sign and seal such deeds and have them witnessed and registered"; and yet, that on behalf of his ward, David S., he insists on the validity of the deeds and their efficacy to pass the title of the slaves respectively to the several donees; and that he therefore claims, as belonging to the said David S., the three negroes conveyed to him, and one-half of the negro Clem, which was conveyed to the infant intestate, James. The bill, however, insists that the negroes really belonged to the father at his death, and (admitting that James, the son, owed no debts) that they ought to be divided equally between the surviving children; and alleging that there are no debts of the intestate remaining unpaid, and that the slaves, and one since born, are a clear surplus of the estate, the bill prays for such equal division and distribution.

The answers do not materially vary the facts from the statements of the bill; but they state that the deeds were executed and delivered, and insist that though fraudulent and void as against creditors, they were valid between the parties, and effectually passed the (23) title to the negroes.

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

No counsel for plaintiffs.
Iredell for defendants.

RUFFIN, C. J. The bill must be dismissed, for upon its face it cannot be sustained. It says, indeed, that the deeds were never delivered, and therefore that they never were complete. But the bill itself states facts which amount to delivery. It states that the father executed the deeds by signing and sealing, had them attested and caused them to be registered—which, of course, includes an acknowledgment of them, or a probate of them at his instance. That brings the case literally within *Snider v. Lackenour,* 37 N. C., 360, as to the delivery. The subsequent loss or destruction of them did not affect their operation so as to vest the slaves again in the father, and enable Currie to take them as his administrator. Then, as to the other point, that the deeds were not intended to operate between the parties, but only to hinder creditors, it is only necessary to say that the act avoids such deeds only in favor of creditors, and makes them effectual as against the party and those claiming under him; and it is well settled that equity will not interfere with the operation of the statute at the instance of either party to a fraudulent conveyance. The plaintiffs are therefore entitled to the negro Louisa, and also the plaintiff, A. W. Ellington, as administrator, is entitled to the slave Clem, conveyed to his intestate; but they may be recovered at law, if Currie will not give them up; and there is no trust or other ground for a decree in respect to them in this Court.

PER CURIAM. Bill dismissed with costs.

Cited: Airey v. Holmes, 50 N. C., 144; *Phillips v. Houston, id.,* 303; *Myrover v. French,* 73 N. C., 610; *York v. Merritt,* 80 N. C., 290; *Bank v. Adrian,* 116 N. C., 539, 549; *Helms v. Austin, ib.,* 754; *Robbins v. Rascoe,* 120 N. C., 84; *Perkins v. Thompson,* 123 N. C., 179; *Tarlton v. Griggs,* 131 N. C., 221; *Pierce v. Stallings,* 163 N. C., 107; *Buchanan v. Clark,* 164 N. C., 63.

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(24)

EXUM PERKINS v. WILLIAM HOLLOWELL ET AL.

On a motion to dissolve an injunction, it is a rule now well established that when, 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 charge of the bill, it must be allowed.

PERKINS *v.* HOLLOWELL.

APPEAL from an interlocutory order of the Court of Equity of WAYNE, at Fall Term, 1847, directing the injunction which had theretofore been granted in the cause to be continued to the hearing, *Manly, J.*, presiding.

The bill is filed to compel the specific execution of a contract, and for an injunction. The following facts are admitted by the pleadings: One Raiford Hooks was the owner of a couple of lots in the town of Goldsboro, which, in 1840, he contracted to sell to the complainant for $150, payable in three several installments, and secured by three several bonds or notes. Hooks, at the same time, executed to the plaintiff a bond to make title when the money was paid. All the money was paid to Hooks but about $20, as the notes fell due. The plaintiff was, at that time, indebted to the defendant Hollowell in the sum of $40, and with a view to secure its payment it was agreed between them that Hollowell should pay to Hooks the $20 due him, and the plaintiff should surrender to Hooks his bond to make title, and the latter should convey the lots to Hollowell, who should, at the same time, execute to the plaintiff a bond to make title to him whenever he should pay to him the two sums of $20 and $40, amounting to $60, and for the payment of which the plaintiff was to execute his note to Hollowell. All of this (25) was done. The plaintiff has been in possession ever since his purchase from Hooks, and still is. The plaintiff then alleges that he had paid to Hollowell all that was due to him, except $20; that at Spring Term, 1846, of Wayne Superior Court he was fined $50, and being unable to pay it, he proposed to the defendant Hollowell to become his surety to the sheriff for the amount of the fine, and that he would surrender to him his bond to make title, and that Hollowell should execute a new bond to make title when the plaintiff should pay the $20 and the fine. He avers that the proposition was acceded to by Hollowell, to whom he immediately surrendered the bond for title, then in his possession, and gave his obligation for the two sums of $20 and $50; but that Hollowell did not execute his bond to make title, upon the pretense that he was then too busy. The bill then charges a sale of the lots by Hollowell to the other defendant, Hines, who has sued him in an action of ejectment, obtained judgment, and threatens to turn him out of possession; and that he has tendered to Hollowell what was due him, and demanded a title.

The defendant Hollowell, in his answer, admits that the plaintiff has paid, upon the $60 note just given, about $40, but avers that the payment was made in notes upon other persons who have since proved to be entirely insolvent. He denies positively that he ever agreed to become the surety of the plaintiff to the sheriff for the fine imposed, or to take up the bond to make title, which he had previously given, and to execute

another to make title when the plaintiff should pay to him the amount of the fine and the balance due on the $60 note. He avers the facts to be, as to that second contract, as follows: When the court inflicted upon the plaintiff the fine of $50 it also adjudged him to pay the costs; all of the latter the plaintiff did pay, but about $9. The plaintiff, being
(26) unable to pay the fine and balance of the costs, did apply to him to be his surety to the sheriff for it, which he positively refused. The plaintiff then proposed to him, if he would surrender up the note which he held upon him for $60, and pay the sheriff the sum due him, then amounting to $60, he would surrender up to him his bond to make title to the lots, and thus make to him a *bona fide* sale of them; that he agreed to the purchase of the lots thus proposed by the plaintiff, and gave to the sheriff his note for $60, covering the fine and costs due; and that it was well understood at the time, by the plaintiff and the defendant, that this note to the sheriff, and the balance due upon the $60 note, were to be in full satisfaction for the interest the plaintiff had in the said lots. He admits the sale to the defendant Hines and the recovery in the action of ejectment.

The court refused a motion to dissolve the injunction, and ordered it to be continued to the hearing. From this order the defendants appealed.

Husted and Houze for plaintiff.
Mordecai for defendants.

NASH, J. We take no notice of the answer of Hines, as the cause must, in this stage of it, turn entirely upon the equities of the plaintiff and the defendant Hollowell. On a motion to dissolve an injunction, it is a rule now well established in our courts that when, 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, it must be allowed. *Moore v. Hylton,* 16 N. C., 429; *Sharpe v. King,* 38 N. C., 402. In this case we think the whole of the plaintiff's equity is denied. The plaintiff has placed his case solely upon the ground that by his last contract with the defendant Hollowell he was entitled, upon paying the $20, the balance due upon the first
(27) $60 note, and fine, and the costs imposed on him in Wayne Superior Court, to a conveyance of the land. This allegation is directly and positively denied by the answer. Hollowell admits the proposition was made by the plaintiff, but says that he distinctly refused to accede to it, and the reasons he assigns, we think, are credible. The proposition was that he should become the surety of the plaintiff to the sheriff for the fine and costs, and he refused it, because, as he

alleged, he had already been his surety, and that he never had or could get any money from him, and that when he did pay him, it was in small notes upon others, who were entirely insolvent. If these things were facts, it would well explain why he should refuse to be any farther bound for him. Nor do we perceive any attempt to evade answering any material charge. The defendant does not stop at denying the material charge of the plaintiff, but proceeds to state what the contract was; that it was for the *sale* and purchase of the equity, which was then in the plaintiff, the legal title being in him, and that it was so distinctly understood by the parties at the time the contract was made.

A motion was made in the court below to dissolve the injunction, which was refused, and an order made that it should be continued to the hearing. From this interlocutory order the defendants appealed to this Court. We think there was an error in the order, and that the injunction ought to have been dissolved.

The plaintiff will pay the costs of this Court.

PER CURIAM. Reversed.

Cited: Perry v. Michaux, 79 N. C., 98; *Riggsbee v. Durham,* 98 N. C., 87.

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(28)

JOHN JAMES ET AL. v. TANDY MATTHEWS ET AL.

Where a settlement was made between the legatees and executor, in which settlement no interest was computed, and the legatees received the principal, they cannot afterwards be allowed to rectify the settlement as to the interest, unless they show that the interest was omitted in the settlement, either through mistake or accident, or fraud and imposition—especially after the lapse of several years.

PETITION in this Court to rehear an interlocutory order.

James Matthews by his last will devised as follows: "Also, I will at my death that all my movable property shall be sold and the money arising from such sale shall, after the payment of all my lawful debts, be divided between Tandy Matthews, Betsy James, and John Matthews; but what share shall be coming to Betsy James shall be paid to her children when of age." There is a similar bequest of all the money due him. The plaintiffs are the children of Betsy James, and all of them, as they arrived of age, received, as they state in the bill, the principal of the money due them from Tandy Matthews, who was the acting executor; and that he refused to pay them any interest. The bill is to recover the interest.

The defendant alleges that he has settled with and paid over to the plaintiffs their respective shares, some of them more than twenty years ago; and during all the long time he was making his different settlements no dissatisfaction was expressed at his not paying interest, nor was any claim for interest set up, and he relies upon the lapse of
(29) time, and the settlements, as a bar to an account.

The case was set for hearing on the bill and answer, and an account was decreed by the preceding judge in the court below, as to the interest. The cause was then brought here, and a petition is filed to rehear that interlocutory decree.

Kerr for plaintiffs.
Morehead for defendants.

NASH, J. Lapse of time is, in itself, no bar to the demands of an account, by next of kin, against an administrator; but it may raise a presumption that an account has been rendered and satisfaction made, or the claim to satisfaction abandoned, and the farthest this Court has gone in raising such presumption is the intervention of twenty years between the time when the settlement ought to have been made and the filing of the bill. *Bird v. Graham,* 36 N. C., 198. In this case it is admitted that a settlement has taken place and the principal paid. Twenty years, however, have not, as far as we can see, passed since the time when the legacies were payable. The answer states that the payments were made to *some* more than twenty, but which of them he does not state, and it was to be paid as they arrived at age, and those respective periods have not been set forth by either party. The bill does not seek to set aside the settlement generally, but that it may be rectified as to the matter of interest. To entitle themselves to the relief they seek the plaintiffs must show that the interest was omitted in the settlement either through mistake, or accident, or fraud and imposition. None of these reasons exist in this case, because the plaintiffs show they knew their rights, and all the facts, and were perfectly aware of the
(30) omission to allow interest. *Compton v. Green,* 17 N. C., 96.

They state that at the settlement "the defendant paid them a part of their respective legacies, alleging that that was the full amount of the principal money for division, and *refused to account for any interest whatever.*" With this knowledge before them, and without any allegation of fraud, accident, or mistake, or any reason shown why he did so settle, they cannot be permitted now, after receiving the principal as all that was due to them, and after the length of time that has elapsed, to come into court and ask an account of the interest, which was but an incident, at best, to the principal demand. We consider them concluded by the settlements made.

The interlocutory order was erroneously made, and must be reversed, and the bill

PER CURIAM. Dismissed with costs.

Cited: Grant v. Hughes, 96 N. C., 191.

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(31)

HUGH ROGERS v. JOHN C. ROGERS ET AL.

1. Where A. is a partner in two distinct firms, neither firm can sue the other for an amount alleged to be due.

2. If A. be insolvent, the proper course is for the firm claiming to be the creditor firm to charge him on his books for the amount believed to be due.

3. If A. be insolvent, then the accounts of the creditor firm should be adjusted, and a bill may be brought by the remaining members of that firm against the debtor firm, to recover the amount due from the latter after deducting what may be due to A., if anything, upon the adjustment of the accounts of the creditor firm.

CAUSE removed from the Court of Equity of WAKE, at Fall Term, 1847, by consent of parties.

The bill is filed by Hugh Rogers, George W. Lowe, and John C. Rogers, against the same John C. Rogers and Walter L. Otey. It states that Hugh Rogers, George W. Lowe, and John C. Rogers were copartners under the name of John C. Rogers & Co.; that John C. Rogers and Walter L. Otey were copartners in a house of entertainment in Raleigh, called the Eagle Hotel, under the name of Rogers & Otey; that the firm of John C. Rogers & Co. sold to the firm of Rogers & Otey large quantities of wood for the use of the hotel, and, for the accommodation of Rogers & Otey, accepted their bills, and were compelled to pay them, and likewise lent money to that firm; that upon all their transactions a balance is due from the firm of Rogers & Otey to that of John C. Rogers & Co., amounting, as the plaintiffs believe, to the sum of $2,000, though they cannot ascertain it precisely; and because the plaintiffs cannot, by reason that John C. Rogers is a member of each firm, have an action at law, the bill prays that the defendants John C. Rogers and Walter L. Otey "may answer what amount is due from the said firm of Rogers & Otey to your orators, and that they may be decreed to pay your orators what may be justly due," and for general re- (32) lief.

John C. Rogers did not answer the bill. The other defendant, Otey, put in an answer, in which he states several matters of defense, tending to show that John C. Rogers had used the effects of Rogers & Otey to a large amount for the use of himself and the other plaintiffs, and that he and they were heavily in debt to this defendant. After replication and commissions, the cause was set for hearing, as between Otey and the plaintiffs, and was transferred to this Court.

Miller and G. W. Haywood for plaintiffs.
W. H. Haywood for defendant.

RUFFIN, C. J. It is unnecessary to consider the various matters stated in Otey's answer that might affect the merits of the controversy, as between him and the other parties, as it is impossible there can be any decree for the plaintiffs on this bill. It seems to have been drawn upon some vague sort of notion that the firms are in the nature of corporations, and that one of them might have a decree against the other, as firms. Still, it does not pray that the payment of the debt to John C. Rogers & Co. shall be decreed out of the effects of Rogers & Otey, for it does not allege that there are such effects, and, on the contrary, it looks behind the names of the firms to the persons who compose them, and seeks a decree that John C. Rogers and Walter L. Otey, who constitute "Rogers & Otey," shall pay the debt to the same John C. Rogers, Hugh Rogers, and George W. Lowe, who constitute "John C. Rogers & Co." The bill therefore involves the absurdity of a man's having a personal decree against himself for a sum of money; and that, too, coupled with a decree against another person in such a manner as to enable the
(33) supposed creditors to raise the whole debt out of this latter person, although, as between that person and his partner (who is also a partner in the other firm), it might appear, upon taking the accounts of their firm, that the latter holds the fund out of which the debt ought to be paid. Without taking the accounts of the partnership of John C. Rogers & Co. it cannot be told whether the partners, Hugh Rogers and Lowe, have a right to more of the assets of that firm, or could call even on John C. Rogers to make good this debt. And without taking the accounts of Rogers & Otey it cannot be told which of those two persons, as between themselves, ought to pay the debt. Now, under this bill, none of those accounts are sought or can be taken, for it is a bill which supposes the two firms to be yet subsisting and to be, as well as the individual partners, all solvent. Supposing that to be so, and that this debt is just, it is easy for the persons composing John C. Rogers & Co. to redress themselves. John C. Rogers himself might appropriate the assets of Rogers & Otey to the payment of John C. Rogers & Co.

He may be charged with this debt on the books of John C. Rogers & Co., and that will entitle him to a credit for that amount with Rogers & Otey. If Otey will not consent to it, there is the alternative, when partners disagree, of dissolving and filing a bill to take the accounts, upon which the debts must all be first paid. If, however, John C. Rogers should refuse to become paymaster to John C. Rogers & Co., or be already so far a debtor to that firm that the other members, Hugh Rogers and Lowe, are unwilling to take him alone for the debt of Rogers & Otey, then their course is to stop their business, and upon the settlement of it this debt of Rogers & Otey will, as a part of the assets, be allotted to one of the partners in his share, and he can have relief on his own bill. But in the present state of things the Court does not see, nor can the accounts be taken that will enable the Court to see, who is the proper person to pay and receive this money. It may be that John C. Rogers' is the hand, in the firm of Rogers & Otey, (34) from which the money ought to go, and also that in the other firm which ought to hold it. There can, therefore, be no decree for the plaintiffs. Not one against Otey alone, because no several liability on his part is alleged, nor anything to exempt John C. Rogers from paying, or contributing to the payment of, the debt. And not one against Rogers by himself, or jointly with Otey, because it would be to pay to John C. Rogers himself, jointly with others, and for that reason would be repugnant, absurd, and void.

PER CURIAM. Bill dismissed with costs.

WILLIAM SMITH v. STEPHEN SMITH ET AL.

For any sum which a surety for the price of land, purchased by another, has paid or is liable to pay on that account, he has an equity to be reimbursed or exonerated by a sale of the land; and to that end he has a right to file his bill to prevent a conveyance to the purchaser by the vendor, who has kept the title as a security for the purchase money.

CAUSE removed by consent of parties from the Court of Equity of ROCKINGHAM, at Spring Term, 1847.

The defendants Stephen Smith and David Smith are the (35) sons of the plaintiff, William Smith, and the former, Stephen, is the son-in-law of the defendant Andrew Martin, the elder. In October, 1842, Andrew Martin, the younger, who is a son of Andrew Martin, the elder, proposed to sell a tract of land in Stokes County to the two defendants, Stephen and David, at the price of $1,000; but they,

not feeling themselves able to pay for it, declined the purchase, unless they could get assistance from the plaintiff and Andrew Martin, the elder. On 23 October, 1842, the plaintiff and his two sons, and Andrew Martin, Jr., met, and it was concluded between them that the two young men should make the purchase for that sum on a credit until the first day of January following, and the two elder persons would become their sureties, and would also contribute to the payment of the debt. A bond was accordingly drawn, and executed by the defendants Stephen and David, and also by the plaintiff, and Andrew Martin, the elder; and the defendants Stephen and David took it to Andrew Martin, the younger, with whom they made a parol contract for the land, and delivered him the bond; and upon the payment of it they were to receive a deed. On 14 February, 1843, a payment of $300 was made on the bond, the same being the proceeds on a tract of land, which the plaintiff then conveyed to one Drury Smith, at that price, which he delivered to his son, Stephen, with directions to apply the same to this debt, and which was entered on the bond as a payment by Stephen. On 1 May, 1843, Andrew Martin, the elder, paid on the said bond the sum of $350, and it was credited as a payment by him. Afterwards, Andrew Martin, the younger, instituted a suit at law on the bond against the plaintiff alone, and obtained judgment for the balance due thereon and costs.

The plaintiff then filed this bill against his two sons and both of the Martins, and therein states that when the bond was executed he
(36) agreed to pay upon it the sum of $250 as advancement to his sons, and no more, and that the defendant Andrew Martin, the elder, also agreed to pay on it the like sum of $250 as an advancement to his son-in-law, the said Stephen, and that the two young men were to pay the residue themselves. The plaintiff further states that when he afterwards sold the land for $300 he was willing to give them the whole of that sum, and directed it to be applied to the bond as a payment by him, in discharge of his part of the debt; but that the defendant Stephen had it entered as a payment in exoneration of himself. The bill also states that the said Stephen had been in the employment of the defendant, the elder Martin, for several years, in superintending the manufacturing and selling of tobacco for him, and that on that account the latter was indebted to the former in the sum of $350, which was satisfied by the payment of that sum on the bond aforesaid; and that the same was, by collusion, entered as a payment by Martin, instead of being by the said Stephen, with the view of throwing the payment of the remaining $350 on the plaintiff.

The bill further states that the land had not been conveyed, and that the two defendants, Stephen and David, had but little property, and would be unable to reimburse to the plaintiff the same, if he should

be compelled to pay the residue of the bond, unless by means of the land itself; and it charges that, by collusion between all the defendants, the vendor had sued the plaintiff alone for the purpose of coercing the payment from him and leaving the other parties the power of disposing of the land to other purposes.

The prayer of the bill is that the land may be declared a security for the residue of the debt, and particularly to the plaintiff for any further sum he may be compelled to pay in the premises, and that the defendants Stephen and David and Andrew, the elder, or some one or more of them, may be decreed to discharge the residue of the bond, and in default thereof that the land may be sold for that purpose; and (37) that in the meanwhile an injunction might issue, restraining Andrew Martin, the younger, from raising the money on his judgment, and from conveying the land otherwise than under the order of the court. The injunction was granted as prayed for. The answer of Andrew Martin, the younger, admitted the contract of sale, as charged in the bill, and stated that he had been unable to make a conveyance because he purchased the land at a clerk and master's sale, and had not been able to make payment of the purchase money, by reason of being disappointed in receiving the price he was to get. It further stated that this defendant had now received a conveyance, and with his answer he filed a deed from himself to Stephen Smith and David Smith in fee, to be delivered to them under the direction of the court, whenever the balance of his debt should be paid to him. This defendant further states that he was not present at the execution of the bond, and does not know what agreement the other parties made as to the proportions of the debt, which they were respectively to pay; but that he brought suit against the plaintiff alone because he was informed by the other parties that the payment of $350 was made by Andrew Martin, the elder, with his own funds, and that of $300 was made by Stephen Smith, and that the balance of $350 was to be paid by the plaintiff for his son David.

Stephen Smith and David Smith answered together. They state that after consultation between the plaintiff, Andrew Martin, the elder, and themselves, it was ultimately agreed between them that these defendants should make the purchase of the land, and give their bond for the purchase money, and that the two elder persons should execute it as sureties. They deny, however, that the agreement as to the mode of payment was as it is stated in the bill, namely, that each of the four was to pay $250; and they say the agreement was that they, the defendants Stephen and David, should pay the sum of $300 in (38) part of the bond; that the defendant the elder Martin should pay $350 thereon as an advancement to Stephen Smith, his son-in-law; and that the remaining $350 should be paid by the plaintiff as an advance-

ment to the defendant David. They further state that their father had, before that time, given to them, by parol, a tract of land lying in Virginia, which they could sell, and which their father told them they might sell, to one Drury Smith, for $300, in order thereby to raise that part of the bond which these defendants were to pay. The defendant Stephen states "that Andrew Martin, the elder, had engaged him to conduct his business in manufacturing tobacco, carrying it off, and selling it; that no definite settlement had taken place between them, and the said Andrew had advanced only about $150 in cash, and some manufactured tobacco; and that it was agreed between them that the said Andrew, the elder, should pay towards the said bond, for the said Stephen, the sum of $350, which was to close their private accounts; that there was not due to the defendant Stephen that amount upon strict settlement, but as it was a family arrangement between father-in-law and son-in-law, it was to be considered as an advancement." The answer further states that the land which their father had given them was sold by them to Drury Smith, and conveyed by their father, and the price, viz., $300, was received from the purchaser by the defendant Stephen, with the assent of their father, and applied to the bond on the joint account of both the defendants Stephen and David; and they insist the plaintiff cannot retract the gift of that sum, nor claim to be reimbursed out of the land the further sum recovered from him, inasmuch as he agreed to pay that sum on the bond as an advancement for the defendant David, who was to have one-half of the land, and the plaintiff was well able to make such advancement.

(39) The other defendant, Andrew Martin, the elder, put in a separate answer, in which he states the transaction much in the same manner as in the last answer. It states that during the consultation about the purchase "the two young men said they could not pay for the land without considerable aid, and ultimately it was agreed that this defendant and the plaintiff would help them. Stephen Smith had done considerable work for this defendant, in hauling and selling tobacco, for which he had received $150 in cash and a load of manufactured tobacco; no definite settlement, however, had ever taken place. This defendant then stated that if Stephen and David went into the trade he would pay $350 towards the price; and the plaintiff said he was willing to help his sons by paying an equal sum towards the price; and he distinctly stated that he had previously given them a piece of land, and that, although he had not made a deed for it, they might sell it for $300, and therewith pay the residue of the purchase money for the land they were to buy, so that one-half of the land should belong to each of the sons. The answer further states that the price to be got for the land, previously given, was not to be in part of the payment to be

made by the plaintiff; but that he was to pay $350, in addition thereto, as an advancement to his son David, against that sum advanced by this defendant, for his son-in-law, Stephen Smith, so as to entitle each of them to an equal share of the land, and the defendant avers that, in good faith, he paid the sum of $350, according to his agreement, as an advancement to Stephen Smith, and he insists that the plaintiff is bound in good faith to this defendant, and also to his sons, to advance a sum sufficient to discharge what may be due on the bond.

Upon the coming in of the answers the injunction was dissolved with costs; but it was made a part of the order that the deed filed by Andrew Martin, the younger, and made to the defendants Stephen and David, should be retained in the master's office until the further order of the court. It further appears in the record that the (40) plaintiff paid upon executions the debt, interest, and costs, in equity and at law; and he then dismissed his bill as to Andrew Martin, the younger, and continued it as an original bill against the other defendants, and replied to their answers.

The defendants took no testimony. On the part of the plaintiff two witnesses were examined. One is Drury Smith, who, as stated in the pleadings, purchased the land in Virginia. He says that in January or February, 1843, Andrew Martin, Sr., proposed to sell to him a tract of land lying in Henry County and belonging to William Smith, the plaintiff; and that he then informed the witness that Stephen and David Smith had agreed to take a tract of land in Stokes County, in North Carolina, from his son Andrew, at $1,000, and that the plaintiff had given his land in Henry to the boys, to sell for the best price they could get, to help to pay for it; that the witness then said to him that when Stephen Smith, who was then at the South, should come home, he might tell him to come over, and that he, defendant, would give a fair price for the land; that in a short time Stephen Smith came to the house of the witness, and they agreed for the land at $300, provided the plaintiff would enter into writing to close the contract; and that on an appointed day the plaintiff and his son Stephen went to the witness, and the contract was reduced to writing between the plaintiff and the witness; and the witness then paid to the plaintiff the price of $300, and he immediately handed the whole sum to his son Stephen, and told him to go and pay it towards his land before he slept, to stop the interest. The witness further states that at the time of the trade Stephen Smith wished to borrow money from him to make a further payment for the land purchased from Andrew Martin, Jr., and that he said, "if he could get $300 from the deponent, that sum, with the price deponent was to

(41) pay for the land, and what Andrew Martin, Sr., owed him, would enable him and David (who was in partnership in the purchase) to pay for it."

Another witness states that he was present in February, 1843, when Drury Smith paid $300 for the land, to the plaintiff, who immediately handed the money to his son Stephen, and told him to go and see his mother, and, if she would make a right to the land, to go on and pay the money before he slept, to stop interest, but if his mother would not make the right, to return the money to him, to which Stephen replied that he would.

Iredell for plaintiff.
Morehead for defendants.

RUFFIN, C. J. For any sum which the plaintiff might have paid, or might be liable to pay, as a surety for his sons on the bond for the purchase money of the land, he had an equity to be reimbursed or exonerated by a sale of the land; and to that end he had a right to file his bill to prevent a conveyance to the purchasers by the vendor, who had kept the title, as a security for the purchase money. *Green v. Crockett,* 22 N. C., 390; *Polk v. Gallant, id.,* 395. The title is still under the control of the court; and, therefore, the inquiry is, how far the plaintiff is to be regarded as the surety of his sons. It is agreed on all hands that the sons made the purchase, and that the fathers-in-law executed the bond in the character of sureties to some extent. The plaintiff, however, admits that he undertook to pay $250 of the purchase money as an advancement for his sons; and he says that upon selling the piece of land for $300, from which he expected to raise the $250, he agreed to give the whole price as an advancement, to be applied as a payment from him on the bond. For that sum the plaintiff seeks, and could have, no redress. Undoubtedly he could have no recourse on his sons
(42) for a sum thus voluntarily assumed and voluntarily advanced, as a gift. We are not prepared to say that, after agreeing with his sons and the father-in-law of one of them to advance a certain proportion of the purchase money, and thereby inducing the sons to make the purchase, and the father-in-law to agree also to advance a sum towards paying for it, the plaintiff could, before the payment, retract his undertaking, but would not be compellable to make it good. However, it is not necessary to consider that point, nor how far the plaintiff might be discharged from his obligation by a fraud on the agreement on the other side, in making, with the funds of the son Stephen, the payment which his father-in-law was to make out of his own funds as an advancement to Stephen. For, as the pleadings stand, and upon the proof,

it must be found, in point of fact, we think, that the $300 received for the land from Drury Smith was a payment made on the bond by the plaintiff, and that he did not undertake to make any further payment on it by way of advancement to either of his sons, or was bound therefor, except as a surety. Several considerations concur to produce that conclusion. In the first place, the bill admits no further responsibility to have been assumed by the plaintiff; and it affirms that the land from the sale of which the money was raised belonged to the plaintiff, and was sold by him to enable him to meet his engagement on the bond. In both respects the burden of proving to the contrary is on the defendants; and they have entirely failed to give any such proof. The burden is on them, because, as the purchasers of the land, they are *prima facie* the principal debtors for the price. The furthest the law has gone in presuming a gift from the father to the child is when the father paid or secured the price and took a conveyance in the name of the child. In that case it is inferred that the advancement of the child was intended, and no trust results to the father on account of the purchase money being his. (43)

But where no conveyance is executed, and the child makes the contract of purchase, and all the father does is to join in the bond for the purchase money, there can be no presumption that the father was to pay the price, as a gift to the child; else, every responsibility incurred by a parent for and with a child is to be held as making the former the principal and the latter only the surety, which is against the common experience of the course of business. So, in regard to the ownership of the land sold to Drury Smith, and of the money got for it, it must be deemed to have been, in fact and truth, in the plaintiff, as it was legally his, unless there be evidence on the other side to establish that he had previously given the land to his sons, and that his concurrence in the sale to D. Smith was merely formal, in order to pass the legal title. The answers state the last to be the truth; but they cannot divest the plaintiff of his estate without proof *aliunde,* and no such proof appears. On the contrary, the defendant Andrew Martin, Sr., is represented by the witness Smith as making the first proposition to sell to him the land in Henry, and as then stating, not that it had been given by the plaintiff to his sons before they made their purchase, but that he "had given it to them" (in consequence of their purchase) "to sell for the best price they could, to help to pay for it"—that is, for the land they bought. The same inference results from the dealings of the defendant Stephen and his father with Drury Smith, as deposed by that witness. Throughout the father acted, and was treated by the other two, as the real owner and vendor of the land, who was entitled to and received the purchase money, and disposed of it. And it is clear from the

declarations of the son in that negotiation that no further contribution was intended by or expected from the plaintiff besides the sum obtained for that land; for he said the defendant Martin owed him enough to enable him, with the $300 paid by the witness, to pay for the
(44) land within $300, and he applied to the witness to lend him and his brother that sum for that purpose.

The payment of the $300 on the bond, then, was not made with the funds belonging legally or equitably to the sons, as far as appears, but with the money of the plaintiff; and, therefore, he fully complied with the whole of the undertaking on his part, as far as any is established.

Another consideration strongly corroborates this view of the subject. It is plain upon the answers themselves that by the agreement between the parties the advancement which the plaintiff was to make was to be compensated by one to an equal amount in favor of Stephen Smith, by his father-in-law, and by means of those two advancements, and the sum of $300 to be paid by the two sons, expected to be raised from the sale of the land previously given to them by the plaintiff, the answers say the debt was to be paid. Now, it has been already shown that the sum got for that land did not belong to the two sons, and, therefore, it must have been understood that the payment to be made by them was to come from a different quarter. What the quarter was cannot be doubted. The debt of the defendant Martin to Stephen was known—not, perhaps, in its exact amount, to all parties—and was unquestionably the source relied on for the payment which was to be made by the sons with their own means, leaving the brothers afterwards to settle between themselves for the difference in their advances. This must have been so, since no other resource is suggested, and because the defendant Stephen expressly declared as much to Drury Smith. But those defendants say that the sum of $350 which Martin paid on the bond in May, 1843, was his (Martin's) money, and was paid by him as an advancement to his son-in-law, and that no part of it belonged to the son-in-law, although it extinguished the debt from his father-in-law to him, or, in the language of the answer, "closed their pri-
(45) vate accounts." The Court cannot be so blind as not to see that the transaction, in that respect, was not a fair one, and that the account given of it in the answers is imperfect, uncandid, and unsatisfactory, intended to give a false coloring to the payment. We are obliged to perceive that the payment in the name of the father-in-law was illusory, and that, in reality, it was with the funds belonging, perhaps wholly, and at all events, nearly so, to the son-in-law. Taking, then, that payment to be made by the defendant Stephen, and not by Martin, it follows necessarily that the payment which Martin agreed to

make as an advancement is yet to be made; and if made, there would be nothing left to be paid by the plaintiff, even had an agreement been established against him to pay more than the proceeds of the land in Henry.

Upon the whole, therefore, the Court holds that the plaintiff was entitled to be relieved from any further payment on this debt by compelling the defendants, or some of them, to discharge the balance due on it. From what has been said it will have been perceived that in our judgment the defendant Andrew Martin, the elder, ought in justice to pay it; and we should be obliged to examine his liability for it, in this Court, if the two other defendants had insisted on it. But, as they have chosen to consider the payment of the $350 as a payment by him in satisfaction of the advancement promised by him, and to discharge him from all further liability, and thereby to take that much of the debt on themselves, we suppose it must be so, and that the law cannot force those persons, against their will, to look to him for this money. With that question the plaintiff has no concern at present; nor will he have any unless he should be unable to get back the money he has paid, out of the land, or from his sons, the principal debtors. If that should so turn out, the plaintiff would, at all events, have a claim for contribution on Martin, as his cosurety, and, perhaps, for a (46) full indemnity, upon the ground above mentioned, of his agreement with the plaintiff to make an advancement to his son-in-law equal to that made by the plaintiff for his sons. Reserving these points, however, it is only necessary at present to declare that the defendants Stephen and David are bound to repay to the plaintiff the debt, interest, and costs, at law and in equity, which he paid on the dissolution of the injunction in this cause, and, in case they should fail to do so in a reasonable time, that the plaintiff will be entitled to have the same raised by the sale of the land purchased from Andrew Martin, the younger. There must be a reference to inquire what sum is due to the plaintiff on those accounts; and in the meanwhile the defendants must pay the plaintiff his costs incurred in this cause up to this time.

PER CURIAM. Decree accordingly.

Cited: Freeman v. Mebane, 55 N. C., 47; *Mast v. Raper,* 81 N. C., 334; *Stenhouse v. Davis,* 82 N. C., 434.

(47)

EDWARD WILLIAMS AND WIFE AND OTHERS v. BENJAMIN AVENT.

1. A. by deed conveyed to his grandchildren a number of articles of small value, such as "old iron, an old horse, two or three hogs, linen wheel," etc., and others, specifically enumerating and describing them, and then the deed says: "and all and every article of property which I own, whether enumerated or mentioned, is herein conveyed": *Held*, that none of the slaves which A. owned passed by this conveyance.

2. Where a deed of gift is fraudulent against creditors, and the property conveyed by it is sold under executions at the instance of the creditors, the surplus in the hands of the officer remaining after satisfying the executions belongs to the donees.

CAUSE removed from the Court of Equity of HALIFAX, at Spring Term, 1847, by consent of parties.

The bill sets forth that Benjamin Kimball, in 1837, with a view to advancing in life certain of his grandchildren, who were the children of his daughter, the wife of William Sturdevant, one of the plaintiffs, conveyed to the said William, by deed, various articles of personal property in trust for his said children, and who are the above named plaintiffs. In said deed is the following clause: "All and every article of property which I own, whether enumerated or mentioned, is herein conveyed." The bill alleges that the donor, Benjamin Kimball, at that time owned a negro slave named Henry, who was then a runaway. Soon thereafter B. Kimball removed to the west, and Henry came in, and the plaintiff William Sturdevant took him in his possession and held him as guardian for his children. Benjamin Kimball re-
(48) moved to the State of Tennessee and there died; and in 1842 the defendant William Avent was duly appointed his administrator. The bill then charges that, in 1839, an execution was issued from the county court of Halifax against Benjamin Kimball, and was levied on the negro Henry, and at the sale the plaintiff William Sturdevant purchased him, for and on account of his children, for a sum which, after discharging the execution, left a balance of $482.35, which he claimed to hold for his children; but the sheriff insisted he should either pay it or give his note for it. The latter was done, with the understanding that the sheriff was not to collect it unless compelled. Upon the appointment of Avent as administrator of Benjamin Kimball, the sheriff was induced by him to put the note in suit for his own use, and, a judgment being obtained, the money was paid to the defendant by William Sturdevant.

The bill charges that the conveyance from Benjamin Kimball to the complainants was good and valid, except as to the creditors of the said Benjamin; that they were entitled to the surplus of the money for

which the slave Henry was sold, after satisfying the execution, and that the defendant holds it as their trustee, and prays he may be decreed to account for and pay it over to their guardian. All the parties interested are before the court.

The defendant Avent admits the execution of the conveyance under which the plaintiffs claim the slave Henry, but denies that at that time his intestate had more than a life estate in him, or that Henry was included in the conveyance, or was intended to be. He alleges that Benjamin Kimball, in February, 1824, being about to enter into the marriage state a second time, with the knowledge and consent of his intended wife, conveyed a large portion of his estate to his children, reserving to himself a life estate therein. That among other conveyances was one to his son William D. Kimball of this negro Henry; that he retained possession of the property so conveyed, and of Henry, (49) who, being unwilling to remove with the intestate Benjamin, ran away from him a short time before his removal, and came in, in a short time thereafter, and went into the possession of the plaintiff William Sturdivant. He admits the execution, as stated in the bill, and the sale of Henry under it by the sheriff, and the purchase by the plaintiff William Sturdivant, the giving of the note, as stated, by him to the sheriff, but denies that to his knowledge there was any such agreement as alleged between them. He admits he has, by due process of law, recovered from the said William Sturdivant the amount of said note and received the money. The defendant further alleges that after he was appointed to administer the estate of the said Benjamin he brought an action against William Sturdivant and recovered the hires of the slave Henry from him for the time he was in his possession up to the death of his intestate. He also alleges that his intestate owned and had in his possession several negroes, whom he took with him to the west, and that the plaintiffs, under their construction of the conveyance, were as well entitled to all of the latter as to the slave Henry.

Replication was taken to the answer, depositions filed, and the case was set for hearing.

Among the exhibits filed by the parties in the case is the conveyance from Benjamin Kimball to the plaintiff William Sturdivant, in trust for his children, dated 8 May, 1837, under which the bill claims the decree of the court, and also a conveyance from Benjamin Kimball to his son William D. Kimball of a negro man by the name of Henry, together with a considerable amount in land and other negroes, dated 9 February, 1824. Both these deeds were voluntary conveyances. By the latter one Benjamin Kimball reserves to himself a life estate in all the property conveyed.

(50) *Bragg for plaintiffs.*
Badger and B. F. Moore for defendant.

NASH, J. The testimony sufficiently proves that the negro Henry, claimed by the plaintiffs to have been conveyed to them in the deed of 1837, is the same Henry mentioned in that of 1824. Benjamin Kimball died in 1840, and this bill was filed in 1845.

The principle upon which the plaintiffs' claim rests is that by the deed of 1837 the slave Henry was conveyed to them by the clause, "and all and every *article* of property which I own, whether enumerated or mentioned, is herein conveyed"; that this deed, being voluntary, was void as to the creditors of Benjamin Kimball, but valid as to him and those representing him; that therefore the surplus in the sheriff's hands, and that now in hands of defendant Avent, was their property, and received by him as their trustee, and he is bound to account for it to them. The money would belong to them if, under the conveyance of 1837, the plaintiffs acquired any interest in Henry which was subsisting at the time the defendant Avent received the money. *Taylor v. Williams,* 23 N. C., 249; *Jones v. Thomas,* 26 N. C., 12. We are not prepared to say that by that deed the slave Henry was conveyed to the plaintiffs, or was intended to be. He is not named in the instrument, while a variety of the most minute and trifling articles are enumerated, as (among other things) a "parcel of *old* iron in the shop, an old horse, five wheel boxes, two large white hogs, a barrow, and a sow of my mark, a spotted sow of my mark uses about where William Sawlin's family lives, the two white hogs uses in the old field in the bend of the creek above the mill, and are shy," etc. Of the same character are the other articles enumerated. It is very difficult to conceive why the only property of any value, intended to be conveyed, should be omitted, when the donor is so very careful in designating the other property as to tell us that two of the hogs were shy, and where they ranged. In addition
(51) to this, William Sturdivant, a witness for the plaintiff, tells us that the conveyance was made twelve or eighteen months before Benjamin Kimball left the State, and that, some time after its execution, he asked him why he had not named Henry in that deed; he answered, because he had before given him to him, William Sturdivant, for his children. This is strong evidence that although the words used in the deed *might* be sufficient to embrace Henry, yet that such was not the intention of the donor. There is no evidence of any gifts to the plaintiffs prior to the deed of 1837, nor do they, in their bill, allege there was.

If, however, it be conceded that under the deed of 1837 an interest in the slave Henry was conveyed to the plaintiffs, it becomes important to inquire its nature and extent.

Benjamin Kimball was the original owner of the slave, and a wealthy man. Being about to enter into a second marriage, and desirous to advance his children, with the knowledge and consent of the lady whom he was about to marry, he divided among them a large portion of his estate, both real and personal. To his son William D. Kimball he gave, by deed bearing date in February, 1824, the portion of his property intended for him, including this slave Henry, but reserved to himself a life estate in him as well as the rest of the property so conveyed. There can be no question that under the act of 1823, ch. 1211, Rev. St., ch. 37, sec. 22, the limitation to the son, after the life estate to the father, is good. It is enacted "that every limitation by deed or writing, of a slave, which limitation, if contained in a last will and testament, would be good and effectual as an executory devise or bequest, shall be and is hereby declared to be a good and effectual limitation in remainder of such slave, and any limitation made or reserved to the grantor, vendor, or donor, in any such deed or writing, shall be good and effectual in law," etc. If the gift we are considering had been contained in a last will and testament, it would have been good, as an executory devise, and it is such gifts contained in a deed the act provides for. All legislative acts, by the common law, refer back to the first day of the session, without any reference to the actual time when passed, unless otherwise directed. In this State, by statute, all acts go into effect thirty days after the rise of the session at which they are passed, unless expressly otherwise directed. 1799, ch. 527, Rev. St., ch. 52, sec. 36. The session of the Legislature was closed on 28 December, 1823, and the act went into operation 28 January, 1824; and the deed from Benjamin Kimball to William D. Kimball was executed 9 February, 1824, after the act of 1823 had gone into operation, and that act gives full operation to the deed and sustains the interest both of the donor and donee. The life estate reserved to the donor was, then, a good reservation, and when he made the deed of 1837, under which the plaintiffs claim, if Henry was included, he conveyed to them, and could convey, no larger estate than he possessed, which was for his life. It is in evidence that Benjamin Kimball retained the possession of Henry until a short time before his removal, when, to avoid going with him, he ran away, but returned, and went into the possession of William Sturdivant, one of the plaintiffs, by agreement between him and Benjamin Kimball, and in whose possession he remained until October, 1839, when he was taken by the sheriff of Halifax and sold to satisfy an execution in his hands against Benjamin Kimball. William Sturdivant became the purchaser, at a price which paid off the execution and left a surplus of $482.35, for the payment of which he gave his note to the sheriff. The money due upon this note was subsequently, towit, between May

(52)

and August, 1844, received by the defendant on an execution which issued for his benefit or that of the estate of Benjamin Kimball. The money did not belong to the plaintiffs, either in law or in equity, as they are volunteers under a deed subsequent to that to William D.
(53) Kimball, who may recover the money from the defendant. To the plaintiff, Benjamin Kimball could, legally, convey nothing but an interest for his life, an interest which ceased with his life, and at the time the defendant received the money he had been dead nearly four years.

The plaintiffs are not entitled to the relief they seek, and the bill must be

PER CURIAM. Dismissed with costs.

THOMAS FAUCETTE v. ELLISON G. MANGUM.

When a case is referred to a clerk and master, he must state in writing, in his report to the court, all the testimony heard by him and upon which his report is founded.

CAUSE removed from the Court of Equity of ORANGE, at Spring Term, 1847, by consent of parties.

The plaintiff in his bill, as administrator of Thomas D. Crane, prays an account against the defendant, as an agent. The defendant admits the agency. Replication was taken to the answer, and upon the hearing the court decreed an account, and an order was made referring the case to the clerk and master to take an account. A report was made, and exceptions filed by both parties, and the cause transferred to this Court.

(54) *Norwood for plaintiff.*
J. H. Bryan for defendant.

NASH, J. The plaintiff's fourth exception must be allowed, and as it disposes of the report, it is unnecessary to give to the others a separate and distinct consideration. The exception is that the master has failed to state the evidence upon which his report is founded. Each party has a right to appeal to the court from the judgment of the master, upon any matter decided against him. To enable the court to act, they must be put in possession of the evidence. It is therefore necessary that the master should put in writing all the testimony heard by him, and make it a part of his report. But the report in this case is, in other respects,

so defective upon its face that the court could not found upon it any decree. It does not show the amount of the vouchers put into the hands of the defendant by the testator Crane, what was collected by him, nor the disposition made by him of that which was collected. Nor does the report show what sum in money, or what amount in bonds, or otherwise, is still in the hands of the master.

The fourth exception of the plaintiff is sustained, and the report set aside.

PER CURIAM. Ordered accordingly.

Cited: Cain v. Nicholson, 77 N. C., 412.

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(55)

WILLIAM S. ASHE v. EDWARD J. HALE ET AL.

1. To support a bill of injunction by the purchaser of land against the vendor to restrain the collection of the purchase money, upon the ground that there were prior liens upon the land (as, for instance, for taxes due), the plaintiff must set forth in his bill, as nearly as he can, the amount of such liens; and where he alleges he gave more for the land than he otherwise would have done, in consequence of misrepresentations made by the vendor or his agent at the time of the sale, he must set forth what he believes to be the amount of the injury he has sustained by reason of such misrepresentations.

2. Where a purchaser is entitled to compensation merely, he cannot enjoin the vendor from collecting the purchase money, or at most he can only enjoin him for the sum which he alleges distinctly in his bill to be due to him for such compensation.

3. It is the usual course in injunction cases that all the parties defendant shall answer before a motion can be made to dissolve; but that rule may be dispensed with under peculiar circumstances, as where the party not answering is not charged in the bill with any particular knowledge of the facts alleged, and the parties who have answered were so charged.

4. Where land was devised to a trustee, in trust "for the sole and separate use of A. B. until such time as the then existing debts of her husband should have been by him discharged and satisfied, and in that event to be conveyed to him": *Held,* that when the husband died without having discharged such debts, the equitable fee simple rested either in the said A. B. or in her for life, and after her death in the heirs at law of the testator; and that, in either case, the purchaser of the land sold under a decree of a court of equity, to which the said A. B. and the said heirs were parties, acquired a good title in fee.

ASHE *v.* HALE.

APPEAL from an interlocutory order of the Court of Equity of NEW HANOVER, at Spring Term, 1847, refusing a motion to dissolve an injunction theretofore granted and continuing it to the hearing, his Honor, *Judge Battle,* presiding.

John Mosely Walker made his will on 24 October, 1824, and shortly afterwards died. By it he devised and bequeathed his land called Mosely Hall, in New Hanover County, and all his other property, real
(56) and personal, to Samuel Ashe and Charles P. Mallett and their heirs, in trust "that my said trustees will hold the said property to the sole and separate use of Mrs. Caroline M. Walker, wife of Carlton Walker, until such time as the now existing debts of the said Carleton shall have been by him discharged and satisfied; and then in trust and for the use and benefit of said Carleton, to whom my said trustees may convey it; and further, my said trustees may permit Mrs. Caroline M. Walker to receive and have to her sole and separate use the rents and profits of the lands, the dividends on my bank stock, and the hire of my negroes, until such time as the trust estate, as to her, shall be terminated, and her receipt for them shall be a full and sufficient discharge."

The testator appointed the trustees his executors; but Mr. Mallett did not prove the will nor accept the trust, and Mr. Ashe alone acted.

The testator was the only child of Carleton Walker by his first marriage. At the time of the testator's death he left surviving him his father and Caroline M. Walker, then the wife of the said Carleton, and eight half brothers and sisters, the issue of his father's said last wife. At the making of the will, and at the death of the testator, the father, Carleton Walker, was very largely indebted and entirely without property, and he so continued up to his death, which happened in 1840, and without his having paid any of those debts, or leaving an estate, unless it be the interest derived from his son under the provisions of his will. Samuel Ashe, his trustee, died without devising these lands, and left several children, his heirs at law, of whom the plaintiff is one.

In January, 1843, Caroline M. Walker and her eight children filed their bill in the court of equity for Cumberland County against Mallett and the present plaintiff, and the other heirs of the deceased trustee, Ashe, setting forth the foregoing facts, and stating that they were
(57) advised that the Mosely Hall land and other real estate left by the testator belonged equitably to Mrs. Walker during her life, and at her death to her said children, and that the interest of those parties would be promoted by a sale of Mosely Hall, and dividing the proceeds equally among the children, after allowing thereout to Mrs. Walker a certain proportion, which she was willing to accept for her interest in the land. The present plaintiff put in an answer to that bill, in which he

admitted all the facts stated in it to be true; and such proceedings were had in the cause that by consent of all the parties thereto it was decreed that Mosely Hall should be sold in fee simple, as prayed for, and Mr. Smith, the clerk and master of the court, was appointed the commissioner to make the sale at public auction. Mosely Hall contained about 3,000 acres, and was offered in parcels, and the present plaintiff was reported as the purchaser of four of them, known by the numbers 1, 2, 4, and 5, on the map of the whole tract. The plaintiff, according to the terms of the sale, paid down one-eighth part of the purchase money, and for the residue gave his notes payable to the clerk and master at the different periods. He also paid two of those notes, but failed to discharge two which fell due in January, 1846, and the clerk and master, under the order of the court for the collection of the money, brought suits on them and obtained judgments, the one for $603.40 and the other for $999.33, and therefor issued executions. There remained four other notes of the same amounts, two of them falling due 1 January, 1847, and the other two on 1 January, 1848.

After the above mentioned two judgments were obtained, the plaintiff, on 12 November, 1846, filed the present bill in the court of equity of New Hanover against the clerk and master, Mr. Smith, and against Mrs. Walker and her eight children, and the husbands of such of the children as are females. After setting forth the will of (58) the testator, John Mosely Walker, and the suit brought by Mrs. Walker and others for a sale of Mosely Hall for partition, and the decree therein, and the sale under it, and the plaintiff's purchase, as already stated, the bill charges that at the sale Smith represented that one of the parcels purchased by the plaintiff (which was bid off for him by a friend) had a valuable mill-site on it, for the purpose of enhancing the price, and that the plaintiff was induced thereby to give more for that parcel than he would otherwise have done. The bill further charges that one McIntyre owns the land adjoining that parcel, and has, since the sale, erected a mill on the stream below the point at which it was represented by the said Smith there was a suitable seat for the mill on said parcel so purchased by the plaintiff, whereby the alleged mill-seat is entirely overflowed and rendered of no value to the land, and making it sickly. And the bill further charges that, from information since obtained, the plaintiff believes that McIntyre had the legal right, either by deed, grant, or prescription, to erect his mill.

The bill further charges that at the time of the sale "the State and county taxes had been allowed to remain unpaid and to accumulate as a lien upon the land," and the plaintiff insists that it is unjust that he should be made to lose the amount of those taxes.

The bill then states that the plaintiff is advised by counsel that the land is liable in equity for the debts of Carleton Walker, deceased, as the *cestui que trust* of the same; and, moreover, that the plaintiff, being one of the heirs and executors of the trustee, Samuel Ashe, could not make a valid purchase of any part of the land, but that it is still subject to the creditors of Carleton Walker.

The prayer is "that the said Smith may be enjoined from proceeding to collect the money on the two executions, and from bringing
(59) suits on the other notes as they should fall due; and that the said Smith and the other defendants may be compelled by a decree to come to a full settlement with your orator in the premises."

Copies of the bill and subpœna were served on Smith, Mrs. Walker, and each of her children, except on Mrs. Mary Byrne, one of her daughters, and a widow.

The defendant Mr. Smith answered separately, and he states that he has no recollection of having made any representation at the sale with regard to a mill-seat on the land, and that he believes he did not. He states, indeed, that he knows nothing of the land except upon the information of one Johnson, a surveyor, who had been employed to survey and lay out the land in parcels, of which fact the plaintiff was fully cognizant; and that Johnson was present at the sale, and gave such information as was asked of him by the bidders; and those were the only representations made; and the defendant heard no representation of the kind from him. He further states that the lot or parcel on which the plaintiff alleges there was a mill-site, as represented, was not bid off by the plaintiff, but by Edward J. Hale, who was the husband of one of the testator's sisters, and one of the owners of the land, and who afterwards assigned his bid to the plaintiff. The defendant says that he merely acted officially, and sold the land as it was, without making any representation; that the plaintiff was fully aware of these circumstances, and knew the title and the situation of the land. He further states that he does not know of any taxes being due on the land, and insists that as the plaintiff, as an heir of his father, was one of the trustees of the estate through whose hands the issues went, he must have known at the time how the fact was.

E. J. Hale and wife put in a separate answer, in which they state that the plaintiff advised the filing of the bill for the sale of the land, and concurred in the opinion that it belonged to Mrs. Walker for life, and afterwards to her children in fee; and that the decree was
(60) entered upon his express consent and that of the surviving trustee, Mallett, and of all parties in interest. At the sale the plaintiff, who was a lawyer by profession, mentioned that he had been informed some persons doubted the title, but he assured the bystanders

that in his opinion the title was undoubted, and that he and his father's heirs would make any assurances desired by purchasers.

The defendant E. J. Hale answers that he was present at the sale, and he heard no such representations about a mill-seat as are charged by the plaintiff, and he believes none whatever were made by any person. He states that on the map which was exhibited, and by which the sales were made, there was marked on lots Nos. 4 and 5 the words "Old Mill," and he expects that may have led the plaintiff into the error of supposing that Mr. Smith had made some representation about a mill-seat, with a view to enhance the price. He further says that, in fact, he, this defendant, purchased those two lots on the joint account of the plaintiff and himself, and afterwards gave up the whole purchase to the plaintiff, and he avers that he was not induced to give one cent more for them by any remark from any one about a mill-site, and that he thinks the land amply worth the price without any mill-site; and that the plaintiff was born and, until manhood, lived within a mile or two of the land, and was well acquainted with it. This defendant further answers that, after the sale and before he relinquished his bid to the plaintiff, McIntyre served a notice on him that he intended to apply to the county court for leave to build a mill, and that he communicated the same to the plaintiff, and that he, the plaintiff, had full knowledge of McIntyre's application before the sale was confirmed or reported, and expressed his intention to oppose it.

All the other defendants upon whom process was served put in an answer, in which they state that they have no personal knowledge of the facts, but that they are informed and believe that the several matters stated in the answers of Smith and Hale are true. Upon (61) these answers the defendants moved to dissolve the injunction, which had been granted in vacation, on the bill; but the court refused the motion, and the defendants by leave of the court appealed.

Strange for plaintiff.
W. Winslow for defendants.

RUFFIN, C. J. The Court is of opinion that the decretal order is erroneous, and must be reversed. Upon the reading of the bill, by itself, it is difficult to conjecture on what ground an injunction could have been granted. The bill places the plaintiff's right to relief on three grounds, namely: that there were taxes in arrear at the time he purchased, which form a lien on the land that the defendants ought to discharge; that on one of the four lots which he purchased the clerk and master represented at the sale that "there was a valuable mill-site," and that in consequence thereof the plaintiff was induced to give more for

that parcel than, otherwise, he would; and that the plaintiff had not a good title, because he had been advised that, under the will of his son, the estate was liable, in the hands of the plaintiff, for Carleton Walker's debts. These are the allegations of the bill, and the prayer is for an injunction against the judgments and unpaid notes (amounting, together, to about $4,500, and being nearly three-fourths of the purchase money), and that the defendants "may come to a full settlement" with the plaintiff.

The first two grounds, if they had been properly stated, are such as only entitle the plaintiff to compensation, and not to rescind the contract. But to entitle the plaintiff to an injunction, so as to give him the compensation by way of deduction from the purchase money, he must state in the bill the amount of his loss, and some probable estimate of the deduction that will be a reasonable compensation. (62) He says there were taxes due on the land; but because $20 or $50 were in arrear, the defendants are not to be kept out of their whole purchase money. Indeed, unless the bill states the sum due for taxes, or gives some excuse for not doing so, it cannot be assumed that more than a nominal sum was behind. So with respect to the mill-seat, the statements are equally vague. There is no pretense that the mill was the principal object of the plaintiff's purchase of that lot, even, on which he says he thought it was. Nor is it alleged that the other lots are so complicated with that as to have their value affected. It was merely an incidental advantage, appurtenant to a particular lot, which, in his opinion, enhanced its value; and, therefore, according to the common learning, he could not be compelled to complete the purchase without a deduction for the difference in value. It is clear, then, that the plaintiff cannot ask to have the contracts for the other lots touched, nor, indeed, that for the particular lot, except to have a reasonable deduction from the purchase money for it, by way of compensation. Yet he has sought and obtained an injunction as to the residue of the purchase money, and that without setting any value upon a seat for a mill there, or giving any estimate whatever of the diminution in value from the loss of it—saying, merely, that the master represented that there was a "valuable" mill-site, and that he was induced to give "more" for that parcel than he would have done without it. If the party will not venture to state, on his oath, the extent of his loss, the Court cannot presume it to be to that extent which makes it proper to restrain the vendor from calling for any part of his debt. If it were otherwise, debtors would be encouraged, instead of seeking compensation for the real injury, to make these loose statements in order to prolong the injunction until the damage could be ascertained by inquiring after the hearing; and the delays from injunctions would become yet more reproachful than

they are at present. But if these observations be, as they are (63) believed to be, generally correct, they apply with peculiar force to the present case, in which the plaintiff does not ask, for these reasons and that of the defect of title superadded, to have his purchase rescinded, but seeks merely an injunction and "a settlement." The plaintiff is in the enjoyment of the estates under his purchase and the order of confirmation, and without offering to give up the contracts or his possession, or saying what kind of a settlement he desires, he prays an injunction for about three-fourths of the purchase money, for an indefinite period, upon the two grounds, that a trivial sum was due for taxes at the sale and that he bid for one of the lots a trivial amount "more" than he would have done because of something that was said about a seat for a mill on it. Besides, the plaintiff does not allege that there was not the mill-seat, according to the representation which he charges. But he says it has been lost by the building of another mill below it, by another person, who, as the plaintiff believes, had the legal right, "either by deed, grant, or prescription." Now, if a mill be built by any person so as to injure another person's property, he must make just compensation; and, therefore, in that point of view, a plain legal remedy is open to the plaintiff. Then, as to the statement that the plaintiff is informed and believes that the other mill was erected by one who had right in one of the ways mentioned, by deed, grant, or prescription, it is to be observed, as has been done as to the other parts of the bill, that it is entirely too vague and conjectural to found a decree on. A title ought to be stated in the pleadings. Otherwise, the defendants cannot answer to the plaintiff's grounds of relief, and the decree is necessarily founded on proofs beyond the allegations. If the other person set up a paramount right to erect a mill, the plaintiff ought to have stated his title before he can claim relief on the mere ground of that title, without any statement that it is not known to him, or was known to the defendants when they (64) sold, or is even now known to them.

We come then to the third ground, which is a defect of title by reason of the encumbrance of Carleton Walker's debts. The bill does not allege any fraud on the court in obtaining the decree for the sale, that the title of the parties was not truly shown to the court as claimed. Indeed, the plaintiff was a necessary party to that suit, and therefore would not undertake to prefer such a charge. It might then be a question of no slight difficulty in the way of the plaintiff whether, after the court of equity for Cumberland had decided on the question of title arising upon the construction of the will and by descent, and had confirmed the sale of that title to the plaintiff, he could sustain a bill in another court of equity to have the title declared defective, and on that ground be relieved to any extent from his contract. The solution of that question

favorably to the plaintiff is not rendered the easier, when it is considered that the clerk and master is made a party, and that it is placing him under the opposing obligations of obedience to the order of the court, of which he is the officer, to collect the money, and of the other court not to collect any part of it. But the Court does not enter into that question, since it is not necessary to the decision of this case. For the Court is clearly of opinion that the plaintiff has a good title. The only defect suggested in the bill respects the interest of Carleton Walker, and the encumbrance of his debts as appearing upon the face of the will, of which a copy is set out in the bill. In the events which have occurred, no estate vested in that person or has become subject to his debts. The land is given to the trustees in *trust* for the wife to her separate use *until* Carleton Walker should pay his debts then existing, and *then* in trust to convey it to the husband. The case is, therefore, directly within that of *Bank v. Forney,* 37 N. C., 181. The bill charges
(65) that he died very much in debt and without any property, unless he had a title under his son's will. It does not allege that any of the debts were contracted after the making of the will, or that he paid any part of those existing. It must be understood, then, that the debts he owed when he died were the same debts which are mentioned in the will, and the payment of them is made a condition precedent to the arising of the trust for him; and as he is now dead without property, that condition can never be performed; and the case just mentioned excludes his creditors. It might, perhaps, be a question whether Mrs. Walker, under those circumstances, took the fee or only took a life estate, and so the reversion, not being disposed of by the will, descended to her children as the heirs of their half-brother. But it is not material to the plaintiff what the rights of those persons were, since the fee was certainly among them, and they were all parties to the cause, and the decree and conveyance under it will, under the statute, pass to the plaintiff all the interest belonging to all or either of them . The plaintiff, then, gets the absolute title to the land, however the other parties may be entitled to the money. If, however, it had been true that Carleton Walker had a vested interest liable to his debts, the plaintiff is now in no danger, and would hold the land exempt from those debts. Under the circumstances, and since the bill does not charge any particular debt to have been contracted after Carleton Walker's insolvency, or to have fallen due after his death, it is a reasonable presumption that his only debts were those which existed in 1824, and that they were due before 1840; and, therefore, as Carleton Walker died in 1840, and no proceeding by any creditor is suggested, it may be safely assumed, that every creditor of his is now barred by the act of 1715.

Therefore, upon the bill itself, there does not appear any just ground for relieving the plaintiff from the contract, if he had so prayed; nor for exempting him from the payment of the residue of the (66) purchase money, or, as far as he enables the Court to see, of any part of it, as will justify the holding up the injunction for any sum in particular, much less for the whole that remains due.

If there were, indeed, any doubt upon the bill, the answers are sufficient to remove it, as they deny that any taxes were due, to the knowledge of the defendants, and deny any such representations respecting the mill, and affirm that, when the report was made and confirmed, the plaintiff was fully informed of the purpose of another person to build a mill, and likewise that he knew the state of the title when he purchased, and long before, and that the decree and sale were made by his consent. It is said, however, that one of the defendants, Mrs. Bryne, has not answered, and that it is against the course of the court to dissolve an injunction upon the answers of only a part of the defendants. It is true that is the usual course; and it is for that reason, amongst others, that the case has been so much considered upon the bill alone. But it is plain that the rule cannot control the Court in this case. For, in the first place, the bill does not make a case for an injunction, as has been shown. Next, the bill charges nothing to have been done by this lady except that she was a party to the suit for sale and partition (about which there is no dispute), and does not charge any of the matters to be particularly within her knowledge; and those persons who had any agency in the sale, or within whose peculiar knowledge any of the facts are charged to be, have answered and fully denied them. Under such circumstances the omission of a defendant, in the situation of this lady, to answer, does not preclude a motion from the others for a dissolution —especially when the plaintiff did not serve her with process, or, as far as appears, take any other proper steps to bring her into court.

The Court is therefore of opinion that the order was erroneous, and that the injunction should have been dissolved with costs. The plaintiff must also pay the costs of this Court. (67)

PER CURIAM. Reversed.

Cited: Ijams v. Ijams, 62 N. C., 41.

LEWIS WEBB ET AL. v. WESLEY L. LYON, ADMINISTRATOR, ETC., ET AL.

1. An equitable lien is neither a *jus in re* nor a *jus ad rem*, but simply a right to possess and retain property until some charge attaching to it is paid or discharged.

2. A father made an advancement to one of his sons and took from him a covenant, by which he stipulated "that he would pay to his brothers and sisters, on a final settlement of his father's estate, without interest, whatever sum or sums of money he had received, if above his ratable part of said estate." Afterwards, the father borrowed a sum of money from his son (not equal to the amount advanced) and gave his bond for it: *Held*, that the brothers and sisters, not advanced, had no right to restrain the collection of this bond.

CASE transmitted from the Court of Equity of PERSON, at Fall Term, 1847, by consent of parties.

The plaintiffs are, together with the intestate, Thomas Webb, the children of the defendant Thomas Webb, Sr. The latter made advancement to his son Thomas to the amount of $2,552, and on 6 January, 1835, the deceased executed to his father a covenant, which is as
(68) follows: "I do acknowledge the receipt of the above $2,552, from my father, Thomas Webb. I do promise to pay to my brothers and sisters, on a final settlement of said estate, without interest, whatever sum or sums of money I may have received, if any, above my ratable part of said estate. Given under my hand and seal," etc. On 18 December, 1843, Thomas Webb, the father, borrowed of his son Thomas the sum of $1,384.15, and to secure the payment of it executed his bond of that date, and payable one day thereafter. Thomas Webb, Jr., is dead, and the defendant Lyon is his administrator, and, finding the above bond among the papers of his intestate, has commenced a suit upon it against the obligor, Thomas Webb, Sr. The bill alleges that at the time the money was borrowed by the father from the son, and when he gave the bond for its repayment, it was expressly understood between them "that said bond was not to be collected, but was to stand, to make good any sum which might be necessary, upon the death of the father, to equalize the advancements aforesaid; and that in pursuance of such agreement and understanding the said Thomas Webb, Jr., did indorse on the said bond that the same was not to be collected during the life of his father, for reasons which would then appear; the legal effect and operation of which is to give them (the plaintiffs) an equitable lien upon the said bond for the security and fulfillment of said covenant."

The bill states that the defendant Lyon, the administrator of Thomas Webb, Jr., has brought suit on the bond against the obligor, and that

the father has but little property, and that it will be ruinous to him to be compelled to pay the money, and that the plaintiffs are quite willing and desirous that he should not be compelled to do so during his life; and the prayer is that the creditor may be restrained from raising the money until after the death of the father, and that the debt shall remain as a security for what may be coming to the plain- (69) tiffs for their distributive shares upon the death of their father.

The bond given by the father has upon it an indorsement such as is set forth in the bill. The defendant Lyon denies, as far as he has any knowledge on the subject, that there was any agreement between the obligor and the obligee at the time of its execution, or before, to the effect as stated in the bill; and he alleges that the indorsement was made by his intestate, after the bond was given, of his own voluntary motion.

Norwood for plaintiffs.
E. G. Reade for defendants.

NASH, J. If it be admitted that there was such an agreement between the parties as alleged by the plaintiffs, we cannot perceive how it gave to them any equitable lien upon the bond for the security and fulfillment of the covenant. An equitable lien is neither a *jus in re* nor a *jus ad rem,* but simply a right to possess and retain property until some charge attaching to it is paid or discharged. 1 Story Eq., 483, sec. 506. Now, it cannot be pretended that the plaintiffs have a right to the possession of the bond. They have, in fact, no interest in the estate of Thomas Webb, Sr., until his death, and it depends upon his will and pleasure whether they will have any then. There is nothing, then, to graft a lien upon; it was a personal contract, if it existed at all, between the father and the son, that the former during his life should not be called on for the money. He alone has a right to complain if the contract is violated. But he does not complain—*he* does not seek to enforce it, but is made a defendant in the cause because he will not complain. This is, of itself, a fatal objection to the plaintiff's bill. They are no parties to the suit, and have no interest in it. All they can be entitled to, upon the death of Thomas Webb, Sr., will be an equal portion of his estate, after the payment of his debts. It is not denied, but admitted, that the money was borrowed by Thomas (70) Webb, for which the bond was given; it is therefore a just debt, and must be paid before there will be anything to divide. It cannot, therefore, be a matter of any moment to them, if they can enforce the covenant given by Thomas Webb, Jr., on which we give no opinion, whether this bond is paid by Thomas Webb, Sr., or by his estate after

his death. The case is before us upon the bill and answers and exhibits. There is no evidence of any agreement between the parties, such as is stated in the bill as having taken place when T. Webb gave his bond, apart from the indorsement on the bond, and that was merely a memorandum personal to the father, and directory to his personal representative after his death, creating no obligation, in law or equity, so far as the plaintiffs are concerned, and conferring upon them no legal interest that can be enforced.

PER CURIAM. Bill dismissed with costs.

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(71)

THE ATTORNEY-GENERAL v. THE BANK OF CAPE FEAR.

1. Under the act of 1833, chartering the Bank of Cape Fear, the tax of "25 cents on each share of stock owned by individuals" is payable out of the general funds of the bank, the State not being entitled to any exemption from such tax in the distribution of the dividends.

2. Where by the penning of a statute its meaning is rendered doubtful, long usage is a just medium by which to expound it, upon the maxim that the "*jus et norma loquendi*" are governed by usage.

3. But if such usage is contrary to the obvious meaning of the words of the statute, it is not to be regarded.

4. Where the words are doubtful and the usage has been acquiesced in by both parties for a long series of years, it is conclusive.

CAUSE removed by consent of parties from the Court of Equity of WAKE, at Fall Term, 1847.

The information is filed to ascertain the fund out of which the bank shall pay the tax imposed by the act of incorporation. The charter was granted in 1833, and amended in 1836. Section 11 provides, "that a tax of 25 cents on each share of stock owned by *individuals* in the said bank shall be annually paid into the Treasury of the State, by the president or cashier of said bank, on or before 1 October in each year." The bank soon went into operation, and from that time to the filing of the information has paid the tax out of the common corporate funds, without reference to the fact that profits were or were not made. The information charges that the tax was designed by the charter to be paid and collected from the individual stockholders, and that the State, as a stockholder, was to suffer no diminution of dividends of profits by reason of the tax; and by the construction placed on the acts by the

bank, and their practice, the State has been deprived of a large (72) portion of the profits to which it is entitled as a stockholder.
The information does not seek an account of the taxes wrongfully, as it is alleged, paid heretofore out of the dividends of the State, but asks that the true construction of the act may be declared and established, and that the tax may hereafter be charged on each share of stock held by individuals, and not on the mutual profits, as heretofore erroneously practiced.

Attorney-General for plaintiff.
W. H. Haywood and G. W. Haywood for defendants.

NASH, J. From the wording of the acts it might well be doubted what was the expectation of the Legislature as to the fund out of which this tax was to be paid: whether out of the general corporate funds or out of the dividends of profits arising from the stockholders by the individual stockholders, to the exemption of the stock owned by the State; in other words, whether the State, as a joint corporation, was bound to bear any portion of this burthen. We are of opinion that the construction given to the contract by the parties, and under which the tax has been heretofore paid by the bank and received by the State, is the true one. Where by the penning of a statute its meaning is rendered doubtful, long usage is a just medium by which to expound it, upon the maxim that the *jus et norma loquendi* are governed by usage. *Shepherd v. Gosnold,* Vaugh., 169. This rule governs in the construction of the fundamental law of the land, the Constitution of the United States. A cotemporary exposition practiced and acquiesced in for a period of years fixes the construction. *Stewart v. Laird,* 1 Cranch, 299. But if such usage is contrary to the obvious meaning of the words of the act, it is not to be regarded. Dwarris' St., 703. Vaugh., *supra.* This is also a rule in the construction of contracts. For near sixteen years the tax has been paid by the bank out of the corporate funds, and not out of the profits accruing to the individual stockholders from (73) their stock. This, then, is a cotemporaneous exposition made by the parties themselves, and, unless shown to be contrary to the obvious intention of the Legislature, must be considered the proper one. After such an acquiescence, the laboring oar is upon the State to show it is wrong.

A similar question to the present arose, upon the 11th section of the charter granted by the State to the Cape Fear Bank in 1814. That section is: "A tax of 1 per cent per annum shall be levied on all the stockholders in said bank, except on the stock holden by the State, which shall be paid to the Treasurer of the State, by the president or cashier of the

bank, on or before the first day of October in each and every year." The State complained then, as she does now, that the tax had been paid, but in the account kept by the officers of the bank it was charged, not against the individual stockholders in respect of their stock, but against the whole corporation; whereby, in the dividends of profits, the State was made to bear its proportion of the tax. This was alleged to be erroneous, and the information sought to rectify the accounts, and for other purposes. In deciding the case it was necessary for the Court to put upon clause 11 such a construction as they thought it required. *S. v. Bank,* 21 N. C., 216. In the exposition of the clause the same questions presented themselves as here. "The doubt is," say the Court, "whether, on the wording of the charter, the tax is payable by the corporation out of the common fund, the number of private shares being the measure of the tax, or whether it is payable out of the private shares only." The decision is that the tax was payable out of the common fund. In the charter of 1833 the phraseology of the taxing clause is very little varied. There is nothing in it authorizing a different exposition. The material differences are, that by the charter of 1814 the tax was 1 per cent per annum, to be *levied* on all the stock holden by
(74) private individuals; in the charter of 1833 the tax is 25 cents on each share of stock owned by individuals. And in each it is to be paid annually by the president or cashier of the bank; and in neither is there any provision made as to the distinct fund out of which the officers of the bank are to make it. All the reasons which led the Court to the conclusion to which they came in the former case, as to the appropriate fund, apply here with equal force. There is in the charter of 1833 the same want of explicitness, and here, as in the case referred to, the effort is to throw upon the individual corporators a burthen imposed upon the corporation itself as a whole. Although this may be done by the Legislature on *granting* the charter, the enactment must be clear. We are aided in our construction in the present case by the charter granted at the same session to the Bank of the State of North Carolina, in which there is an explicit clause upon this subject. The 13th section says expressly that *"each share* owned by individuals shall be subject to the annual tax of 25 cents, which shall be reserved out of the profits as they accrue, by the cashier, and placed to the credit of the State." That shows that the tax on each share is dependent on the profits of it; so that when there are no profits, there is no tax. But in the charter of the Bank of Cape Fear the tax is payable at all events, and no fund is specified out of which it is to be paid, and it is added in the taxing clause, "that the said bank shall not be liable to any further tax," which shows it was a common charge upon the corporate funds. The rule

adopted by the defendant, as soon as it went into operation, was in conformity to this opinion, and has been acquiesced in by the State, through its officers ever since, until the filing of this information.

PER CURIAM. The information is discharged.

Cited: S. v. Giersch, 98 N. C., 727; *Gill v. Comrs.,* 160 N. C., 190.

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(75)

JAMES W. HOWARD, EXECUTOR, ETC., v. EDWARD S. JONES ET AL.

1. A bill, which is brought simply to recover from the defendants a sum of money, paid for them on their account, cannot be sustained; this being a claim on which a court of common law is competent to give relief.

2. Where the plaintiff in his bill claims against two defendants to recover as surety for both, alleging they are both principals, he cannot have a decree against one of them as a joint surety.

CAUSE removed from the Court of Equity of JONES, at Fall Term, 1847.

The bill states that, in 1839, the defendants, who were merchants residing in the State of Alabama, applied to the testator, Joseph Whitty, to aid them in obtaining a loan of money from the Bank of New Bern, for the use of the firm; to which he agreed, and a note for $5,000 was drawn and discounted at the said bank, for the sole use and benefit of the defendants. In said note the testator was made the principal and the said Jones and Ferrand signed as sureties, and this form was adopted, as the bank refused to loan the money unless they procured some responsible person, resident within the State and subject to their control, and who would regularly attend to the renewal of the note. The plaintiff avers that although his testator was, upon the face of the note, the principal, yet in fact and in truth Jones and Ferrand were the principals, and that he was *their* surety. That the note bore date 13 May, 1839, was duly discounted, and the proceeds drawn by G. W. Ferrand and applied to the use of the firm. The bill further charges that Joseph Whitty renewed the note as principal, from time to time, as it fell due, up to the time of his death in 1843, and that he paid out of his own funds the necessary installments, which in the whole (76) amounted to the sum of $1,258.40, towit, one payment on 18 December, 1839, of $745.09; on 20 April, 1841, of $477.52; and on 6 August, 1842, $30.43, and that no part of these sums was repaid to the testator, Joseph Whitty; but that G. W. Ferrand is entirely insol-

vent, and Edward S. Jones alleges that the note was discounted for the sole benefit of Ferrand, and that he was a cosurety on it with Joseph Whitty; which is denied. The bill prays an account and that the defendants may be decreed to repay to the plaintiff the money so advanced by his testator for their use and benefit. The answer of Ferrand states that some time in 1838 or 1839, being in the State of North Carolina, and in need of money, he applied to Joseph Whitty to aid him in procuring a loan from the New Bern Bank, to which he agreed; a note was drawn for the sum of $5,000, in which Whitty was the principal, because the defendant Ferrand did not reside within the State. The note was discounted for his sole use and benefit, and the proceeds drawn by him. That at that time E. S. Jones, the other defendant, was not in the State, but executed it afterwards, and as a cosurety with Joseph Whitty, for him. It further states, when the note was drawn and discounted he and Jones were not engaged in trade as copartners, and not until 1841 did they enter into partnership.

E. S. Jones in his answer states that an arrangement was made between Whitty and Ferrand to procure the discount of a note while he was out of the State, but, upon his return, he did execute it, at the request of the deceased, Joseph Whitty, and as *his* surety, he being the principal therein; that it was discounted, but who drew the proceeds, or how they were applied, he does not know; but he denies that the note was executed or discounted for his benefit or that of the firm of Ferrand & Jones, or that any part of the proceeds were so applied. The firm of Ferrand & Jones was not formed until near two years after the
(77) execution of the note, towit, in 1841. He denies that he was bound to furnish any portion of the funds for the renewal of said note, or that the testator so considered him, as the latter was his agent and attorney, from the time the note was discounted up to the time of his death, to sell his crops and receive the proceeds; and during the whole time the note was in bank had in his hands funds for the defendant, which he might have applied if he had considered him bound to pay the renewals, but that said Whitty, as he is informed, paid the money out of his own resources. He admits that after the death of Whitty he did renew the note, for the reason that Whitty's executor had neglected to do so, and his codefendant was in another State, and entirely insolvent, and it was more convenient to pay it in that way.

J. H. Bryan and J. W. Bryan for plaintiff.
Mordecai for defendants.

NASH, J. The plaintiff has placed his claim to relief upon the allegation that the money was borrowed from the Bank of New Bern for

the use of the firm of Jones & Ferrand, and to enable them to go into business in the State of Alabama, and that he was made a principal on the note only because he was a resident of this State, and therefore within reach of the bank, but that Jones & Ferrand were in fact the principals, and he was *their* surety. The answers deny the allegation, and the proofs do not sustain it. The note in controversy, as charged in the bill, was executed on 13 May, 1839, and according to the testimony of Mr. Wapples and Mr. Stockton the firm of Jones & Ferrand was not formed until January, 1841, near two years thereafter. It could not, therefore, have been made and discounted for the use of the firm. But, if made for the use of Jones and Ferrand, individually, and the testator was their *joint* surety, the plaintiff is entitled to the money paid him in renewing the note. The testimony upon which the plaintiff relies is contained in the depositions of Mr. Perkins, a (78) director of the Bank of New Bern at the time the note was discounted, of Mr. Clark, the teller, and of Mr. McDaniel and Mr. Simmons. The first named witness states it as his belief that the note was discounted for the benefit of E. S. Jones and George W. Ferrand, and that such was the impression of the board. The others testify to conversations with Jones on the subject, at different times. Mr. Clark states that before Whitty's death, Jones told him it was *his* debt, and not Mr. Whitty's, and that the latter signed it as principal at his request. In the same deposition, however, the witness states that the proceeds of the note were placed to the credit of G. W. Ferrand, who told him the money was to pay a claim against him in the New Bern branch of the Bank of the State. McDaniel states that Jones told him that the debt was *his,* and that he would attend to it, and that Whitty did not owe a cent of it, and Mr. Simmons' statement in substance is that he heard Jones admit the debt was his.

Admit all that the three last witnesses state to be true, it only tends to show the debt to be E. S. Jones', and that Whitty and Ferrand were cosureties. But it is not upon this ground that the plaintiff puts his case. His allegation is that Ferrand and Jones were the principals, and he was *their* surety. That Mr. Perkins' *impressions* were not correct is proved, not only by the fact proved by Mr. Clark, the teller, that the proceeds were placed to the credit of Ferrand, but the latter is sustained by the testimony of Mr. Sloane. He was also a director of the New Bern Bank at the time the note was discounted. He tells us that on the discount night it was stated to the board of directors by Mr. Guion, the cashier, that Mr. George W. Ferrand wished to borrow a sum of money, giving as his sureties Mr. Jones and Mr. Whitty, and the bank refused the loan unless Mr. Whitty, or some other responsible person residing in the State, would sign it as principal. Mr. Perkins' (79)

testimony cannot, therefore, be considered sufficient to sustain the plaintiff on the ground upon which he requests the interference of this Court.

We think the deposition of Mr. Roberts, the cashier of the branch of the Bank of the State, exhibits this transaction in its true light. It appears from it that George W. Ferrand, who was the stepson of the testator, Whitty, was largely indebted to that bank upon notes discounted in 1837, and that Joseph Whitty and E. S. Jones, one of these defendants, were his sureties. On 14 May, 1839, the day the note in question was discounted, Joseph Whitty paid off the note due in the State Bank, and Mr. Clark, the witness of the plaintiff, states that Mr. Ferrand told him at the time the note was discounted that *he* wanted the money to pay off a debt *he* owed in the New Bern branch of the Bank of the State. This discloses the object of the parties in procuring the loan from the New Bern Bank. Ferrand was largely indebted to the Bank of the State, and Whitty and Jones were his sureties, and it is not very likely that Jones would be willing, in changing the debt from one bank to the other, to change, at the same time, his relative position, and from a surety become a principal; but we are not called on to decide this question. Whether the testator and Jones were the joint sureties of Ferrand in the note discounted in the New Bern Bank, or whether, if so, upon an account taken, anything would be due to the estate of the testator, are questions which do not arise here. This is not a bill for contribution, but simply to recover from the defendants a sum of money paid for them on their account and at their request, a claim for which a court of common law is competent to give relief. The plaintiff has not proved the allegations of his bill, and it must be dismissed with costs.

(80) RUFFIN, C. J. It seems to be doubtful, upon the evidence, what the transaction between the parties really was. The bill states that the note was made and discounted to raise money for the use of a mercantile firm formed between the defendants Ferrand and Jones, in Alabama. It is clear that it is not correct in the full extent, for that firm was not thought of when the money was borrowed, and did not exist for nearly two years afterwards. Indeed, it is pretty certain that the loan was obtained for the benefit of Ferrand, and that the money was actually applied, the day after it was borrowed, to the discharge of a debt which Ferrand owed to another bank. Still, as between Jones and Whitty, the material question arises, whether one executed the note at the request of the other, and, if so, which was the primary and which the supplemental surety for Ferrand. The proof is far from being satisfactory on the point. The declarations of Jones,

as stated by some of the witnesses, would be very strong for the plaintiff if their effect was not weakened by some declarations of Whitty of an opposite bearing. Besides, it would seem very singular that Jones should incur such a responsibility of Whitty in behalf of Ferrand, a stepson of Whitty, whom he had brought up from infancy, and to business as a merchant, and for whom he professed great affection. That improbability is strengthened by other facts. From the making of the note to Whitty's death, he was the agent of Jones in this State, and had large funds belonging to him in his hands. Yet when he made the payments, for the recovery of which the bill is filed, he did not charge them to Jones, but to Ferrand, while he did charge to Jones other sums which he paid on the note out of Jones' funds, by the special written orders of Jones, in favor of Ferrand. Moreover, in his will Whitty mentions certain negroes which he got from Ferrand, and bequeaths them to him upon the payment of these debts for which he was liable for him, saying that was all the claim he had to them. It is by no means certain, therefore, how the truth is upon this point; (81) and if a declaration on it were necessary to the decision of the suit, it might be proper to direct an issue. It rather seems from other parts of the evidence that, in point of fact, Whitty and Jones were cosureties for Ferrand, who was, almost unquestionably, the principal. If there had been a charge in the bill to that effect, it would have brought the case within the cognizance of the court of equity, and made it necessary to weigh the proofs in that respect. But the bill states that as one of Jones' pretenses, and expressly denies that to have been the fact; and, therefore, it cannot be entertained as one for contribution between cosureties. Then, in the other aspect of the case, and taking the facts most favorably for the plaintiff, namely, that he made the note at the express request of Ferrand and Jones, for the accommodation of one or both of them, the plaintiff had a plain remedy at law for the money by him paid for the use of the person or persons thus requesting him. It is, thus taken, the common case of money paid for another, for which *indebitatus assumpsit* lies, and not a bill in equity. Without any declaration of the facts, therefore, and assuming them to be alleged by the plaintiff, the bill cannot be sustained, but must be dismissed with costs.

PER CURIAM. Bill dismissed with costs.

(82)

ELIZABETH TUCKER ET AL. v. SILAS TUCKER ET AL.

A. by will devised certain lands to his wife, children, and grandchildren, and also directed certain parts of his personal estate to be delivered over to them. He then devised as follows: "The balance of my land and other property I appoint and ordain to be sold, and the money arising from the sale thereof, not given away, to be applied to paying my debts; and the balance, if any, to be equally divided among the herein named legatees." The will was afterwards declared good as to the real estate, but not good as to the personal estate: *Held*, that the balance of the proceeds of the land directed to be sold, after payment of the debts, should be divided among those who were named as legatees, though in fact the legacies had failed by reason of an informality in the execution of the will.

CAUSE removed from the Court of Equity of STOKES, at Spring Term, 1847, by consent of parties.

By a will made in September, 1842, Robert Tucker devised as follows: To his wife, Elizabeth, he gave 100 acres of land. To his daughter Susannah Martin, $50, to accrue from the sale of his land; and to his daughter Sarah, 50 acres of land. To the children of his daughter Elizabeth Norton, he gave two parcels of land, to be equally divided between them.

Besides those devises, the will contained dispositions of personalty, as follows: To the widow, two slaves. To the testator's children John and daughter Elizabeth, five shillings each. To Sarah, a daughter of the son John, a negro girl; and to his sons Anderson, Paul, Silas, George, Robert, and Daniel, and to his daughter Sarah, and his granddaughter Sarah Priddy, certain slaves, each.

Then follows this clause: "The balance of my land and other property I appoint and ordain to be sold, and the money arising from the sale thereof, not given away, to be applied to paying my debts;
(83) and the balance, if any, to be equally divided among the herein named legatees."

The will was upon a caveat pronounced to be good as to the real estate, but not as to the personalty. *Tucker v. Tucker,* 27 N. C., 161. Administration was then granted; and the residue of the real estate was sold.

The testator's daughter Elizabeth had six children. The bill is filed by the testator's widow and children, and the granddaughter Sarah Priddy against the administrator, the granddaughter, Sarah Martin, the granddaughter Sarah Tucker (daughter of John Tucker) and the six children of the daughter Elizabeth Norton; and the prayer is for an account and distribution of the personal estate, and of the proceeds of the residue of the real estate.

Morehead for plaintiffs.
No counsel for defendants.

RUFFIN, C. J. No difficulty is made as to the personal estate proper. The will was not effectual to pass it, and therefore it must go as if there had been nothing said in the will about it. Consequently, after the payment of debts and the charges of administration, the surplus is to be distributed according to the statute, among the widow and children of the testator, or their representatives. Rev. St., ch. 64, sec. 1, and ch. 121, sec. 12. *Johnson v. Johnson,* 38 N. C., 426.

A question is, however, made as to the proceeds of the real estate, upon the terms, "the herein named legatees," as descriptive of the donees in the last clause. For the plaintiff it is contended that no one takes under that description, inasmuch as the instrument is inoperative as to the personalty, and, therefore, no "legacy" is given in it. And, if that be held otherwise, it is moreover insisted that the testator meant, by "legatees," his children who were his heirs and next of kin, and not the widow, the children, and grandchildren, indiscrimi- (84) nately, to whom the paper purports to make donations. But the Court cannot agree to that construction. It is true that the more appropriate definition of "legatee" is, a person to whom personalty is bequeathed. But that is not the only sense in which it is used. It may also embrace a donee of realty by devise. *Holmes v. Mitchell,* 6 N. C., 228; *Williams v. McComb,* 38 N. C., 450. It does not follow, because the will is inoperative as to the personalty, that the parts of it which purport to be gifts of personalty cannot be looked at for any purpose whatever. As dispositions of the personal estate, they are not to be read. But for any other purpose—for example, to explain the meaning of other parts of the will, which refer to those dispositions—the whole will may be considered. Thus, when the will gives legacies to particular individuals, and then adds that the land is given to the same persons to whom the legacies were given, the disposition of the land does not fail merely because those of the personalty fail by reason of the want of some formality in the execution of the instrument requisite to constitute it a will of personalty. The gift of the realty is not dependent on the efficacy of those of the personalty; but the only purpose of the reference in the former to the latter is to designate the donees of the land as a class of persons. The operation of such a designation is as effectual as if those donees were particularly named, although the clauses in which personal legacies purport to be bestowed on them fail of that end. *Melchor v. Burgen,* 21 N. C., 634.

Then, as to the other sense in which it is said this term "legatees" is to be taken, it is necessary to say very little. It is perhaps true

that sometimes, among the very illiterate, heirs or next of kin, or both, are vulgarly called "legatees." But there has been no such judicial acceptance of that term, nor can there be, unless it be perfectly plain upon other parts of the instrument that the testator meant it in that
(85) sense. We find nothing to control it in this will; and therefore we must understand by it, here, the persons to whom the testator had, in the previous parts of the instrument, made or professed to make donations of some sort. It is true, it seems singular that after cutting off two of his children with five shillings, and at the same time bestowing bounties on their children, the testator should divide the residue equally among all his children and those same grandchildren. Yet it must be so, if the testator has said so; for the Court cannot undertake to recognize all incongruities in such wills, nor refuse to carry out the directions of the testator as far as they are intelligible and consistent with law, because we may not be able to account reasonably for them. Indeed, it is often the case that unlettered men sit down to make their wills without any settled plan in their own minds, and that they are drawn up by persons not capable of expressing correctly the directions given to them. Nevertheless, the Court cannot receive their words in any other than their legal sense, unless it be quite clear in what other sense they were intended. Consequently, it must be declared that the proceeds of the land are to be equally divided *per capita* between the widow and the testator's children, and those of his grandchildren to whom any gift had been made or purported to have been made in the previous parts of the will.

PER CURIAM. Decreed accordingly.

Cited: McCorkle v. Sherrill, 41 N. C., 177; *Hastings v. Earp,* 62 N. C., 7.

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(86)

BENJAMIN BARNAWELL AND WIFE v. PATRICK B. THREADGILL ET AL.

1. A creditor may follow the assets of a deceased person into the hands of legatees, and of other persons claiming as volunteers or fraudulent alienees of an unfaithful and insolvent executor.

2. It is a general rule that a demurrer must be good throughout, and that, if it covers too much, it must be overruled *in toto.*

3. Statutes which merely give affirmatively jurisdiction to one court, do not oust that previously existing in another court. The jurisdiction of the court of equity, or of the higher courts, proceeding according to the course of common law, is never taken away but by plain words or as plain intendment.

BARNAWELL *v.* THREADGILL.

APPEAL from a decree *pro forma* of the Court of Equity of ANSON, at Spring Term, 1847, sustaining a demurrer to the plaintiff's bill, *Battle, J.*, presiding.

The facts alleged in the bill and the grounds of the demurrer are set forth in the opinion of the Court.

No counsel for plaintiffs.
Strange for defendants.

RUFFIN, C. J. The Court thinks the demurrer ought not to have been sustained. The bill, it is true, is very badly drawn, stuffed with epithets not pertinent, and irrelevant matter, and wanting in directness and precision in the material allegations. The vagueness of the charges, not stating specifically the grounds on which each of the defendants is to be charged, may perhaps prevent the plaintiffs from getting as satisfactory answers as might be desired; and probably the plaintiffs may find themselves under the necessity of amending the bill, in order effectually to obtain all the relief they ought to have. But even at present we cannot say that the plaintiffs have not entitled (87) themselves to some relief.

There is no doubt that a creditor may follow the assets into the hands of legatees, and of other persons claiming as volunteers or fraudulent alienees of an unfaithful and insolvent executor. Bills for that purpose are not infrequent. The creditor has an evident equity to satisfaction out of the testator's estate, in preference to the volunteers; and if he cannot obtain his debt from the executor, he is clearly entitled to pursue the fund until it has changed its character by a sale to some person on an honest contract. That seems to have been the purpose of this bill, though darkly expressed. But reading the bill carefully, and throwing off what is irrelevant, and bringing together what is material, that can, we believe, be made out of the substance of the bill, we find these statements in it, among many other idle ones: That pending an action at law brought by the plaintiff against the defendant Patrick B. Threadgill as executor of Thomas Threadgill, Sr., he, the executor, and "the other defendants," with the intent to defeat the plaintiffs' judgment, if recovered, procured an order of the county court for a sale of the negroes of the testator, upwards of twenty in number, under the false pretense that it was necessary for the purpose of paying debts and distribution; and that Thomas Threadgill, Jr., Gideon B. Threadgill, and George Allen (three of the defendants) "having taken the control and charge of the executor, who was an intemperate and weak man, contrived to effect a sale of several of said slaves, a few of which were bought by other persons, whose bonds were

transferred before due by the executor by the aid of the said three defendants, in order to realize the proceeds before the plaintiffs could get judgment, were by mere sham and fraud, through the forms of a sale, public or private, transferred over into the possession of the
(88) said Thomas, Jr., and Gideon B.; that there were still eighteen slaves belonging to the estate in the hands of the executor "or the other defendants," not disposed of, and "the defendants" conceived the idea of carrying them out of the State in order to hinder the plaintiffs of their recovery, and that "the defendants all joined in collecting those eighteen (who are named) and in confining them so that they might be safely carried away; and then that the two defendants, Thomas Threadgill, Jr., and Wilson Allen, acting under the directions of the other defendants (who are Patrick B. Threadgill, the executor, Gideon B. Threadgill, George Allen, and Joseph W. Allen), carried them out of this State, before the plaintiff obtained judgment." The bill further charges, "that the sales by the executor, where any of the defendants" purchased, were sham sales; and that if any bonds were given for the purchase money, the same were never paid, and in fact nothing was paid to the executor by either said Thomas, Jr., or Gideon B., or any other of the defendants for any of the slaves, which they pretended to purchase; and that "all the said sales, or pretended sales, to the defendants or any of them were without consideration and fraudulent." It is further stated that the plaintiffs finally obtained judgment at law for $4,950.83, and sued out a *fieri facias de bonis testatoris,* on which a sum was levied by the sale of some few articles, and that no other property could be found, and the residue of the debt remains unsatisfied; and that the executor is insolvent and entirely without property of his own. Here, then, is a distinct allegation that there was a pretended and fraudulent sale of several of the negroes to two of the defendants, Thomas and Gideon B. Threadgill, which must be understood as vesting the apparent title in them; and so far, if that be true, the bill is, at all events, a proper one. The charge is not so distinct of an actual sale and conveyance of slaves to the other defendants, and it is only to be collected by inference that it was intended to be so
(89) alleged. It is unnecessary, however, to say whether the bill could be sustained upon such vague and inferential allegations by themselves, nor how far it might be supported upon the removal of the other eighteen slaves out of the State, or upon the fraudulent agency of three of the defendants in effecting the sales under the order of court and receiving the money that was paid thereon; because the demurrer must be overruled, at all events, and those questions will be better disposed of upon the hearing, when, probably, all the facts will be before the court upon the answers and proofs. We say the demurrer must be

overruled at all events, because enough appears to entitle the plaintiff, if true, to a decree as to the "several negroes" conveyed or sold to Thomas and Gideon B. Threadgill; and therefore this joint demurrer of the defendants to the whole bill (except the formal charges of combination) will not lie. For it is the general rule that a demurrer must be good throughout, and that if it covers too much it must be overruled *in toto*. *Thompson v. Newlin,* 38 N. C., 338. The first and principal cause of demurrer for want of equity is, therefore, not good. It was, however, said also in its support, that the bill ought not to lie now, because the statute gives a remedy at law, by *scire facias* and trial by jury. Rev. St., ch. 50. But that is but a cumulative legal remedy, not so effectual in many cases as that in equity, where accounts may be taken, all parties in interest brought before the court, and the decree enforced, not only by execution, but by process for contempt. Besides, the rule of construction is settled, that statutes which merely give affirmatively jurisdiction to one court do not oust that previously existing in another court. There is nothing incongruous in concurrent jurisdictions; and therefore, that of the court of equity or of the higher courts, proceeding according to the course of the common law, is never taken away but by plain words or as plain intendments.

What has been said disposes of the demurrer, and it is not necessary that more should be said. Perhaps, however, it may be proper to notice the other points. (90)

The bill is not multifarious; for the plaintiffs are pursuing one demand against one fund, the assets of their debtor. Though not necessarily, yet the defendants were properly all made defendants, as having different parts of that fund, either in negroes or their proceeds, in their hands, or being liable for their value, and so bound at least to contribution.

It is not necessary to scan the bill to see whether it imputes to the defendants an indictable conspiracy; for, if it do, it furnishes no ground of demurrer to the relief prayed, though it might justify a demurrer to so much of the bill as seeks a discovery of the facts constituting that crime. It would be a strange reason for dismissing a bill that the plaintiff's equity arose out of a transaction for which the defendants were also liable *criminaliter* for a misdemeanor.

It is not the ground of the plaintiff's equity at all that he has a specific lien on the slaves. If such a lien had attached, it could be enforced by law, and the plaintiffs need not have come here. The equity is that they are entitled to have satisfaction from the negroes, or their proceeds in the hands of the defendants, because there is no other property of the testator accessible, and the executor is not only insolvent, but without any property.

Barnawell's wife appears, on the face of the bill, to be a plaintiff, having been made so by amendment allowed. The bill states that the plaintiff before judgment instituted some proceeding for a *ne exeat,* etc.; but it does not appear in the bill to be still pending, and if it did, this case is essentially different by reason of the subsequent judgment and execution, and other occurrences.

The decree was, therefore, erroneous, and must be reversed and the demurrer be overruled. We cannot say, however, that the defendants were so much to blame for taking the opinion of the court upon
(91) such a bill as the present as to entitle the plaintiffs to costs on overruling the demurrer. But, on the other hand, most of the causes of demurrer are so captious and obviously unfounded as to induce a pretty strong suspicion that it was put in much for delay and vexation. Therefore, it seems best to give costs to neither side, as far as the case has as yet gone.

PER CURIAM. Ordered accordingly.

Cited: Oliviera v. University, 62 N. C., 70; *Pullen v. Hutchins,* 67 N. C., 433; *Humphrey v. Ward,* 70 N. C., 281; *Conant v. Barnard,* 103 N. C., 320; *Settle v. Settle,* 141 N. C., 563; *Blackmore v. Winders,* 144 N. C., 218.

JOHN D. PIPKIN v. HENRY BOND.

1. A creditor is not bound to a surety for active diligence against the principal; for it is the contract of the surety that the principal shall pay the debt, and it is his business to see that he does. Therefore, forbearance merely, the omission to sue, or, after suit, to take judgment, or to sue out execution, although it may be from the wish not to distress the principal, and the consequence of communications from him, and although the creditor may not inform the surety of the principal's want of punctuality, will not discharge the surety.

2. But if the creditor parts from a security held by him, either for favor to the principal or from any other motive of bad faith to the surety, or, without the privity of the surety, makes a contract with the debtor for forbearance, so that he cannot rightfully sue him, and thus disable himself to receive payment from the surety and transfer to him his securities at any moment the surety may require it of him, in such cases he discharges the surety.

3. For while the creditor is not bound to diligence, he is bound not to increase the risk of the surety by any act of his, and if he does anything that has that effect, he can no longer look to the surety.

4. In an application by a surety to a court of equity for relief in a case of such forbearance it is not necessary for him to set forth or prove what damage he has sustained, or whether he has sustained any.

CAUSE removed from the Court of Equity of CHOWAN, at Spring Term, 1847, by consent of parties.

William McNider was indebted to the defendant in the sum (92) of $932.80, and to secure it he gave a bond and procured the plaintiff Pipkin to join in it as his surety. After the bond had been some time due, Pipkin, understanding that McNider was somewhat embarrassed, informed the defendant of it, and requested him to put the bond in suit and collect the debt. The defendant accordingly brought a suit against McNider and Pipkin in the county court of Chowan, where McNider lived; and after the suit had been put at issue and stood for trial at the next succeeding term, the defendant, at the instance of McNider, agreed to dismiss it, and at the next term he did dismiss it at the costs of the defendants in the action. About eighteen months afterwards the defendant brought another action of debt on the bond, and recovered judgment; and, McNider having become insolvent, the present bill was brought by Pipkin to restrain the creditor from raising the money from him.

The bill states that at the time the first suit was brought, McNider, though embarrassed, had considerable property, and that if the suit had been duly prosecuted and judgment obtained according to the course of the court, the money could have been raised out of McNider's property.

It further states that the suit was dismissed (as he, the plaintiff, afterwards learned from McNider) upon an agreement between the defendant and McNider for further indulgence on the debt for a year, or some other specified time, in consideration of the sum of $100 paid by McNider to Bond, or secured by a note of McNider to Bond; and that this agreement for indulgence and dismissing the suit was entered into by Bond and McNider without the plaintiff's consent or knowledge; and that he supposed, from hearing nothing to the contrary, that the judgment had been duly taken and the debt collected from McNider, and that he had no suspicion that such was not the case until the writ was served on him in the second action.

The bill insists that the defendant discharged the plaintiff as surety by entering into the new arrangement with the principal debtor; and it prays for a discovery of the several facts stated and a per- (93) petual injunction.

The defendant demurred to so much of the bill "as seeks a discovery in relation to the alleged consideration of $100 having been paid by

W. McNider to the defendant to dismiss the suit at law, which, etc., and to grant indulgence to said McNider," etc., and for cause assigned that the bill does not waive the penalties and forfeitures, etc.

To the residue of the bill the defendant answered that in the latter part of April, 1841, McNider, who lived in Edenton, applied to the defendant at his residence, about 25 miles from Edenton, to withdraw the suit he had brought against him, the plaintiff, at the same time delivering to the defendant an open letter addressed to him from the sheriff of Chowan and dated 24 April, 1841, in which he mentioned that he "had been called on by McNider to state his situation in regard to matters in his hands, and that he said with pleasure that he had not an execution against him nor a writ, and that he had discharged at the last court all the claims that were against him, in executions; and expressed the hope that the defendant would withdraw the suit, as he thought McNider deserved indulgence and was a managing, persevering, and excellent man." The answer further states that McNider informed the defendant that he had called at his house the day before, and, not finding him at home, had gone to see the plaintiff, who lived in Gates, and had stayed with the plaintiff all night, and shown him the sheriff's letter to the defendant; and that the plaintiff was satisfied by it, and consented that the defendant might extend to him any indulgence he might see proper. The answer also states that the defendant is convinced McNider showed the letter to Pipkin, as it was open, and the object of his visit was to procure the plaintiff's assent to the indulgence which
(94) McNider solicited from the defendant; and that he did not hear that the plaintiff intended to resist the payment of the debt until about eighteen months afterwards, when he brought the second suit. The answer then states that the defendant has heard and can establish, that after the suit was dismissed the plaintiff expressed his approbation of the indulgence granted to McNider; and that without the perfect conviction that the plaintiff fully approved of the application for indulgence, the defendant would not have granted it. The answer further states that the defendant "never entered into any contract or agreement with McNider whereby he was under any legal obligation to forbear proceeding on said bond by suit, or otherwise, for one moment." The defendant denies that he concealed the fact that he had granted indulgence to McNider, and he says that he frequently spoke of it to those to whom he was in the habit of speaking upon his affairs, but he admits that he does not recollect making it known to the plaintiff—for the reason that he had no doubt the plaintiff knew it from McNider.

Upon his answer the defendant moved for and obtained a dissolution of the injunction that had been granted on the bill, and, on execution from the court of equity on the injunction bond, the money was col-

lected from the plaintiff Pipkin, and paid to the defendant. There was then replication to the answer, and after proofs taken, the cause was set for hearing, and transferred to this Court.

The letter from the sheriff to the defendant is exhibited and is of the tenor set forth in the answer.

McNider being released by the plaintiff, was examined, and deposed that if the defendant had not dismissed the suit against him and the plaintiff, the debt would have been made out of his property, and that he has now become insolvent and unable to pay any part of it. He states that upon delivering the letter from the sheriff he requested the defendant to withdraw the suit and grant him indulgence; that the defendant stated that he required a certain sum to pay a (95) debt he owed another person, and that he agreed, if the witness would pay that much in a short time, or, in case of failing to do so, would give a further sum for the indulgence, he would dismiss the suit and grant him the indulgence for a particular time, which was named; that he then informed the defendant that he thought to collect the sum the defendant needed from a person in Northampton, who owed him, and it was agreed that he should go and try to collect it; and that he did so, but was disappointed in his expectations, and returned to the defendant and informed him of it; that he then inquired of the defendant what amount would satisfy him for the indulgence, and he required the witness to give his note for $100 therefor, which he did, and then took an order to Bond's attorney to dismiss the suit, and it was done. Being asked what was the time of indulgence agreed on, he answers that he cannot recollect the time precisely, though there was a certain time named. And being further asked whether he did not inform the plaintiff of the agreement, he states positively that he never mentioned it to him, and, as far as he, the witness, knows, he was entirely ignorant of any agreement and of the dismissing of the suit.

Three witnesses on the part of the defendant depose that they saw McNider on the day he went to the defendant's, and were told by him, that he had understood that evil disposed persons had alarmed the plaintiff and the defendant about his circumstances, and induced the defendant to bring suit, at Pipkin's request; and that for that reason he had obtained a letter from the sheriff stating his real situation, upon which he wished to get some indulgence; that he had been disappointed the day before of seeing the defendant, and had gone on to Pipkin's and shown him the letter (which also he did to the witnesses), and satisfied him perfectly, so that the plaintiff had authorized him to say that he was then quite willing the defendant should dismiss the suit and grant further indulgence; and that he was then going to see Bond to give him that information, and deliver the letter, and (96)

obtain forbearance, if he could. He further stated that he was anxious and able to pay the debt, and although he then needed indulgence, that he would pay it in a short time, and without the assistance of Pipkin; and that he was more anxious to pay it because Bond had shown him a kindness in lending him the money without usury. Two other witnesses state that upon subsequent occasions he (McNider) sent a message to the defendant, or mentioned that he understood that some persons were endeavoring to discover something on which they might bring an action against the defendant for usury in his dealings with him; but that the defendant need not make himself uneasy, for he never received anything from him for the forbearance of this debt, and that he would so swear; and that he further said Pipkin was perfectly willing to the indulgence given by Bond, and that if Bond would give a little more indulgence he (McNider) would pay the whole debt.

Two witnesses were examined to the character of McNider, and they both say that they have resided in the same village with him for twelve or fifteen years, and that his character is good—or very fair, to use the language of one of them; and that from their knowledge of his general character, they would believe him on oath.

Heath for plaintiff.
A. Moore for defendant.

RUFFIN, C. J. The law affecting this controversy has been so often discussed in modern times that it has come to be well understood, we believe. A creditor is not bound to a surety for active diligence against the principal; for it is the contract of the surety that the principal shall pay the debt, and it is his business to see that he does. There-
(97) fore, forbearance merely, the omission to sue, or, after suit, to take judgment, or to sue out execution, although it may be from the wish not to distress the principal, and the consequence of communications from him, and although the creditor may not inform the surety of the principal's want of punctuality, will not discharge the surety. The reason is, as was just mentioned, that it is the duty of the surety to himself, and to the creditor, to look to those things himself—the ability and punctuality of his principal; and if there be reason to doubt them, it is his own folly not to ascertain the fact and request the creditor to press for payment, or, if the creditor does not choose (as he is not bound) to incur the trouble and expense of suing, then to pay the debt himself, and prosecute the claim in his own name or in that of a trustee for him. But if the creditor parts from a security held by him, either for favor to the principal or from any other motive of bad faith to the surety, or, without the privity of the surety, makes a contract with the

debtor for forbearance, so that he cannot rightfully sue him, and thus disables himself to receive payment from the surety, and transfer to him his securities at any moment the surety may require it of him: in such cases he discharges the surety. For, while the creditor is not bound to diligence, he is bound not to increase the risk of the surety by any act of his; and if he does anything that has that effect, he can no longer look to the surety. *Nisbet v. Smith,* 2 Bro. C. C., 579; *Rees v. Barrington,* 2 Ves., Jr., 539; *Samuel v. Howarth,* 3 Meriv., 272; *Bank v. Beresford,* 6 Dow. P. C., 233. To these might be added many American cases to the same purpose. *Lord Eldon,* in the cases, lays down the rule almost in so many words as it has been just stated. And in *Nisbet v. Smith,* where the creditor had, at the request of the surety, brought a suit against the principal, and dismissed it, and took a warrant to attorney to confess judgment with a stay of execution for three years, if the interest should be paid, *Lord Thurlow* said that it was (98) contrary to the faith of the action which had been brought to give credit to the principal beyond the term stipulated in the bond; and that, as the creditor had thought fit to compromise the action, under an idea that the surety would comply, the case was brought to the mere question whether the surety should be obliged to remain bound for the prolonged term; and he held that he should not.

It is to be considered, then, whether there was here an indulgence to the principal, without the privity and assent of the plaintiff; and whether that was done upon an agreement for forbearance which legally or equitably put it out of the power of the creditor to enforce payment from the principal for some period.

As to the first part of the inquiry, there can be no dispute. The answer admits over and over that the defendant agreed to give up the action he had brought and to indulge the principal—how much longer it does not say. But, in point of fact, the indulgence was extended for eighteen months longer or more. Now, although that suit has been brought at the instance of the surety, as in *Nisbet v. Smith,* yet the defendant had no communication with the surety on the subject. He says that his reason was a conviction that the plaintiff already knew that McNider intended to apply for indulgence, and that he had given his consent that it should be granted; and but for that belief, that he would not have agreed to indulge at all. But the plaintiff denies, in general terms, all knowledge upon the subject, and McNider fully confirms the denial, as far as he had any information, and states positively that he did not show the plaintiff the sheriff's letter, nor communicate to him his purpose to apply for indulgence, nor his success in the application he made. There is, therefore, no evidence to charge the plaintiff with a concurrence, express or implied, in the new arrangement,

(99) whatever it was. It is probably true, according to the answer, that McNider informed the defendant that the plaintiff knew all about what was going on, and approved of it entirely. He, no doubt, on that day, told the several gentlemen who have been examined for the defendant that such were the facts. But though his declarations then may go to his credit as a witness in this cause, they cannot establish affirmatively that he did impart to the plaintiff the information, which he now swears he did not. It was a blind credulity in the defendant to trust to the representations of a distressed debtor, begging for delay, almost upon any terms, as to the wishes of his surety, that a suit, brought upon his motion, should be withdrawn and a protracted indulgence extended. It was the creditor's duty to obtain the surety's express concurrence; and it can hardly be believed that but for some extraordinary advantage expected from McNider's proposal, the defendant would not have asked why he did not bring a letter from Pipkin, and tell him, then, to go back and get one.

Then, as to the other point, whether there was a binding contract for forbearance—one founded upon a consideration and disabling the creditor for a time to sue. The statement in the bill is that in consideration of $100 paid, or secured to be paid by McNider's note (over and above the legal interest accruing on the original bond), the defendant undertook to McNider to forbear for a year or some other certain period. If that be true, the case is clearly within the principle we have before laid down, as extracted from the cases. That it is substantially true, the testimony of McNider fully establishes, if it be credible. He says that he did not pay the defendant any sum for the indulgence, but that he gave a note for $100 as the consideration for his agreement to dismiss the suit and forbear another suit for a further certain time then named, though he was unable in his deposition to designate the precise period. The defendant offers no evidence to contradict the witness as to the facts stated by him; and even the answer itself, as will be more distinctly pointed out hereafter, does not unequivocally oppose any part of this testi- (100) mony, and does not at all oppose a most material part of it. The defense rests upon an attempt to discredit the witness by proving that, in relation to the concurrence of the plaintiff in the arrangement, he made different representations at the time from those contained in his deposition, and that such is likewise the case as to what he said upon the subject of usury.

With respect to the last, it may be remarked at once that there is nothing in this cause to show that he is self-contradicted. He said the loan of $932.80 was made without usury. He does not now say otherwise. When he heard that some persons were trying to discover a case of usury, on which they might sue this defendant for the penalty, he

said that the defendant need not be afraid, for he would swear that he never *paid* him money; and he does not say the contrary now, nor is it proved. He says he gave the defendant a bond for $100, of usurious interest; but it is not pretended that he ever paid it, and consequently neither the original bond (for $932.80) was thereby avoided nor the penalty incurred. All that was in it was that if sued on the small bond for $100, and he chose to plead the statute of usury, that bond would be avoided; but, upon that point, it does not appear that he ever spoke.

The false representations of the witness respecting his pecuniary condition, and the plaintiff's knowledge of it, and willingness that he should be further indulged, certainly affect his credit materially; and by themselves—their effect not repelled by other circumstances in support of his credit and tending to show that, in substance, his evidence is true—they might impeach his credibility, so far that the court could not safely decree on his evidence. But we think that, taking everything together, the confidence ordinarily due to statements on oath cannot be denied to those of this witness. It is to be feared that many men receiving and entitled to full credit as witnesses, when they find their pecu- (101) niary credit suspected and ruin impending over them, resort to very unjustifiable shifts to conceal their condition, and are even betrayed into representations positively untrue in order to put off the evil day of an explosion and open bankruptcy. Few things are better calculated to prop sinking credit than to get it to be believed that sheriffs, sureties, and money lenders—all of whom are usually supposed to look narrowly into people's affairs—have investigated one's condition and are satisfied it is sound. Motives of this kind might, and probably did, influence the witness upon the occasions under consideration; and this, and cases like it, go far to prove the wisdom of the rule of evidence in *Queen Caroline's case,* that evidence of the declarations of a witness shall not be heard to affect his credit until he has been asked whether he made those declarations, so that he may be enabled to explain them, and his motives, in the first instance. For, although such falsehoods are very unjustifiable upon whatever motive they may be uttered, they cannot condemn a person so far as to render him altogether unworthy of belief, when it appears that they were made upon such motives as have been mentioned, and that, in all other respects, he has acted uprightly and is deemed by the public at large a man of good character and credible on oath. This man is so proved to be; and the defendant acquiesces in the proof, and offers none of a bad character. Then there are the circumstances of the case, which tend strongly to corroborate his statement. The facts, that the suit was dismissed and that no other suit was brought for a long time afterwards, cannot be questioned, and are difficult to be accounted for, unless upon some such ground as those stated by the wit-

ness. But, above all, the credibility of this statement is placed almost beyond doubt, because, although the bill makes the charge directly that the defendant took the bond for $100 as the consideration of for-
(102) bearance, the answer does not deny it. It is to be noted that the bill says the sum of $100 was either paid or secured. The defendant, as rightfully he might, demurred to that part of the bill which seeks a discovery of the alleged consideration of $100 *paid* by McNider; but the demurrer takes no notice of the alternative allegation, that if not paid, it was *secured* to be paid by note—which latter happens to be the fact here, according to this witness. It is somewhat surprising that the plaintiff did not insist on an answer to that allegation, as the defendant did not object in a legal way, by demurrer, to answering it. But he did not; and consequently the plaintiff could not have safely set the cause down for legal hearing on bill and answer, as the affirmative allegation of the bill is not established by the omission in the answer of a denial, and the plaintiff must prove his case. But when such proof is offered by the plaintiff by calling a witness, who and the defendant are the only persons cognizant of the fact, it is a powerful confirmation of the credit to which the witness's character entitles him, that the defendant, with full knowledge of the truth, does not venture to state the contrary on his oath. The answer neither admits nor denies that the defendant took such a note. If it had plainly and positively denied it, the established rule of the court would have refused a decree upon the evidence of a single witness in opposition to it. But, although the defendant submitted to answer the whole bill, except a particular part, not including this point, yet he is not able to deny the essential fact on which the cause turns, and to which the witness positively deposes, and the defendant had every reason to suppose he would depose. What stronger support to the credit of the witness on that point could be asked?

Then the Court must declare it to be established that the defendant, as charged in the bill, took a bond from McNider for $100 as the price of giving him indulgence on the debt for which the plaintiff was
(103) surety. That was a sufficient consideration to make the contract for time binding, if any particular time was agreed on, so as to constitute a definite agreement. Upon that point also the witness is positive that there was a precise time named, though he was then unable to state it. On this the answer is not silent, as it was on the other. The answer, however, is far from being direct, candid, and satisfactory on it. It denies that the defendant "entered into contract or agreement with McNider whereby he was under any *legal* obligation to forbear proceeding on said bond by suit, for one moment." Now, this involves matter of law as well as fact; and it may be that the salvo in the defendant's mind for stating the matter thus is that, though he entered

into an agreement, he thinks it is not legally obligatory. He ought to have set forth what the agreement was, and left it to the court to judge of its legality and obligation. He admits he granted indulgence. For what time, on what consideration, he should have said. There is not, therefore, such a conflict between the answer and the witness as precludes the court from decreeing on the testimony of a single witness. But if there were, the evidence of the witness is so supported by corroborating circumstances as to give to it the preponderance. For when it is once found by the court that the defendant took the bond of the debtor for $100, the question immediately occurs, for what reason, on what account was it taken? To such a question there can be but one answer, when it is admitted that at the same time the defendant "agreed to indulge" the debtor, and agreed further, that at the next court he would dismiss a suit he had brought on this debt; and that is, that the indulgence agreed for must have been, at least, until the next court. Without proof to the contrary, it must be the construction of an agreement, for a price, to withdraw a suit at a certain future time, that the party shall not be at liberty to evade the agreement by bringing another suit immediately or before the time when the pending action was (104) to be withdrawn. The witness cannot specify the time fixed by the agreement, though there is every probability that the forbearance agreed for, like that actually granted, was much longer. However that may be, as men of common sense, with even a very slight acquaintance with the common course of dealing, we are obliged to perceive that the parties must have perfectly understood that no suit should, at all events, be brought before the next term of the court. For the purposes of the relief here, that is the same as a longer forbearance, because, as *Lord Eldon* said in *Bank v. Beresford, supra,* the defendant thereby put it out of his power to make good his engagement to enforce *immediate* payment from the principal, whenever the surety should have a right to require him to do so. And in *Rees v. Barrington,* after remarking that the creditor had disabled himself to do that equity to the surety which he has a right to demand, he proceeded to say that it is the most evident equity that the creditor should not carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. He adds, also, that he could not try the cause by inquiring what mischief the forbearance might have done to the surety, for that would go into a vast variety of speculations, upon which no sound principle could be built. It may be, indeed, beneficial to the surety that a creditor, for example, should accept a composition from the debtor; yet it is not for the creditor to decide that for the surety, and, therefore, if he does accept composition without consulting the surety, he undoubtedly discharges him. *Bowmaker v. Moore,* 7

Price, 231. *Ex parte Gifford,* 6 Ves., 807. But the prejudice to the surety of such dealings between the creditor and principal is here clearly seen, as the evidence is that the principal would have been able to pay the whole debt had the suit gone on, whereas he could pay nothing when subsequently sued, and the surety had to pay the whole.

(105) The Court is perfectly satisfied that there was a distinct and definite agreement by the defendant to forbear on this debt, certainly until the succeeding court, and, probably, much longer; and that the defendant's promise of forbearance was founded on an agreement of McNider to pay him $100 therefor, secured by his promissory note. Consequently, the plaintiff was discharged, and has now a right to recover back all that he has paid to the defendant for principal, interest, or costs at law, or in equity, with interest on the whole from the time of payment; and there must be a reference to ascertain the sum due on that footing. The defendant must also pay the costs of the cause.

PER CURIAM. Decree accordingly.

Cited: Carter v. Jones, post, 199; *Edwards v. Sullivan,* 30 N. C., 307; *Thornton v. Thornton,* 63 N. C., 213; *Deal v. Cochran,* 66 N. C., 271; *Kesler v. Linker,* 82 N. C., 459; *Carter v. Duncan,* 84 N. C., 680; *Neal v. Freeman,* 85 N. C., 446; *Stallings v. Lane,* 88 N. C., 218; *S. v. Dickerson,* 98 N. C., 711; *Scott v. Fisher,* 110 N. C., 314; *Bell v. Howerton,* 111 N. C., 70; *Banks v. Nimocks,* 124 N. C., 361; *Revell v. Thrash,* 132 N. C., 808.

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(106)

THOMAS D. BENNEHAN'S EXECUTOR v. JOHN W. NORWOOD, EXECUTOR, ET AL.

1. Where a testator who died before the passage of the act of 1830 (Rev. Stat., ch. 111, sec. 59) bequeathed certain slaves to A. and B. in trust that they should enjoy the produce of their own labor: *Held,* that this bequest was void, and the said A. and B. being the residuary legatees, that the absolute property in the slaves passed to them.

2. *Held further,* that the act of 1830 did not affect the construction of this devise, the testator having died before the passage of that act.

CAUSE removed from the Court of Equity of ORANGE, at Spring Term, 1846, by consent of parties.

The facts of this case are not controverted, and are as follows: Dr. Umstead, formerly of Orange County, died in 1829, having made his last will and testament. In it he gives to his friends, Catlett Campbell

and Thomas D. Bennehan, the plaintiff's testator, who are also appointed his executors, "a negro slave Dicey, and her two children, Emeline and Harriet, in special trust and confidence, and to and for the purposes hereinafter mentioned, that is to say, that my said friends, so soon after my decease as they shall deem it expedient, shall take the necessary legal steps to have said slave Dicey and her two children manumitted and liberated, and, in the meantime, until such manumission shall be effected, it is my will and desire that the labor of such slaves, and the profits and proceeds thereof, shall inure to the use and benefit of the aforesaid slaves only, and to the benefit of no other person whatever. And in further trust and confidence that in case the said trustees should fail in effecting the manumission of said slaves, from any (107) cause, then and in that case the labor of said slaves and the profits thereof shall continue to inure to the only proper use and benefit of said slaves and their issue, so long as they or any of them shall live." After making several other devises and bequests, the testator devises as follows: "I devise and bequeath to Catlett Campbell and Thomas D. Bennehan, their heirs and assigns forever, all the rest and residue of my estate, both real and personal." This will was duly proved, and the executors accepted the trust; and at September Term, 1829, of Orange filed their petition for the emancipation of the slaves, and procured a decree to that effect, as to Dicey, the mother, but the court refused to emancipate the children, Emeline and Harriet. Catlett Campbell died in 1845, having made his last will and testament, in which, after stating the trust reposed in him and Mr. Bennehan, he devises as follows: "I do most earnestly entreat Mr. Bennehan (if in his power) to perform the trust thus confided to us by our mutual friend, and I give to my executors full power to release any interest which I may have in said negroes, or their increase, present and future, to Mr. Bennehan, to enable him to accomplish this purpose, if such release is necessary, or to sell or to convey them to any other person or persons for a nominal price, for the purpose of effecting their freedom, as I do not desire that they should ever be considered any part of my estate." The defendant Mr. Norwood alone qualified as executor of Mr. Campbell's will, and took into his possession all the negroes held by his testator under the will of Dr. Umstead. The other defendant, being a creditor of Mr. Campbell, sued his executor, obtained a judgment, and had his execution levied on the interest of Mr. Campbell in these negroes. It is alleged that the estate of Mr. Campbell is unable to pay this judgment without subjecting his interest in the slaves to the execution.

The bill charges that the trust created by the will of Dr. Um- (108) stead was such an one as was not contrary to the laws of the State, and, if invalid at the death of the testator, was good by the act of

1830 and 1831, regulating the proceedings to procure the emancipation of slaves, and that by the death of Mr. Campbell the trust survived to the plaintiff's testator, whose executor is now ready and willing to carry it into execution. But if the court should be of opinion that the trust attempted to be created is void, and that under the residuary clause Mr. Campbell had any individual property in said slaves, then that a partition may be decreed between the plaintiff and the estate of Mr. Campbell, to enable the former to perform his duty in emancipating those of the slaves which may be allotted to him, and prays an injunction to stay the sale in the meantime.

Badger, Waddell, and J. H. Bryan for plaintiff.
Norwood and Iredell for defendants.

NASH, J. There can be no doubt that the trust attempted to be created by the will of Dr. Umstead was void. Such was the settled law of this State at the time of the testator's death. It was considered contrary, not only to the policy of the State, but to the statute law, to sustain such trusts. They have been uniformly held to be void, and the executors declared trustees for the next of kin or the residuary legatees. The leading case upon this subject is *Haywood v. Craven,* 4 N. C., 360. It has been followed, and the principle upon which it was decided been repeatedly recognized, in this Court. *Wright v. Lowe,* 6 N. C., 354; *Turner v. Whitted,* 9 N. C., 621; *Huckaby v. Jones,* 9 N. C., 120; *White v. Green,* 36 N. C., 49. We do not, therefore, consider it,
(109) at this day, an open question. The trust intended by the will, being void, the executors became trustees for those who are entitled. In this case the next of kin cannot take the negroes, because there is a residuary clause into which they fall as not being disposed of by the will. *Davie v. King,* 37 N. C., 204; *Jones v. Perry,* 38 N. C., 200. The residuary legatees are the executors themselves; they, therefore, under the will, took the slaves Dicey and her children absolutely and free from all trusts, and held them as tenants in common, each being entitled to an undivided moiety. The interest of Mr. Campbell was subject to his disposition, either by sale or gift during his lifetime, or by his will, and by his will he does, in substance, give it to the plaintiff, for the purpose of effectuating the intention of the testator, Dr. Umstead. This bequest of Mr. Campbell is a valid one, as made since the passage of the act of 1831, and Mr. Bennehan held his own share, or moiety, discharged of the trust, and the moiety or share of Mr. Campbell subject to the trust, as directed by *his* will. Mr. Campbell, however, could not so dispose of his interest in the slaves as to free them from the claims of the

creditors. Upon his death it became a part of the assets of his estate in the hands of his executors, and was liable to the execution of the other defendant, as well as to other creditors.

The act of 1830 can have no effect upon the devise contained in Dr. Umstead's will. Before its passage the legacy was vested in the residuary legatees, and it could not, nor was it so intended by the Legislature, divest the interest so acquired. The legatees held the property as it passed to them at the death of the testator.

The plaintiff is entitled to have partition of the slaves, according to the prayer of the bill, and he is entitled, under the will of Catlett Campbell to have delivered to him all of such slaves as may be set apart for or allotted to his executor as the share of Mr. Campbell, and which are not needed to discharge the debts of his testator. There must be a reference to the master to inquire the number, names, and value of the slaves, (110) and to make an equal division of them, as near as may be, in the first place, between the plaintiff and the defendant Norwood as executor of Campbell, and from the importance of that division to the negroes, and their equal right to emancipation, as far as it can lawfully be effected, it is proper the division should be made by lot. It must also be referred to the master to take an account of the estate of Catlett Campbell, that hath or ought to have been or may be received by the defendant Mr. Norwood, as his executor, and of the administration thereof, and also of the debts of the said Campbell remaining unpaid, and of the charges of administration; and the master will particularly report whether Mr. Norwood hath or will have assets of his testator sufficient to discharge the judgment obtained by the other defendant, or any, or what part thereof, or to discharge the other debts of his testator, Campbell, if any, or some part thereof, and what part, exclusive of said Campbell's share of the said slaves; and if he should find that any of the said debts or charges will remain unpaid after applying thereto all the assets of the testator, exclusive of his share of said negroes, the master must further inquire what balance will remain due for the debts and charges aforesaid, whether it will require the whole of the said Campbell's half of said slaves, or only a part therof, to be sold for the payment of such balance, and, if the latter, the master will designate, by lot, a sufficient number to be sold for that purpose.

PER CURIAM. Decree accordingly.

(111)

JESSE WEEKS ET AL. V. ELIJAH WEEKS.

1. The act of the General Assembly of 1827, relative to the construction of limitations over in wills after a "dying without issue," etc., which was ratified on 7 January, 1828, and directs that it shall not apply to wills made before "the 15th day of January next," must be construed to speak from the first day of the session, which was in November, 1827, and therefore it went into operation on 15 January, 1828.

2. A testator, in February, 1828, bequeathed a negro girl to A. and B. "and if they should die without an heir or heirs lawfully begotten, the said negro, etc., to return to my children." The testator had eight children living then and also at the time of his death: *Held*, that they took under this will an immediate interest, which was transmissible to their executors or administrators.

3. A person who has received negroes from his father or father-in-law under a parol gift or loan is but a bailee, and cannot avail himself of the statute of limitations.

4. As to land, where one of several tenants in common has the actual adverse possession, claiming the whole to be in himself, the other claimants must recover their shares in ejectment before they can come into a court of equity for partition; but the rule is not so as to personal chattels, because one tenant in common of a personal chattel cannot recover from his cotenant at law, except for the destruction of the thing or its disposition in such way that it cannot be had for the purpose of partition.

5. Though a husband may assign or release the wife's *choses in action*, or convey her expectant legal interest in personal chattels, yet if he do not assign, release, or convey them during the coverture, they survive to her or to her representative.

6. Where neither of several tenants in common has possession of the slaves claimed in common, but they are in possession of another person claiming adversely, a bill in equity for partition cannot be maintained until the tenants have recovered at law, although the person having such possession be made a party defendant to the bill.

(112) CAUSE removed from the Court of Equity of CARTERET, at Fall Term, 1847, by consent of parties.

Jabez Weeks, the elder, by his will, executed on 23 February, 1828, bequeathed as follows:

"Item. I give and bequeath unto my grandson, William Bell, and my granddaughter, Caroline Bell, one negro girl named Sophy, to them, their heirs and assigns forever; and if they should die without an heir or heirs lawfully begotten, the said negro girl and her increase that may come hereafter to return to my children."

The grandchildren, William and Caroline, above named, were the only issue of the testator's daughter, Vashti, by her husband, Abner S. Bell; and she, Vashti, died before the making of the will. The testator

died in August or September, 1828, leaving four sons and four daughters surviving him, namely: Elijah, Jesse, Isaac, and Jabez, and Elizabeth, Rebecca, Sarah, and Mary, who were all born before the making of the will. Elijah was appointed the executor of the will, and proved it in October, 1828. Upon the marriage of Bell with his first wife, Vashti, in 1824, the testator put into his possession the girl Sophy and she remained there when the testator made his will and died. After the death of his first wife, Abner S. Bell, in the testator's lifetime, married the testator's daughter, Elizabeth, who died, as also did the daughter Rebecca, during the lives of William and Caroline Bell—the latter of whom, Caroline, died on 4 October, 1829, and the former, William, on 17 January, 1842. In March, 1830, Abner S. Bell procured himself to be appointed the guardian of his son William. Elijah Weeks, the son and executor of the testator, took administration of the estates of his deceased sisters, Elizabeth and Rebecca.

The bill was filed in March, 1843, against Elijah Weeks and (113) Abner S. Bell, by the other children of the testator or the executors of those of them who have died. It states that the woman Sophy has issue of a large number of children, and that all of them are in possession of the defendant Abner S. Bell, who refuses to produce and deliver them up, alleging that he is entitled, in right of his late wife, Elizabeth, to a share thereof as tenant in common with the other children of the testator. The prayer is for a discovery of the number and names of the negroes and for their production and partition into eight shares, one for each of the testator's children or the executors or administrators of such of them as are dead, and, if partition cannot be made specifically, that a sale may be decreed for that purpose.

The defendant Elijah Weeks answers that he assented to the legacy of the girl Sophy, and delivered her to the defendant Abner S. Bell, as the guardian of his two children, shortly after the death of the testator; and that after the death of Caroline and William, he applied to the defendant Abner S. Bell to surrender the negroes, that they might be divided, but "he denied the right of the plaintiff and this defendant to any part or share of said slaves, and refused to surrender them." This defendant submits that only such of the children of the testator as survived William and Caroline Bell are entitled to the negroes, and he insists that under the will they do belong to such survivors, and he assents to a sale for the purpose of making a division between them.

The answer of Bell, after admitting the will, death of the testator, the number and names of the children and their deaths, as before stated, sets forth "that in 1824, in the lifetime of the said Jabez Weeks, the elder, and of Vashti, who was then the wife of this defendant, and a daughter of said Jabez, he, this defendant, became possessed (114)

of the said negro Sophy, aged about 17 years, and that he has ever since had said negro in his possession, claiming her and her increase adversely to the world, and particularly to the said Jabez, the testator, and the said Caroline and William, and the plaintiffs; and that in or about the year 1830 the said Elijah, the executor of said Jabez, demanded the said negro Sophy and her increase from this defendant, who refused to deliver them to him, claiming the title to be in him, this defendant."

The answer then sets forth the names and ages of the negroes, and admits that the defendant refused to give them up to the complainants; but he says he so refused because he denied any title to them in any of the complainants, or that he was tenant in common with them. The answer then insists that the slave Sophy vested absolutely in William and Caroline Bell under their grandfather's will, and that the limitation over is void; and further, if that be not so, that then the title of the remaindermen is a legal title upon which there is a complete remedy at law against the defendant, if he be a wrongdoer. The defendant further insists upon the statute of limitations.

Upon replication to the answers, evidence was taken, that about the beginning of 1829 or 1830, Elijah Weeks, as the executor of his father, applied to the defendant Bell for the negroes, for the purpose of hiring them out for the benefit of the children, William and Caroline, and that Bell became displeased and refused to give them up, saying that he was as capable of being the guardian of his children as Weeks was, and that after Bell was appointed the guardian of his son (in March, 1830) he put up the negroes for hire, and bid them off himself two or three years.

(115) *J. H. Bryan for plaintiffs.*
No counsel for defendants.

RUFFIN, C. J. There is no doubt upon the construction of the will. It is clear that, before the act of 1827, a limitation over after a dying without an heir or heirs of the body is too remote; and it is equally clear that by that act such a limitation is made good by construing it to be a limitation to take effect at the time of the death of the person without having an heir living at the time of the death. The question upon this point is, then, whether the act of 1827 operates upon this will or not. The session of the General Assembly of that year began on 19 November, 1827; but this act was ratified and signed by the speakers of the two houses on 7 January, 1828, and has a proviso, "that the rule of construction contained in this act shall not extend to any deed or will executed before 15 January next." The inquiry is, whether the act was in force from 15 January, 1828, or 1829; and that depends upon the period to which the word *next* relates. It means "next after"; but "next

after" what? The adjective *next,* no doubt, agrees with "January," and not with the "day" of that month: meaning "next January," and not "the next 15th day of January." If, therefore, *next* relates to that point of time when the act was finally passed, it would not be in force until 15 January, 1829. But we believe that the rule of construction is too inveterate to be resisted, that unless an act refers to its ratification as the time from which it speaks, it must be considered as speaking by relation from the beginning of the session of the Legislature at which it passes, in the same manner that a judgment relates to the first day of the term. By the act of 1799 the laws are to be in force only after thirty days from the end of the session, unless the commencement of their operation be in the acts themselves otherwise directed. Here that has been done, and the difficulty is in fixing the time meant in the statute itself. Now, if the words had been that the act should take effect "from and after the passing of the act," unquestionably the rela- (116) tion would have been to the first day of the session. *Latless v. Holmes,* 4 Term, 660. So where an act laid a duty on rice "hereafter to be exported," it was held by the opinion of the twelve judges that *hereafter* referred to the beginning of the session, and that a duty was due on rice exported after the session began, but before the act was in fact passed. *Panter's case,* 6 Bro. P. C., 553. Certainly, that was a remarkable instance of the application of the principle, producing manifest injustice. In the case before us, happily, it produces no injustice; for doubtless it effects the real intention of this testator, and is a proper application of a beneficent rule of construction which the Legislature found necessary, to prevent the frustrating of the intentions of testators upon technical grounds. The case of *Brown v. Brown,* 25 N. C., 134, was cited to the bar to show that the Court had already construed the act of 1827 as operating on wills made after 15 January, 1828. But that is giving to the remark in that case more weight than it ought to have; for when the opinion was given the original act was not looked at, but its contents were taken upon trust from the Rev. St., ch. 43, sec. 7. That could not use the term "next," but necessarily designated the particular day from which instruments had been operated on by the act of 1827; and that day is 15 January, 1828. For, undoubtedly, the Legislature of 1836 did not mean to carry back the rule of construction, by virtue of the law of that year, to a year earlier than it had been fixed by the law of 1827; but the day fixed in 1828 is that which was understood as having been intended in 1827. So that, although there has really been heretofore no judicial, there has been a legislative, exposition of the act of 1827, which is entitled to the highest respect. Consequently the Court must now hold, in conformity with the general and ancient principle and with the particular sense given to the act of 1827

(117) by the Legislature, that "the 15th day of January next" meant "next after" the commencement of the session in November, 1827; and therefore that the limitation over to the testator's children is good.

There is no difficulty as to the persons who take under the limitation to the testator's children. There were eight children living when the testator made his will, and when he died, and no other was afterwards born. As the limitation is not to "surviving children," but to "my children," all of the children took immediate interests, that were transmissible to executors. *Devisene v. Mullo,* 1 Bro. C. C., 530; *Attorney-General v. Crispin, id.,* 388; *Lewis v. Smith,* 23 N. C., 145.

The defense, founded upon an adverse possession and the statute of limitations, would be unavailing, and the plaintiffs would have a decree were there no other more serious objection to the bill. The defendant artfully avoids stating from whom or upon what terms he acquired the possession of the woman Sophy—the answer saying merely that in the lifetime of Jabez Weeks the defendant became possessed "of the slave and has had possession ever since, claiming her as his own, and adversely to the testator, the defendant's children, the plaintiffs, and all the world." But it is charged in the bill, and established by the proofs, that the slave belonged to the testator, and that shortly after the marriage of the defendant with his first wife, about 1824, the testator sent the negro to the defendant. It is clear, then, that the defendant held her as a bailee, either upon an express loan or a gift by parol from his father-in-law; and therefore his possession was not adverse and could not set the statute in motion. *Collier v. Poe,* 16 N. C., 55; *Palmer v. Faucett,* 13 N. C., 240; *Green v. Harris,* 25 N. C., 210. That was the state of things when the testator died. There is then an attempt to bring the case within the rule of *Martin v. Harden,* 19 N. C., 504, by alleging that after the death of the testator his executor, Elijah Weeks, demanded the slaves then in *esse* from the defendant, and that
(118) he refused to deliver them, "claiming the title to be in himself."

But the defendant has not at all established such a demand and refusal, as he pretends. On the contrary, the plaintiffs have proved to the satisfaction of the Court that the defendant did not set up a title in himself, but impliedly disavowed it; for when the executor applied for the negroes, he told the defendant that his object was to hire them out for the benefit of the defendant's infant children, to whom they had been bequeathed—which was in itself an assent to the legacy; and the defendant, so far from setting up a claim of his own and refusing for that reason to surrender them, distinctly puts his refusal upon the ground that he would himself be the guardian of his children, as he was as fit for that office as Weeks was. Accordingly, soon afterwards

he became the guardian of his son, the daughter being then dead; and he hired out the negroes for two or three years. It is clear that the hiring was in the character of guardian, as he bid them in himself. The statute of limitations, therefore, does not affect the case, as the defendant's possession was never adverse, but that either of bailee or guardian, up to the death of the son, which happened about a year before the bill was filed.

Another objection, however, is taken in Bell's answer, which seems to be fatal to the bill. It is, that the title of the other parties is legal, upon which they can have complete remedy at law. The bill purports to be founded on a tenancy in common of the slaves, and a right to have a partition of them. Upon that supposed state of the case the answer of Bell insists that he was in the adverse possession at the beginning of the suit, and therefore that the plaintiffs must establish their title at law before they can have the decree they seek here. But, restricting the objection to that single point, it does not seem very formidable. It is true that is the rule in respect to land. But the reason is that an ejectment may be maintained by one tenant in (119) common against another, upon an actual ouster, or upon an exclusive possession by one, who denies all right in the other and claims the whole for himself. The court of equity, therefore, requires the plaintiff to recover his share in ejectment or otherwise get into possession, before there will be a decree for partition. *Garrett v. White,* 37 N. C., 131. But there cannot be a like rule with respect to personal things; for joint tenants or tenants in common cannot maintain detinue against each other for a share of such a chattel, nor even have trover or trespass, except for the destruction of the thing or its disposition in such way that it cannot be had for the purpose of partition. *Lucas v. Wasson,* 14 N. C., 398. Of necessity, therefore, when the law gives the power to one of the owners to compel partition of slaves, the court to which the application is made must decide the title, or have it decided under its direction. Then as to the coming into the court of equity for that purpose, it is to be observed that partition is one of the subjects of settled equitable jurisdiction, although the estate be legal and the partition may be made upon writ at law. It is assumed upon the grounds of the more convenient and perfect relief in the court of equity, by reason of the power of the court to enforce the discovery and production of title papers, and an account for profits and outlays, and apportioning the expenses of the partition and charging money for equality of partition. The jurisdiction, therefore, would necessarily have arisen upon the passing of the act of 1829, giving the right of partition of slaves between two or more owners. Indeed, before that act it had been exer-

cised, for it was upon that ground that the bill was sustained in *Jones v. Zollicoffer,* 4 N. C., 645; *s. c.,* 9 N. C., 623, where the defendant held the negro under a conveyance from three of the remaindermen.

In the present case, however, the defendant is not a tenant in
(120) common with the other parties, but they have the whole legal estate and may therefore recover the negroes from Bell at law, and have no ground for coming into this Court against him. We suppose he was thought to be one of the tenants in common in virtue of his marriage with the testator's daughter Elizabeth, who survived her father, and was one of those entitled in remainder. That would have been the case had the daughter Elizabeth survived either of the grandchildren, William and Caroline, so that the estate limited over would, either in whole or in part, have fallen into possession during the coverture. But it is stated in both the bill and the answers that Mrs. Bell died before either of the children, so that, at her death, her interest was still in expectancy. Such an interest of the wife did not vest in the husband during the marriage, nor survive to him at law, but goes to her administrator for payment of debts in the first place, and the surplus, if any, for the husband, under the statute of distributions; for, although the husband may assign or release the wife's choses in action, or convey her expectant legal interest in personal chattels (*Burnett v. Roberts,* 15 N. C., 81, and *Knight v. Leake,* 19 N. C., 133), yet if he do not assign or convey them during the coverture, they undoubtedly survive to her, or to her representative.

This was formerly much controverted in this State. It was once decided otherwise, in *Lewis v. Hines,* 2 N. C., 278. But the contrary was held soon afterwards in divers instances, and has continued to be held up to a very recent period, without any contradiction. The first case on the subject was that of *Whitbie v. Frazer,* 2 N. C., 275; and then, after *Lewis v. Hines,* followed in quick succession *Neale v. Haddock,* 3 N. C., 183, and *Blount v. Haddock,* 1 N. C., 295; *McCallop v. Blount,* 1 N. C., 314; *Johnston v. Pasteur, id.,* 582, and *Norfleet v. Harris, id.,* 627. Those cases seem to have settled the law in the estimation of the profession; for we do not find that the point was again raised until
(121) the late case of *McBride v. Choate,* 37 N. C., 610, where it was contended that a vested remainder of the wife, after a life estate in a slave, belonged to the husband and not the wife. But the Court held that it did not vest in the husband and could not be bequeathed by him, but, notwithstanding his bequest, survived to the wife, and there was a decree accordingly. What was said in the previous case of *Hearne v. Kevan,* 37 N. C., 34, calculated to throw a doubt on this question, was an *obiter dictum* and passed without observation. The point did

not arise in the case, for no representative of the wife was before the court, and it was perfectly immaterial to the plaintiff whether his share belonged to her administrator or her husband; as in neither case had they a right to interfere to prevent a sale of that undivided share by a creditor of the husband whose property the negroes were in equity, except as against the wife's creditors. That the case was considered in that light by a majority of the Court is certain; and it is so seen in the subsequent case of *McBride v. Choate,* in which the point came directly in judgment. In the present case Mrs. Bell's interest belongs to her administrator, Elijah Weeks, who is, indeed, made a party defendant.

But he has not possession of any one of the slaves, and, like the plaintiffs, he claims them from the other defendant, Bell. The case then is, that five tenants in common of slaves sue three others for partition of slaves, not held by either one of them, but held by a third person, who is also made a party and claims to hold for himself, and had refused to surrender the slaves before this suit was brought. As between that person and the other parties, who are cotenants, the controversy is purely legal, and they ought to sue him at law, and cannot transfer the jurisdiction to the court of equity by making one or more of the tenants defendants with him and asking for a partition of the slaves. With the partition the party who holds the negroes has nothing to do; (122) and the owners must recover the negroes from him before they can divide them among themselves. The bill must, therefore, be dismissed with costs to the defendant Bell.

PER CURIAM. Bill dismissed.

Cited: Dean v. King, 35 N. C., 24; *Sanderlin v. Deford,* 47 N. C., 77; *Hamlet v. Taylor,* 50 N. C., 39; *Arrington v. Yarborough,* 54 N. C., 75; *Allen v. Allen,* 55 N. C., 238; *Clifton v. Wynne,* 81 N. C., 162 (but see Code, sec. 2862); *Wooten v. Wooten,* 123 N. C., 223; *Sain v. Baker,* 128 N. C., 258.

LARRY NEWSOM v. CHARITY NEWSOM ET AL.

1. Where a guardian *bona fide* transfers to another, for a full consideration, a debt due to his wards, the assignee is entitled to the same remedy in equity to recover the debt which the wards would have had.

2. The Court expresses its disapprobation of bringing forward in the pleadings irrelevant matters, and interlarding bills and answers with unavailing epithets, and with matters that have no bearing whatever on the controversy.

CAUSE removed from the Court of Equity of WAYNE, at Spring Term, 1847, by consent of parties.

John Newsom was the guardian of his three infant children, Charity, Penelope, and Sarah, and died intestate and indebted to his wards, leaving them surviving, and also eight other infant children, all of whom were his heirs at law. At the time of his death he was seized in fee of a tract of land in the pleadings described, which descended to all his children. Administration of his personal estate was com-
(123) mitted to Theophilus T. Sims, and against him a suit was brought by petition by the three children, Charity, Penelope, and Sarah, by their guardian, William Barnes, to recover their portions which were in the hands of their father as their former guardian. The sum of $1,945.94 was found to be due to them, and so declared by the court; but it was also found that there were no personal assets in the hands of the administrator, and, therefore, no decree was given against him therefor. A *scire facias* was thereupon sued out by the plaintiff against the other children and themselves, to subject the real estate descended from their father, and judgment was thereon entered for the debt and costs; and Barnes, the new guardian, assigned the debt to the present plaintiff, Larry Newsom.

The intestate, John Newsom, died indebted also to James Sims and to James Phillips, and they respectively brought suits, and ascertained their debts, but had the plea of fully administered found against them, and then irregularly took judgments against the heirs at law.

On those three judgments writs of *fieri facias* issued against the lands descended, and a tract of land was exposed to sale by the sheriff, and purchased by Larry Newsom at the price of $3,157.50, that being the amount due on the three executions for debt, damages, and costs; and therewith the creditors, Sims and Phillips, were satisfied, and the present plaintiff retained the residue in satisfaction of his own demand, as assignee of the debt to the said Charity, Penelope, and Sarah. Afterwards all these judgments and executions were set aside as irregular and void, as may be seen in respect to one of them in *Newsom v. Newsom,* 26 N. C., 381; and then the plaintiff, who had gone into possession of the land, surrendered it to the heirs again, and commenced this suit against Theophilus T. Sims, the administrator, Barnes, the guardian,
(124) and against all the children and heirs of the intestate, John Newsom.

The bill states that the several debts recovered against the administrator were just, and that in fact he had no personal assets, but had fully administered the estate; and, therefore, that the lands descended were chargeable with the debts. The bill also states that the plaintiff was not aware of any irregularity in the proceedings at law, at the time

he made his purchase and paid the money, with which Sims and Phillips were satisfied; and that he is advised that he ought to be substituted in this Court to their rights against the land; and it also states that the assignment to him by Barnes was in consideration of the full amount due on the judgment in favor of his wards, which the plaintiff paid therefor.

The prayer is that the plaintiff may be declared to be entitled to the sum due on the judgment assigned to him by Barnes, and also to the two sums which he paid in satisfaction of the judgment recovered by Sims and Phillips against the administrator; and that, if not paid within a reasonable time by the heirs, those sums may be raised by the sale of the land descended, or so much as may be requisite for that purpose.

The defendants, all, put in answers. Barnes, the guardian, admits that he sold the debt to the plaintiff for a price equal to the whole amount of it; but he says that he took a note for the money, and that it has not been paid. He further says that his reason for making the assignment was that he considered that he was thereby realizing the debt due to his wards, and thought the plaintiff was actuated in getting the assignment by motives of good will towards his wards and the other infant heirs, but that he has since had reason to believe that his object was to purchase their land unfairly and at a sacrifice.

The answer of the administrator states that he had no assets at the time the judgments were obtained, and has had none since.

The answers of the heirs insist that they are not bound by the (125) former findings upon the question of personal assets, and claim to have an inquiry as to them, as they are not satisfied that the administrator has fully administered. They are, however, chiefly taken up in stating many circumstances evincive of a fraudulent purpose of the plaintiff in procuring an assignment of the judgment from Barnes, and in conducting the sale of the land, so as to purchase it at an undervalue, and insist that an assignment of an irregular judgment, thus obtained and thus used against infant heirs, ought not to be upheld.

The answers further insist that the plaintiff cannot have any relief in respect of the money paid to Sims and Phillips, because the plaintiff can recover that money back from those persons, since their executions were set aside, and because those persons were proceeding at law, by *scire facias,* on their judgment against the heirs.

By consent of all the parties, the bill was amended in this Court by stating in it that, after the sale of the land and the executions had been set aside, Sims and Phillips respectively assigned their judgments against the administrator to the plaintiff, instead of repaying to him the money they had received; and such is admitted to be the fact.

By consent, also, there was a reference to the clerk to take an account of the administration of the personal assets of the estate; and he reported that the administrator had fully administered before the suits at law were brought against him.

J. H. Bryan and Mordecai for plaintiff.
Husted and W. H. Haywood for defendants.

RUFFIN, C. J. This cause has been brought to a hearing upon the pleadings and proofs and the master's report, as to the state of the personal assets. The assignment to the plaintiff of the judgment or
(126) decree obtained by the defendants Charity, Penelope, and Sarah against their father's administrator is admitted in the answers, and it is established by the evidence that the plaintiff gave the guardian the full value of it by transferring to him a debt of another person, from whom the guardian took a satisfactory security. The plaintiff, therefore, is clearly entitled to the decree he asks in respect to this demand. The Court so said, when the case was before us at law, upon the ground that there was no remedy at law, and this Court would not let a just debt be lost for the want of a fit legal remedy. Without recurring, therefore, to the general jurisdiction of a court of equity to entertain a creditor's bill against the personal and real representatives for a discovery and account of the personal and real estates, and for payment out of the former, if sufficient, and, if not, out of the latter, the particular circumstances of the present case constitute a clear one for satisfaction to be decreed in this Court out of the lands descended from the debtor. Of course, there is nothing in the objections taken in the answer that the plaintiff took the assignment from a bad motive, and attempted to use it injuriously and oppressively to the heirs; for the sale was vacated and the possession of the land surrendered by the plaintiff. That matter is therefore now out of the case; and, as to the assignment, it could not, in a legal sense, be injurious to the heirs, as it subjected them to the payment of neither more nor less, whoever might be the owner of the judgment.

The Court uses the occasion as a fit one to express a disapprobation of bringing forward in the pleadings matter so entirely irrelevant, and suggests to pleaders that it is well calculated to impair a professional reputation thus to interlard bills and answers with unavailing epithets, and with matters that have no bearing whatever on the controversy.

With respect to the other debts, which were assigned to the plaintiff by Sims and Phillips, no observations are necessary, further than
(127) to say that it does not appear that there have been any proceed-

ings at law against the heirs on them, and that it is understood the defendants prefer, if the plaintiff could get a decree for the payment of the other debt, that these two should be added, so as to diminish the expense and terminate the litigation.

Upon these grounds it must be declared that the plaintiff is the assignee and owner of the three judgments mentioned in the pleadings, and is entitled to have the money due on them for principal, interest, and costs at law, and also the costs of this suit, satisfied out of the lands descended from the intestate and described in the pleadings, subject to a deduction for the clear profits made, or that might have been made by the plaintiff from the said land while it was occupied by him as the pleadings mentioned, and it must be referred to the master to inquire what sums are due to the plaintiff in the premises, after deducting the profits of the land.

PER CURIAM. Decree accordingly.

(128)

PRUDENCE CALLOWAY v. JOHN WITHERSPOON.

If, when a man is so drunk as to render him an easy prey to the fraudulent designs of another, an unfair advantage is taken of his situation to procure for him an unreasonable bargain, a court of equity will interfere and rescind the contract, not on the ground of his drunkenness, but of the fraud.

CAUSE removed from the Court of Equity of CALDWELL, at Spring Term, 1844, by consent of parties.

The bill charges that the plaintiff and William Howard were the bastard and only children of one Polly Howard, and that William Howard died in August, 1840, intestate and without any lawful issue. For nine or ten years before his death he had been very intemperate, so much so that his mind was impaired; and about two months before his death he purchased from the defendant John Witherspoon a tract of land for the sum of $4,000, which he paid for in notes upon other persons.

The bill further states that at the time of the purchase, and before the deed for the land was executed, it was distinctly understood between the parties that the vendor, John Witherspoon, was to execute a deed conveying the fee simple in the land; that the deed was drawn by one of the other defendants, Dula, who was a brother-in-law of the grantor, and witnessed by him and another, who is the son of the defendant, and only conveys an estate for the life of William Howard; that nothing was, at the time of its execution, said as to the extent of the estate conveyed, and that the grantee, William Howard, accepted it under the belief that he was getting a deed in fee simple; that the sum

(129) of $4,000 was a high price for the fee simple, and that from the habits of William Howard it was not worth $300 for his life estate, and the deed was executed in June, 1840. The bill charges that the defendant John Witherspoon held the land in right of his wife, and well knew he could convey a fee simple, but, by his false suggestions and fraudulent conduct, induced William Howard to believe that he could; that since the death of the latter the plaintiff requested John Witherspoon to correct the deed and make a good title in fee simple, which he refused. The bill prays that either the contract may be rescinded and the defendant John Witherspoon be decreed to repay the money received by him, or that he may be decreed to execute a good and sufficient deed in fee simple with general warranty. The bill further charges that in the division of the estate of William Dula among his heirs, the land now in question was assigned to the wife of the defendant John Witherspoon, who was one of them, and valued by the commissioners at $2,700, and that real estate was higher in market at that time than when the defendant sold to William Howard, and charges a combination between the defendants to defraud William Howard.

The answer of John Witherspoon admits the sale of the land to William Howard, at his own request and at the price of $4,000; admits that it was held by him as land which he had got by his wife, and that in the division of the estate among the heirs of her father it was assigned to her as one of them, and was valued by the commissioners at $2,700, but denies that was its true value. It avers that William Howard well knew his title to the land, and that he could not convey it in fee; and denies that he sold or intended to sell, or that Howard bought or intended to buy, anything but the life estate of the defendant. It avers that the deed was prepared by William H. Dula, who was instructed by said Witherspoon as to the interest intended to be conveyed, and before it was executed it was distinctly and fairly read over to William (130) Howard, who expressed himself fully satisfied with it, and denies that he thought he was receiving the deed in fee. He admits the deed was intended to convey an estate for said defendant's own life, and that he thought it did convey such estate, and consents to have the deed so rectified. In another part of his answer he states that he was to convey an estate for the life of Howard as well as his own, and is willing to correct that error.

The answer of William H. Dula states he knows nothing of the contract, but as told him by John Witherspoon; at the request of the latter, he drew the deed, but did not witness it, nor was he present when it was executed; was told by John Witherspoon to draw the deed so as to convey only his life estate, as that was all he had sold.

The answer of W. P. Witherspoon denies all knowledge of the trade between the parties; was a subscribing witness to the deed, and believes he read it over to William Howard, and if so, read it correctly; denies he made any attempt, or that any was made in his presence, to induce W. Howard to believe that it was a deed in fee simple.

Replications were taken to the answers, and the case was set for hearing.

Boyden for plaintiff.
Avery and Bynum for defendants.

NASH, J. The equity of the plaintiff's bill is that in purchasing the land in dispute from John Witherspoon, William Howard bargained for, and intended to buy, a fee simple in the land, and was induced by the fraudulent representations of the said Witherspoon to accept a deed which did not convey such an interest, under the belief that it did convey it and that it was sufficient for that purpose. The bill charges that the price paid for the land was full value of the fee simple, and the answers do not deny it. It is indeed admitted by the (131) defendant, John Witherspoon, that the land, when allotted to his wife, was valued at $2,700, but he denies that was its full value, but does not state what it was worth.

No person was present when the bargain was made. We are left, therefore, to draw our opinion from the deed itself, and the after declarations of the parties, and the facts admitted. Upon its face, the deed conveys to William Howard nothing but an estate for his life, with a general warranty from J. Witherspoon and his heirs of title to him and his heirs forever. The price given was the full value of the fee simple of the land, and the defendants admit that it was the intention of the grantor to convey to Howard a title for the life of John Witherspoon, or for his own life and that of Howard. It is further admitted that William Howard was a very intemperate man, and that at the time the deed of conveyance was executed he had been drinking. The plaintiff does not pretend that William Howard was, at the time of making the contract, drunk to that extreme point as would, of itself, invalidate the act, but that he was so drunk as to render him an easy prey to the fraudulent designs of the defendant, John Witherspoon, and if, while in that situation, an unfair advantage has been taken of him to procure from him an unreasonable bargain, a court of equity will interfere and rescind the contract, not on the ground of his drunkenness, but of the fraud. *Cook v. Clagworth,* 18 Ves., Jr., 12; *Say v. Barwick,* 1 Ves. and Be., 195; Story's Eq., 236, sec. 231. The witnesses, on both sides, agree as to the intemperate habits of William Howard, but differ as to

its effect upon his ability to manage and transact his business, or make contracts. Some of those on the part of the plaintiff state that he was rarely sober, and when drinking appeared to have no mind; those examined for the defendants never saw him so drunk as to disqualify
(132) him. There are three witnesses to the conveyance; only one has been examined, and he by the plaintiff—David E. Bowers. He states that Howard, "for some time before his death, had become very intemperate from excessive drink," and "that he had frequently seen him when intoxicated; that his mind appeared to be entirely void of reason," and "that he was intoxicated at the time the deed was executed." On his cross-examination he was asked by the defendant, "If, at the time the deed was executed, Howard's mind was not in a situation to know very well what he was doing?" The answer is, "He appeared to be in a situation in which he *might* do business—not so bad as he had sometimes seen him, and not so good," etc. It is then established that he was, at the time the contract was executed, in a state of intoxication. Was an unfair advantage taken of the situation, to obtain from him an unreasonable bargain? We think the evidence fully establishes such to have been the fact. If the contract was such as the defendant alleges, then it is unreasonable upon its face. No witness valued the fee simple at more than $4,000, and all but one at prices ranging from $3,000 to that sum, and yet we are told that Howard agreed to give for the life estate of John Witherspoon the large sum of $4,000, the full value of the fee. As a reason, however, why he should be willing so to do, it is alleged that there was a feud between him and the plaintiff's family, and that he had at different times declared that they should not enjoy any of his property; that he had so fixed it they should not. It is strange, if such was his determination, it had not occurred to him that a will would have been more efficacious. It would have executed his purpose, and left him in the full and free enjoyment of his property during his life. Instead of so doing, it is alleged that while in the enjoyment of his mental faculties, and with a full knowledge of what he is doing, he accepts a deed which not only deprives the plaintiff and her family of the enjoyment of his property after his death,
(133) but actually makes his own enjoyment of it dependent upon the life of Witherspoon. The land excepted, Mr. Bowers tells us, he was not worth $150, and the witnesses for the defendant testify that he was a young man, and as likely to live a long time as any one. Now, it is certainly true that Howard had the legal right to dispose of his property as it is alleged he did, but the unreasonableness of such a disposition is, in our opinion, strong evidence either that he was imposed on or that he did not understand the nature of the conveyance he accepted. But further to show that Howard was not imposed on, the de-

fendant alleges that the deed was distinctly and deliberately read over to him before it was executed, and he expressed himself, and that to different persons, that he was satisfied, and that he had got such a deed as he had bargained for. Mr. Bowers is asked if the deed was read to or by Howard; he states he does not know; he is then asked what kind of a title he understood was to be conveyed; he answers, he does not recollect to have heard anything said by the parties at the time, as to the title, but he understood it was to be a full, good, and absolute title. At the time the conveyance was executed there were four persons present, beside the parties to the instrument, towit, William H. Dula, the brother-in-law of the defendant, and the three attesting witnesses, of whom Mr. Barnes was one, and the son of the defendant another. Mr. Barnes alone is examined, and no reason is assigned why the testimony of the others has not been brought before us. If they could have sustained the allegation of the answer of John Witherspoon upon this point, we have little doubt it would have been done. The allegation, then, that the deed was read over to Howard, and that he understood it, is not sustained. But it is proved that to different persons he did state that he was satisfied, and that he had got such a deed as he had bargained for. Did he get such a conveyance as, according to the answer of John Witherspoon, he had bargained for? Certainly not; he was (134) then either mistaken or had been imposed on; he did not get the estate he had contracted for, but one which, though of a higher, was of a different, character, and which in the event turned out to be worth little or nothing. Did he understand the deed as written? We cannot believe he did. Howard lived but about two months after the conveyance was executed, and after it was so executed he offered to sell the land to Daniel Horton, and, a short time before his death, he consulted James Brown, another witness, as to arranging his worldly affairs, as he said he was sick, and thought he would die; and after the payment of his debts he intended to give the land to the son of Polly Simmons. He had no land to give but that now in question, and if he had known the nature of the deed he had gotten, he must have known he had nothing in it to devise; that his interest expired with his life. His meaning, then, when he declared he was satisfied with the deed, that he had gotten what he had bargained for, was not that he had purchased nothing but his life estate, but that he had got a deed from John Witherspoon, with general warranty, and that would make his title good. He relied upon the warranty, either as conveying the fee or as binding the grantor to make it, and such belief was produced on his mind by the fraudulent representations of the defendant Witherspoon. We are confirmed in the opinion that William Howard believed he was purchasing the fee in the land, and that he had done so, from the additional facts that John

offered the land to Thomas Isbell, one of the subscribing witnesses, at the price of $3,500, the full value of the fee simple, and that, after the sale, he advised Catlett Jones to purchase it from William Howard, telling him it would suit him, and upon neither of these occasions did he speak of a life estate. Whether, however, the conveyance was drawn so as to convey but a life interest to Howard, by mistake or fraud,
(135) is not material to the relief of the plaintiff, for in either case the Court will correct the instrument. We are perfectly satisfied it was so drawn either by fraud or mistake. So far from Howard understanding it, Witherspoon himself, according to his answer, did not. He says in one part of it that he sold his own estate, namely, for his own life, and in another part that the contract was for a conveyance of the land for the lives of himself and William Howard, while the deed conveys but an estate for the life of Howard. It is admitted, therefore, that there was an error or mistake, to some extent at least, and the defendant says he is willing the plaintiff shall enjoy the estate while he lives, and that he has not disturbed her. But where a mistake is thus clearly established, upon the parties' own admission, we are the more at liberty to give weight to other circumstances, as to the extent of it. Upon that point, the value of the estate, the understanding of the only subscribing witness as to that bargained for, the purpose of the purchaser to dispose of the land as if he had the fee, the omission of the defendant to produce evidence that the treaty was for a life estate only, or that the deed was read by Howard or to him when he was in a condition to understand it, and when it appears really not understood by any of the persons present, all satisfy us that the contract was for a sale and purchase in fee, or at least that Witherspoon was to convey in fee, with general warranty. And we must so declare, and that the deed was otherwise drawn, either by fraud or mistake. The plaintiff, therefore, is entitled to the relief she seeks.

PER CURIAM. Decree accordingly.

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(136)

NICHOLAS C. HARRISON AND WIFE v. WILLIE BRADLEY.

1. An account, stated in writing and settled and signed by the parties, is a bar to a bill for another account.

2. If the plaintiffs state the settlement in their bill, they cannot ask to have it opened, but for some fraud, omission, or mistake pointed out.

3. Where a bill for an account lies, the defendant can adduce the settlement, and show thereby that the parties have already accounted, and therefore ought not to be compelled to do so again.

4. The difference is, that when the defendant sets up this defense, he must state, upon his oath, that the account, as settled, is just and true; and, in that case, it is conclusive, unless impeached upon one of the grounds mentioned.

5. The sale of an infant's land ought not to be decreed by a court of equity upon *ex parte* affidavits, without any reference to ascertain the necessity and propriety of the sale and the value of the property.

6. The material facts ought to be ascertained and put upon the record, either by a report or the sending of an issue, and, after a sale, it ought to appear, in like manner, to be for the benefit of the infant to confirm it.

7. Where a guardian obtains a decree of a court of equity for the sale of his ward's land, to make him liable for any loss in consequence of such sale, it must appear that he willfully practiced a deception on the court by false allegations and false evidence or by industriously concealing material facts.

8. It would be hazardous to impeach confirmed judicial sales upon the ground of inadequacy of price; and, if it can be done in any case, it must be a very strong one of deceitful practice on the court.

9. Although it is the duty of a court of equity, when the real estate of an infant is sold under its decree, to direct the proceeds to be held as real estate, yet a husband of such infant, who has received the proceeds from his wife's guardian, has no right to complain that such course has not been adopted.

CAUSE removed from the Court of Equity of EDGECOMBE, at Spring Term, 1847, by appeal of the plaintiffs.

Reddin Lynch died intestate, leaving Nancy his widow, and the (137) plaintiff Elizabeth, his only shild, in infancy. Administration of his estate was taken by David Bradley, and the widow intermarried with the defendant, Willie Bradley. The intestate left several negroes, and was also seized at his death of the undivided half of a tract of land which had descended to him and his brother, Hansel Lynch, from their father. After the death of Reddin, the land was divided between the plaintiff Elizabeth and her uncle Hansel, in 1827. In February, 1829, the defendant (his wife being then recently dead) was appointed the guardian of the infant Elizabeth, and received her share of the slaves of the estate from the administrator, four in number, namely, a man aged 23 years old, a girl 11 years, one 13 years, and a boy 9 years old. In March, 1829, the defendant filed a petition, as guardian, in the court of equity, in which he set forth that his ward owned the land mentioned and her share of the negroes; and that the land was of but little value and the rents very small, and that the annual proceeds of the land and negroes were too small to afford a maintenance to the infant, who had no other means of subsistence; and that it was therefore necessary that some part of her real or personal estate should be sold for the purpose of supplying the

means of her subsistence and education; and that the petitioner believed it would be to the advantage of the infant that the land should be sold in preference to the negroes; and he therefore prayed for the sale of the land. To the petition were annexed the affidavits of the petitioner and two other persons, that they believed the facts stated in the petition to be true, and that the interest of the infant Elizabeh would be materially promoted by the sale of the land. Thereupon the court decreed the sale and appointed the clerk and master to make it upon a credit of one and two years; and to the next term, September, 1829, he reported a sale on 13 April to the defendant, at the price of $500, for which he had given bonds with approved sureties. The court confirmed the report, and ordered the master to make a conveyance to the defendant,
(138) and also to deliver to the defendant, as guardian, his two bonds for the purchase money, if the master should find that the defendant had given sufficient security for his guardianship; which was accordingly done.

The defendant continued to be guardian of Elizabeth until her intermarriage with the other plaintiff, Harrison, in July, 1843.

The bill was filed in August, 1845. It states that after the death of Reddin Lynch, his widow occupied all the land until her intermarriage, and that the defendant did so afterwards until the sale above mentioned; that immediately after his wife's death the defendant conceived a strong desire to own plaintiff's land, and that, with that view, he filed the petition, and that the reasons set forth therein for the sale were frivolous and untrue pretexts; that the land was worth from $1,200 to $1,500; and that the defendant took active pains to depreciate it by decrying its value, and also to suppress competition in the bidding; that the defendant applied to respectable persons who were resident in the neighborhood and knew the land and its value, to join in the affidavits annexed to the petition and they refused; and that he then procured the two other persons to make the affidavits, who were of easy and accommodating dispositions, and resided, the one 4 and the other 6 miles from the land; that during the time the defendant occupied the land he permitted the buildings and inclosure to go to waste, and thereby diminished the market value of it; and the bill distinctly charges that the intent and purpose of the defendant in procuring the sale of the land was to purchase it at a sacrifice, and that it was for that reason that he did not inform the court, upon the coming in of the report, of the inadequacy of the price, and thereby protect his ward from undue loss. The bill also alleges, as a breach of his duty, that the defendant pro-
cured the report to be confirmed and an order for the payment of
(139) the price into his hands, as guardian, and designedly omitted to

cause it to be secured to any specific use or purpose, and a portion of the negroes to be set apart as a substitute for the land sold.

The bill further states that the defendant seldom hired out the plaintiff's slaves, but kept them in his service, and would not account for the full value of their services; that the plaintiff Nicholas applied to the defendant for a settlement of his accounts as guardian; but that he refused to come to any settlement, and in February, 1844, paid the sum of $55, and soon afterwards $10 more, and alleged that those sums were all that was due upon his guardianship, including the hires of the negroes and the rents of the land before the sale and also the price of the land.

The bill then insists that in justice and equity the land should be considered as still belonging to the plaintiff Elizabeth, and that the defendant ought to be considered a trustee for her; and if that be not so, that at all events the proceeds of the sale of it ought to have been secured to her, and that the defendant ought to make the same good to her.

The prayer is that the purchase of the land may be declared fraudulent and the defendant be decreed to convey to the plaintiff Elizabeth, and for an account of the rents and of the land, and also of the personal estate, and that all sums that Mrs. Harrison may be entitled to in respect of the sale of the land may be settled and secured to her out of the fund in the defendant's hands.

The answer denies that any waste was permitted by the defendant on the land, or that his wife or he ever occupied it. It states that there were no improvements on it, except some detached pieces of cleared land, containing in all about 17 acres, very badly inclosed; that in 1828 the defendant leased those pieces for $3; of which he kept $1, in respect of his wife's dower, and accounted for the other $2 as part of his ward's estate; that immediately after he was appointed guardian, (140) in February, 1829, he offered the land for rent; but that owing to there being no house on it, and the poverty of the land, and the defective fences, he could get no offer for it. Believing that he would afterwards be unable to get tenants, knowing that there were debts encumbering the personal estate, he thought it best that the land should be sold rather than keep it lying idle and paying taxes on it during the long minority of his ward, who was then about 3 years old; and accordingly, and with the sole view of promoting her interest, he consulted counsel and was advised to apply to the court of equity for an order to sell it, in aid of the personal estate. The defendant denies positively that he used any practices to impose on or deceive the court, or that he applied to or procured any persons to give evidence in support of the application, but such as he believed knew the land well and were good judges

of what was for the interest of the ward. He states that he did not wish or intend to purchase the land when he filed the petition nor when it was offered, but that, finding no bid made, and supposing that if any should be made, it would be small under those circumstances, and being determined the land should not be sold at a sacrifice, he made up his mind to give the value of it himself, as well as he could ascertain it, and therefore he bid $500; that he was not particularly acquainted with the land; but he had ascertained that the other half of the original tract, being the share of Hansel Lynch, had been a short time before sold for $500, and supposing him to know the land well and to be a competent judge of its value, he bid the same sum for the other half, considering, then and now, that to be its full value; that the defendant was desirous not to purchase the land, and that the master kept the bidding open until the succeeding county court, but, receiving no

(141) other bid, he then declared the defendant the purchaser.

The answer thereupon insists that the defendant by force of the decree and conveyance from the master had a good title to the land; and, moreover, that as the decree directed the money to be paid to him as such, and without any settlement of any property in lieu of the land, he is not chargeable with any error in law upon that point, as it was not his act, but that of the court.

The answer then states that the defendant annually returned his accounts as guardian to the county court, and included therein all the hires of the negroes and the price of the land, with the interest accruing thereon, and the same were duly audited and allowed by the court. It denies that the defendant kept the negroes in his service, and avers that he accounted for the whole estate in his returns. A copy of those accounts is annexed to the answer as a part of it, and the original of the last one, made to May, 1844, is exhibited. The answer then states that soon after the marriage of the plaintiffs, he was requested to settle, by the plaintiff Nicholas; and the defendant thereupon gave him a full statement of all his transactions, by laying before him his said guardian accounts and vouchers to support them; and that after time taken for full examination, the said Nicholas expressed himself fully satisfied therewith; and the defendant then delivered to him the negroes belonging to his wife, and after first paying him $55, in February, paid him on 25 May, 1844, the sum of $10.92, as the balance due on the last account, and took his receipt therefor on the account in full; and the answer insists on that settlement of the accounts and the plaintiff's receipt thereon as a bar to a decree that he shall now account, as if he had pleaded the same.

The accounts began in February, 1829. It appears by them that the ward's estate was indebted at that time $202.22½ for owelty of parti-

tion of the land between herself and her uncle, and of the negroes (142) between herself and the defendant, and for her share of a balance due her father's administrator on his accounts; and that the defendant, afterwards, was obliged to pay Reddin Lynch's administrator, on a refunding bond, the further sum of $238.01 for her share of a recovery effected against him. The hires of the negroes appear to be regularly entered, and to have barely supported the ward for several years, though they gradually increased, notwithstanding the charges also increased by reason of one of the negro women having a large family of young children, and the expenses of the ward's education. The defendant gave the ward credit in the account for $500, as the price of the land, when it fell due; and there does not appear any charge in the account that does not seem quite moderate for the expenses of the negroes, or the board, education, and clothing of the ward. In the return in May, 1844, the defendant is charged with the balance due upon the preceding return, and it appears upon the original that it (as the others had been) was credited and allowed by three members of the court, who signed it. Therein the plaintiff is charged with $55, paid to him in February, 1844, and a balance is struck of $10.92, and signed by the defendant; and immediately below the plaintiff gave a receipt as follows:

25 May, 1844. Received the above amount as stated from Willie Bradley, guardian of Elizabeth R. Lynch, in right of my wife, now Elizabeth R. Harrison.

N. C. HARRISON.

Depositions were taken on both sides as to the value and condition of the land. It appears that the share of Hansel Lynch was sold by him at $500; and several witnesses think that a fair price for that lot as well as for the land of the plaintiff. Others, however, say that both parcels were worth more; and upon the whole evidence it seems probable that the land of the plaintiff was worth about $600, or (143) $650, though it could not be sold for that sum, because it did not adjoin any person desirous or able to buy it. But all the witnesses agree that but little of it was cleared and the most of it in swamp; so that little or no rents could be had for it, without laying out capital or labor to a considerable extent in clearing and ditching.

Upon the hearing in the Superior Court the bill was dismissed, but the decree did not declare the grounds of it, and the plaintiffs appealed.

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

RUFFIN, C. J. The Court finds no reason for disturbing the decree. In respect of the personal estate, the plaintiffs cannot have any decree against the defendant. The negroes, with their numerous increase, have been delivered to the husband, and he has also settled the accounts with the guardian and received the balance due on it, and given a receipt for it as such. It is not necessary to cite authorities that an account stated in writing, and settled, and signed by the parties, is a bar to a bill for another account. If the plaintiffs state the settlement in the bill, they cannot ask to have it opened, but for some fraud, omission, or mistake pointed out. If the bill take no notice of the settlement, but is simply for an account, in a case in which a bill for an account lies, it follows that the defendant can adduce the settlement and show thereby that the parties have already accounted, and therefore ought not to be compelled to do so again. The difference is, that when the defendant sets up this defense, the rule is that he must state upon his oath that the account as settled is just and true; and in that case it is conclusive, unless impeached upon one of the grounds mentioned; for fair settle-
(144) ments, like other contracts, ought to be binding. Here the accounts were stated, signed and settled, and there is nothing to impeach them; for the bill does not even notice the settlement. The final account refers, upon its face, to those before returned, and they must have been known to the husband. The defendant says that he in fact had them and examined them carefully; and he further states positively, that the whole account was just and true. There is no ground, therefore, on which that settlement can be disregarded.

The Court cannot forbear expressing a decided disapprobation of the loose and mischievous practice adopted in this case, of decreeing the sale of an infant's land upon *ex parte* affidavits offered to the court, without any reference to ascertain the necessity and propriety of the sale, and the value of the property, so as to compare the price with it. The court ought not to act on mere opinions of the guardian or witnesses, but the material facts ought to be ascertained and put upon the record, either by a report of the master or the finding of an issue; and after a sale it ought to appear in like manner to be for the benefit of the infant, to confirm it. Otherwise there is great danger of imposition on the court and much injury to infants. In the case before us, if it were admitted that the ward lost by the sale of her land, it is not seen that the guardian did more than err in opinion as to the infant's interest; for the facts stated in the petition do not appear to be untrue, and there is no evidence of an effort to prevent competition at the sale or before. The only prejudice alleged in the bill is that the land was sold too low. On that point the guardian or the witnesses made no representation. It was incumbent on the court to direct an inquiry as to

the suitableness of the sale at the price, taking into view the income from the land, the ward's age, and the condition of her estate. Certainly, a guardian is not to answer for error in the court in those respects; for he cannot undertake to set himself above the court, whose advice he asks. To make him responsible, if he be so at (145) all, for a loss to the ward, something more than a loss and an error of a court must be made to appear. It ought, at least, to be established that he practiced a deception on the court by false allegations and false evidence, or by industriously concealing material facts. However, it is not our purpose at present to lay down any rule as to the liability of guardians for losses to wards from sales of their land. It will be sufficient to do so when a case of such injury shall come up. The plaintiffs do not establish anything like a previous design of the defendant to buy the land, and they fail to render it even probable that it was not the ward's interest to confirm the sale that was made, rather than not make one at all. It is true, there is some difference of opinion about the value of the land. But suppose it to be worth $600, or a little more, there would still not be such disparity between the price and value as would induce the Court to annul a contract *inter partes*. This case stands on ground even higher than that. The right of rejecting the sale is reserved to the court; but instead of doing so, it confirms it, and thereby holds the purchaser bound. It would be hazardous to impeach confirmed judicial sales upon the ground of inadequacy of price; and if it can be done in any case, it must undoubtedly be a very strong one of deceitful practice on the court. Without commenting minutely on the evidence here, it will be sufficient to say that it produces a decided impression that, under the circumstances, it was the interest of the ward that the sale should have been made at the price given, rather than not sell at all; and that, even if the land were worth more intrinsically, it is not probable, owing to its condition and situation, that more could have been had for it in any reasonable time. The proceeds of sale were almost indispensable to the infant, in the state of her property. The land yielded no profits, and would not, without an outlay beyond the power of the owner. If not sold, it (146) would have been chargeable for taxes, and at the end of her pupilage would still have been in a wild and waste state. On the other hand, it has yielded $500, and compound interest thereon for about fourteen years—altogether, upwards of $1,100. Besides, there were debts, then due, exceeding $200, and others, afterwards ascertained, to a greater amount; and for the discharge of them, and the education of the ward, there was nothing but the negroes. During the same period they have yielded above $1,500 in hires, and have more than doubled in number. So that it is plain that she would have suffered more loss by a

sale of negroes for the payment of her debts, besides being cut off from resources for nurture and education. The Court, therefore, must declare that the sale of the land was not procured by the defendant in bad faith, but that, under the circumstances, it was a discreet and proper act.

The bill also insists on a liability of the defendant, because he did not keep and have settled on the plaintiff, Mrs. Harrison, as much of the personal property as would have been of the value of $500, to go as real estate. This is founded on the provision of the act of 1827, which requires the court to set apart as much of one kind of property as will be a substitute for that of the other kind sold, and enacts that the portion set apart shall go as that sold would have done, until the equitable owner shall make a disposition of it that will change its character. No doubt it was the duty of the court of equity to have complied with these provisions. Perhaps, also, the guardian might have withheld as much of the personal property from the husband of his infant ward, and insisted on its being settled as real estate. It is not necessary to say how that would be, as it is not the question here. The question before us is whether the husband, by joining his wife with him, can bring a bill to compel the guardian to make good this sum out of his
(147) proper goods, when the husband has in his own hands the whole estate out of which the settlement ought to be made. Undoubtedly, that much of the personal estate is, or ought to be, considered as land, between the husband and wife and between her personal representative and heir. Why does not the husband set up a sufficient fund and settle it for that purpose? If he will not, the wife has a right to insist on it by her bill, fixed by a next friend. But, clearly, they cannot charge the present defendant with that sum, when he delivered the whole estate to the husband, and he now has it. Whether he could be made liable by the wife, upon the insolvency of the husband, may admit of more doubt; though it would seem hard that he should, as the court omitted to designate a fund for the purpose. But if he could be reached by the wife ultimately, he assuredly cannot be on the bill of the husband and wife, and while the husband has the fund itself, and is, in respect thereto, the person primarily liable.

PER CURIAM. Decree affirmed, with costs.

Cited: Henderson v. Palmer, 57 N. C., 109; *Morton v. Lea,* 73 N. C., 23; *Blue v. Blue,* 79 N. C., 71; *Grant v. Bell,* 87 N. C., 44; *Suttle v. Doggett,* 87 N. C., 206; *In re Dickerson,* 111 N. C., 113; *Barcello v. Hapgood,* 118 N. C., 726.

(148)

ANN B. REA v. WILLIAM L. RHODES ET AL.

1. In the case of a legacy to one for life, remainder over, the assent of the executor to the legatee for life inures to the benefit of the remainderman, and vests in him a legal estate, which is liable to execution.

2. The assent of the executor vests the legal estate in the legatee, though the executor may thereby commit a *devastavit*, and a creditor can only follow the property in a court of equity.

3. It is not necessary that an assent be expressly given or directly proved, for it may be implied from the acts of the parties, or the declarations of the executor, though not amounting simply to an assent. But the acts or declarations, in order to have that effect, must be such as are unequivocal, and satisfy the mind that the executor meant to acknowledge the right of the legatee to the thing, and, of course, to determine his own title or control over it in opposition to the legatee.

APPEAL from the Court of Equity of WASHINGTON, at Spring Term, 1847.

Arthur Rhodes made his will, 23 June, 1836, and therein gave to his wife, Amelia, his manor plantation, fifteen slaves, by name, with his household and kitchen furniture (except a bed and furniture), and his stocks of horses, cattle, sheep, and hogs, and his farming utensils, for her life; and after her death he directed the land to be sold, and he gave the proceeds thereof and the said negroes to his son Edmund Rhodes and his grandchildren, the children of his deceased son, William Rhodes, equally to be divided between them, that is to say, one half to Edmund and the other half to the said grandchildren. He also gave to his son Edmund six other slaves specifically, and a bed and furniture. The testator appointed his wife the executrix and his son Edmund executor, and died shortly afterwards. In November, 1836, (149) the will was proved, and Edmund alone qualified as executor.

Mrs. Rhodes was an aged lady, between 60 and 70, and quite infirm, and her son Edmund lived with her, as a member of her family, at the late residence of her husband, until her death. During that period the negroes continued on the plantation generally, though some of them were occasionally hired out, and the contracts of hiring were made by Edmund Rhodes, who was the executor of his father, and also managed his mother's plantation for her. Edmund Rhodes was also the administrator of his deceased brother, William, and his father, Arthur Rhodes, was his surety in that office. The children of William Rhodes were William L., Elizabeth, James E., Joseph H., and Franklin A.; and, as next of kin of their father, they instituted in May, 1842, a suit by petition against Edmund Rhodes for an account and payment of their distributive shares, and in August, 1842, recovered $197.24, besides costs,

and sued out a *fieri facias,* and levied it on Edmund Rhodes' one-half in remainder of the slaves left to his mother for life, and they were afterwards sold under a *venditioni exponas* on 22 July, 1843, and the present plaintiff became the purchaser by Charles Latham, her agent.

In March, 1843, the present plaintiff also recovered a judgment for $2,500, and costs, in an action at law, which she had instituted against Edmund Rhodes; and thereon she sued out a *fieri facias,* which was also served on the interest or half part in remainder of Edmund in those slaves; and the sale by the sheriff, under which the plaintiff purchased, was made under this execution as well as that of William L. Rhodes and others before mentioned. The sale was made at the residence of Mrs. Amelia Rhodes, in the presence of herself, Edmund and William L. Rhodes. Afterwards, William L. Rhodes, for himself and as the guardian of his brothers and sister, who were all infants, instituted in February,

1844, an action at law against Edmund Rhodes in his own
(150) right, and as executor of his father on his bond as administrator of William Rhodes, deceased, assigning as a breach the nonpayment of the hires of the negroes belonging to that estate for the year 1843, and which fell due at the end of that year and amounted to $126.11. No defense was made to the action, but a judgment by default was entered and a reference to the clerk to take the accounts. He did so, and reported that the sum of $126.11 was due, upon the admissions of the parties, Edmund and William L., who attended before him; and at May Term, 1844, judgment was rendered therefor; and upon it a *fieri facias* was issued against the goods and chattels of the testator, Arthur, in the hands of the executor, and against the proper goods of Edmund Rhodes, and on 16 August, 1844, the whole of the negroes, then amounting to seventeen, were exposed to sale as the goods of the testator, Arthur, in the hands of Edmund Rhodes, the executor, and also undivided half thereof as the interest, if any, of the said Edmund in those slaves, and were purchased by William L. Rhodes for the sum of $144.35. This last sale took place a month after the death of the testator's widow, which occurred in July, 1844; and since his purchase William L. Rhodes has been in possession of all the negroes.

The bill was filed in September, 1844, against William L. Rhodes, Edmund Rhodes, and the other children of William Rhodes, deceased, and it states that soon after the testator's death Edmund Rhodes paid off all the debts of the testator and assented to the legacies in the will to himself and to his mother, and the other remaindermen, and that Mrs. Rhodes had the possession and enjoyment of the negroes, as tenant for life, up to the sale to the plaintiff in July, 1843; that at the sale the negroes were offered for sale, with an express reservation of the life estate of Mrs. Rhodes, derived under her husband's will, and that the interest of

Edmund Rhodes was sold as a remainder dependent upon that (151) life estate; and that, although Mrs. Rhodes, Edmund, and William L. Rhodes were all present, neither of them made any objection to the sale in that mode or intimated that the negroes were held or claimed by Edmund as executor; that so far from setting up any such pretense, the said William was having them sold under the execution of himself and others on their first judgment, as the property in remainder of Edmund Rhodes, and Edmund Rhodes himself applied to persons not to bid for the negroes, but to allow William L. Rhodes to purchase them without competition, and that, upon that request being refused by the plaintiff's agent, William L. Rhodes demanded that, to the extent of his execution, which was the elder, the sale should be for specie; and that after the said sale the negroes went back into the possession of Mrs. Rhodes, who claimed them, as before, as tenant for life, with the knowledge and approbation of Edmund, and held them during her life. The bill further states that the subsequent suit and judgment against Edmund Rhodes for the hires of the negroes of his intestate, William Rhodes, for 1843, was a contrivance of Edmund and William L. Rhodes to baffle the plaintiff, by having the negroes sold under color of an execution against the estate of the testator Arthur, as some ground for pretending that the executor had not consented to the gifts of them in the will; that the whole of those hires amounted only to $126.11, for which the judgment was taken; and that in fact William L. Rhodes was the hirer of some of the negroes for $77, which he never paid, and that Elizabeth Rhodes hired others to the value of $34, which was paid by keeping other negroes of the estate that were chargeable, and that no reduction was made therefor or claimed before the clerk.

The prayer is for a discovery of the negroes and their increase, and a partition, by which one-half shall be laid off and delivered to the plaintiff, and, in the meantime, for reasons stated in the bill, for (152) an injunction against the removal of the slaves out of the State.

The answer of Edmund Rhodes states: "That, soon after he qualified as executor, he paid all such demands as were, to his knowledge, then outstanding against his testator, without a sale of any negroes." He "denies ever having announced his assent or assented as executor to the life estate in the negroes to Amelia, the tenant for life in said will; but says that they lived together at the late residence of the testator, at which place the negroes not hired out were employed by this defendant upon the farm. He says that the proceeds of those hired out were collected by him as executor, and appropriated to the wants of the farm during the life of his mother, and that she derived her support from the income of the property bequeathed to her during her life; he denies that the negroes were surrendered by him into the possession of said

Amelia, and that she exercised any greater control over them than she did prior to the testator's death." He states "that up to the sale to the plaintiff the negroes had been in his continued possession, and that he, at that time, claimed to hold them as executor, and that, to the best of his knowledge and belief, he stated to the sheriff, and to Charles Latham, the plaintiff's agent, that he was in advance for the estate, and looked to the negroes to be reimbursed."

The defendant denies any fraudulent combination with William L. Rhodes, or contrivance to defeat the plaintiff of her purchase by the second suit and judgment obtained against him in May, 1844, and says the proceeding was *bona fide*. He says that he had hired out the negroes for 1843, and that after William L. Rhodes was appointed the guardian of his brother and sister, in the summer of 1843, he demanded payment from this defendant, which he was unable to make in consequence of pecuniary embarrassments; and that his reason for not defending the suit was that he really owed the sum reported by the clerk upon
(153) his admission. He admits that Elizabeth Rhodes hired negroes that year for $34, and that the same was charged against him in the suit, though that sum was not paid to him, but was satisfied by an allowance to her for keeping other negroes; and he admits that William L. Rhodes hired some of the negroes himself for $77, which was charged against the defendant, though it had not been paid to him; and he says that said William L. gave his note therefor, "and that said note has been long since passed off by this defendant."

The answer of William L. Rhodes, after admitting the bequests in the will, the names of the negroes, etc., states that Amelia and Edmund Rhodes lived together, and that the latter, so far as he knows or has reason to believe, exercised the sole control over the slaves, and, as he has understood, hired some of them out from time to time and took notes for the hire to himself, and that the defendant does not know of any assent by Edmund, the executor, to the legacy to his mother, nor act of possession or ownership on her part, inconsistent with his possession as executor. He admits that he, Mrs. Rhodes, and Edmund Rhodes were present at the sale under the executions in favor of the plaintiff, and of himself and brothers and sister against Edmund Rhodes, and the interest of Edmund in the negroes was set up and sold as charged in the bill; and that he set up no objection to the sale, as he does not know that he was called upon to do so. But he says that he has since understood, and believes, that Edmund did, on that day, state to the sheriff and the plaintiff's agent, Latham, that he claimed to hold the slaves as executor of Arthur Rhodes. And this defendant insists thereupon that the plaintiff acquired no title by her purchase, because Edmund Rhodes had not assented to the legacy to himself, and therefore held as executor.

He denies that he applied to any person not to bid against him, so as to let him buy the negroes for the amount of his execution, or that Edmund Rhodes made such application with his knowledge or (154) assent; and he admits that he demanded specie, and insists that, as he had a right to do so, it furnishes no evidence of any fraudulent purpose. With respect to the institution and prosecution of the suit last brought by him for himself, and his brothers and sisters, he gives much the same account the other defendant does, excepting only that he says that, soon after he was appointed guardian in 1843, he applied to Edmund Rhodes for a settlement, and receiving no satisfactory answer, he then applied to counsel "to know if there was any way to secure the negro hire for 1843, to himself and his wards, and was instructed that he could do nothing until the end of the year, but that then he should again demand a settlement, and, upon refusal, bring a suit on the administration bond, which he accordingly did, without the agency, concert, or request of Edmund Rhodes." And excepting further, that in respect to his own note for $77, for hires of that year, this defendant says, "Where said note was, at the time of instituting said suit, he does not know, nor does he know who is now [14 March, 1845] the holder of it, but supposes that it has been long since passed by said Edmund for his own purposes."

The answers of the other defendants—those who are still infants, answering by William L. Rhodes, as their guardian—are not material, as they say they have no personal knowledge of the matters in controversy, and leave the plaintiff to her proof.

Upon the proofs it appears that Mrs. Rhodes owned no land nor negroes, besides those left to her by her husband. She was old and infirm, and left the management of the plantation and the transaction of her business generally to her son Edmund, who resided with her. He generally gave in her property, as well as his own, for taxes. The tax lists for all the years from 1836 to 1844, both inclusive, are filed, except for the years 1840 and 1841. In 1836 Edmund Rhodes listed for himself one white poll, and nothing more; and he listed "for the (155) heirs of Arthur Rhodes 447 acres of land and seven black polls." In each of the other years he gave in for his mother the land and black polls, varying in number from four to eight, and generally increasing. During that period he gave in no list as executor of his father, and never more than one black poll for himself, and generally none.

A witness, Latham, states that he attended the sale in July, 1843, as the plaintiff's agent, and was asked by Edmund Rhodes, privately, whether he had come to bid on the property, and upon being told that he had, Rhodes said it was a hard case to be broken up by an unjust verdict, and remarked that there would be no sale unless the witness bid.

But the witness told him that he must bid, and then Edmund Rhodes said to him: "There is a small execution against me older than Rea's, and, if you will not bid, the plaintiff in that execution can purchase the property." But the witness informed him that he could not consent; and the negroes, that is, one-half of them in remainder after the death of Amelia Rhodes, being the share of Edmund Rhodes, were put up and purchased by the witness, as the agent of the plaintiff. Neither in that private conversation nor in any public declaration did Edmund Rhodes or any other person make an objection to the sale of his half of the negroes, subject to the life estate of Mrs. Rhodes. To the question by the defendants, whether Edmund Rhodes did not say, on that day, that Arthur Rhodes' estate was indebted to him, and that he would hold on to the property, as executor, until he was paid, this witness, and the deputy sheriff who sold the negroes answer that nothing of the sort occurred, according to their recollection.

The defendants examined the sheriff of the county, and asked him whether on the day of sale Edmund Rhodes did not claim the negroes as the executor of his father, and object to the sale of them; to which (156) the witness replied that he made the sale, at which William L. Rhodes purchased, and that, upon that occasion, Edmund Rhodes stated that the negroes were the property of the testator, and that the estate owed him and had never been settled; that at the sale at which the plaintiff bought, the witness was also present, and he thinks Edmund Rhodes made some objection to the sale of the negroes, but what the objection was, witness is unable to say.

The defendants examined several other witnesses for the purpose of showing that Edmund Rhodes had the possession of the negroes, and claimed to control and dispose of them as executor. A physician says he attended some of the negroes for two years at Mrs. Rhodes' and was told by Edmund to charge him as executor of his father, and he at different times received payment from Edmund. But he does not mention the years when he attended. Others prove that Edmund managed the plantation or farm and the negroes that were on it, and that he sometimes hired some of them out. But the witnesses generally state that they are unable to say whether, in so doing, he acted as executor or as agent for his mother. None of them say that there were regular annual hirings of the slaves; but occasionally they were hired for short periods by private contracts, or rather, some of them. To a person who applied to Mrs. Rhodes in 1840 or '41, to hire a negro for a few days, she replied that she "had nothing to do with the negroes and horses, and that he must go to Edmund." Another witness, being asked whether Mrs. Rhodes did not express the wish that Edmund would give up the

negroes to her, answers: "I do not know that I heard her say 'give up the negroes,' but I heard the old lady say that if Mr. Rhodes would give up to her, she would manage things differently from what he did." And some of the defendants' witnesses testify that in some of the hirings of negroes Edmund Rhodes took notes payable to himself (157) and sometimes payable to him as executor. One of the witnesses, who hired a negro, says that he gave the negro up at the request of Edmund, who said his mother wished it.

A. Moore and Heath for plaintiff.
Badger for defendants.

RUFFIN, C. J. The case turns on the question of assent by the executor to his own legacy. He might give it either directly or to the first taker, and that would inure to him in succession. If he did assent, his interest in remainder became subject to the *fieri facias* against him (*Knight v. Leake,* 19 N. C., 133); and the negroes could not afterwards be sold under the execution *de bonis testatoris.* For it is settled that the assent of the executor passes the legal property to the legatee, although the executor may thereby commit a *devastavit,* and a creditor may follow the property in equity. *Hostler v. Smith,* 3 N. C., 305; *Alston v. Foster,* 16 N. C., 337. It is not, therefore, material to the rights of the plaintiff in this case to determine the character, in point of good faith, of the subsequent suit, judgment, and execution under which William L. Rhodes purchased. It was proper enough to make it a part of the bill, in order to have all the rights of every class of claimants passed on. The true character of the transaction can indeed hardly be doubted, notwithstanding the answers. No counsel could have advised that next of kin could not by a bill compel an insolvent and unfaithful administrator to bring in securities belonging to them and restrain him from parting from them to others. It is obvious that the remedy on the administration bond was the real object, probably under an impression that the assent of the executor, and the purchase of the plaintiff under an execution against him, might be avoided by a sale for a liability of the testator, the original owner of the negroes. William L. Rhodes says he thought it his duty, after he became guardian, to secure the hires for (158) 1843 for his wards and himself, and therefore brought the action on the administration bond under the advice of counsel. But that is a most extraordinary statement, leading to this conclusion: that for the purpose of securing the sum of $126.11, he would sell seventeen negroes, as the property of the testator, and thereby defeat a gift of one-half of them to himself and his wards. It is true that he purchased, and therefore would not be loser; but what becomes of his duty, of which he

speaks, to the infants, who owned four-fifths of that half? The impression, therefore, cannot but be very strong that the parties fabricated the claim for the occasion, by not allowing the proper credits for the debts of William L. Rhodes, and for the charges for keeping some of the negroes, so as to overreach the plaintiff's purchase, as they supposed. But in that they were mistaken, if the executor had assented to his legacy, since in that case the plaintiff got a good title to one-half the negroes, and would be entitled, at all events, to a partition against the owner or owners of the other half, whether the ownership be in William L. Rhodes alone or in him and his brothers and his sister under the will. Upon the question of assent, we think there is no doubt, either in point of fact or law, that there was one. It is not necessary that it should be expressly given or directly proved, for it may be implied from the acts of the parties, or the declarations of the executor, though not amounting simply to an assent. But the acts or declarations, in order to have that effect, must be such as are unequivocal, and satisfy the mind that the executor meant to acknowledge the right of the legatee to the thing, and, of course, to determine his own title or control over it in opposition to the legatee. When the executor delivers the legacy to the donee, as his, the act is unequivocal. So a long enjoyment of the legatee with the knowledge of the executor is the highest evidence of such delivery, and of the purpose of it. Here the enjoyment was in
(159) the legatee for life, for about seven years before the sale at which the plaintiff purchased. It is true, the residence of the executor with his mother might make that circumstance, in itself, somewhat ambiguous, if there appeared to be any reason upon which it could be supposed the executor ought or would have wished to hold the property as executor. But there was nothing of that sort in the case. For the interference of the son with the negroes, either in superintending their labor on the farm or occasionally hiring some of them, is rather to be referred to his wish to serve his mother, with whom he lived, and of all whose affairs he took the charge on account of her sex, age, and infirmity, than to his rights or duties as executor. It is so, because there were no known debts of the testator unpaid; the negroes, as negroes belonging to an estate usually are, were not regularly hired, and accounts kept by the executor of their hires as parts of the estate; but most of them were worked on the mother's plantation, with which, as executor, the son had nothing to do, and from the profits of their labor on the mother's land, as well as the small hires that were received, the mother and her family were supported. It is true, the answer of Edmund Rhodes denies positively that he had either announced or given an assent to the legacy to his mother or himself. The Court could not, indeed, look at that as evidence between the other par-

ties; but each party read it, and commented on its bearing on this point, and therefore the Court is to treat it as they did. We think, however, notwithstanding the positive denial of the assent, in terms, that the answer itself shows very strongly that it had been given; for the denial may be only of what that defendant deemed an assent, which is matter of law to a considerable extent, and about which he might be mistaken; while the facts that under his own management the negroes had been employed on his mother's farm, or hired out for her benefit for seven years after the debts of the testator had been or were (160) supposed to have been paid (which are found in the answer), are of a character that precluded all danger of mistake on his part, and tend clearly to establish his understanding and admission that the negroes were his mother's for life, and then in her enjoyment as such, and that is in law an assent. But if it were allowable to doubt on that state of the case, the acts of the executor in listing the negroes for taxes make the matter plain. He listed them in that character but one year; and afterwards when he gave in his own list he gave in that of his mother, and every year included these negroes as hers and in her name. It may be true that she was liable for the taxes of the negroes, as the possessor of them, although they might not be her property.

But the defendant by using that argument gives up the point, for the question is whether the possession was in her as legatee or in the son as executor. He denies that he assented to the legacy or parted from the possession, and says that he held some, and hired out the others as executor. Now, there is no pretense that his mother hired any of the negroes from him. Therefore, if she was liable, as possessor, for the taxes, she must have got the possession in some other way, and that could only have been as legatee. Such acts of an executor are not like a congratulation of the legatee upon his legacy upon opening the will. They could proceed through such a course of years only from a settled purpose in the executor to recognize the negroes as the property of the legatee, when he thus subjected her to the charge of the taxes on them from year to year. But the inference from the circumstances already mentioned is rendered irresistible when to them is added the conduct of the mother and son, and also of the defendant William L. Rhodes, at and after the first sale of the negroes by the sheriff.

An undivided half of them in remainder after the life estate of the mother was offered and sold *as the interest* of Edmund Rhodes *de bonis propriis;* and after the sale the negroes went back into the service of Mrs. Rhodes, *as tenant for life,* and under the man- (161) agement of Edmund for the benefit of his mother, as before; and for the next year he again gave them in for taxes as hers. If all those persons thus acquiesced as to the nature of their several interests,

it comes very much to the same thing as if Edmund Rhodes had purchased from his mother her life estate *eo nomine,* or in like manner sold his remainder. *Lamphet's case,* 10 Rep., 47, 52. The defendants state that Edmund Rhodes did object to the sale. But the Court is not at liberty to act on that statement as true. In the first place, why should he? He says his reason was that the estate was in debt to him. But there is no evidence of that, but every reason to think otherwise. Besides, it is difficult to believe that any objection could have been made known, since even William L. Rhodes did not hear it; for he answers upon that point, not on his knowledge, but upon subsequent information. One witness is under the impression that he did hear Edmund Rhodes make an objection of some kind to the sale, but he is unable to state his words or even the nature of the objection. But if such a thing had occurred, it must be supposed that William L. Rhodes and many others, out of such a crowd as usually attends a sale of so many negroes, would have heard it. So far from it, two witnesses, and those most likely to be cognizant of all that passed, the officer who sold and the plaintiff's agent, swear that nothing like it was said in their hearing; but, on the contrary, the latter states that Edmund wished the remainder in the negroes sold as his, under the execution of his nephews and niece, and expressly requested the witness Latham not to bid, in order that William L. Rhodes might buy them in. If this, *per se,* were not an assent by implication, it at least conclusively removes any ambiguity that might possibly rest on the other circumstances. The
(162) Court must therefore declare that the defendant Edmund Rhodes, as executor of the testator, Arthur, did assent to the legacy of the negroes given in the will to Amelia Rhodes for her life, and after her death given, the one half to himself and the other to the children of William Rhodes, deceased; and that when the negroes were seized under the executions against the property of Edmund Rhodes, in favor of the plaintiff and of William L. Rhodes and others, and at the sale thereof by the sheriff to the plaintiff on 22 July, as mentioned in the pleadings, Mrs. Amelia Rhodes held them as legatee and tenant for life, under such bequest and assent, and that the remainder in one undivided half of them was then vested in and claimed by the defendant Edmund Rhodes as legatee, and not as the executor of his father's will.

Therefore, the plaintiff is entitled to half of the slaves and of their increase, and also of the profits of them since the death of Mrs. Rhodes. The Court, of course, does not undertake to determine in this cause between the defendants, as to the right to the other half of the negroes—with which the plaintiff has no concern. There must, therefore, be the

usual decree for the production of the slaves and their division as here directed, and for an account of the profits and expenses of the negroes since Mrs. Rhodes died.

The defendant William L. Rhodes must pay the costs of the plaintiff up to the present time.

PER CURIAM. Decree accordingly.

(163)

WILLIAM G. GOODSON v. ISAAC WHITFIELD ET AL.

1. If a woman on the eve of marriage, and without the knowledge or consent of her intended husband, convey her property to her children, it is a fraud on his marital rights, and the deed of conveyance will be set aside.

2. A deed takes effect from its delivery, and not from its date; the former is of its essence, the latter is not.

CAUSE removed from the Court of Equity of WAYNE, at Fall Term, 1847, by consent of parties.

The case is fully stated in the opinion delivered in this Court.

J. H. Bryan and Mordecai for plaintiff.
Husted and W. B. Wright for defendants.

NASH, J. The plaintiff's bill must be dismissed. He alleges that in 1828 he intermarried with Nancy Whitfield, the mother of the defendants, who owned a considerable portion of personal property, among which were the negroes in controversy, and that on the day of the marriage and before the ceremony took place, without his knowledge, privity, or consent, she conveyed all her personal property to her three children, Hester, Isaac, and John Whitfield; that the deed was not registered until near nine years thereafter, and that he continued in the undisturbed possession of the slaves up to the time of the death of his wife in 1836, when he was dispossessed of them by the guardian of the children. The evidence fully sustains the allegations of the bill as to the time and manner of making the deed by Mrs. Whitfield. There can therefore be no doubt it was a fraud upon the marital rights of the plaintiff, and in equity is void as to him.

But it appears that Nancy Whitfield was the widow of John (164) Whitfield, and had by him the three defendants, Hester and Isaac and John Whitfield. John Whitfield by his last will and testament bequeathed to his wife three negroes, Matilda, Alley, and Esther, for and during her natural life, and then over to the defendants. It will be remembered that we are not expressing any opinion as to John

Whitfield's will, further than is necessary to the decision of this case. The defendants by their answers allege that Matilda and Alley originally belonged to their grandfather, Isaac Kornegay, and are the stock from which all the negroes have sprung, who are now in controversy in this case; that their grandfather, by deed bearing date 24 September, 1824, gave the negroes Matilda and Alley to their mother, Nancy Whitfield, and that she was at that time a *feme covert,* their father, John Whitfield, being still alive.

To avoid the force of this deed, it is alleged by the plaintiff that, although it bears date during the lifetime of John Whitfield, yet in fact it was not delivered until after his death. This is the important question in the case. A deed takes effect from its delivery, and not from its date; the former is of its assence, the latter is not. If, then, the deed was in truth delivered after the death of John Whitfield, though dated before, the negroes were the property of Nancy Whitfield, and never were the property of her former husband. Her deed of conveyance to the defendants, her children, being made in fraud of the marital rights of the plaintiff, was void as to him. If, however, it was delivered during her coverture, they became the property of her husband, and subject, of course, to his disposition. The deed from Isaac Kornegay to his daughter, Nancy Whitfield, is witnessed by two witnesses, L. W. Kornegay and Polly Kornegay; is proved at October Term, 1825, of Duplin County court, and registered 29 December, 1835. John Whitfield's will is witnessed by L. W. Kornegay, and is proved and registered at the April Term, 1825, of Duplin County
(165) court. He died in April, 1825. To sustain the deed of gift from Isaac Kornegay to his daughter, Mrs. Whitfield, as being delivered in the lifetime of John Whitfield, the defendants produced the deposition of L. W. Kornegay, who swears that he was a subscribing witness, the deed being before him, and that it was executed and delivered on the day it bore date, to John Whitfield, in whose possession it remained up to the time of his death, and that after his death his widow, Nancy Whitfield, delivered it to him to be proved and registered. It is in proof that the other witness to the deed, Polly Kornegay, is dead. Emanuel Kornegay testifies that he saw the deed from Isaac Kornegay to Nancy Whitfield in the possession of John Whitfield, her husband, during his life. William Whitfield testifies that twenty or twenty-one years before the taking his deposition he heard Isaac Kornegay say he had given John Whitfield a deed for Matilda. To rebut this testimony, the plaintiff relies, in the first place, upon the form of the deed, and the fact that it was not registered until after the death of John Whitfield, both of them circumstances worthy of consideration in connection with the question we are considering, but neither of them

possessed of much controlling weight. A father, in giving property to a daughter who is *covert,* is very apt to make use of the form here pursued, and it is in evidence by the testimony of J. W. Kornegay that John Whitfield was a man of feeble health. The plaintiff, however, does not rest his case as to this question upon these facts, but has examined a witness to sustain his allegation. Nancy Price testifies that some time after the death of John Whitfield she was sent for by Mrs. Nancy Whitfield—she did not know for what. When she got to her house, she found there Isaac Kornegay, the father of Mrs. Whitfield, who read a paper in her presence, in which he conveyed to his daughter Nancy a negro woman named Matilda *and her children,* and a negro girl named Olive, to her and her heirs forever, and that she saw him deliver it.

Much testimony is taken by the defendants to discredit this wit- (166) ness, and much to sustain her. We do not think it necessary to scrutinize it with a view to forming an opinion on the subject. We do not think she in any degree contradicts the witnesses who speak to the delivery of the deed to John Whitfield and his possession. In the first place, she does not say that the deed she heard Isaac Kornegay read was the one spoken of by the other witnesses, and relied on by the defendants; and she has, in some degree, shown that it was not the same, for she swears that by the deed she heard read not only was Matilda given, but *her children.* Now, in the deed before us there is no mention of Matilda's children. In the second place, Mrs. Whitfield was the executrix of John Whitfield; at the time of his death the deed from Isaac Kornegay had not been registered, if the statement made by Mrs. Price is true, and that conveyance then read was the one now before us. It only proves that Mr. Kornegay and his daughter were willing to secure the negroes to the latter, and free them from any claim on the part of the creditors of John Whitfield. The testimony of Mrs. Price, then, does not prove that the conveyance under which the defendants claim the negroes in dispute never was delivered to John Whitfield. We are satisfied from all the testimony that the conveyance was so delivered, and that the title to the negroes vested in him, and that he had full power to dispose of them by his will. It is conceded that under the will of John Whitfield, his widow, Nancy, had at most but a life estate in the negroes, and consequently the possession of the plaintiff up to the time of her death was a rightful possession, and could not operate against the defendants.

PER CURIAM. Bill dismissed with costs.

Cited: Ferebee v. Pritchard, 112 N. C., 86.

(167)

SARAH CARR v. JOHN HOLLIDAY.

Where a bill is filed to set aside a purchase made by a lunatic, and upon the report of the clerk and master it appears that the price given was not grossly extravagant, and, moreover, that the lunatic has it not in his power to make compensation to the vendor, if the contract should be set aside, the bill will be dismissed.

CASE heard upon the report of the clerk and master.

J. H. Bryan and Mordecai for plaintiff.
Badger and Husted for defendant.

NASH, J. The bill seeks to rescind certain contracts entered into between the intestate, Robert Carr, and the defendant. The case was under the consideration of this Court at June Term, 1836. *Carr v. Holliday,* 21 N. C., 344. The Court then declared Robert Carr to be a lunatic, and to enable it to decide whether the contracts should be rescinded, they directed a reference to the master, to inquire whether the estate of the lunatic had received benefit by the sales and transactions mentioned in the pleadings, and to what extent. The master was directed to report upon each of the contracts specially, what was the true value of each of the things sold by the defendant and received by the lunatic, and whether the plaintiff can make restoration to the defendant of all or any of the articles so purchased. The master has made his report, from which it appears that the defendant sold to Robert Carr three articles, a sulky at $85, the true value of which was $65; a watch at $65, and a tract of land at the price $666.66; neither beyond its value. These sales amounted in the aggregate to $816.66—the real value, $796.56—making a difference of $20. The master
(168) further finds that in part pay of the land, Robert Carr had transferred to the defendant a negro boy at the price of $150, and that he was worth at the time $180, a difference of $30. These two differences amount to $50, a sum not greater than might and probably would have occurred if the contracts had been made by men who were both capable of contracting. The master further reports that the plaintiff cannot make restoration to the defendant of any of the property so purchased by him, and that the contracts were made by the defendant in good faith, without any knowledge of the incapacity of Robert Carr, and that no undue advantage was taken of him. In such a case, as we before decided, equity will not interfere to set aside the contracts. Justice cannot be done the defendant by placing him in the state he was in before the purchase. The court in this case has said: "The Court will not deprive him (the defendant) of the ad-

vantages he has obtained without restoring to him whatever benefit the estate of the lunatic has received in consequence of the contracts." This, we are informed, cannot be done.

The bill must be

PER CURIAM. Dismissed with costs.

Cited: Riggan v. Green, 80 N. C., 239; *Odom v. Riddick,* 104 N. C., 522.

GENERAL RULES

ADOPTED AT JUNE TERM, 1847.

In consequence of the changes made necessary by the act of the General Assembly passed at the late session, whereby a term of the Supreme Court is required to be held at Morganton, and the period of holding one of the terms at Raleigh is altered, the judges of the Supreme Court find it proper to make and publish the following rules:

I. All applicants for admission to the Bar must present themselves for examination within the first two days of the respective terms.

II. All causes which shall be docketed before the eighth day of a term shall stand for trial during that term. All appeals which shall be docketed afterwards shall be tried or continued at the option of the appellee. All suits in equity transferred to this Court for hearing, and not docketed before the eighth day of a term, shall be continued at the option of either party.

III. During the two first days of the term the Court will hear motions, and try causes by consent of the counsel on both sides. On the third day of the term the Court will proceed regularly with the dockets: first, with that of the State; secondly, the equity; and, thirdly, the law causes.

IV. For the Court held at Raleigh, the clerk will docket the causes in the following order, namely: Those from the Fifth Circuit shall be placed first, then those from the Fourth Circuit, and so on to the First Circuit.

V. For the Court held at Morganton, the clerk will docket the causes in the following order, namely: Those from the Seventh Circuit shall be placed first, and then those from the Sixth Circuit, and then those from other counties.

VI. When causes are called, they must be tried or continued, unless for special cause the Court should extend the time for the argument, and except that equity causes under a reference may be kept open a reasonable time for the coming in of the reports and filing and arguing exceptions.

E. B. FREEMAN, *Clerk.*

MEMORANDUM

The Honorable JOSEPH JOHN DANIEL, one of the judges of this Court, died at Raleigh on 10 February, 1848, aged about 65 years.

He was a native of Halifax County, in this State. He graduated at the University of North Carolina, and studied law under the late General Davie. Soon after coming to the bar, his talents and attainments gained him a high eminence, and in 1816 he was appointed a judge of the Superior Courts of Law and Equity, the judges of which courts at that time exercised the functions of a Supreme Court. In 1832 he was appointed a judge of the Supreme Court, under its new organization.

The following proceeding of the Bench and Bar of the Supreme Court, upon the occasion of his death, are extracted from the minutes of the Court, where they were ordered to be recorded:

SUPREME COURT,
February 12, 1848.

Court met pursuant to adjournment—

Present: the Honorable THOMAS RUFFIN, C. J.,
Honorable FREDERICK NASH, J.

On the opening of the Court, the Hon. James Iredell presented the following proceedings of the Bar, and requested their Honors to order them to be entered on the minutes:

At a meeting of the Bar of the Supreme Court, held in the courtroom on Friday, 11 February, 1848, in consequence of the death of Judge JOSEPH J. DANIEL, on motion, Hon. John H. Bryan was appointed chairman, and Perrin Busbee secretary.

Hon. James Iredell moved that a committee of six be appointed to report resolutions expressive of the feelings of the meeting.

The chairman thereupon appointed the following gentlemen, viz., James Iredell, Charles Manly, H. W. Husted, George W. Mordecai, George W. Haywood, and Henry W. Miller.

Mr. Iredell subsequently reported, in behalf of the committee, the following preamble and resolutions, which were *unanimously* adopted:

The members of the Bar of the Supreme Court, now in attendance, have learned with deep grief the great loss which this Court and country have sustained in the death of the Honorable JOSEPH J. DANIEL.

A judge so learned in the law, so patient in his investigations, so pure in his purposes, so gentle in temper, and so generous in his acts, could not be

called from his labors without causing the most sincere sorrow in the hearts of those who have so long honored and loved him.

Such sorrow we now feel and but feebly express in the following

RESOLUTIONS.

1. That in the death of the late Judge DANIEL the Supreme Court of North Carolina has lost a learned and able jurist and the State an eminently good and useful citizen.

2. That in token of our respect for his memory, we will wear the usual badge of mourning for thirty days.

3. That these proceedings be presented to the Court, at their first meeting, with a request that they be entered on the minutes.

4. That the Chief Justice be requested to communicate a copy of the foregoing resolutions to the family of the deceased, with the assurance of our sympathy with them under their sad bereavement.

JOHN H. BRYAN, *Chairman.*

PERRIN BUSBEE, *Secretary.*

To which Chief Justice Ruffin, on behalf of the Court, replied as follows:

The surviving members of the Court receive with deep sensibility the proceedings of the Bar in commemoration of our late and lamented brother. They but express our own emotions upon that melancholy event, and are no more than a just tribute to the unsullied purity of his personal character, his learning, and long and useful official labors.

He served his country as judge through the period of very nearly thirty-two years; and he served acceptably, ably, and faithfully.

He had a love of learning, an inquiring mind, and a memory uncommonly tenacious; and he acquired and retained a stock of varied and extensive knowledge, and, especially, because well versed in the history and principles of the law. He was without arrogance or ostentation, even of his learning; had the most unaffected and charming simplicity and mildness of manner, and no other purpose in office than to "execute justice and maintain truth"; and, therefore, he was patient in hearing argument, laborious and calm in investigation, candid and instructive in consultation, and impartial and firm in decision.

With these properties and his long experience, it is no wonder that he should have proved so eminent on the Bench as to endear himself to his associates, gain the high respect and regard of the profession, and the confidence of the country. He did so to such a degree that few men, if any, were in life more honored among us, or in death, we think, will be more deplored.

Fully sharing in these sentiments and feelings, the Court readily joins in the expression of them, and yields to the wish of the Bar that these proceedings should be entered on the minutes, and also communicated to the bereaved children of our late venerated friend and brother.

Mr. Mordecai, on behalf of the Bar, requested that the response of the Chief Justice to their proceedings might also be spread upon the minutes of the Court, and it is ordered accordingly.

EDMUND B. FREEMAN, *Clerk.*

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

JUNE TERM, 1848.

JAMES EVANS ET AL. v. WILLIAM LEA.

A bequest to A. and "at her death to be equally divided among the heirs of her body" is a good bequest in remainder to A.'s children.

CAUSE removed from the Court of Equity of CASWELL, at Spring Term, 1848.

John Lea died in 1803, having made his will, and therein bequeathed as follows: "It is my will that my daughter Sally shall have the negro girl Rachel during her life, and at her death to be equally divided between the heirs of her body, she and her increase." (170) Sally, the daughter, married Thomas Lea, and they had three children, Nancy, Elizabeth and William; of whom Nancy married a man named Wright, and after his death she married James Evans, and they are two of the plaintiffs, and Elizabeth married C. W. Lunsford, and they are the other two plaintiffs, and William is the defendant in this suit. Mrs. Sally Lea died in July, 1840, leaving her husband and their three children surviving her, and her two daughters married at the time to their present husbands; and Thomas Lea died in November, 1844, having made his will and appointed his son, the defendant, his executor. On 14 August, 1838, Thomas Lea gave and conveyed to the defendant one of the children of the woman Rachel. In November, 1840, being about to break up housekeeping, the father divided the said Rachel and eight of her issue into three parcels, of which he then intended one lot for each of his three children, and put them in possession; and on 14 September, 1842, he made a deed of gift to the plaintiff James Evans, for Rachel and one of her children, Rebecca, being two of the lot laid off to his wife; and on 19 October, 1844, he made a deed of gift

to the defendant for the slaves allotted to him. He made no conveyance in his lifetime to the plaintiff Lunsford, but by his will, as the answer states, he bequeathed them to the defendant in trust for the plaintiff Elizabeth, and gave to W. Wright and M. Wright (two children of Mrs. Evans by a former marriage) the third slave which had been allotted to Mrs. Evans. In the lifetime of Thomas Lea, the defendant, as his father's agent, sold a child of the woman Rachel for $675, and after his death the defendant, as his executor, sold two others at the price of $1,016, of one of which the plaintiff James Evans became the purchaser.

That plaintiff alleges that at the time he accepted the possession (171) of the negroes, and a deed of gift from his father-in-law, and also when he purchased at the sale by the executor, he was ignorant of his wife's title under his grandfather's will, and believed that the negroes belonged to her father as his absolute property, and that he had a right to dispose of them at his pleasure; and that he did not know otherwise until he consulted counsel shortly before the filing of this bill, which was on 7 January, 1847. The plaintiffs offer to confirm the sales which had been made by Thomas Lea, or by the defendant, and to take, instead of the negroes, the money recived for them, with interest thereon from the death of Mrs. Lea, the mother, and from the time the sums were received by the defendant for those sold by him. The bill states that there are now sixteen of the slaves, besides those sold, of which the defendant is in possession of eight; and that the defendant had brought an action of detinue against the plaintiff C. W. Lunsford for the negroes in his possession, claiming to recover them under the bequest in his father's will, to him as trustee for the plaintiff Elizabeth. The bill prays that all the negroes may be declared to belong to the plaintiffs Nancy Evans and Elizabeth Lunsford and the defendant William, as the children of Sally Lea, deceased, and that they and the values of those which were sold, with the interest thereon, may be equally divided between them; and that an account may be taken of the hires and profits received by any of said persons since the death of the mother, the tenant for life, so that each of the parties may have a just share of the slaves and their produce and profits.

The answer insists that Thomas Lea claimed the negro Rachel and her increase as his own, under the bequest in John Lea's will, and as such disposed of them, and that the plaintiffs well knew of that claim, and acknowledged it; and that accordingly the plaintiff James Evans took a deed of gift from him for two of the slaves. And it further states that from the death of his wife, Sally, in July, 1840, to (172) his own death in November, 1844, the said Thomas claimed such of the slaves as he held in possession, as his own, and possessed them adversely to all the world; and as to those by him conveyed to

the defendant, that the said Thomas and the defendant claimed and held them likewise adversely to all the world; and that such adverse possessions were for a longer time than three years; and thereupon the answer insists on the lapse of time and the statute of limitations.

Morehead for plaintiffs.
Kerr for defendant.

RUFFIN, C. J. The limitation under which the plaintiffs claim has been held to be good in a suit brought on a similar clause of the same will. *Miles v. Allen,* 28 N. C., 88; *Swain v. Rascoe,* 25 N. C., 200. The plaintiffs are therefore undoubtedly entitled to recover. In the first place, the defendant has not offered evidence of the adverse character of the possession of his father and himself. In the next place, the possession of the father was rightful up to the death of the mother in 1840, and at that time both of the daughters were married women, and have so continued ever since, so that the statute of limitations does not run against them. There is nothing in the idea that the plaintiffs, Evans and wife, are estopped from claiming her share of the negroes because he took a deed of gift of two of them to himself. That could, even at law, only operate as an estoppel as to those two, so as to prevent the donee from denying the donor's right to them. But it could not affect the right to the others, as the plaintiffs did not join in the conveyance of them, nor in any way contract to relinquish their title to them. No doubt, the parties, under a mistake of the title, acted as if the negroes belonged to the father. But nothing has been done by which the daughters could be precluded from claiming their slaves under the original gift by their grandfather; and, of course, they and their husbands may (173) sue in their right.

PER CURIAM. Decree accordingly.

Cited: Chambers v. Payne, 59 N. C., 278.

JAMES AMIS v. ISAAC SATTERFIELD.

Proof of partial imbecility, combined with undue influence, will, in equity, invalidate a deed as well as a will.

CAUSE removed from the Court of Equity of PERSON, at Fall Term, 1847.

The bill was filed in the court of equity for Person County, and charged in 1822 defendant intermarried with Frances Raven, the widow of one John Raven, having previously entered into articles of agreement, bearing date 18 December, 1822, which, after reciting the intended marriage of the parties, and that the property of each was encumbered with debt, and stipulating that the property of neither should be liable to the debts of the other, but that the property of each should (174) be liable for his or her own debts only, declared as follows: "It is fully and completely understood that Frances Raven, widow as aforesaid, is to have full power to give and sell or convey her property at any and all times, and should it so happen that she should be the longest liver, she shall have power and authority to take or retain the possession of her own property, and set up no claim for any part of the other contracting party's property." The bill then charged the defendant had never conveyed, as he ought to have done, the property which belonged to the said Frances at the time of the marriage, to her sole and separate use, though he had always admitted it to be her separate property, and had induced the plaintiff and all other persons to believe so, and had permitted her to sell, as her own, some of the slaves, and that in particular she had sold to the plaintiff two negro slaves at the price of $800, and executed therefor a bill of sale signed by herself and the defendant; and that the plaintiff was induced to make said purchase in consequence of a letter addressed to his father by the defendant, in the joint names of himself and his wife. It then charged that at the time of the marriage the parties could not have contemplated that any issue should be born to them, because the said Frances had then passed the age of child-bearing; and that it was the evident intention of the said Frances to secure her property so that she could dispose of it to her own relations; that, in fact, there was no issue of the marriage, and the next of kin of the said Frances were her brothers and sisters and their children. The bill then stated that on 7 July, 1844, the said Frances, by virtue of the power secured or intended to be secured to her by the marriage articles aforesaid, did execute and deliver to the plaintiff a deed attested by two witnesses, by which, in consideration as well of love and affection for him, who was her nephew, as of divers valuable considerations expressed in the said deed, she conveyed to him (175) eleven slaves, towit, Jenny, James, Mary, Ann, Scott, Aleck, John, Jerome, Eliza, Jane, and Warren, which were the same, and some of the increase of the same slaves, which she owned at the time of her marriage; that one of the considerations upon which the conveyance was made to the plaintiff was that he should pay to the defendant the sum of $800, and another that he should pay to one Lewis Amis, a nephew of the said Frances, the sum of $500; that the said Frances

departed this life some time in the spring of 1846, and that the plaintiff had taken the said slaves into his possession in consequence of a report, which he had heard and believed, that the defendant was about to run them off and sell them. The bill then stated that the defendant had instituted an action at law against the plaintiff to recover back the said slaves, and that the plaintiff had been advised that though he had a good and indisputable title in equity, yet the legal title was in the defendant, which would enable him to recover in the action at law. The bill alleged that the plaintiff had always been ready and willing, since the death of the said Frances, to pay to the said Lewis Amis the sum of $500, and to the defendant the sum of $800, as stipulated in the deed aforesaid, and had offered to pay the defendant the said sum, but he had refused to receive it. The prayer was for an injunction to restrain the defendant from proceeding in his suit at law, and from setting up the claim or title to the said slaves, and that he might be compelled to produce the original marriage articles, and to execute all necessary conveyances to vest the legal title of the said slaves in the plaintiff.

The defendant filed his answer, and therein admitted his marriage with Frances Raven, and the execution of the marriage articles stated in the bill and at the time therein mentioned, but denied that it was intended by the parties to the said articles to give to the said Frances any separate control over the property which she owned before the marriage, or any power to dispose of it during the coverture (176) without the consent of her husband, and that such was not the proper intent and meaning of the said articles; and the answer denied expressly that he ever gave his consent that the said Frances should convey the said slaves to the plaintiff. On the contrary, it averred that the said deed of conveyance was obtained by fraud; that the said Frances was at the time, and had been for several years before, incapable of making a valid contract; for that she was then upwards of 80 years of age, was very infirm, had lost her memory, and was scarcely able to discharge the most ordinary domestic duties; that about the time when the conveyance was obtained by the plaintiff, he was in the habit of visiting the defendant's house and holding private interviews with the slaves, and through these means had obtained an undue influence over their mistress; that he also made small presents of money and other articles to the said Frances, and by them and other means finally prevailed with her to leave the house secretly and go into the woods, where the deed was executed in secret, no persons being present but the parties and the two subscribing witnesses; and that the defendant was entirely ignorant of what was going on until the plaintiff had accomplished his purpose of obtaining the deed. With respect to the two

slaves sold to the plaintiff, the answer stated that the sale was made on 1 July, 1844, by the defendant and his wife jointly and for their joint benefit.

The marriage articles and the deeds referred to in the pleadings were filed as exhibits. Upon the coming in of the answer, the defendant submitted a motion to dissolve the injunction which had been previously granted, but the motion was overruled and the injunction continued until the hearing. The plaintiff replied generally to the answers, and the parties thereupon proceeded to take their proofs, which being completed, the cause was set down for hearing and transmitted to this
(177) Court.

E. G. Reade and T. B. Venable for plaintiff.
Norwood and Kerr for defendant.

BATTLE, J. Upon the construction of the marriage articles, we are clearly of opinion that the defendant's wife had the power to dispose of her slaves during her coverture without the consent of her husband. The intention of the parties is to be collected from the language of the instrument, and that is too plain to be misunderstood. In it there is an express provision that she "is to have full power to give, sell, or convey her property at any or all times," which must mean during the marriage as well as at any other time, both because there is nothing in the instrument to restrict the generality of these words to any particular time, and because it is immediately added that if she be the longest liver, "she shall have power and authority to take or retain the possession of her own property," thereby showing that the preceding clause was intended to give her the power to dispose of it as she might think proper, during coverture, free from the control of her husband. But notwithstanding this, we think that the deed of conveyance for the slaves, obtained by the plaintiff, cannot be sustained. The proofs taken in the cause clearly satisfy us of these prominent facts: that Frances Satterfield, the wife of the defendant, was at the time when she executed the deed, about 80 years of age, of infirm health and impaired mind; that she was much under the influence of her slaves and easy to be imposed upon; that the plaintiff was her great nephew, and that though he had occasionally visited her, there was no intimacy between them until the conveyance for the slaves was executed; that after that time his visits became more frequent and his attentions more marked; that he
(178) gave her small presents of money and other articles; that the deed was executed secretly, in the woods, at a distance of more than 200 yards from the house, no person being present except the parties and the subscribing witnesses, and that the latter were brought to

the place by the plaintiff from his own neighborhood, about 20 miles distant from the house of the defendant; that the execution of the deed was studiously concealed from the defendant, and that he knew nothing of it until several months afterwards, and that the grantor advised with no other person than the plaintiff in relation to it. These facts alone, independent of other circumstances, and admitting that the grantor had sufficient mental capacity to make a binding contract, require that the conveyance obtained from her should, in order to be supported, be reasonable in itself, and should appear to have been obtained by the plaintiff without the use of any unfair means, and without the exercise of any undue influence. Was the conveyance a reasonable one? It was made to a great nephew, one only among several other relations of equal and nearer degree, who does not appear to have done anything to entitle himself to her particular regard previous to its execution. It deprived her husband after her death of all the slaves which she owned, the most of whom he had been at the trouble and expense of raising. He seems to have lived with her upon terms of affection, to have been kind and indulgent to her, and always disposed to gratify her wishes and caprices. There is not a particle of evidence to show that she had ever intimated an intention of disposing of her property contrary to his wishes. It does not appear that she was aware of her legal right to execute a deed without joining him, until it was mentioned by the plaintiff himself, when he bought the two slaves on 1 July, only a few days before the deed in question was executed. From these considerations we are bound to say that the deed, if not unreasonable, is, at least, somewhat extraordi- (179) nary. This alone, however, is not sufficient to invalidate it. The law has no inflexible standard for reasonableness in the disposition of property, and must yield something to caprice. Let us see, then, whether the plaintiff practiced any unfair means in obtaining the conveyance from his aunt. We have no direct evidence of any practices before the execution of the instrument. But we are satisfied, from what then took place, that she had been previously and secretly prepared for that transaction. It appears that he had ascertained that she had the right to dispose of her slaves without the consent of her husband; for he said, when he bought the two slaves on 1 July, that he did not care whether the old man signed the bill of sale or not; that her signature was sufficient. A few days afterwards he prepared the instrument in question at home, and called upon two of his neghbors to accompany him for the purpose of attesting the execution, telling them that he did so because his aunt and himself did not wish it made public. He then went in company with his witnesses to a retired place in the woods near the defendant's house, where he left them and went alone to the house, from which he sent his

aunt to the witnesses, he following on at some distance behind her. Before his arrival, the witnesses read the instrument over to her, when she objected to it, because it purported to convey an absolute present interest in the slaves, without reserving her a life estate in them, contrary to her agreement with the plaintiff. When he came up, the objection was mentioned to him, and he wished her to execute it upon a pledge of his word that she should retain the slaves during her life. She still objected; and he then gave her a written authority to keep the slaves until her death, and she thereupon executed the conveyance. All this was studiously concealed from her husband, and he did not hear of it until several months afterwards, and, so far as we can discover, the grantor consulted no person but the plaintiff in relation to the prepara-

(180) tion or execution of the instrument.

We cannot consider an instrument thus obtained as fairly obtained. But without deciding the effect which this may have upon its validity, let us see whether it was procured by the plaintiff by the direct or indirect exercise of any undue influence over his aunt. The evidence on this part of the case consists principally of the reflected lights thrown upon the transaction by subsequent occurrences. It is very clearly proved that the slaves had great influence over their mistress, and it appears from the readiness with which they left the defendant's house, after the death of his wife, that the plaintiff had acquired great influence over them. He had several times had private interviews with them before the death of their mistress, and his conduct on one occasion was so suspicious that it incurred the censure of the defendant. The old woman, too, some time after the conveyance, said "that if she had known beforehand what she then knew, she never would have made the conveyance," adding, "Oh, if I could see James (meaning the plaintiff), I would tell him what I think of him; he has disappointed me." These things satisfy us that the plaintiff did exercise an undue influence—most probably, indirectly through the slaves—in procuring the conveyance from his aunt.

In considering the questions whether the conveyance was a reasonable one and whether it was fairly obtained, we have treated the grantor as having sufficient capacity to make a valid contract. The testimony satisfies us that she had. It is true that many witnesses whose opportunities for observation were good have expressed a contrary opinion. But the facts which they state do not justify the inferences which they deduce from them; and the testimony of the two subscribing witnesses clearly shows that she well understood the provisions of the instrument which she was about to execute, so far at least as her own interests were concerned. But while her reason, or instinct—call it what you will—remained sufficiently strong, amid the general decay of her men-

tal faculties, to enable her to protect her own rights from open (181) invasion, she certainly was not capable of fairly considering and duly estimating the just claims of others. Age and infirmity had done their work upon her mind, as well as upon her body, and it was an easy task for any person, so disposed, to procure from her any conveyance of her property which he might desire, provided only that he took care not to interfere with her own immediate present interests, or those of her slaves, which she had come to consider as identical with her own. The instrument which she executed was absolute in its terms, and conveyed an immediate title to the slaves mentioned in it. But as the plaintiff at the same time executed another instrument by which he assured the possession of the slaves to her during her lifetime, its operation was pretty much the same as that of a will; and it may be treated as a will in every inquiry into the capacity of the grantor, and the means by which it was obtained. As it is irrevocable in its nature, it certainly cannot claim to be considered upon any better footing than a will. How, then, would a will be regarded, obtained under the same circumstances? We think it cannot be doubted a probate court would pronounce against it. The principal cases which have come before the courts upon this subject are referred to in Stock on Non Compotes, 49. He says that "the proof of partial imbecility, combined with undue influence, has been held in very numerous cases to invalidate a will." Even some peculiar position of the party benefited, as the connection of a favorite domestic companion with a testatrix, old and weak, has been held a principal ground for overturning a will. *Bridges v. King,* 1 Hagg., 256. It is true that *Sir John Nichols* in one case, *Williams v. Gaude,* 1 Hagg., 581, declared "that the influence to vitiate an act must amount to force or coercion, destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be very strong ground of support of a testamentary act." "But," (182) says Stock, "so narrow a definition denotes that the learned judge understood the phrase 'undue influence' in a less extended sense than the cases in general give it." Upon the whole, it seems that in coming to a conclusion in questions of this kind, "the extent of capacity, the nature of the influence, the character of the party influencing, his connection with the party influenced, the benefit he derives from the will, all form materials for consideration," Stock on Non Compotes, *ubi supra.* We have done in this case what the author from whom we quote states to be necessary. We have taken into our deliberate consideration all the materials which the pleadings and the proofs furnish us, and the conclusion to which we have come is that the deed of conveyance executed by the wife of the defendant to the plaintiff is too extraordinary

in itself, and was obtained under too many circumstances of secrecy and suspicion from a very aged, infirm, and weak-minded woman, to be upheld in this Court.

The bill must be

PER CURIAM. Dismissed with costs.

Cited: Oldham v. Oldham, 58 N. C., 92; *Garrow v. Brown,* 60 N. C., 597; *In re Fowler,* 159 N. C., 209.

(183)

H. ALLMAND v. MALACHI RUSSELL ET AL.

Where a debt, intended to be secured by a deed of trust, is not correctly described in the deed, though the creditor by identifying it may recover it out of the trust fund, while that remains; yet if the trustee has *bona fide* paid out the trust fund to discharge other debts, without any notice of the mistake by the creditor to the trustee, the creditor cannot make the trustee personally responsible.

CAUSE transmitted from the Court of Equity of PASQUOTANK, at Fall Term, 1847.

William T. Bryant, being more indebted than he was worth, on 15 February, 1840, made a deed to the defendant Russell for all his property and effects, upon trust to pay out of the proceeds certain debts named, in the order in which they are mentioned in the deed. The first is the debt of $2,000 to J. C. E., for which Matthew Cluff and Malachi Russell were sureties. Then followed four other debts to different persons, for which Matthew Cluff was surety. Then followed several other debts to others, particularly named; and then a general provision for payment proportionally of all other debts.

The bill was filed in April, 1842, and states that, on 23 April, 1839, Bryant gave to the plaintiff his promissory note for $259.68, payable six months after date, and that the same remained unpaid at the making of the deed of trust and was the debt mentioned and intended by Bryant to be secured in the deed. It states that it is true that Matthew Cluff was not a party to the note, or in any other way bound as surety or otherwise for its payment; but that, nevertheless, this was the debt

(184) and was sufficiently identified by its amount and the name and residence of the plaintiff, which were truly stated in the deed; and that it was described therein as a debt "to which the said Matthew Cluff is surety" by mistake. The bill states that the plaintiff,

in December, 1841, sued Bryant on the note and recovered judgment, but was not able to obtain satisfaction by execution, and it prays an account and satisfaction out of the trust fund.

The answer renders an account and states the amount of the fund to be $8,262.19, which is sufficient to pay the debts prior in order to that mentioned in the deed as being due to the plaintiff, and also to pay the plaintiff, if he be entitled to it under the deed and existing circumstances. But the answer states that in fact the defendant had disbursed the sum of $8,443.30 in discharge of the debts, making him already $181.11 out of pocket, though it admits that some of those thus paid were posterior in order to the debt of H. Allmand, which is mentioned in the deed. The defendant states that he thus applied the fund *bona fide* and under the belief that he was bound so to do, because upon inquiry he did not find that any such debt existed as that described in the deed, and because he knew that, in point of fact, the object of Bryant in mentioning in the deed a debt to the plaintiff was not to secure the plaintiff, but to indemnify Cluff, who was surety for it, as Bryant and Cluff then by mistake believed; and because the plaintiff acted on the construction of the deed that it was not a security for the debt now demanded, and prosecuted an action at law against Bryant therefor, and made no claim for it on the trustee before the whole fund had been disbursed as before mentioned.

Iredell for plaintiff.
No counsel for defendants.

RUFFIN, C. J. The cause comes to a hearing on bill and an- (185) swer, and upon the case thereby made the Court is of opinion with the defendant. The plaintiff might, probably, have entitled himself to satisfaction under the deed, as his demand seems to be sufficiently identified by its amount and the name and residence of the creditor. The addition of a further false description, to which nothing answers, would not, merely as a part of the description, hurt the prior true one. When it appears, then, that there was no debt from Bryant to the plaintiff answering the whole description in the deed, but that this debt and this only existed at the time, the natural construction is that this debt to the plaintiff, for the very sum mentioned in the deed, is that which was intended to be secured. The answer, indeed, states that the part of the description which fails was the material part of it, for that the moving cause for placing the debt in its position among the debts, as to the order of payment, was not to secure it to the plaintiff, which was considered as already done by the responsibility of Cluff, but to indemnify Cluff, the supposed surety. Hence the defendant insists that to con-

sider that an unessential part of the description and disregard it would really not effectuate, but defeat, the intention of the deed by reason of a pure mistake. We do not conceive it to be necessary to determine that point in this case; for, admitting that the plaintiff, on the reasoning first adverted to, might insist that the deed secures "the debt" to him, and sufficiently identifies it, the remark is obvious that the identity does not fully appear upon the fact of the deed by itself, but that it is necessary, in order to establish it, to resort to extrinsic evidence of the facts, that this debt existed when the deed was made, and that it was the only one that did. It may be taken that a trustee is bound to inquire for the debts made payable out of the fund. But it must be enough for him, in the first instance, to inquire for them according to the description given in the deed. If he finds none such, he may properly conclude, for anything that can be learned from the deed, that the debt mentioned
(186) has been paid by the debtor himself or had never existed, and was mentioned by mistake. Here, according to the tenor of the deed, the trustee was not at liberty to pay this debt, because there might be two debts to the plaintiff for the same amount, for one of which Cluff was, and for the other he was not, the surety, and the former only would be payable. If, however, there be another debt which, though not coming up to the whole description, is yet by legal construction of the deed, upon certain facts appearing *aliunde,* within the instrument, the creditor may doubtless insist upon the deed as a security for this last debt, as much as if it were correctly described in it in all particulars. If, therefore, the trust fund was still in hand, and supposing the indemnity of Cluff not to be the primary purpose of the deed, and so to form an essential part of the description, there would be no difficulty in holding that the plaintiff should have this debt paid out of it. But that is not now the state of the case, nor the object. It is to charge the trustee with the payment, and to entitle the plaintiff to do that, it is plain that while the trustee had enough of the trust fund to answer the demand, the creditor should have communicated to him the same facts on which the Court, by construction, holds the deed sufficient to cover the debt in question. Now, it does not appear that the plaintiff ever informed the defendant that the debt now sued for existed when the deed was made, and that it was the only one between the parties, or had any communication with him on the subject before the commencement of this suit. Nothing of the kind is charged in the bill, but, on the contrary, it is admitted that the plaintiff proceeded against the original debtor personally. The trustee, not finding the debt described to exist, and, as far as charged in the bill or admitted in the answer, having no knowledge of any other debt to the plaintiff, paid away all the proceeds of the trust property *bona fide.* We think it too late, after that, to make

known to him the fact on which he might once have safely paid (187) the plaintiff this demand, and on that ground to insist on payment now out of the trustee's own pocket. The trustee ought not to be prejudiced by mistakes of the other parties, of which it is not known he was aware.

PER CURIAM. Bill dismissed with costs.

PETER MAY v. MARY B. SMITH ET AL.

According to our practice, under an order for time until the next term "to answer or demur," the defendant may demur to the whole bill, without answering or pleading to any part.

APPEAL from an interlocutory order made in this cause at the Spring Term, 1848, of the Court of Equity of ANSON, directing a demurrer, which had been filed, to be taken off file, *Bailey, J.*, presiding.

At the term to which the subpœna was returnable the defendants appeared and obtained an order for time until the next term "to answer or demur." At the next term they put in a demurrer to the whole bill, supported by an answer denying combination; and, on the application of the plaintiff, the court ordered them to be taken off the file, but allowed the defendants an appeal, which was taken.

(188)

Winston for plaintiff.
No counsel for defendants.

RUFFIN, C. J. We think his Honor was mistaken upon this point of practice. In support of the decision a passage was cited from Story Eq. Pl., secs. 461-2-3, which we have looked into, and find to be almost literally extracted from Mitford's Treatise. It is to the effect that when the defendant obtains an order for time, and is afterwards advised to demur, he must also plead to or answer some part of the bill; and answering to some immaterial thing, as denying combination or the like, will not prevent the court from discharging the demurrer. But the "order for time," spoken of by *Lord Redesdale*, appears in the previous part of the passage to be an order giving the defendant time "to demur, plead, or answer to the plaintiff's bill, *but not to demur alone*," which latter, he says, is always the special condition of an order for time in England, because it was there considered that counsel could advise, upon sight of the bill, whether a demurrer would lie, and therefore there should be no delay merely to demur. There is no doubt that such is

the common order in England, though *Lord Redesdale* says it may work great injustice, and that in proper cases it may be relaxed, upon application for a special order. *Taylor v. Milner,* 10 Ves., 447. And it is clear that an answer, denying combination with such trifling matter, is not a compliance with the condition that the party shall not demur alone, but an evasion of it, which will not be allowed. *Steppenton v. Gardiner,* 2 P. Wms., 286; *Done v. Peacock,* 3 Atk., 726; *Lea v. Pascoe,* 1 Bev. C. C., 78. But the course with us has not been to annex to an order for time the condition that the defendant should not demur alone. The statute, in describing rules for pleading, enacts that the defend-
(189) ant shall put in his answer or plea, or demur at the first term, or the bill may be taken *pro confesso;* but it adds that "such time shall be allowed for pleadings on both sides as the court shall direct." Therefore, the whole is at large, and subject to the order of the court in each case. We are not aware that it has been the course in this State to restrict the order for an extension of time, as it is in England; and from the situation of the country, and the difficulty, often, of obtaining the opinion of counsel before the term for appearance, and of the counsel's making up an opinion on the circuit upon sight of the bill during that term, we suppose that such a practice has never prevailed here—at least, not since 1806. But, however that may be, that was not the nature of the order in this case, which was special and express that the defendants might answer *or* demur, and without any condition with respect to demurring alone. It might be, if such a condition had been annexed to the order, that the defendant would not have accepted the time, but have preferred demurring at once to the whole bill. Therefore, the defendant's pleadings are within the order for time, and that for taking them off the bill ought to be reversed and discharged. The plaintiff must pay the costs in this Court.

PER CURIAM. Reversed.

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(190)

MATTHEW PLUMMER ET AL. v. ALEXANDER W. BRANDON.

1. The acquisition of a new domicil does not depend simply upon the residence of the party. The fact of residence must be accompanied by an intention of permanently residing in the new domicil, and of abandoning the former—in other words, the change of domicil must be made manifest *animo et facto,* by the fact of residence and the intention to abandon.

2. The length of residence is not important, provided the *animus* is there. If a person goes from one country to another, with the intention of remaining, that is sufficient; and whatever time he may have lived there is not enough, unless there be an intention of remaining.

PLUMMER *v.* BRANDON.

3. An administrator, appointed in one State, cannot sustain an action brought in his representative character in another. But where a person dies in this State, in possession of slaves, then being in this State, the administrator may sue for them in his own name and upon his own legal title, either in this or another State, though they may have been removed out of this State before administration granted.

THIS case came on to be heard upon the exceptions to the report of the master, to whom it had been referred to take an account, etc. The nature of the exceptions will be seen in the opinion of the Court.

Francis Locke, by his will, devised to Esther Pinxston, during her life, certain shares of stock upon the State Bank of North Carolina, and after her death to her children. Dr. Scott, the executor, took said fund into his possession, and regularly received and paid the dividends over to the legatee up to the time of his death in 1838. Dr. Scott went to the State of Tennessee for the purpose of examining the country, with a view to a removal if he liked it, and took with him a number of slaves, leaving his wife and family, a number of slaves and other property behind him, in the county of Rowan, where he (191) had been living many years. After his death, which took place in 1838, administration was duly granted in that State upon his property there, and in the year —— his widow removed to Tennessee, taking with her the remainder of the negroes belonging to the estate of Dr. Scott and other property. These negroes she took with her by the consent of the defendant, who was her uncle, and to whom Dr. Scott had conveyed all said property by deeds of trust. The defendant administered on the estate of Dr. Scott, which was in this State in 1841, and Mrs. Scott took the negroes to Tennessee some time before. Upon the hearing, an account was decreed and a reference made, with special instructions. Among others was the following: "The nature and value of the property sent by the defendant to Tennessee the time at which it was so sent, whether before or after the defendant took out letters of administration upon the estate of Dr. Scott. The master will further report whether Dr. Scott, at the time of his death, had removed to Tennessee or was there merely making preparations to remove."

The master made his report, and several exceptions were filed by the plaintiffs.

Boyden for plaintiffs.
Badger and J. H. Bryan for defendant.

NASH, J. The first exception is that there was no legal evidence that Dr. Scott had removed to Tennessee. The master has made no specific report upon this inquiry, and, if he intended so to do, it is to be gathered from the report on the subject of the administration granted

in Tennessee. If his intention was so to report on that point, the exception is sustained, for both the reasons assigned in the exception.
(192) There is no evidence that such was the fact, and it is contradicted by the answer. Upon this subject the testimony of Mr. Stirwalt is decisive. He states that when Dr. Scott started for Tennessee, he declared he was going to Tennessee to look about, and, *if pleased with the country,* intended to stay or make a permanent location there, and took with him eight or ten valuable negroes. His family continued to live on and cultivate the same place where Dr. Scott had lived for many years, and continued there until the fall of 1839. Dr. Scott went to Tennessee in 1837 and died in October, 1838. The defendant in his answer states that, at the time Dr. Scott died, he was making preparation to remove to Tennessee. Here, then, we have the declaration of Dr. Scott, that his going to Tennessee was not a removal there, but an exploratory trip, preparatory to a removal if he liked the country; and we have the admission of the defendant that he was making preparation to remove at the time he died. To remove is to change one's domicil or place of permanent residence. Dr. Scott had not changed his domicil at the time of his death. When he went to Tennessee, in addition to his own declaration, we have the fact that his wife and family and a large portion of his property was left in North Carolina, where it remained until after his death. North Carolina was the domicil of origin of Dr. Scott, and must so remain until he acquired another. The acquisition of a new domicil does not depend simply upon the residence of the party; the fact of residence must be accompanied by an intention of permanently residing in the new domicil, and of abandoning the former; in other words, the change of domicil must be made manifest, *animo et facto,* by the fact of residence and the intention to abandon. *De Bonneval v. De Bonneval,* 6 Eng. Eq., 502, 1 Curt., 856; *Craigie v. Lewin,* 7 Eng. Eq., 460, 3 Curt., 435. *Sir Herbert Jermer Trest* in the latter case says the result of all the cases is that there must be the *animus et factum,* and that the principle is
(193) that a domicil once acquired remains until another is acquired or the first abandoned, and that the length of residence is not important, provided the *animus* be there. If a person goes from one country to another with the *intention* of remaining, that is sufficient, and whatever time he may have lived there is not enough, unless there be an intention of remaining. Again, in the case of *De Bonneval* the same judge lays down this principle: "The presumption of law being that the domicil of origin subsists until a change of domicil is proved, the *onus* of proving the change is on the party alleging it, and the *onus* is not discharged by merely proving residence in another place, which is not inconsistent with an intention to return to the original domicil."

Apply these principles to the case before us. Dr. Scott's domicil of origin was North Carolina. What evidence does the defendant, who insists he had changed it, produce? Not a particle, except the fact that he had resided in Tennessee a year before his death. Where is the *proof* of his intention to make that his permanent place of residence? There is none whatever. There is no proof of making any preparation to move his family. We have seen that the duration of the residence is nothing, unless the *animus non revertendi* accompanies it, and that it did not, the continuance of his family at the former domicil is strong evidence. There was not the *animus et factum.* We are of opinion then that Dr. Scott at the time of his death had not acquired a domicil in Tennessee, but that it was still in North Carolina.

The second exception is to that part of the master's report in which he states that there is no evidence that the defendant sent any property to Tennessee. This exception is allowed. The answer states that after the death of Dr. Scott, his wife being desirous to go to Tennessee, the defendant was willing that the other property mentioned in the deed of trust should be removed, and it was so accordingly re- (194) moved, there being, at that time, an administrator regularly appointed in that State, towit, Mr. William Treat, *"to whom all said property was consigned by the defendant."* We think this is an admission that he did send the property to Tennessee.

The third exception is sustained. It is founded, as we understand it, upon the principle that the domicil of Dr. Scott, at the time of his death, being in Rowan County, in this State, the letters of administration granted to the defendant by the court of that county was the primary administration, and that granted in Tennessee was ancillary; and that it was therefore the duty of the defendant to have collected the assets of the estate, though they were in Tennessee. It is well settled that an administrator appointed in one State cannot sustain an action, brought in his representative character, in another. 1 Hagg., 355; *Butts v. Price,* 1 N. C., 289; *Morrell v. Dickey,* 1 John Ch., 186; 1 Cranch., 259; *Governor v. Williams,* 25 N. C., 154; *Raymond v. Wattsville,* 2 Lee E. R., 551. But in this case a number of negroes, belonging to Dr. Scott, were in the actual possession of the defendant, and were *sent* by him to the administrator in Tennessee. At the time of the death of Dr. Scott those negroes were in this State, and were of course assets, and as such belonged to his personal representatives in this State (*McBride v. Choate,* 37 N. C., 613), and for them only can an administrator be made answerable. *Governor v. Williams, ubi supra.* And though it be true that the defendant did not administer on the estate of Dr. Scott until he had sent the negroes to Tennessee, yet the moment he did take out letters of administration they related and made him responsible for

all the assets which had been in his possession or what he might have reduced to possession at the death of his intestate. *Whit v. Ray,* (195) 26 N. C., 14. The defendant might have declared upon his possession, and maintained an action against any one who detained them from him, either in this State or elsewhere; and this was the charge against the defendant, because he had the legal title under the deed of trust. We think the defendant is justly chargeable with the value of the negroes and other property sent by him to Tennessee, and this exception must be sustained.

The report is set aside, and the case is referred back to the master, with the instructions formerly given, and in conformity with the principles now declared, unless the defendant admits the property sent to Tennessee was sufficient to pay the plaintiff's demands.

PER CURIAM. Order accordingly.

Cited: Horne v. Horne, 31 N. C., 109; *Sanders v. Jones,* 43 N. C., 247; *Williams v. Williams,* 79 N. C., 421; *Grant v. Reese,* 94 N. C., 730; *Fulton v. Roberts,* 113 N. C., 426.

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(196)

MITCHELL CARTER ET AL. V. PENDLETON JONES ET AL.

1. The jurisdiction of a court of equity to give relief in the case of lost bonds is now too well established to be called in question.
2. Delay, merely, by the creditor to sue the principal debtor does not discharge the surety.
3. A person who pays off a bond due to a creditor, without the request of the debtor, express or implied, cannot recover from the debtor at law. But in equity he is considered as the equitable purchaser of the bond, and is therefore entitled to relief against the debtor.
4. In a bill for that purpose he may join the obligee to whom he made the payment.
5. In a bill brought by a *cestui que trust* to recover an amount alleged to be due to him, the trustee is a necessary party, in order that his legal interest may be bound by the decree.

CAUSE removed from the Court of Equity of ROCKINGHAM, at Spring Term, 1848.

The bill in this case was filed in the court of equity for Rockingham and made returnable to Spring Term, 1841, by Thomas L. Boyd and Mitchell Carter, both of the county of Wythe in the State of Virginia, against Pendleton Jones and Pleasant Black of the county of Rockingham in this State, and Thomas Smith of the county of Wythe afore-

said. It is stated, in substance, that on or about 4 November, 1837, the defendant Smith sold to the defendant Jones a wagon and team, for which Jones executed to him a bond for the sum of $700, with the defendant Black as surety, payable on or about 15 January, 1838; that said Smith being indebted to the plaintiff Boyd by judgment, (197) on which an execution had issued, which was then in the hands of the sheriff of Wythe County, offered this bond in part discharge of the debt, which the officer refused, unless Boyd would consent to it; that Boyd, upon being applied to, declined taking it, for reason that he knew nothing of the circumstances of the obligors; that the plaintiff Carter, hearing of this, and meeting with Boyd, stated to him that he was well acquainted with the defendant Black, and that he was a man of property and had the reputation of being a gentleman; that Boyd still declined taking the bond unless Carter would say that it was good, and that the latter thereupon took the bond and indorsed upon it: "This is a good bond. Black is good and a gentleman"; that Boyd then received it from Smith, with his indorsement, in part satisfaction of the execution; and that all this was done before the bond fell due. The bill stated further, that after the bond became due, the plaintiff Boyd, for the purpose of having it collected, inclosed it in a letter addressed to Emanuel Shober, an attorney at law, living at Salem in this State; that the letter was stolen from the postoffice or the mail, and the bond taken thereout and destroyed or concealed, so that Boyd never heard of if afterwards; that Boyd then informed the defendants Jones and Black of the loss of the bond, and demanded payment of it, which they refused, when, being in want of money, he sued Carter on his guaranty, and recovered a judgment in Wythe County court, which Carter paid on 11 February, 1839, under an execution against him.

The bill then charged that after the payment of the money by Carter to Boyd, the plaintiff Carter frequently applied to the defendants for payment of the bond, offering to indemnify them against every liability that might accrue in consequence of its loss; but they and each of them refused to pay the same or any part of it. The prayer is for payment of the bond with the interest accrued thereon, the plaintiff offering to give any indemnity the court might require to protect the (198) defendants from any further liability on the bond.

The defendant Smith failed to appear and answer, and the bill was taken *pro confesso* against him.

The defendants Jones and Black filed their answer, and therein admitted the execution of the bond as stated in the bill and that it had not been paid, but they denied all knowledge of the assignment of the bond by Smith to Boyd, the guaranty of Carter, the loss of the bond, and the recovery by Boyd against Carter on his guaranty and his pay-

ment of the same; and they required strict proof of all those allegations. They insist, as a defense, that if the plaintiffs could recover at all, their only remedy was at law; and that at all events the bill could not be sustained in the joint names of Boyd and Carter, when it appeared from the bill itself that Boyd had been paid the full amount of the bond, and had no other interest in it. They insisted, also, that Carter was not a guarantor of the bond, and that the recovery against him by Boyd was wrong, and that if he, by negligence or by conspiracy with Boyd, suffered a judgment to be taken against him, he ought not now recover from the defendants. The answer of the defendant Black insisted, further, that the plaintiff, by delaying to apply to his principal for payment for an unreasonable length of time, had discharged him.

Replications were filed to the answers, and proof taken which fully sustained all the allegations of the bill not admitted by the answers.

Morehead for plaintiffs.
Iredell for defendants.

BATTLE, J. Upon the admission in the answers of the defendants Jones and Black, that the bond has not been paid, and the proof that it is lost or destroyed, and that the latter has paid the full amount of it to Boyd, the plaintiff Carter is clearly entitled to a decree against (199) the defendants, unless their objections that Carter was an officious intermeddler, and for that reason not entitled to relief, and to the bill on account of Boyd's being a party plaintiff, can avail them; for the other objections are clearly untenable. The jurisdiction of the court of equity to give relief in the case of lost bonds is now too well established ever to be called in question. *Allen v. Bank,* 21 N. C., 3; *Dumas v. Powell,* 22 N. C., 122. It is equally well settled that the delay merely by the creditor to sue the principal debtor does not discharge the surety. *Cooper v. Wilcox,* 19 N. C., 90; *Pipkin v. Bond, ante,* 91. The recovery by Boyd against Carter, in the county court of Wythe, on his guaranty, has not been proved to have been obtained by negligence or fraud, as alleged, and as it was obtained in a court of competent jurisdiction, it must be presumed to have been regular and proper. But it is said that Carter was an officious intermeddler, and on that account can have no claim to the interference of a court of equity. It is true that he paid the amount of the bond to Boyd without any request, express or implied, from the defendants Jones and Black, or either of them. He could not, then, have recovered at law, as was decided in a suit at law brought by him against them. *Carter v. Black,*

20 N. C., 551. But in this Court the plaintiff Carter stands in a very different situation. He is not suing here for money paid for the use of the defendants at their request. He became bound on the bond at the instance of the plaintiff Boyd and the defendant Smith, and, having paid the amount of it to Boyd, he claims as an equitable purchaser of it, and seeks here to recover on it as lost, in the same manner as Boyd might do. The bond has not been extinguished by Boyd's recovery against Carter, as is expressly said in the case at law. See *Carter v. Black, ubi supra.*

We can see no reason, therefore, why he should be denied this (200) relief.

The objection that Boyd is improperly joined as a party plaintiff remains to be considered. It is said that he has no interest; that he can have no decree in his favor, and that, therefore, he has been improperly made a party plaintiff. From what has been before said, in considering the objection that Carter was an officious intermeddler, it is to be deduced that Boyd must be regarded here as bound to assign the bond to Carter. If that be so, and we think it is, then the case of *Ryan v. Anderson,* 3 Madd., 175, is an authority directly in point; for it was there held that an assignor and an assignee might sue together for satisfaction of a debt. See, also, Calv. Parties in Equity, 240; Story Eq. Pl., sec, 153. Boyd and Carter may likewise be regarded as standing towards each other in the relation of trustee and *cestui que trust;* Boyd having the legal and Carter the equitable interest in the bond. Viewing them in this light, they are both necessary parties; Carter as entitled to a decree for the amount of the bond, and Boyd in order that his legal interest may be bound by the decree. Story Eq. Pl., sec. 153. And they may both be made parties plaintiff. *Thompson v. McDonald,* 22 N. C., 463. It must be referred to the clerk and master to ascertain the amount due on the bond mentioned in the pleadings, for principal and interest, for the payment of which the plaintiff Carter is entitled to a decree, upon executing a proper indemnity.

PER CURIAM. Decree accordingly.

Cited: Thornton v. Thornton, 63 N. C., 213; *Wilson v. Bank,* 72 N. C., 626; *Davison v. Gregory,* 132 N. C., 396; *Moring v. Privott,* 146 N. C., 564; *Liverman v. Cahoon,* 156 N. C., 201, 207; *Bank v. Bank,* 158 N. C., 248.

(201)

ROBERT LOVE v. JOHN C. LOVE ET AL.

1. In a will the grammatical construction must prevail, unless a contrary intent plainly appears.

2. A bequest of a negro woman and her increase, without any explanatory words, will not entitle the legatee to a child of the woman, born before the testator's death. But if there be any expression in the will showing an intent on the part of the testator that the child, so born, shall be included in the gift of the mother, then the legatee shall take it; as where, in such a bequest, one of the children of the mother is expressly excepted, this shows the intention of the testator that the legatee should take all the children, except the one excepted.

THIS case came on to be heard upon exceptions to the master's report, which exceptions are sufficiently set forth in the opinion of the Court.

The bill was filed in the court of equity for CASWELL by Robert Love, Marmaduke Kimbrough and his wife, Sarah, Benjamin D. Purely and his wife, Margaret, Samuel Love and his wife Mary, and Martha Love by her father and next friend, Samuel Love, against John C. Love, executor of John Love, deceased, and John McKissack and his wife, Elizabeth Elmira, in which the plaintiffs claimed as legatees under the will of the said John Love, and prayed for an account from the executor and the payment of their respective legacies. The defendant John C. Love filed his answer, and thereupon an order was made that the master should take an account between the parties, which was accordingly done; and upon the coming in of his report, exceptions thereto were filed by the plaintiff and the cause was transmitted to this

(202) Court.

The case made by the bill and answer, so far as is necessary to a proper understanding of the report and the exceptions thereto, is as follows: John Love died in the year 1844, having previously made and published his will, wherein, among other bequests, he bequeathed as follows:

"6th. I give to my daughter Elizabeth Elmira McKissack a negro girl named Beck, to her and her heirs.

"7th. I give to my son John C. Love a woman named Lyn and all her increase, except a girl named Thene.

"8th. It is my will that if I do not sell Thene, my son John C. Love have her to him and to his heirs, etc. My will is that my stock of horses, half of my cows, wagon, sheep, and hogs be sold, my just debts paid out of the said money, and the balance to be divided between my four children, namely, Robert, Sarah, Mary, and Elizabeth; all the

balance of my estate, viz., stock that is not mentioned above, also my household and kitchen furniture, I give to my son John C. Love and his heirs, etc."

John C. Love was appointed executor, and, after probate of the will, was duly qualified and took upon himself the burden of its administration.

The bill charged that the girl Beck, given to Elizabeth E. McKissack, had a child named Sally, born in the testator's lifetime, which did not pass under the will, and for which the executor was bound to account, and had failed to do so; that the testator left, as part of his personal estate, a number of horses, stock of catttle, hogs and sheep, an ox cart, a quantity of provisions, and many articles raised on the farm, for which the executor had also failed to account; and that he had likewise neglected and refused to account for the children of Lyn born in the testator's lifetime, as it was alleged that he was bound to do.

The executor in his answer stated that he was, and had at all times been, ready to account with the plaintiffs for every part of his testator's estate to which they were entitled; that he had sold the horses and half the cattle and other stock, and returned an account of the sales thereof to the proper court; that the ox cart was his own (203) property; that half the cattle and other live stock was given him by the will, and that he claimed all the crop and provisions on hand at the testator's death by virtue of a contract made with the testator in his lifetime, to the effect that if he would live with the testator and manage his business, he, the defendant, should have all that he could make, after supporting the family, and that he had fully complied with the said contract in every particular. He admitted that he had children of Lyn, born before the death of the testator, in his possession, claiming them as his own, under a bequest in his testator's will, and he utterly denied the right of the plaintiff to them or any part of them. As to the child Sally, alleged to have been born of the woman Beck before the death of the testator, he answered "that he had understood, and had no reason to disbelieve, though he did not know of his own knowledge, and therefore did not admit, that negro woman Beck, given in the will to Elizabeth McKissack, had a child named Sally born before the death of the testator; and he further stated that the said Elizabeth had been living in Tennessee for a great number of years, claiming and using the negroes as her own, and he had been advised that, by the laws of that State, he could not recover, if there were any child of the said Beck; and he stated, further, that he believed that if he had attempted to recover, it would have been attended with great expense to the estate—probably more than the value of the negro, if he had been successful."

The report of the master exhibited a statement of what was in the hands of the executor after charging him with all which the master thought he ought to be charged with, and allowing all proper disbursements; and it also exhibited the testimony upon which the charges were made and the disbursements allowed, among which testimony was a copy of the account of sales returned to the county court by the executor.

The exceptions filed by the plaintiffs to the report were as (204) follows:

1. The master has submitted no evidence of the amount of the estate which came to the defendant John C. Love's hands, nor does he show of what sums, how raised, or from what sources, he made the aggregate amount with which he has charged the said defendant.

2. The master has credited the defendant with $39 paid attorneys, without evidence that the service of counsel was required in matters pertinent and proper for the estate.

3. The master has failed to charge defendant with the stock of provisions on hand at testator's death, or with any of the proceeds of articles raised on the farm.

4. The defendant is not charged with the horses on hand, and permits the defendant to retain them as his own; that he has omitted to charge the defendant with half of all the stock, other than cows.

5. That the master has failed to charge the defendant with the children of the woman Lyn, and has taken upon himself to construe the will, and gives to defendant all Lyn's children and half of all the stock, other than cows, which construction is erroneous and against law.

6. That defendant is not charged with an ox cart.

7. That the report is not sustained by the evidence, and is against the testimony in the cause.

8. The defendant is not charged with the child of the woman Beck which was born before the making of the will.

Morehead and Norwood for plaintiff.
Kerr and E. G. Reade for defendants.

BATTLE, J. We have examined the testimony taken by the master, and must overrule the first exception, because the plaintiffs have produced no evidence to show that the amount of the estate which came to the hands of the executor was different from what it appeared to (205) be from his answer and account of sales. The master was therefore justified in stating that to be the true amount.

The second exception we must overrule, also, because the plaintiff has failed to show that the charges were improper or unreasonable.

The third exception is overruled, because the testimony satisfies us that the executor was entitled to all the articles mentioned in the exception, under a contract made with his testator in his lifetime, and which was fully performed on his part by the executor.

The fourth exception is also overruled, because it appears from the testimony that the testator had, at the time of his death, but two horses, and they were sold as a part of his estate by the executor; as were also one half of the cows and other stock. The other half the executor is entitled to upon a proper construction of the will. That is certainly the grammatical construction, and according to *Jones v. Posten,* 23 N. C., 171, it must prevail, unless a contrary intent plainly appears, which is not the case here. Besides this, it appears from the testimony that the defendant was entitled to one-half of the stock, other than horses, under contract with the testator.

The fifth exception cannot be sustained, and must also be overruled. It is well settled that a bequest of a negro woman and her increase, without any explanatory words, will not entitle the legatee to a child of the woman born before the testator's death. But if there be any expression in the will showing an intention on the part of the testator that the child, so born, shall be included in the gift of the mother, then the legatee shall take it. *Stultz v. Kiser,* 37 N. C., 538. Here the exception of the girl Thene from the bequest of the woman Lyn and *all her increase* shows plainly the intention of the testator that the legatee should take all the children which Lyn then had, except Thene; and this intention is still more plainly manifested by (206) the testator's giving, in a subsequent clause of his will, the girl Thene to the same legatee, in the event of his failing to sell her. The construction placed upon the will by the master was therefore right in point of law, and must be sustained.

The sixth exception must be overruled, because the ox cart, to which it relates, is proven to have been bought by the executor himself, and was no part of the testator's estate.

The seventh exception is overruled because it is too general and indefinite.

The eighth exception has raised rather more difficulty than we have found with the others. The allegation in the bill, that the woman Beck, given to Elizabeth McKissack, had a child born in the testator's lifetime, is neither expressly admitted nor denied in the answer, and there is no testimony taken upon that point. We cannot, therefore, declare the fact that there was such a child born as above stated; yet we think that it is manifest from the answer that the executor believes the fact to be so, and we suspect that it is so. Under these circumstances the plaintiff may, if he choose, have it referred to the

master to inquire whether the woman Beck had a child named Sally born before the testator's death and living at the time of his death; and, if so, what was her value at that time; and whether the share of the estate to which Elizabeth McKissack is entitled under the will be sufficient to answer for the value of Sally, or of any and what part of such value.

PER CURIAM. Decree accordingly.

Cited: Joiner v. Joiner, 55 N. C., 74; *Williamson v. Williamson,* 57 N. C., 285; *s. c.,* 58 N. C., 144; *Fairbairn v. Fisher,* 58 N. C., 387; *Kelly v. Odum,* 139 N. C., 280.

(207)

JAON C. ATKINS ET AL. v. FRANCIS J. KRON ET AL.

1. Aliens cannot hold land, but the sovereign may take it; and a trust of land for an alien cannot be enforced by the alienee, but may be by the sovereign in equity.
2. It is the nature of a trust to be subject in equity to the same rules, as to its acquisition and alienation and the succession to it, as the legal estate is. Hence those persons only who may purchase and hold the legal estate may purchase and hold the equitable.
3. When the law separates real and personal estate which a testator had given together to the same persons, subject to charges, and then gives one portion of the property to one set of persons and the other portion to another set, it must in like manner apportion the charges. The fund and the encumbrances ought to go together.

PETITION by some of the defendants to rehear a decree made in this cause by this Court at December Term, 1841. See 37 N. C., 58, 423.

Strange for petitioners.
Winston and J. H. Bryan, contra.

RUFFIN, C. J. This cause was hertofore heard and a decree made, as reported, *Atkins v. Kron,* 37 N. C., 58 and 423; and it has been now reheard upon the petition of the defendants, the Forestiers, the grandchildren of the testator's sister Quenet, to have that part of the decree reversed by which it was declared that, by reason of their alienage, they could not take the real estate under the devise to the plaintiff in trust for them.

The provisions in the will on which the question arises are these: After giving a number of pecuniary legacies and annuities, the testator says: "I give the balance or residue of my property to my ex-

ecutor in trust for the benefit of my sister Quenet's grand- (208)
children by the name of Forestier, to be paid to any one of them
who should apply for the same, subject, however, to the payment of the legacies made in this will, and, moreover, obligatory on them to the payment of $100 yearly to their grandmother Quenet during her life; and after her decease the same sum of $100 to be paid to their own mother yearly, also during her life. But should no one of my sister Quenet's grandchildren, nor any one duly authorized to receive the above property in their behalf, apply within two years from the time of my decease, then the above property to revert unto Mary C. Kron's children, and be distributed equally amongst them, subject, however, to the legacies herein mentioned."

By subsequent clauses the testator gave to his wife a child's part of his personal estate, and directs how her share of his slaves shall be allotted, and then he adds: "I wish that all my perishable property be sold to the highest bidder, as usual, at nine months credit. I wish that my lands be leased or rented out to the best advantage, and also that my negroes, my wife's share excepted, should be hired out to the highest bidder, as usual in such cases, except such as are hereinafter mentioned; and I wish that the ready cash which I may have at my decease and shall remain after the legacies are paid, together with all the moneys arising from the renting of the lands and hiring of the negroes and the collection of the notes and money due me, should be lent out on interest to responsible people giving bond and approved security for the payment therof." Then follows a particular provision respecting one of his negroes, named David, and his family, that they should live together on a certain piece of his land and support themselves there until the children of Charity, one of David's daughters, should attain the age of 21, and then that Charity's children be returned to the common stock, as each of them may attain that age,
but that David and his wife should remain in possession of that (209)
land during their lives.

That part of the decree which the petition brings under review was founded on two propositions: that aliens cannot hold land, but that the sovereign may take it; and that a trust of land for an alien stands upon the same footing, and cannot be enforced by the alien, but may be by the sovereignty in equity. Each position was considered at the time so firmly settled as to be indisputable, and in fact neither was disputed; so that it was not deemed necessary to cite an authority in support of them. The question whether the aliens can take benefit by this devise has now been fully argued, and the Court has attentively considered the whole subject, but without being able to reach a result different from that declared in the decree.

It is said that the intention of the testator was that his land should be sold and the proceeds go to the alien donees; and, if that be not so, that at all events the law should leave it to the *cestui que trust* to elect to have it sold and take the proceeds, which would avoid any violation of the policy which excludes aliens from real estate.

But it is clear that the trust is not of the special nature insisted on for a sale of the land and payment of the money to these parties, but that the devise is simply a devise of the land to the executor in trust generally, for the grandchildren of Mrs. Quenet. Had those persons been citizens, no one would have thought that the trust was to make a sale without the orders of the *cestui que trust;* and we think it clear that a purchaser from the executor would not have a good title against the Forestiers, without their concurrence in the sale. Some stress was laid in the argument on the expression, "to be paid to any one of them," as denoting the intention to sell. But that is not sufficient. The testator was himself a native of France, and obviously did not un-
(210) derstand the English idiom; and it is plain that he used the term "paid" inaccurately. For it is the residue of "my property" which is to be "paid," according to the grammatical construction; in which sense that word cannot properly be used. The testator meant by those words only to express the intention that, though the gift was to all Mrs. Quenet's grandchildren, it might "be paid to any one of them," or that any one of them, or, as afterwards more fully expressed, any one else duly authorized, might "receive the above property in their behalf." There was no intention by the will to convert the real estate. So far from it, the expression just mentioned, "receive the above property," shows that the trust was of the *corpus* specifically. Besides, while the testator is so particular as to direct the terms of a sale of the most unimportant perishable part of his estate, he gives no direction about the sale of any part of his land; but, on the contrary, he orders that certain negroes should live on one tract of the land during their lives, for the benefit of the devisees and legatees, and that the other land should be leased by the executor, and the rents invested in securities bearing interest until, as we suppose, it should be ascertained who, under the contingencies in the will, would become entitled to the estates. The trust, then, is not one for conversion, but is merely the common one of a devise of land to one person to hold it, as land, in trust for another. Upon the death of a *cestui que trust,* undoubtedly the right would descend to his heir, and not go to his executor. Thus viewed, the Court holds that the aliens could not hold under the devise.

It cannot be disputed that an alien cannot take land by act of law; or, though he may take by purchase, that he cannot hold land against the sovereign, who may take it upon office found. Co. Lit., 2 v. It is

the nature of a trust to be subject in equity to the same rules as to its acquisition and alienation and the succession to it as the legal estate is. Hence, on the principle of *equitas sequitur* (211) *legem,* those persons only who may purchase and hold the legal estate may purchase and hold the equitable. Lewin on Trusts, 105. And in respect to an alien, *Chief Baron Gilbert* lays it down as clear law that he cannot compel the feoffee to uses to execute a use to him. He gives as the reason that it is contrary to the policy of the law that an alien should implead touching lands in any court of the country. Therefore, he says, the king shall have the use of an alien upon his purchase; for the inconvenience is the same if the interest be the freehold at law or the trust, the only difference being that at law he can seize the land on office found, while in the case of a trust he cannot, but may have a subpœna in chancery to have the trust executed to him. Gil. Uses, 43. These positions are fully supported by the opinion of *Lord Hale* in *Attorney-General v. Sands,* Hardres, 488, and more particularly as it is given in *Attorney-General v. Duplesis,* Parker, 145, by *Chief Baron Parker* from a copy of *Lord Hale's* own manuscript argument, in which the Chief Baron entirely coincides. The words are: "If an alien be *cestui que trust* at this day of an inheritance, the trust shall be executed in a court of revenue for the king. The reason is, because the alien has no capacity to purchase for any but the king, because of the infinite inconveniences that might follow by letting in aliens to the possession of land." *Lord Hale* further said that he was of counsel in *Holland's case,* which is stated in *Duke of York v. Marsham,* Hardres, 336; and that "there the king was entitled upon account of the incapacity of the alien to purchase; and though the king could not have the interest in point of law, and an information of intrusion would not lie" (because the legal estate was in a subject), "yet by a bill in equity it might have been decreed." Upon these authorities the doctrine is adopted by *Chief Baron Comyns,* and is laid down by him in nearly the same words (Com. Dig., Alien, (212) ch. 3); and it is found unquestioned in the latter text-books. In *Leggett v. Dubois,* 5 Paige, 114, *Chancellor Walworth* held that where an alien purchased land and took a conveyance to a trustee, with authority to sell the land to satisfy certain express trusts, and there was a surplus of the proceeds, it belonged to the State and might be recovered in equity. He stated that the same opinion had been given by the Court of Appeals in Virginia in *Hubbard v. Goodwin,* 3 Leigh, 514, a book not at this moment within our reach, in which the general conclusion is stated that where an alien purchases land in the name of another upon an express and declared secret trust to be permitted to receive the profits, the trust passes to the State, to be enforced in its favor in the

court of equity; and in that conclusion *Chancellor Walworth* expresses his full concurrence. In *Fourdine v. Gowdy,* 3 Mylne and Keene, 383, where one, having freehold and leasehold lands, directed all his property to be sold by his executor, and turned into money, with injunction on his heir at law to concur in the sale, and, after the payment of certain legacies thereout, he bequeathed the residue to his alien sister and three brothers, one of whom was his heir, *Sir John Leach* held that the brothers and sisters could not take the proceeds of either the freehold or leasehold property, because "aliens could no more take an interest in land (which this would be) than the land itself." It is to be observed that there was a clear intention to convert, so that what the brothers and sisters should get should go to them as money; and yet they could not hold it, but it was decreed to the crown. It has been supposed that the decision may have been influenced by the circumstance that there was no devise of the land in trust, but a power to the executors to sell the land, leaving the legal estate in the heir; and the master of the rolls let fall some expressions calculated to give
(213) color to the supposition. But it seems certain that the decree was not founded on that at all; for, first, the injunction on the heir to unite with the executors in selling seems sufficient to have turned him into a trustee for that purpose, if the legal estate could have descended to him as an alien; and, secondly, that reason could have no application to the leaseholds, which vested in the executor *virtute officii;* and yet the aliens could not get the proceeds of them more than those of the freeholds. That shows that the judgment went upon the general principle that neither land nor the produce of any estate in land can be effectually given to aliens or in trust for them. *Chancellor Kent,* in treating of the disabilities of aliens, cites several of the foregoing authorities and from them adopts the conclusion that they are under the like disabilities as to uses and trusts arising out of real estates as they are with respect to the land itself, and that the sovereign may in chancery compel the execution of the trust. 2 Kent Com., 62. He, however, mentions that when there is a devise upon an express trust to sell and pay the proceeds to aliens, the gift may be supported as a legacy of the money; and for that he cites as the leading one on the subject the American case of *Craig v. Leslie,* 23 Wheat., 563, in which the devise was to four persons, also executors, of "all my estate in any part of America, in special trust that the aforementioned persons will sell my personal estate to the highest bidder, and my real estate on one, two, and three years credit. In the second place, I give and bequeath to my brother Thomas Craig, of Scotland, all the proceeds of my estate, both real and personal, which I have herein directed to be sold, to be remitted to him, as the payments are made, by my said trustees and executors"; and upon

it the Supreme Court of the United States held that the brother, and not the State, took the proceeds of the land, because it was "considered as a bequest of personal estate, which the alien could take." It was contended in the argument at the bar against the decree that, (214) although there be not an express trust to sell and pay the money to the donees, yet the Court ought to imply it, if necessary to effectuate the intended bounty of the testator; or, at least, will allow an election to the *cestui que trust;* and in support of that position *Craig v. Leslie* was chiefly relied on. If that position had been adjudged in that case, it could not have overruled the ancient doctrine, which has been shown to have been so long and so thoroughly established; for this notion of an election equally applied to every one of the old cases as well as to this. It amounts to this, that an alien may commit a fraud on the law by buying in the name of a citizen, and whenever the sovereign discovers the trust and is about enforcing it for the public benefit, upon the ground of its violation of public policy, the alien may say he will stop the fraud there, and order his trustee then to sell the land and pay him the money. But the courts could not yield to such an application; but as is laid down in *Leggett v. Dubois,* equity will not imply a trust in favor of an alien, in fraud of the law or the rights of the State. In truth, however, *Craig v. Leslie* establishes no such proposition as that contended for by the counsel, but quite the contrary. The Court proceeded on the ground of the express trust to sell and remit the money abroad, as a conversion out and out, and did not mean to deny the principle that an alien cannot hold the trust of land; for the first paragraph of *Judge Washington's* opinion is that the incapacity of an alien to take and hold beneficially a legal or equitable estate in real property is not disputed; and that the inquiry in that case was whether the clause in the will was to be construed as a bequest of personalty or as a devise of the land itself. That it was the former was the opinion of the Court; and therefore it has no application to the present case. Nor has the other case, cited at the bar, of *Du Hourmelin v. Sheldon,* 1 Beavan, 79, before *Lord Langdale,* and 4 Mylne and Craig, 525, be- (215) fore *Lord Cottenham,* on appeal, any more application to it. There a testatrix devised real estate to trustees in trust to sell and divide the produce among aliens and others, with a direction that the purchaser might pay the purchase money to the trustees, whose receipt should discharge the purchasers from seeing to the application of the money. A sale was made under a decree on a bill to have the will established and the trusts carried into execution; and upon the ground of the provision in favor of the aliens, the purchasers excepted to the master's report that a good title could be made; but the exception was overruled. In the first place, as the case came up for decision, the question

was not as to the right to the proceeds of the sale, but merely as to the purchaser's title; and as to that there could be no doubt, since there was an express direction in the will for a sale, and the purchaser was only to see that his money went into the hands of the trustees, or, as we suppose, was paid into court in the cause in which the trustees were parties. It is indeed true that, both upon the original hearing and on the appeal, opinions were unequivocally declared in favor of the gifts to the aliens, and *Sir John Leach's* judgment in *Fourdine v. Gowdy* would probably have been overruled had the occasion called for it. But both of the judges in *Du Hourmelin v. Sheldon,* like the Court in *Craig v. Leslie,* held the gifts to the aliens to be good, simply because they were bequests of personalty, arising out of express trust to sell the land and pay the produce, as money, to the alienees. Our duty does not call on us to advocate, at present, either side of the controversy between the eminent judges mentioned, and certainly without the necessity there is but little inclination to the task; and that necessity does not exist here. For, whether *Sir John Leach* or *Lord Cottenham* be right, our judgment is to be the same, as it is expressly admitted by the Lord
(216) Chancellor, who says, in so many words, that there was in that case an absolute conversion; that the testatrix gave the legatees no option—that is, to take the produce of the land or the land itself; and, therefore, that the question was untouched by the decisions that aliens cannot enjoy, against the crown, trusts of land, any more than the land itself. Our case, therefore, is altogether out of that decision or the reasoning on which it was made. Indeed, the principle on which this decree went is explicitly admitted by *Lord Cottenham,* and its operation avoided by showing that there the trust for the alien was not of the land, but the money.

The Court then looks upon the disability of an alien to hold as *cestui que trust* of land as placed beyond all question, upon both principle and authority. When, therefore, the testator's trustee and executor asked whether he ought to execute the trust in respect of the real estate in favor of the aliens, the Court was obliged to declare that he ought not, and that against them the sovereign was entitled. Whether the State should in this particular instance take, as between it and the children of Mrs. Kron, the devisees substituted for the aliens, was another question, with which the aliens had and yet have nothing to do, and which is not now open for discussion. But, as to the exclusion of the aliens, no one of the Court doubted, when the decree was made; and upon a rehearing no one of the Court now doubts.

The counsel for the Krons, availing himself of his privilege of reëxamining the whole decree upon the rehearing at the instance of the opposite party, has urged that the decree was erroneous in making the

real estate in their hands contribute *pro rata* with the personalty to the legacies and annuities to themselves and others in this country. That question was much discussed among the judges who made the former decision, and all the reasons and authorities that could be commanded on either side were then adduced. They have now been (217) carefully reviewed and the able argument of the counsel deliberately considered; and without being able to add anything material to what was formerly said in support of the opinion of the majority of the Court, we find those reasons satisfactory to our minds. We think the principle is clear that when the law separates the real and personal estate which the testator gave together to the same persons, subject to charges, and then gives one portion of the property to one set of persons and the other portion to another set, it must in like manner apportion the charges. The fund and the encumbrance ought to go together.

I am therefore instructed to declare it to be the unanimous opinion of the Court that there is no error in the decree in the matters alleged. The applicants must pay the costs of the rehearing.

PER CURIAM. Decree accordingly.

Cited: Trustees v. Chambers, 56 N. C., 266.

MEMORANDA

The Honorable WILLIAM H. BATTLE, of Chapel Hill, one of the judges of the Superior Courts of Law and Equity, was in May, 1848, appointed by the Governor, with the advice of his Council, a judge of the Supreme Court, to supply the vacancy occasioned by the death of Judge DANIEL.

At the same time AUGUSTUS MOORE, Esquire, of Edenton, was in like manner appointed one of the judges of the Superior Courts of Law and Equity, to supply the vacancy occasioned by the promotion of Judge BATTLE.

And at the same time, and in like manner, BARTHOLOMEW F. MOORE, Esquire, of Halifax, was appointed Attorney-General, to supply the vacancy occasioned by the resignation of EDWARD STANLY, Esquire.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

THE TOWN OF MORGANTON

AUGUST TERM, 1848.

N. S. HOWELL ET AL. v. HOWELL AND BATTLE.

Where an appeal was taken from the decision of the court on motion to dissolve an injunction, and the parties afterwards compromised the matters in dispute, this Court will not look into the merits of the case for the purpose of awarding costs, but will certify to the court below that their order must stand; and as to the costs of the appeal, will direct each party to pay his own.

APPEAL from an interlocutory order of the Court of Equity of HAYWOOD, refusing to dissolve an injunction, at Spring Term, 1844.

The bill was filed in October, 1843, and the object of it was (219) to restrain the defendants from carrying out of the State a slave and other chattels, claimed by the plaintiffs under a conveyance from the defendant Howell and to compel the defendants to give security for the forthcoming of the property, the defendant Howell having been left in possession of the slave, and other articles for his enjoyment, during life, upon certain terms specified in a separate agreement, and having recently conveyed them absolutely to the other defendant, Battle. The defendant put in an answer in March, 1844, and then moved to dissolve the injunction and discharge a sequestration which had been ordered on the bill. The court refused the motion, but allowed the defendants an appeal. At this term the counsel for the appellants wished to bring on the appeal for hearing; but the counsel for the plaintiff, at the same time stating to the Court that, pending the appeal, the plaintiffs brought an action at law for the property and that they have recently compromised, and that the plaintiffs have received from the

defendants all the property and are now in possession of it. Each party, however, insisted that the merits were with him in the case, and on that ground claimed costs.

Francis and N. W. Woodfin for plaintiff.
Edney and Gaither for defendants.

RUFFIN, C. J. The counsel have properly advised the Court of the present state of this controversy, and we think it must prevent any further proceeding in it here. The whole purpose of the suit has been answered by the acts of the parties themselves. They have made it useless, and therefore improper, that the Court should determine whether the order appealed from was erroneous or not. Upon that ground the Court must decline considering that question at all, and as a matter of course the order must stand, and a certificate to that effect be transmitted to the court of equity. The appeal being from an inter-
(220) locutory order, the Court can only dispose of the costs of the appeal, leaving the costs of the cause to the court below. As an appeal would not be entertained upon the single question of costs, so the Court will not, in a case situated like this, look into the merits for the mere purpose of seeing how the costs ought to have gone if the case had come on for a decision upon the merits. But as neither party would bring on the appeal for upwards of four years and until a decision of it became immaterial and consequently improper, we think that costs ought not to be given in this Court, but that each party should pay his own.

PER CURIAM. Ordered accordingly.

K. KIRKPATRICK ET AL. v. JOHN W. MEANS ET AL.

1. A judgment creditor must show that he cannot have satisfaction by execution at law, before he can call in the aid of this Court to subject any equitable interest of the debtor.

2. Where an execution had been returned *nulla bona*, and afterwards the debtor became entitled by the death of a relation to a distributive share of certain personal property which remained in the hands of the administrator, and to a portion of the lands of the deceased: *Held*, that the creditor could not subject the equitable interest in the hands of the administrator until he had first endeavored by an execution at law to obtain satisfaction out of the lands descended to the debtor.

APPEAL from an interlocutory order of the Court of Equity of CABARRUS, overruling a demurrer, at the Spring Term, 1848, *Manly, J.*, presiding.

The bill was filed 6 November, 1847, and states that, in Janu- (221) ary, 1843, the plaintiffs recovered a judgment in Cabarrus County Court against the defendant John W. Means, for the sum of $228.75, and that they sued out a *scire facias* thereon, returnable to April Term, 1843, on which the sheriff raised the sum of $47.50 and no more, and as to the residue he returned *nulla bona*. The bill further states that John W. Means became insolvent and without any property on which an execution could be levied. That in 1846 one George Means was entitled to a very large estate, real and personal, in Mecklenburg County, and there died intestate, and that John W. Means was entitled to a share of the said estate; that William C. Means obtained letters of administration of the personal estate and has possessed himself of the same to a large value, exceeding $15,000, and that John W. Means is entitled to a part thereof as one of the next of kin of the intestate. The prayer is that the plaintiffs may have satisfaction of their debt out of the said distributive share, and the administrator may be restrained from paying the same over to the said John W. until he shall have first discharged the debt to the plaintiff. The defendant John W. Means put in a general demurrer to the bill, for want of equity. On argument it was overruled; but an appeal was allowed therefrom to this Court.

Osborne and Thompson for plaintiff.
Wilson and Coleman for defendant.

RUFFIN, C. J. As the bill is framed, it cannot be supported, we think, and the demurrer ought to have been sustained. Supposing the distributive share of an intestate's estate, consisting, as far as appears, of money alone in the hands of the administrator, to be such an interest as can be called the equitable property of the debtor, and as such applied to the discharge of judgment debts, yet it is clear that the creditor must show that he is unable to obtain satisfaction by execu- (222) tion at law, before he is in a condition to ask the extraordinary aid of this Court; for it is settled that a court of equity cannot interpose in behalf of a legal demand until the creditor has tried the legal remedies, and they have proved ineffectual. It is necessary, therefore, that the creditor should in all instances have reduced his demand to judgment, and that he should further show that he issued an execution, and either that it was returned *nulla bona* or that the debtor had not a legal title to any property, but only the equitable property out of which satisfaction is sought in equity. *Harrison v. Battle,* 16 N. C., 537; *Brown v. Long,* 36 N. C., 191. In this case a return of *nulla bona* was once made upon an execution taken out on the plaintiff's judgment, and on that the plaintiff might have come here against the debtor's equitable property,

if nothing more had occurred. But the bill states that at the return of that execution the debtor was entirely insolvent and had no property of any kind until 1846, when the judgment had become dormant, and that then George Means died, entitled both to a large real and personal estate; and it prayed satisfaction out of the debtor's distributive share of the latter, without in any manner giving a reason why the plaintiffs could not, by reviving their judgment and suing execution, obtain satisfaction out of the share of the real estate descended to the debtor. It may be that the debtor had disposed of the land; and, if so, the court below would probably allow the bill to be amended so as to introduce a charge to that effect, notwithstanding the demurrer—at least, upon terms. But this Court cannot take any step of that sort, as the case is here upon appeal from an interlocutory decree; and, without an amendment and in the present form of the bill, it would appear that the plaintiff might have had an effectual remedy by execution on the
(223) judgment, and, therefore, that there is no ground for the interposition of the court of equity.

The decree overruling the demurrer was therefore erroneous. The plaintiff must pay the costs in this Court.

PER CURIAM. Reversed.

Cited: Presnell v. Landers, post, 253; *Carr v. Fearington,* 63 N. C., 562; *Kirkpatrick v. Means,* 84 N. C., 209; *Hackney v. Arrington,* 99 N. C., 115.

MURRAY v. KING ET AL.

1. Where a plaintiff has made a mistake in point of fact in his original bill, he may, by leave of the court, correct that mistake by an amended bill. But where the facts existed at the time the original bill was filed, and he discovers them afterwards, he cannot file a supplemental bill, but this will be dismissed on demurrer.

2. Whenever the same end may be obtained by an amendment, the court will not permit a supplemental bill to be filed.

APPEAL from an interlocutory order of the Court of Equity for BUNCOMBE, at Spring Term, 1848, made *pro forma,* overruling a demurrer to a supplemental bill, *Battle, J.,* presiding.

The bill states that in the original bill the plaintiff charged that certain land belonging to him had been sold under execution and purchased by two of the defendants, Smith and McKesson, who agreed to relinquish their purchase to the plaintiff upon the payment of certain debts he owed them; and that, in order to raise the money for that pur-

pose, he applied to Benjamin King, who agreed to advance for (224) and to him the sum of $1,050 as a loan; and that it was further agreed by and between the plaintiff and said King and Smith and McKesson that the latter should assign their bids for the land to King, and that he should obtain the sheriff's deed therefor, which was done; and that it was also agreed between the plaintiff and King that the plaintiff should continue to occupy the land and pay to the said King annually therefor the sum of $157.50 interest by way of rent, the said King stating that he had been advised that he could reserve any amount of rent without violating the act against usury; that accordingly leases were executed between the parties upon those terms for the several years stated, and that at various times the plaintiff made several payments thereon, as specified; and that subsequently the plaintiff's interest in the land was again sold under execution and was purchased by one of the defendants, William S. Murray, a son of the plaintiff, who purchased the same for and on behalf of the plaintiff; and that the plaintiff, his son William S., and King, at different times afterwards, concurred in selling parts of the land to other persons, who paid the price or gave their bonds therefor to King, who received the same on account of his said demand against the plaintiff; and that then, in satisfaction of money by William S. Murray advanced for the plaintiff on his purchase before mentioned, a part of the land was laid off and conveyed to him; and the residue was still occupied by the plaintiff, paying, as required by King, a rent equal to 15 per cent annually on the balance due on the loan of $1,050; and that such balance, as demanded by King, was about $646.96, and that in order to provide money to satisfy the same, a sale of part of the land was made by King and William S. Murray, by the consent of the plaintiff, to one Cunningham for that sum on a credit, and that Cunningham gave his bond therefor to King, who accepted the same and agreed with the plaintiff that, upon the same being paid by Cunningham, he (King) would convey the residue of the (225) land to the plaintiff; that King died intestate, and the land descended to the defendants Samuel King and others, who were his children and heirs at law, and who recovered the premises in an action of ejectment against the plaintiff; that on 10 March, 1842, the debt of Cunningham was paid to the representatives (not named) of the intestate King; and that the same, and the sums of money received by King in his lifetime from the plaintiff and others, as before mentioned, amounted to $2,048.33, which satisfied the whole sum lent as aforesaid, with the lawful interest thereon, and left a considerable excess; and the bill prayed for a discovery of the several matters charged, and that the plaintiff should be declared entitled to a conveyance of the said residue of the land, and the defendants, the heirs of King, be decreed to convey

the same, and for an injunction against their taking any proceedings under the judgment at law.

The supplemental bill then further states that upon the filing of the original bill the plaintiff obtained the injunction therein prayed, and that the defendants, the heirs of King, appeared and put in their answers to the bill, and that upon their answers and a motion to that effect, the injunction was dissolved, upon the ground that the bill did not distinctly state that the contract between the plaintiff and King was usurious, and the answers denied that the contract was for a loan of money, and averred that it was for the absolute purchase of the land; and also because the answers denied that William S. Murray purchased the interest or equity of redemption of the plaintiff in the premises (if he had any), for and on behalf of the plaintiff, and averred that he purchased the same as the agent and with the money of the said King.

The bill by way of supplement then further states that the said sum of $1,050 was advanced by King to the plaintiff by way of loan, and that it was corruptly agreed between them at the time that the
(226) plaintiff should annually pay to King at the rate of 15 per cent as interest for the forbearance thereof, and that he should pay the same under the color and name of rent for the said land, as a shift and in order thereby to conceal the true nature of the said agreement, which the plaintiff avers was for a loan of the said sum of $1,050, and not for the absolute purchase of the said land. The bill further states by way of supplement that before and at the time of filing the original bill the plaintiff was informed that the sheriff had duly sold his equity of redemption in said land, when William S. Murray purchased as aforesaid; but that the plaintiff is since informed and believes that the sheriff had no process under which he had authority to make the sale; that, nevertheless, one Davidson and Cunningham bid off the land thereat, and that afterwards William S. Murray, at the request of King and the plaintiff, purchased from them at the price of $400, which he paid out of his own means; that no interest passed by the said sheriff's sale, or was acquired by William S. Murray, but that, if otherwise, the said William S. purchased for the plaintiff's benefit as aforesaid. The bill further states by way of supplement that Elisha King and three others, who are named, administered on the estate of the intestate, Benjamin King, and that they received the money from Cunningham on his own bond for the price of the part of the land sold to him.

The bill prays a discovery of the several matters, and that the administrators may come to an account with the plaintiff for the said sum lent and the interest and payments thereon, and be forced to pay to the plaintiff the excess that may be found to have been received thereon by King or his administrators above the principal and legal interest, and

also for a conveyance from the heirs at law, and for a second injunction against the judgment in ejectment.

The injunction was granted by a judge out of court, as prayed (227) for, and at the next term the defendants demurred because the supplemental bill did not charge any new matter to have arisen since the original bill filed nor show any reason why the matters charged by way of supplement might not have been inserted in the original bill, or why the defendants, the administrators of King, might not have been made parties by amendment.

On the argument of the demurrer it was overruled *pro forma,* and the defendants by leave of the court appealed.

J. W. Woodfin, Edney, and Francis for plaintiff.
Baxter and N. W. Woodfin for defendants.

RUFFIN, C. J. As the expense is nearly doubled by having two suits instead of one, it seems manifestly proper that when by an amendment the plaintiff can put his whole case into his original bill, he should be required to do so, and not be at liberty to allege it by piece-meal in different bills, as he finds his case pinching. *Lord Redesdale* lays it down that, whenever the same end may be obtained by amendment, the court will not permit a supplemental bill to be filed. Mitford Pl., 60 (3 Ed.). In a subsequent passage, 164, he says if a supplemental bill be brought upon matter before the filing of the original bill, when the suit is in that stage of proceeding that the bill may be amended, the defendants may demur; and, though an authority is seldom necessary to him beyond his own, he cites in support of the position the case of *Baldwin v. Mackon,* 3 Atk., 817, in which *Lord Hardwicke* made a decision on the point. The same principle has been fully recognized by succeeding chancellors. *Milner v. Harewood,* 17 Ves., 144; *Knight v. Matthews,* 1 Mod., 569. In the present case there is not a single new fact brought forward in the supplemental bill, excepting only the proceedings had in the original suit, which are brought forward merely to let it be seen that the plaintiff had lost the protection of the injunction, and thereby (228) lay a ground to ask for the renewal of it. It is true, the supplemental bill charges that the original bill states untruly that the plaintiff's equity of redemption had been sold by the sheriff and became vested in William S. Murray in trust for the plaintiff, whereas he now says that in truth the sheriff had no process against his property, and that the sale was therefore void, and this he charges to have come to his knowledge since the original bill filed. But that is not material, since the fact, whatever it be, existed when the first bill was filed, and the knowledge of it, as the plaintiff now says it really is, was acquired by

him at the time when, according to the course of the court, the case was open to amendment, being before there was even replication to the answers. And it was peculiarly proper in this case that the facts stated in the supplemental bill, to meet the grounds on which the court dissolved the injunction, should have been inserted in the original bill by way of amendment, instead of being the subject of a distinct bill, because they are not merely in addition to those alleged in the original bill, but in contradiction of them. For, to make out a case of usury, the latter bill has to state the contract differently from the former, by distinctly charging that the agreement was a corrupt one for usurious interest on a loan, and that the loans and reservation of rent were merely colorable, and, especially, it states that the allegations in the bill respecting the second sheriff's sale were founded on mistake and are wholly untrue. Now, as a supplemental bill is, in its nature, merely in addition to the original bill, and, when it is not for further discovery merely, the cause is heard upon both bills together (Mit. Pl., 33, and 69), it is obvious that there would be an absurdity in a plaintiff's asking, and the court's giving, relief upon such inconsistent allegations—all remaining together in the pleadings. But it would be easy to introduce the truth, or the statement by which the plaintiff would be will-
(229) ing to abide as the truth, into the case by way of amendment, because the amendment would begin by striking out what had been incorrectly stated and inserting in lieu thereof allegations of the opposite tenor.

Upon the whole, then, the Court holds that the demurrer ought to have been sustained and the bill dismissed with costs, because, framed as it is, there are material and direct contradictions upon its face, and we do not see how the plaintiff could get a decree upon the two bills; and, if that were not so, because the new parties might have been made and all the facts introduced by amendments to the original bill. The plaintiff must pay the costs in this Court.

PER CURIAM. Reversed.

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(230)

WILLIAM H. ARCHIBALD v. JOHN W. MEANS.

1. It is a decisive objection to a bill, praying for an account of an estate and relief against it, that it makes married women parties without joining their husbands.

2. The stating part of a bill ought to contain the case of the plaintiff, showing the rights of the plaintiff and the injury done to him, and by whom it was done; and, even then, the persons thus mentioned in the bill as the authors of the wrong complained of are not thereby made defendants,

but only those against whom process of *subpœna* is prayed as the means of compelling their appearance, or, under our statute, publication in its stead.

3. But where in a case of this kind the defendant does not avail himself of this objection by refusing to appear, but appears and *demurs*, the court will not give him costs.

APPEAL from an interlocutory order of the Court of Equity of CABARRUS, at Spring Term, 1848, overruling a demurrer, *Manly, J.*, presiding.

The bill is entitled, "The bill of complaint of William H. Archibald against John W. Means, William C. Means, Margaret the wife of Cornelius McKee, Susan the wife of Samuel Hewings, Margaret the wife of M. W. Alexander, Marcus Means," etc., naming several other persons. It states that George Means, late of Mecklenburg County, died intestate in 1846, leaving a large estate, both real and personal; that he never had issue nor married, but that he had three brothers, namely, John, William, and James, and one sister named Margaret, who intermarried with Charles F. Alexander, and that all of them died previous to the intestate, George, and "that the defendants are the children of the said William, John, James, and Margaret, deceased, and are the next of kin and heirs at law of the said George, deceased, and as such were entitled to his entire estate." The bill then shows that the plaintiff is a judgment creditor of John W. Means, and first, (231) before filing the bill, which was in December, 1847, that he sued out a *fieri facias*, and that it was returned *nulla bona*. It further states that "the defendants," as the heirs of George Means, deceased, filed their petition in the court of equity to obtain a sale of the real estate for partition, and that by decree thereon the land had been duly sold on a credit and the sale confirmed by the court, and the clerk and master ordered to collect the price when it became due. The bill also states that William C. Means obtained administration of the personal estate of the intestate, George, and that it is worth upwards of $20,000; and that John W. Means had no visible property out of which the plaintiff's debt could be made by execution, nor any other means of paying the same, but out of his share of the proceeds of the sales of the land and his distributive share of the personal estate, as one of the next of kin and heirs at law of the said George, deceased; and that he refused to make any provision thereout for the security of payment of the debt to the plaintiff, but was endeavoring by fraudulent assignments and orders to evade the payment thereof. The prayer is for "the State's writ of subpœna to issue to the defendants" residing in this State, and that publication be made as to those beyond the State, commanding them to appear, etc., and answer, etc., and that an account may be taken of the personal estate in the hands of the administrator, and what is the

amount of the distributive share of the said John W. Means in said estate, and that it might be decreed that the plaintiff's debt should be satisfied out of the share belonging to John W. Means of the personal estate or the proceeds of the real.

There was a demurrer for want of equity by John W. Means, which was overruled on argument, with costs; but by leave of the court he appealed.

(232) *Osborne and Thompson for plaintiff.*
Wilson and Coleman for defendants.

RUFFIN, C. J. The merits of the controversy between these parties cannot be determined in the present state of the pleadings. If any person can be deemed a defendant to the suit, a decisive objection to the bill is that it is against three married women, without making the husband of either of them a defendant. In the title of the bill it is said to be "against Margaret, the wife of Cornelius McKee," etc., but not to be against McKee himself, or the other husbands. Of course, as the husbands are necessary parties to the account, so as to render it obligatory upon all interested in the estate, the court ought not to entertain the bill and order the cause to an account without them. But the truth is that the bill does not properly make any person a defendant. The bill is entitled a bill against certain persons; but the title is no part of the bill, whether it precede the statement of the bill or be written on the back of it. The stating part of the bill ought to contain the case of the plaintiff, showing his rights, and the injury done to him and by whom it was done; and even then the persons thus mentioned in the bill as the authors of the wrong complained of are not thereby made defendants, but only those against whom process of subpœna is prayed as the means of compelling their appearance, or, under our statute, publication in its stead. Coop. Ch. Pl., 16; Beams Pl., 148. In the present bill no persons are named in the stating part of the bill as the heirs or next of kin of the intestate; but it is only stated that "the defendants" are the children of their deceased brothers and a sister of the intestate, and as such are his heirs at law and next of kin. In like manner in the prayer for process it is against "the defendants," without naming any person. So that in truth there is, strictly, no suit properly constituted in which the court ought to have decreed, or this person, John W. Means, ought to have demurred. The decree was therefore erroneous, and must (233) be reversed; but as we have observed that this is not an uncommon mode of stating a case and making parties in some parts of the State, and the appellant might have availed himself of the defect more properly by objecting to appearing, instead of demurring, the

Court is not disposed to give costs in either court. We cannot, however, but express the hope that more attention will be paid to the framing of the pleadings in an orderly manner, and, to that end, that recourse will be had to the books of precedents of established authority, rather than to the loose and imperfect productions of the circuit.

PER CURIAM. Reversed.

Distinguished: Potter v. Everett, 42 N. C., 155.

EDNEY v. A. MOTZ.

1. In England, where exceptions are filed to an answer to an injunction bill, the exceptions must be disposed of before a motion to dissolve the injunction can be heard.
2. But in this State, owing to the shortness of the terms of our courts, the practice is different, and the exceptions and the motion to dissolve must be heard together.
3. Where a defendant moves to dissolve an injunction, and the motion is refused, and afterwards, by permission of the court, he amends his answer, he is at liberty again to move the dissolution.

APPEAL from an interlocutory order directing an injunction to be continued to the hearing made at Spring Term, 1848, of BUNCOMBE Court of Equity, *Battle, J.,* presiding.

By an original and supplemental bill the plaintiff states that (234) in 1836 he became indebted by note to J. P. Henderson, and that the defendant was his surety therefor; that the same was assigned to one Jacob Ramsour, and that the defendant took up that note from Ramsour and in discharge thereof gave his own note to Ramsour for $345; that in December, 1841, the plaintiff paid to the defendant the sum of $345 on account of the debt, but that, having great confidence in the defendant, he took no receipt therefor, nor called any witness to the payment. The bill further states that in 1840 or '41 the plaintiff purchased from the defendant a sulky and trunk, at the price of $120, and that in 1842 the defendant paid as his surety to one Slade $242 and as the executor of one John Motz held a bond of the plaintiff's for about $160, making together the sum of $522 in which the plaintiff was indebted to the defendant, exclusive of a balance of about $45 due on account of the debt to Ramsour; that the defendant was indebted to the plaintiff in the sum of $150 for a cow and a calf, $100 for that amount paid by the defendant to one James M. Edney, and also in the sum of $75 for a demand he had against his testator, John Motz, which being

deducted from the debts to the defendant would leave a balance of about $242 in December, 1842. The bill further states that at that time the defendant called on the plaintiff to execute to him his bond for $426, saying that he found from his accounts and papers that amount to be due him; that the plaintiff objected to giving a bond without a settlement, as he did not believe his debt was so large; but that the defendant assured him it was, and insisted on taking a bond, saying at the same time that, though he had not then leisure to make the calculations and go into a settlement, yet he would at an early day produce all the papers and make a full settlement, and if any mistake should be found in the bond, he would then correct it. The bill further states that, in reliance on the defendant's integrity and on those promises, the plaintiff
(235) executed his bond to the defendant on 10 December, 1842, for $426, as required, and at the same time placed in his hands as collateral security therefor sundry notes given to the plaintiff by other solvent persons, as follows:

William Welch's bond	$75.00
Elizabeth Moody	75.00
John Hamyent	40.00
Jonathan McClure	50.00
J. Redman	25.00
Burganer and others	40.00
M. Phifer	160.00
	$465.00

With the bill is exhibited a receipt given by the defendant for those notes, in which he says: "I am to collect as much of them as I can and give said Edney credit on a note I hold on him for $426; if there be more than that sum collected, I am to pay the overplus to the said Edney, and if that amount be not collected, then the said Edney is to be liable to me for the balance; the credits to be given as the notes are collected and interest to be calculated on both sides." The bill further states that in December, 1841, the plaintiff pledged to the defendant a gold watch, worth $160, as security for the debts he owed him. The bill then states that the plaintiff has often urged the defendant to make the promised settlement, in order that it might be ascertained what was really due to the defendant, and also urged him to collect the notes so placed in his hands or return them to the plaintiff; but that the defendant refused to come to any further settlement or to give the plaintiff credit for any of the said notes, pretending that the debtors were insolvent and that he was unable to collect any sum on them, whereas the

plaintiff charges that they were all solvent and that the debts have either been collected by the defendant or, if otherwise, that they have been lost by his laches; and at other times pretending that (236) the plaintiff was indebted to him for money which he paid as surety for the plaintiff to one M. Quiggle on justice's judgments for about $170, whereas the defendant procured the constable to seize the plaintiff's property on executions on those judgments to compel the plaintiff to pay them, and he did himself pay them and took up the judgments and executions from the constable. The bill then further states that the defendant instituted three suits at law against the plaintiff, one on the bond for $426, a second on the note first mentioned, as taken up from Ramsour, and the third on the bond for about $160, payable to one John Motz, deceased, and which the plaintiff avers to have been included in the bond for $426; and that the plaintiff recovered judgments in the two former actions for the whole principal and interest, without any deduction. The bill prays a discovery as to the several sums claimed by the defendant, and the origin and consideration of the demands on which the suits were brought, and as to the circumstances under which the bond for $426 was given, and also what steps had been taken to collect the notes which the plaintiff deposited with the defendants, and what had been collected thereon, and if any parts remained uncollected, what parts, and why they were not collected; and generally a discovery upon all the matters alleged in the bill upon which various interrogations are founded; and the bill further prays that the accounts between the parties may be settled under the direction of the court, and the true sum in which the one indebted to the other ascertained, and the plaintiff declared to be entitled to the watch pledged by him, and also the residue of said notes after the satisfaction of the sum that may be found due to the defendant, if any, and for an injunction against the judgments at law.

The original bill was filed 16 February, 1847, while the action at law was pending, and on it no injunction was moved for. On 5 April following the defendant put in an answer, to which the plaintiff (237) took several exceptions. At the same time the supplemental bill was filed, and therein were stated the recoveries at law, and various others of the matters already mentioned. On 2 October following, the defendant put in a further answer, and to that the plaintiff also took several exceptions. Upon his answer the defendant moved to dissolve the injunction, but the court overruled the motion, and directed that the defendant might amend his answer. On 14 April, 1848, the defendant put in an amended and further answer to the bill and supplemental bill, to which no exception was taken by the plaintiff, and the cause came on upon the original and supplemental bill, the exhibits and the answers of

the defendant, and his motion to dissolve the injunction. But the court refused the motion, and ordered the injunction to be continued to the hearing, from which the defendant was allowed an appeal.

The answers state that one of the judgments at law was recovered on a bond given by the plaintiff to the defendant for $345.59, dated 10 March, 1839, and payable one day after date; another on a bond for $426, dated 10 December, 1842, and mentioned in the bill. They state the consideration of the first bond to be as follows: That the plaintiff was indebted to J. P. Henderson upon a judgment in 1839, and, being pressed thereon for the money, the plaintiff prevailed on the defendant to assume the debt for him to Henderson, who was willing to take the defendant and discharge the plaintiff, and he agreed to secure the defendant from loss therefrom by executing to him his bond for the sum then due to Henderson and also a mortgage for two horses and a small library. That in execution of the agreement, the defendant, on 10 March, 1839, took upon himself exclusively the debt to Henderson, then amounting to $345.49, and on 15 February, 1840, he paid Henderson the sum of $363.47 in satisfaction of the principal and interest
(238) then due to him. That the plaintiff likewise, on 10 March, 1839, gave to the defendant his bond for the sum of $345.59, as the counter-security to the defendant, and also then executed a conveyance of two horses and his library, on condition that if the plaintiff "do pay a judgment of $300 now in Lincoln Superior Court in favor of J. P. Henderson against the same Edney, on which execution hath issued, and release said Motz from the liability of said judgment, which he may assume, then, etc.," which mortgage is exhibited with the answer, duly proved and registered in January, 1841. The answers further state that the plaintiff did not pay any part of that debt to Henderson, nor has he since paid any of it to the defendant, but the whole is justly due. The answers admit that the plaintiff was indebted to Jacob Ramsour in the sum of $345, or thereabouts, by note, and that the defendant also assumed to pay that debt for the plaintiff, and that the plaintiff in December, 1841, paid to the defendant the sum of $345 on that account, and that he gave no receipt therefor, but they state that the defendant immediately paid the money to Ramsour to the credit of that debt, and that after deducting the same, only about $40 remained due thereon, including interest afterwards calculated up to 10 December, 1842. And the answers further state that the debts to Ramsour and Henderson were not the same, but distinct and different debts; that they were both just debts, and that the defendant paid them both in the manner and at the different times before stated. The answers state that the defendant is unable to remember distinctly or to state positively the origin of the debt to Ramsour, as the transaction occurred so many years past, but

that he believes the debt was first due to one Simpson on a note, which was assigned to Ramsour, and that he was certain that it was the debt of the plaintiff, and that he, the defendant, applied towards the payment of it, in December, 1841, the money then received for that purpose from the plaintiff, and that he afterwards paid the residue of the debt to Ramsour out of his own money. The answers further (239) state that when the plaintiff paid to the defendant that sum of $345, no allusion was made to the debt to Henderson, as that had been satisfied nearly two years before, and the defendant held the plaintiff's bond therefor, secured by the mortgage, but the money was paid to him specially to be applied to the note then held by Ramsour, to which it was applied as aforesaid.

In reference to the other bond for $426, the answers state it to have arisen as follows: That besides the transactions already related in the answers, the defendant paid for the plaintiff these several sums, viz.: to Slade, $242; to Quiggle, $183.26; to S. P. Simpson, about $200; and that he sold to the plaintiff the sulky and trunk at $128, and held his note to the defendant's father and testator for $168.17, making in all, with the balance of $40 due to Ramsour, the sum of $961.43 in which the plaintiff was indebted to the defendant, to the best of the defendant's recollection; that in December, 1842, the two parties agreed to settle their unadjusted matters, and that before entering upon the settlement they went together to Ramsour to ascertain the balance then due him, which the defendant was to pay, and found it to be about $40; and they then, when the matter was fresh in their memories and with the assistance of memoranda, which each party had kept and then had thought not subsequently preserved, entered upon and made a settlement, upon which, after deducting the sum of $150 for the price of a cow and calf then purchased by the defendant from the plaintiff, a balance was found due to the defendant of $426 upon those accounts, for which the plaintiff then executed his said bond with apparent willingness and without any condition or reservation in respect to a further settlement or other matter whatever. The answers admit that in that settlement was included the debt of $168.17 to John Motz, and state that the note was then given up to the plaintiff and is now in his possession, unless he (240) has destroyed it; but they further state positively that the settlement did not include the bond given 10 March, 1839, for $345.59, because the defendant had already that bond and a separate and special security in the mortgage of the horses and books, and also the pledge of the watch, which he would have been unwilling to give up; and the answers further state that so far from any dissatisfaction or doubt being felt or expressed by the plaintiff with respect to the sum in which he fell in debt, or any stipulation as to any future settlement, the plaintiff

entirely acquiesced in the result and gave this bond for the balance, and at the same time placed in his hands, as collateral security, the notes of Welch and others, and took his receipt for them, which is appended to the bill, and that the plaintiff then perfectly understood and admitted that the same was due to the defendant, besides the other sum of $345.59 due on the previous bond; and that accordingly the defendant still retained the possession of the watch that had been pledged therefor, and also the library some time thereafter, and until the plaintiff removed to another county and solicited the use of the books as necessary in his profession. The answers further state that in fact more was due to the defendant than the balance struck of $426, as he verily believes, and that he has no doubt that he had forgotten at the settlement one or more of the several sums before mentioned, which he had paid for the plaintiff, and that they were omitted in the settlement; and he affirms positively that they were all in fact paid by him. In particular, the answers state that the debt to Mr. Quiggle was $183.26, and that it was not paid by the plaintiff, and was paid by the defendant under the following circumstances, namely: that some of the other creditors of the plaintiff threatened to levy on the effects of the plaintiff, including those mortgaged to the defendant, who had neglected for some time to have the mort-
(241) gage registered, and that, in order to prevent other creditors from getting a preference over him, the defendant ordered a constable to levy Quiggle's executions, and also one in favor of his mother, on the property; but that in fact no part of it was sold, and subsequently the defendant paid the whole debt to the constable, and took his receipt therefor on 4 September, 1841; and he believes the same was included in the settlement of 10 December, 1842, and also that the plaintiff obtained the judgments from the constable after they had been paid by the defendant.

The answers further admit that John Motz owed the plaintiff the sum of $75, but denies that the defendant agreed to give the plaintiff credit therefor in their accounts, or on the plaintiff's bond to John Motz for $168.17; and, on the contrary, they state that the plaintiff was also indebted to John Motz by open account to a larger amount in dealings subsequent to the execution of the bond, and that it was agreed by the plaintiff and the defendant that the $75 should be credited to the open account, and it was so credited.

The answers also admit that in 1839 the defendant was indebted to James M. Edney over $200, and that the plaintiff had the collection of it, and they state that in the autumn of 1839 the defendant, by the directions of the plaintiff, paid $100, part thereof, to Thomas M. Edney, and that the defendant hath no distinct recollection when or by whom the residue was paid; but that he feels confident that the whole was paid

before 10 December, 1842, and if any part of it was advanced for him by the plaintiff, it was allowed to the plaintiff in the settlement of that day on which the bond for $426 was given.

The answers also admit that the watch was pledged to the defendant as a security for the debts existing at the time, but they do not state the time, and only say that the defendant gave the plaintiff a receipt for the watch at the value of $160, or more, expressing the time and the purpose for which he held it. The answers further state, in re- (238) spect to the notes deposited with the defendant for collection, (?) that the one given by Burgnar and other for $40 was claimed by W. J. Alexander as belonging to him, and that the defendant, believing it to belong to him, delivered it to him, and took his receipt for the same for the satisfaction of the plaintiff; that the note of M. Phifer for $160 was payable 22 June, 1844, and that when it fell due, Phifer had become insolvent and has so continued ever since, so that no part of the debt could be collected; that all the others were put into the hands of an attorney, the late Mr. Hoke, for collection, who was unable to collect anything on them before his death, which happened in 1844; and that they were then delivered to another attorney for the same purpose, who had also been unable to collect any part of them before the suit was brought; but that pending the suit his attorney had received the sum of $65 from William Welch, which is all he could get from him, for the reason that the plaintiff himself had received the residue of the debt; that the other debtors are and were insolvent when the defendant received the bonds, and that his attorneys have been unable to collect any part of those debts; and that the defendant has always been willing to return the bonds to the plaintiff, and also, upon satisfaction of the debts due him, to redeliver the watch and release the other property mortgaged.

N. W. Woodfin and Gaither for plaintiff.
Avery for defendant.

RUFFIN, C. J. Before considering the merits, and whether the answer meets the equity, the plaintiff's counsel took some preliminary objections to entertaining at all the motion to dissolve the injunction. It was insisted that the exceptions to the two first answers being undisposed of, stood in the way of that motion; and also that after the motion had been once refused, it could not be renewed. In Eng- (239) land the court never passes on exceptions in the first instance. (?) Hence a reference of an answer for impertinence, or of exceptions to its efficiency, is good cause against dissolving an injunction. *Fisher v. Bayley,* 12 Vis., 18; *Goodinge v. Woodhams,* 14 Vis., 534. Indeed, a motion to dissolve will not be heard until the answer has been filed a

certain time, so as to afford an opportunity to the other side to consider it, and move a reference for impertinence, or except for insufficiency. Those rules of practice are convenient and proper there, as the court is always open, and can require the plaintiff to except in a reasonable time, and to speed the report so as not to delay the motion to dissolve unreasonably; and they greatly facilitate the business, as thereby the attention of the judge, on the motion to dissolve, is not required to anything but the merits. But rules of practice must vary according to the different conditions of courts and suitors, so as to promote substantial justice, as far as may be, in the actual state of things. The shortness of our terms, which are limited to one week, twice a year, puts it entirely out of our power to adopt the English course with any kind of regard to the justice due to the defendant in injunction causes. Therefore, although it does not allow to the plaintiff's counsel as much time as is desirable to prepare exceptions or argument, and also greatly increases the burden of the judge, the Court was obliged to say, in *Smith v. Thomas,* 22 N. C., 126, that exceptions did not answer the motion to dissolve, but that the defendant might bring on both to be argued together, and that the court would dissolve the injunction unless the exceptions proved to be well founded. Indeed, when one considers the matter, it is found that, even without the exceptions, the court would not dissolve the injunction, if there be such an insufficiency in the answers as is material to the equity on which the injunction was granted, and would form a just (240) ground of exception. So that, in truth, the rule in England is (?) designed chiefly to clear the case, on the motion to dissolve, of everything extraneous, that the counsel and the court may not be perplexed with any matter not directly relevant to that motion, on the merits purely. The Court would gladly adopt the same course here, if it might be done without the risk of great injury to defendants; and, no doubt, if there were reason to suppose that a defendant had kept back his answer purposely to conceal its contents and gain an advantage, the court would not act upon the motion immediately, but let it stand over and allow the other side time to examine the answer. In the case before us we think the court was entirely right in refusing to dissolve the injunction in October, 1847, because the motion was founded on the answer alone, without bringing on the exceptions to it. The court might properly have refused to hear the answer at all under those circumstances. If, indeed, the exceptions had been brought on with the motion, the court might possibly, and, we must presume probably, have refused the motion, because the court might have thought the exceptions well founded. But, as the case now stands, the Court here does not consider that point nor look into the exceptions, because there was no appeal upon that part of the case, and because, as we conceive, the exceptions have

now had their desired effect in obtaining the answer of April, 1848, which must be deemed satisfactory to the plaintiff and sufficient, as no exception was taken to it. The court, in the order of October, 1847, did not continue the injunction to the hearing, but merely refused then to dissolve it, at the same time allowing or requiring a further answer. Now, although it was right to refuse the dissolution of an insufficient answer, or even to hear the answer apart from the exceptions, yet there is no reason why the defendant may not be allowed to make or renew a motion, after he shall have, in submission to the exceptions or to the order of the court upon them, put in a further answer which (241) meets the bill and appears to be sufficient, inasmuch as the plain- (?) tiff does not except to it. It would be exceedingly rigorous to visit the omission to put in a full answer at first, by precluding the party, after answering sufficiently, from moving to dissolve, for the effect would be, for perhaps a mere oversight, to continue the injunction to the hearing, though the whole equity of the bill was met by the answers, taken together. We are not aware that there has ever been any such practice, and think there ought not to be, and it is clear that nothing of the kind was intended in the order of October, 1847, but quite the contrary. The Court is therefore of opinion that the defendant's motion, after his further answer at April Term, 1848, was admissible, notwithstanding the exceptions to the previous answers and the refusal to dissolve the injunction upon those answers. In other words, we hold that when the defendant finally put in an answer which, with the others, amounted to a full answer, to which no exception could be taken, it was open to him to move thereon to dissolve the injunction, as he might have done at the first term, if he had then sufficiently answered. For the exceptions are answered, and virtually put out of the way, and the cause is to be considered on the equity to sustain the motion when made, as in other cases.

Upon the merits the answers completely meet the bill in every respect, but those of the note given up to Mr. Alexander and the sum of $65 collected from Welch pending this suit. The defendant admits, it is true, that the plaintiff paid him $345 on account of the debt to Ramsour, as mentioned in the bill; and he says he duly applied it to that debt. But he denies that either of his suits against the plaintiff concerns that debt except the small sum of about $40, included in the bond of December, 1842. He states positively that the plaintiff owed two debts of nearly the same amount—the one to Ramsour, and the other to Henderson—and that he, the defendant, was surety for both, and that although the plaintiff furnished the means of nearly paying the former, yet (242) that he did not pay anything to Henderson, but that the defendant paid the whole debt to him, and that it was for that debt, and not the one to Ramsour, that the plaintiff gave the defendant a bond for $345.59,

10 March, 1839, and the mortgage of the same date. As the two debts were so nearly of the same amount, possibly, after so long a time, one of the parties may be under some mistake on this point. The plaintiff treats the case as if there were but one debt, originally due to Henderson and transferred to Ramsour; while the answer is distinct and positive that they were different debts, and that the defendant paid both. That is sufficient upon the present motion, as the answer is taken as true. But it is, moreover, to be observed that the answer derives support on that point from the statement in the bill, that the defendant took up the plaintiff's note from Ramsour, while in the mortgage of the horses and library the plaintiff says that the debt to Henderson was then (10 March, 1839) in judgment, and execution out.

As to the other debts, the answers are equally explicit. The defendant says the plaintiff was mistaken in supposing that he was sued on his bond to John Motz, deceased, which he admits to have been included in the settlement of 10 December, 1842, on which the bond for $426 was executed. And as to this latter bond the answers deny explicitly and peremptorily every allegation in the bill calculated to weaken its obligation as a bond fairly obtained for a balance ascertained to be due on a full and final settlement; and certainly the circumstance that cotemporaneously the plaintiff placed in the defendant's hands bonds as a collateral security, and the terms in which he took the defendant's receipt therefor go far to give color and credit to those statements in the answer,

(243) independent of the fact that the sum due to the defendant was even larger than amount of the bond, as he swears in each of his answers. For the defendant sets out the particulars, as he recollects them, showing a balance to him of upwards of $200, if, after crediting the plaintiff with the bond for $426, he be also credited with the defendant's debt to James M. Edney. In fine, upon the answers both the bonds to the defendant were justly due. The imputation of laches in regard to the bonds to be collected is also rebutted, not only by the statements that the defendant duly employed attorneys to attend to the business, but that in fact the debtors were insolvent, and that nothing could be got from them, except the sum of $65 from Welch, for which it is admitted the plaintiff is entitled to credit at the period of taking the judgments. The defendant is further accountable, at least for the present, for the bond for $40 and interest thereon from 10 December, 1842, which he surrendered to Mr. Alexander, as he did so without consulting the plaintiff, and he does not show that Mr. A.'s claim to it was well founded. As to the $65, the injunction ought to be perpetuated, and as to the $40 and interest, it should be continued, and at the hearing the defendant may establish, if he can, either that the bond belonged to Mr. Alexander or that the obligors in that also were insolvent. With

these exceptions, we think the injunction should have been dissolved with costs, and to that effect a certificate must be sent to the court of equity. The plaintiff must pay the costs in this Court.

PER CURIAM. Ordered accordingly.

Cited: Capehart v. Mhoon, 45 N. C., 38; *Pendleton v. Dalton,* 64 N. C., 332; *Halcombe v. Commissioners,* 89 N. C., 349.

(244)

THE SOLICITOR ON THE RELATION OF MARVILL MILLS ET AL. V. COLUMBUS MILLS ET AL.

1. Where, under authority conferred by an act of Assembly, commissioners are appointed by a county court to lay off a county-seat, etc., a court of equity has no power, on the complaint of relators through the solicitor, not alleging that any private irremediable injury is to be done to them, to interfere with the proceedings of such commissioners.
2. If such commissioners are guilty of any breach or omission of duty towards the public, the courts of common law, through the high officers of the State, will afford relief by a writ of *mandamus* or *quo warranto.*

APPEAL from an interlocutory order of the Court of Equity of RUTHERFORD, at Spring Term, 1848, *Battle, J.,* presiding.

The Legislature at the last session established the county of Polk, and by a supplemental act directed that a tract of land containing not less than 100 acres should be purchased and a conveyance taken to the chairman of the county court and his successors in office for the use of the county, upon which a town should be laid off, where the courthouse and jail should be erected and the courts should be held after the completion of the courthouse; and appointed William S. Mills, James Blackwell, Jonathan King, Dr. C. Mills, and William F. Jones, commissioners to locate the said county-seat at or within 5 miles of the residence of Murrell Mills, and to purchase and take a conveyance for the land. By other parts of the act the first term of the county court was fixed on the sixth Monday after the sixth Monday of December, 1846, and the court was required at the first session to appoint five commissioners to lay off the lots of the town, and, after selecting those requisite for public uses, to sell at auction the others at such time and after such notice as the court might direct, upon a credit of one and two years; and the proceeds of the sale were appropriated to building a courthouse (245) and jail.

The present proceeding is an information by the solicitor for the State for the Seventh Circuit, filed in the court of equity for Rutherford

County, upon the relation of Marvill Mills and William Taber for themselves and on behalf of the other citizens of Polk County. It charges that Jonathan King, believing that a majority of the commissioners, from selfish pecuniary motives, had determined to make a location at one extreme end of the county, to the injury of the citizens, refused to act as a commissioner; that after such refusal William S. Mills, Blackwell, and C. Mills agreed upon a location known as "Hawkins Ridge," and contracted for a conveyance of the land, and in pursuance thereof procured a deed to be executed to the chairman of the county court of Polk and his successors in office for a part thereof containing 72 acres; that for the residue thereof no conveyance had been as yet obtained, and that in consequence of the right of one Wales and Porter to any mines or minerals that might be in the land, a good title could not be had therefor, and, moreover, that several of the bargainors in the deed for the 72 acres were married women, who had not fully executed the same by acknowledgment thereof upon privy examination, and that, in fact, at the execution thereof no chairman of the county court had been duly appointed, by reason that the day fixed by the act for the holding of the court was an impossible one. The information further charges that, at a court held on the eighth Monday after the fourth Monday of December, 1846, towit, on the fourth Monday of February, 1847, George J. Mills, Joseph M. Carson, Henry Earle, and the said Columbus Mills, and William F. Jones were appointed commissioners to lay off town lots and sell them, as provided for in the act; that the majority of the said commissioners refused to proceed to lay off the town at the place selected by the other commissioners, upon the ground that the location had

(246) not then been legally made, and that thereupon William S. Mills, Blackwell, and Dr. C. Mills proposed to Jonathan King to meet them in conference on their duties, and assured him that they had abandoned the location of "Hawkins Ridge" and were willing to fix on some other more central and just to all the citizens of the county; and that under this assurance, King met those and the other commissioner, Jones, on 25 May, 1847, and proposed to act with them if they would agree in writing to select another location within certain bounds, which proposition they refused, and he then notified them that he would not act; that thereupon the other four proceeded, by themselves, to vote for the location, and that three of them, William S. Mills, James Blackwell, and Dr. C. Mills, voted for "Hawkins Ridge," and Jones voted for another place; and that those three persons, William S. Mills, Blackwell, and Dr. C. Mills, fraudulently combined to select the place which they did, in order to promote their private interest by having the county-seat in the vicinity of their own lands and of a turnpike road in which they are stockholders, to the injury of a majority of the citizens of the county;

that "Hawkins Ridge" is an extensive ridge of many hundred acres and is indefinite, and that the land conveyed to the chairman of the court is not within 5 miles of the residence of Murrell Mills, and is within 2½ miles of one extreme of the county.

The information further charges that, after the selection made on 25 May, four of the commissioners appointed by the county court, namely, Messrs. Carson, C. Mills, Earle, and Jones, met and, without the sanction or coöperation of the others, George J. Mills laid off the town on the lands so selected and purchased by the first set of commissioners and had advertised the lots for sale on 21 July, 1847, the bill being filed on the 19th of the same month; that by a sale of the lots on that day irreparable injury would be done to the citizens of the county, because, from the doubts generally entertained of (247) the legality of the location, the sufficiency of the title to the land, and of the validity of the appointment of the commissioners and of their authority to make the sale, the lots would sell much lower than under different circumstances they would; and that, consequently, there would be a necessity for taxation on the citizens of the county for the erection of the public buildings, and the justices of the county court, under a mistaken notion of their duty, would levy a tax for that purpose; and that the actings of the said commissioners, under the color of authority, tend to mislead the citizens of the county, to engender excitement and litigation, and to the imposition of additional taxes, and defeat the object of the Legislature in establishing the county, namely, that the county-seat might be convenient to all the citizens of the county.

The prayer is for an injunction to the commissioners George J. Mills, Columbus Mills, William F. Jones, Joseph M. Carson, and Henry Earle, to restrain them from selling or in any way disposing of the town lots or otherwise acting as commissioners under the said appointment. The injunction was granted upon the bill as prayed. At the succeeding term the defendants answered, except George J. Mills, who allowed the bill to be taken *pro confesso;* and upon their answers the other defendants moved to dissolve the injunction, insisting, moreover, that there was no ground of equity on which the bill could be sustained, and that it was improperly filed in the name of the solicitor, instead of that of the Attorney-General; that the court of Rutherford had no jurisdiction of the cause, as the land was in Polk, and all the parties lived there. The court refused to dissolve the injunction, but allowed the defendant to appeal.

Gaither, Baxter, and Edney for plaintiff.
N. W. Woodfin and Bynum for defendants.

(248) RUFFIN, C. J. The answers filed fully remove the imputation upon the integrity of the commissioners, and meet the allegations respecting the defects in the title and conveyance, and the inconvenience of the place selected to the mass of the people of the county, and upon the merits of the case seem clear for the defendants, according to the answers. It appears, however, that there was a mistake in the act in naming the person at whose house the county courts were to be held and within 5 miles of whose residence the county-seat was to be fixed, by calling him *Murrell Mills,* when there is no such person in the county, and the answers state that *Marvill Mills* was meant. That circumstance and the singular mistake respecting the periods for holding the courts create the only difficulty that could be raised in the case, by giving color to the doubt as to the power of the justices to hold a court, appoint a chairman and the commissioners, or do any other acts. We do not think there is a great deal in an objection of that kind, when urged in opposition to the entire administration of justice or the existence of any judicial tribunal in a county. But the court does not deem it necessary to discuss those questions, nor to advert to the answers particularly, or to other objections, taken in the court below, one of them excepted, because on that our opinion is clear that the bill will not lie. It is, that this is a subject not cognizable in a court of equity. It is an attempt to restrain public agents in the discharge of public duty from performing their office, because they are acting or supposed to be acting so unfaithfully, corruptly, and illegally to the detriment, not of any individual in particular, but of the public at large, or of a county at least. There is no such jurisdiction, we think. If, indeed, persons acting under a statute as commissioners to lay out a road, for example, or perform any other function of the like nature, unnecessarily and improperly encroach upon the rights and property of the citizen, or erect a nuisance to his an-

(249) noyance and injury, doubtless a court of equity will, at the suit of the citizen, protect him by injunction; for the color of a public appointment, though conferred even directly by the Legislature, cannot justify private wrong, nor induce the Court to withhold its power of preventive justice in anticipation of irremediable mischief to the citizen, if the case be otherwise a proper one to call for such an exertion of the power of the court. But here no one complains of any such impending injury; but the gravamen of the bill is that the court is to be placed at a point not as convenient to a majority of the citizens as it might be, and, secondly, that owing to certain doubts of the legality of the proceedings, in making the selection and appointing agents for the sale of the lots, as good prices cannot probably be had for the lots as if there were no such doubts. That is said to constitute it a case of

impending irreparable loss, calling for the interposition of the court of equity. Now, if it were such a case of loss as that supposed, still these relators would have no right to institute this proceeding, for they have sustained no private wrong in the matter to be redressed, nor have they a separate interest to be protected. The loss, if any, is to call on the public, the State, or the county, and the power and duty of guarding those interests are not in private persons, undertaking the office of relators, but devolve on the high officers of the State, acting in their own names *ex officio*. But if this were an information by the Attorney-General *ex officio* we should still hold that it would not lie. We know not of such a jurisdiction, and no instance of its exercise has been cited to us. The case made in the information is one of usurped public authority, or of the illegal and corrupt exercise of a public power—acts which amount to offenses or defaults, to be remedied in a different way. The State does not come into the court of equity to enjoin her officers against a breach or omission of duty, but she enforces the performance of a public trust by *mandamus* or inquires into their authority, and deprives them of that usurped, by *quo* (250) *warranto*. That would have been the proper course here, if the officer charged with that duty had, for reasons affecting the public, deemed this a fit case for his *ex officio* interference—a thing that could hardly be expected under the circumstances. Equity can no more interfere to prohibit the commissioners from exercising their judgments in the selection of a place for a county town and public buildings or from raising money for the erection of those buildings by a sale of the town lots, than it would to prevent by injunction the justices of the county from laying a tax for those or other purposes, that some one might think impolitic and prejudicial, or to compel them to levy one that might be beneficially applied. Then commissioners and the justices of the peace in such cases act as political agents, and are answerable *criminaliter* for corrupt misfeasances or nonfeasances, and may be enforced to do their duty by means provided by the common law, or such as may be provided by the Legislature. A chancellor cannot undertake to interfere with their political functions, either to punish or prevent the commission of crimes or acts that partake of the nature of crimes, of public offenses of commission or omission. We might as well undertake to issue an injunction upon the ground that it was impolitic to establish the county. For this reason the Court holds that the injunction ought to have been dissolved with costs, to be paid by the relators, who must also pay the costs in this Court.

PER CURIAM. Reversed.

(251)

PRESNELL AND ROUCHE v. W. LANDERS ET AL.

1. Where there was a deed in trust upon land and negroes for the satisfaction of certain enumerated creditors, and another creditor obtained a judgment before a justice against the debtor and levied on his interest in the property, but did not have the execution returned to court and a *venditioni* awarded, and where the personal estate was exhausted in the payment of the creditors secured in the deed, but there remained a surplus in the hands of the trustee from the sale of the land: *Held*, that the levy of the justice's execution on the land created no lien so as to entitle that creditor to be paid in preference to other creditors who had received subsequent assignments from the debtor.

2. To create such a lien and enforce it, it is indispensable that there should be effectual process, such as will enable the creditor to make a sale of the property.

APPEAL from the Court of Equity of LINCOLN, at Spring Term, 1848.

The plaintiffs are creditors of Rouche by judgments rendered by a justice of the peace; and on 16 February, 1846, executions were sued out thereon, and on the same day the constable made a levy and return thereof in the following words: "Levied this execution on the defendant's interest in a house and lot in the southeast square of Lincolnton, also on two negroes, Rody and Caroline, and household and kitchen furniture, under deed of trust to William Lander, trustee." The executions, judgments, and the other papers were returned to the ensuing county court in March. In August, 1843, Rouche conveyed to the other defendant, Lander, the house and lot, negroes and furniture levied on,

(252) and also other things, upon trust to sell and out of the proceeds pay certain enumerated debts. Afterwards Rouche paid a considerable part of the debts, leaving the balance due less than the value of the negroes and the price they brought, at the sale hereinafter mentioned: on 19 and 20 February, 1846, Rouche drew and Lander accepted orders for divers sums of money to be paid out of the surplus of the proceeds of sale, after discharging the debts therein secured; and on Tuesday of the March County Court Lander sold all the property, when the slaves and other chattels brought more than enough to discharge the debts mentioned in the deed. But the trustee claimed the surplus and also the proceeds of the house and lot as applicable to the said orders so drawn on him and accepted by him. The bill was filed in March, 1847, and states that, in consequence of the sales by the trustee, the plaintiffs were advised that it was unnecessary for them to obtain orders of sale or writs of *venditioni exponas*, to sell the house and lot, and, accordingly, no further proceedings were had on the levies and returns. The bill charges, nevertheless, that the levies and returns created a lien at law upon the interest of Rouche in the real property, and, as

the fund arising from the personalty was more than sufficient to discharge the secured debts, that the trustee was bound to apply that accordingly and leave the realty for the satisfaction of the plaintiffs, and that, by virtue of the lien of their executions, the plaintiffs are entitled to satisfaction in preference to the creditors, who obtained the orders subsequently to the plaintiffs' levies.

The answers do not materially vary the statements of the bill and submit the question of preference between plaintiffs and defendants to the court. Upon a hearing on the circuit, the court declared that the plaintiffs obtained a lien on the estate or interest of Rouche in the house and lot by the levies of the executions and returns, and that, as all the debts secured in the deed of trust were satisfied or might (253) be satisfied out of the residue of the fund in the trustee's hands, the plaintiffs were by virtue of their lien entitled to payment out of the proceeds of the sale of the house and lot; and that they were so entitled in preference to the orders drawn after the levies made on 16 February, 1846. There was a decree accordingly, and for costs to the plaintiffs, and the defendants appealed.

Guion for plaintiffs.
Thompson and Avery for defendants.

RUFFIN, C. J. The Court is of opinion that the decree is erroneous, and that the bill ought to have been dismissed.

It is to be remarked in the opening that the bill is not framed with a view to satisfaction out of this fund as the equitable property of the debtor. If it had been, there are two decisive objections to sustaining it: one, that it does not show that the debtor had no other property out of which satisfaction could have been obtained upon a legal execution; the other, that where the fund is equitable, so that an execution creates no lien on it at law, the debtor may assign, notwithstanding execution sued, until the judgment creditor ties his hands by filing a bill. *Harrison v. Battle,* 16 N. C., 537; *McKay v. Williams,* 21 N. C., 398; *Kirkpatrick v. Means, ante,* 220. The bill and the decree, however, do not proceed upon any such ground, but wholly on the idea that this interest of Rouche in the house and lot is such a legal estate as was liable to be sold on execution, and that the justice's execution and the proceedings on it created a lien on the property. The cause therefore depends upon the correctness of that proposition.

It is true, and was so held in *Harrison v. Battle, supra,* and (254) *Pool v. Glover,* 24 N. C., 129, that the resulting trust in such a case is substantially an equity of redemption within the meaning of the second section of the act of 1812, and therefore it might have been

sold upon a *fieri facias* like any other lands or tenements of the debtor, and that writ binds it, or creates a lien on it, from the time of execution sued. *Hall v. Harris,* 38 N. C., 289. We agree, likewise, that when execution has been sued and a lien thereby created, the court of equity, as was said in *Harrison v. Battle* and *McKay v. Williams,* will entertain a bill asking it to exercise a jurisdiction ancillary to the law, and inquire into the encumbrancy and clear the estate therefrom, or decree a sale under the direction of the court, and out of the proceeds satisfy the prior encumbrance, and then the demands of the execution creditors. For although the creditor may proceed at once to a sale under execution, because the statute gives him the power, yet it is most beneficial for all parties that the debtor's real interest, the value of the equity of redemption, may be ascertained by an inquiry into the amount and justice of the mortgage debts, and the estate brought to sale with a clear title. The whole question in the case is, then, whether the plaintiffs before their bill filed had obtained a lien, in a just and legal sense, by their executions. If they had, they would undoubtedly have been entitled to a decree to have a sale of the premises for their satisfaction; and if they had not such a lien, they could not have had a decree for a sale, and, of course, cannot have one for satisfaction out of its produce. It is a question, indeed, whether the lien, supposing it to have been created by executions and levies, would subsist after the sale of the whole property by the trustee; and, if so, whether it does not continue on the property itself and against the purchaser at the trustee's sale, rather than on the proceeds of that sale. But with none of these points are we disposed to meddle now, because we are of opinion
(255) that, supposing the plaintiffs to have in this Court the same rights against the money in the hands of the trustee which they had against the equity of redemption in the house itself, they cannot have any relief, because we hold that the plaintiffs never had a lien on the property itself or the equity of redemption, and therefore can have no right to call for the proceeds of the sales, whether such proceeds be deemed the subject of either the legal or equitable demand of the maker of the deed. The term "lien" when used in reference to an execution, expresses the right of the creditor to obtain payment by force of that process by a sale of the debtor's property, so as to divest the property out of the debtor or his alienee. It may not only be created *in presenti* by suing the process, but it may by relation be carried back to a prior time, as from the teste or from the judgment. But to create the lien and to enforce it, it is indispensable that there should be effectual process such as will enable the creditor to make a sale of the property. That is always the case with a *fieri facias* duly issued from a court of record. But it is not so with respect to that process when issued by a justice of the

peace. It only binds personal property from the time of the levy, and, in respect to land, it does not bind it at all, in the sense of enabling the creditor to have a sale under it. The statute directs that a justice of the peace shall not issue an execution immediately against land; but that it shall command the officer to make the money of the goods and chattels of the party cast, and, for want of goods and chattels, to levy on the lands and tenements. It further requires the officer to make return thereof, setting forth the money he has made of the goods, and what land he has levied on, and enacts that upon such return the land levied on shall by order of the county court be sold by the sheriff as on a *venditioni exponas*. When the order of sale is made in the county court, and is acted on by the plaintiff by duly suing execution thereof, it has been held that the lien has relation to the levy by the constable, determining the preference between other execution creditors, (256) whether they obtained judgments in or out of court. *Lash v. Gibson,* 5 N. C., 266; *Huggins v. Ketchum,* 20 N. C., 550. We doubt not that it has the like relation in restraint of the debtor's own alienation. But it would seem that there can be no relation for any purpose, nor any lien created by the execution of the justices merely, unless the party complete it by obtaining on it an order of the court to sell, and taking execution on the order, for until that be done it cannot be known that it ever will be done, or that it could be done. The debt may have been discharged, or it may be that the county courts may find such defects in the process or the return as will prevent the making of an order to sell. Until the order to sell and execution thereon, there is not such final process as will authorize the party to sell or create an effectual lien. But this case does not require even a rule to that extent to be laid down, because the plaintiffs have not only not issued nor obtained an award of execution, but it is clear that, upon the returns of the constable, they never can rightly obtain such order or process; for the return states a levy on certain personal property, and does not show any disposition of that, nor show that there is no other personal property; and on such a return the court ought not to make an order of sale, and, it is to be presumed, would not. *Borden v. Smith,* 20 N. C., 27; *Henshaw v. Branson,* 25 N. C., 298. It neither appears by the return nor even in the bill that the debtor's goods would not pay the debt; and therefore the plaintiffs do not entitle themselves to execution against the realty, much less show such an one as would authorize a sale. Consequently, they came here prematurely, at all events, and the decree must be reversed and the bill dismissed, with costs in both courts.

PER CURIAM. Reversed.

Cited: McRary v. Fries, 57 N. C., 236.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

DECEMBER TERM, 1848

MARY HOWELL v. JOHN HOWELL ET AL.

1. Where an executor had assented to a legacy of personal property to A. and delivered the property to her, and afterwards obtained an order of court to sell the property for the payment of debts of the testator: *Held*, that A.'s right to the property was complete at law; that she had a full legal remedy for an injury, and therefore had no right to apply to a court of equity for an injunction to prevent the apprehended trespass.
2. A court of equity will not interfere to prevent a trespass, except where the damage would be irreparable.

CAUSE removed from the Court of Equity of CLEVELAND, at Fall Term, 1845.

The bill was filed at Spring Term, 1844. It alleges that about (259) 1828, John Howell died, leaving a last will, in which the defendants were appointed executors; that soon thereafter they proved the will and qualified; that among other things the will contained a bequest of certain negroes to the plaintiff for her life, remainder to the children of the testator; that soon after they qualified, the executors assented to the legacy and delivered the negroes to the plaintiff, who has had them in her possession ever since.

The bill further alleges that in January, 1844, the defendants, upon a false allegation of debts outstanding against the estate, by an *ex parte* application to the county court, obtained an order of sale, and were about to take the negroes and sell them; that the plaintiff is old and infirm, and in all probability her estate will determine by her death before an action at law for the injury could be terminated. The prayer is that defendants be enjoined from taking the negroes and selling them.

The defendants answered; a reference was made to ascertain the debts of the testator; exceptions were filed; and the case was set for hearing and removed to this Court for trial, by consent.

Bynum for plaintiff.
Guion for defendants.

PEARSON, J. The defendants move, in this Court, to dismiss the bill for want of equity.

We think the motion must be allowed.

The assent of the executors vested the legal title in the plaintiff. If the defendants take the negroes and sell them, there is a clear and adequate remedy at law by an action of trespass, trover, or detinue. The death of the plaintiff, pending such action, would not prevent a (260) recovery, by her personal representative, of damages commensurate with the value of her estate and the injury done. So that the damages which the plaintiff seems to apprehend cannot in the proper sense of the word be considered "irreparable," as in the case of ornamental shade trees, the value of which cannot be measured by dollars and cents, or a mine, the value of which cannot be known.

The case presents the naked question, Will a court of equity interfere to prevent a trespass when the damage is not "irreparable"? This Court has never claimed or exercised such a jurisdiction.

The bill must be dismissed with costs, it being a general rule that a plaintiff who files a bill which has no equity must pay the costs.

PER CURIAM. Bill dismissed with costs.

Cited: DuPree v. Williams, 58 N. C., 100; *Thompson v. McNair,* 62 N. C., 124; *Lumber Co. v. Hines,* 126 N. C., 256.

(261)

WILLIAM G. DAUGHTRY, ADMINISTRATOR, ETC., v. THOMAS REDDICK.

1. When A. had been absent and not heard from for seven years, and, on the presumption of his death, administration was granted to B., and B. brought a bill against C., who had been an agent for A., praying for an account of what he had received as agent, and payment of any balance in his hands, and C. in his answer stated that from A.'s wandering habits, it was just as probable he was alive as dead; the cause being set down for hearing upon the bill and answers, it was *Held*, that when the court decreed the payment of the money in C.'s hands, they might properly annex as a condition that before C. should pay it, B. should execute to him a bond of indemnity.

2. It is not proper in praying for process to call it the "People's" writ of subpœna. It should be the "State's" writ of subpœna.

APPEAL from a decree of the Court of Equity of GATES, at Fall Term, 1848, *Bailey, J.*

In October, 1848, the plaintiff filed a bill stating that Hiram Hurdle, formerly of Gates, was entitled to certain land and slaves in that county, and that, intending to go out of the State, about 1840, he appointed Reddick, the defendant, his agent, to lease the land and hire out the negroes during his absence, and put him in possession for that purpose; that after making the appointment, Hurdle disappeared, and had not since been heard from; and that at May Term, 1847, the county court of Gates granted administration of his estate to the plaintiff. The bill further stated that the defendant accepted the agency, and had continued to act under it up to the filing of the bill and had received considerable profit therefrom. The prayer was for a discovery and account, and a decree for a delivery of the slaves to the plaintiff, and payment of the money that might be found due for rents and hire.

The answer admitted the defendant's agency, and set forth an (262) account, showing a balance in the defendant's hands of $2,334.71, including certain notes and bonds held by him for some parts of the rent and hires. It stated that in November, 1839, the defendant received from Hurdle a letter and power of attorney, made in Boston on the 11th of that month, authorizing the defendant to take the management of his property, which had before been confided to another person; that for several years before that time Hurdle had been absent from home, and that at intervals the defendant heard from him; but that he did not receive any two letters from the same place, and that the last time he heard from him was by letter dated 2 January, 1840; that Hurdle then seemed to be wandering about the country without any settled residence or calling; that the county court granted administration of his estate upon the presumption of his death by reason of his absence; but that the defendant believed it as probable that he was alive as that he was dead. It stated, further, that the defendant was desirous to settle his accounts as agent and deliver the effects and pay the money in his hands to any person authorized to receive them and discharge him; and that he was willing to make such delivery and payment to the plaintiff, if he would duly secure the defendant from any claim on him by or under Hurdle, whose death was not certain.

The plaintiff set down the cause upon bill and answer, and moved for an immediate decree for the delivery of the slaves and securities for money, and also for the payment of the balance of cash admitted in the answer; and the same was decreed to be done whenever the plaintiff should execute a bond to the defendant with sureties, to be approved by

the master, to indemnify the defendant against any claim that might thereafter be set up against him by Hurdle, or any person under him, in respect to the estate.

The plaintiff subsequently declined giving the bond, and filed (263) the present bill to review so much of the decree as required the bond. The defendant demurred, and upon argument the decree was affirmed, and the plaintiff appealed.

Jordan and Heath for plaintiff.
No counsel for defendant.

RUFFIN, C. J. The security decreed seems to have been, under the circumstances, but a reasonable protection to the defendant. There must always be more or less uncertainty of the fact when there is nothing else but the presumption of death from the absence of the supposed party deceased. That uncertainty is rendered greater here than it would usually be. The plaintiff could not in the bill allege the death positively, but left it upon the force of the administration, which was granted on the presumption. Besides, he set down the cause upon the answer, and that states the belief of the defendant that Hurdle was as probably living as dead, and the belief appears to be the more reasonable from the previous course of life of that person. He had been actually absent for many years before 1840, during which he sometimes, but seldom, wrote home; and he seems to have had no family, fixed abode, or regular calling. He may, then, be yet alive; or, which is as probable, if dead, he may have made a will abroad, which, as he was a stranger, has not hitherto come to light. Just at the close of seven years, these are more than mere possibilities. If this person be either living or has made a will, the administration granted to the plaintiff is absolutely void, and the defendant would be chargeable again for the effects to Hurdle or his executor. For the jurisdiction to grant administration arises only where the person is dead and has left no will. *Graysbrook v. Fox,* Pl., 276; *Allen v. Dundas,* 3 Term, 125. It is true, if the plaintiff had thought proper to sue at law, that he could (264) have recovered, unless the defendant could have shown that the supposed intestate was in fact alive, or had made a will. The reason is that the judgments of courts of law are absolute, and they cannot give conditional judgment nor provide indemnities. But the jurisdiction of the courts of equity is not so straightened, and allows all proper protection to be provided against any loss that may arise to a suitor from any act which the court requires him to perform. It is a power often usefully exercised. Money, for instance, is frequently directed to be paid to a party upon his apparent right to it in a particular stage

of a cause, before the right is conclusively determined—as, upon the dissolution of an injunction of a judgment at law, upon his engagement to make it good if it should be so decreed in the progress of the cause. So, in the case of lost bonds or notes, the creditor may recover absolutely at law, if he can make out his case there. But if he sue in the court of equity, he is always required there to give an indemnity, unless the destruction of the instrument be admitted. In the present case, if Hurdle be really dead intestate, the plaintiff can sustain no inconvenience from the bond. But as that is uncertain, the risk ought to be borne by the plaintiff, who will have the fund, and he ought not to throw it on the defendant, after taking the effects from him. *Bailey v. Hammond,* 7 Ves., 390.

The Court deems it a duty to notice a departure in the bill from the common prayer for process by calling it "the people's" writ of subpœna. This, though a very trivial matter in itself, requires correction, as we know not what other liberties persons might take with the settled and proper forms of pleadings, if this were passed over silently. The Constitution requires that all writs, like commissions and grants, should run in the name of "the State," and that is authority suffi- (265) cient, one would suppose, in favor of the precedents.

PER CURIAM. Decree affirmed with costs.

KISANY RABY v. WILLIAM J. ELLISON.

Where a testator, after giving various legacies, directed that the property given to his wife should be sold and the proceeds remain in the hands of the executor *for the benefit of A. during her life, to be furnished to her from time to time at his discretion, and at her death to be equally divided among all her children,* and the executor paid off all his debts and the legacies except that to A.: *Held,* that, in a suit brought by A. after the death of the executor, against his administrator, for an account and payment of this legacy, the administrator *de bonis non* of the original testator was a necessary party.

APPEAL from a decree of the Court of Equity of MARTIN, at Spring Term, 1848, dismissing the bill upon demurrer, *Caldwell, J.,* presiding.

The bill alleges that by the will of John Wyatt, after payment of debts and certain specific legacies, all the balance of his property, consisting of land, negroes, etc., was loaned to his wife for life, and after her death was to be sold by the executor, and the money arising from the sales was to remain in the possession of the executor for the benefit of

the plaintiff during her life, to be furnished to her from time to time at the discretion of the executor, and at her death to be equally divided between all her children; that Lawrence Cherry, the executor, qualified and took the estate into his possession; paid off all the debts of (266) the testator; assented to all the legacies; paid off all the legacies except the legacy due to the plaintiff; and delivered over certain property to the widow, as the residue to which she was entitled for life; that the widow died in 1837; that the said Cherry sold all the property which had been delivered over to her, and received from the sale thereof the sum of $1,000, or other large sum; that the said Cherry filed no inventory and made no settlement of the estate of the testator, and died intestate in 1846, having paid the plaintiff only the sum of $10 towards her legacy.

The bill further alleges that the testator bequeathed, and desired, that if his executor should die before the estate was fully settled, the executor or administrator of his executor should carry the will into execution and settle the same; that the defendant had been appointed administrator of the said Cherry, but had renounced as executor of the testator, and declined having anything to do with his estate.

The bill prays for an account of the estate of the testator, so as to ascertain the trust fund which was or ought to have been in the hands of the intestate of the defendant; that the amount found due may be paid to the plaintiff, and for general relief.

The defendant demurred for the want of parties. Upon argument, the demurrer was sustained, and the bill dismissed. The plaintiff appealed.

Rodman for plaintiff.
No counsel for defendant.

PEARSON, J. In answer to the objection that an administrator *de bonis non* is a necessary party, it was contended by the plaintiff's counsel that, as Cherry had paid off all the debts, assented to the legacies, paid off all the legacies, except the legacy due to the plaintiff, and delivered over to the widow certain property as the residue, his duties as executor had terminated, and he was to be considered as having received and held, as trustee for the plaintiff, the proceeds of the property sold after the death of the widow; and that there was no more necessity for having an *administrator de bonis non* a party than there would be if a third person had been trustee and had received the trust funds from the executor. For this position the case of *Birchall v. Bradford,* 6 Mad., 235, was cited.

If the amount of the trust fund had been certain, or been made (268) certain by a settlement filed by Cherry, the executor, there would be much force in the argument, and it would be sustained by the case cited. In that case the amount of the trust fund was certain, towit, £2,000; in this case it is wholly uncertain, towit, the proceeds of the sale of what property may be left after paying debts and legacies, and subject to a life estate of the widow; and to ascertain its amount it will be necessary to have a general account of the estate of the testator. This general account is prayed for and is necessary to the relief sought. It is this which distinguishes the two cases; for it is clear that a general account of the estate of the testator cannot be taken without a representative of the testator.

There is another point of view in which the bill is defective as to parties. The plaintiff is entitled to the benefit of the trust fund for her life, at the discretion of the executor, with a limitation over to her children.

Several questions may arise as to the extent of the plaintiff's interest. Will she be restricted to the interest of the trust fund during her life? Or will she be allowed to use a part of the principal, if necessary for her maintenance? In these questions the children, if there be any, are interested; and if there be none, then, upon failure of the limitation over, an interest will remain undisposed of, and an administration *de bonis non* will be necessary for its distribution. So that the children, if there be any, and the administrator *de bonis non* if there be no children, are necessary parties, because they are interested in and will be bound by the account which may be taken of the estate of the testator, and because they are interested in the questions as to the extent of the plaintiff's interest in the trust fund.

We concur with his Honor and think the demurrer was properly sustained, and that the bill ought to be

PER CURIAM. Dismissed.

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(269)

JOHN K. McGUIRE ET AL. v. JONATHAN EVANS ET AL.

1. Where a testator bequeaths bank stock generally, without saying it is the bank stock he owns, the bequest will be general and not specific.

2. But when, after giving several legacies of bank stock, he uses this expression: "In case there should be any deficiency in the bank stock which I hold at my death, as compared with the amount bequeathed in my will and testament": *Held*, that he meant the stock he should then have, and therefore the legacies were specific and not general.

3. *Held further*, that the bank stock being insufficient to discharge the legacies, the legatees are entitled to have what stock there may be applied *pro rata* to the payment of these legacies, and that the deficiencies are to be supplied out of the residue of the estate.

4. A testator directs, among other things, as follows: "In case my bank stock should not be absorbed in the payment of debt which may come against my estate, then and in that case I give and bequeath to A. two shares of the bank stock," etc. There were no debts to which the bank stock was applied, but there was not stock enough to satisfy the previous legacies: *Held*, that this bequest failed because of the failure of the fund out of which it was to come.

5. When the same property is, by the same will, given to two different legatees, they take moieties.

CAUSE removed by consent from the Court of Equity of CUMBERLAND, at Spring Term, 1848.

The bill is filed to recover from the defendant Evans, the executor of John Kelly, legacies claimed by the plaintiffs under his will. Mr. Kelly, by will, devised to his wife, in the first clause of it, a large portion of property, both real and personal, among which are "the negroes, Caroline and Henry, children of Henry and Mary." He then goes on to say: "I also give and bequeath to my dear wife, absolutely, fifty shares of the capital stock of the Bank of Cape Fear." In the (270) same clause he gives to his wife for life two other negroes, Bill (shoemaker) and Tibby, and "also the *dividends* upon twenty-five shares of the capital stock of the Bank of Cape Fear," and after her death Bill and Tibby are given to Benjamin Rush.

By the 3d clause, "twenty shares of the capital stock of the Bank of Cape Fear" are given to John K. McGuire, and by the 5th, "ten shares of the capital stock of the Bank of Cape Fear" are given to Patrick Murphy. The 6th clause gives to Frances Casey a negro slave "Etty, child of Henry and Mary," and twelve and a half shares of "the capital stock of the Bank of Cape Fear."

The 7th clause gives, in the same words as in the preceding section, "twelve and a half shares in the capital stock of the same bank to Andrew B. Casey." The 8th clause gives to John Kelly McGuire twelve shares of the same stock, and the 28th gives thirteen shares of the capital stock of the same bank to Margaret Casey. The 14th clause is in the following words: "In case there shall be any deficiency in the bank stock which I hold at my death, as compared with the amount bequeathed in my will and testament, then in that case the amount limited and given to my wife is not to abate, but the deficiency must fall on the other bank stock given to the other legatees exclusively."

To this will the testator has annexed several codicils. In the first he directs as follows: "And in the event my bank stock should not be ab-

sorbed in the payment of debts which may come against my estate, *then and in that case* I give and bequeath to my executors and survivors of them ten shares of the capital stock of the Bank of Cape Fear" in trust for Catherine and Mary Fitzharris. This legacy is claimed by these legatees to be made up to them out of the general residue of the estate—the particular fund having failed.

The bill, after setting forth the above legacies, in substance, (271) states that the testator, at the time of his death, had but one hundred and seventeen shares of stock in the Bank of Cape Fear, and that the number devised by him, exclusive of ten shares to Catherine and Mary Fitzharris, was one hundred and thirty-two; that the executor had transferred to Mrs. Kelly the fifty shares given to her, and had still in his possession sixty-seven. It further states that there are no debts or liabilities of the testator of the nature of those stated in the 14th clause, and alleges that the legacies to the Fitzharrises were made dependent on the existence of the fact that his bank stock was exhausted by *such* claims. The bill charges that the girl Caroline, given in the first clause of the will to the testator's wife, Ann Kelly, is the same girl who in the sixth clause is given by the name of Etty to the plaintiff John K. McGuire, in trust for the plaintiff Frances, and that, therefore, the said Ann and Frances held her as tenants in common. And the plaintiffs insist that the legacies of the Bank of Cape Fear stock are general, and as there are not shares sufficient belonging to the estate to satisfy all the said legacies, that they are entitled to have the sixty-seven shares applied *pro rata* to their respective legacies, and that the residue of the estate will be resorted to to supply the deficiencies, as far as it will go; and that they have now the right to demand an account and settlement. The widow, Mrs. Kelly, is dead. The prayer of the bill is for an account and payment of the legacies.

The answers admit the facts set forth in the bill. The defendant Jonathan Evans, executor of John Kelly, craves the instruction of the court, and claims that the legacies to the plaintiffs of Cape Fear Bank stock are specific and not general; and that the said legatees have no right to resort, on failure of the said stock to meet the said legacies, to the residue of the estate; and that the legacies to the Fitzharrises must fail altogether. The answer of John Rose and his wife, Margaret, claims their legacy as a general one and that any deficiency of stock on hand must be made up out of the residue. Jonathan Evans is the executor of John Kelly and the administrator of Mrs. Kelly, who is (272) dead.

W. Winslow for plaintiffs.
Strange and Husted for defendants.

NASH, J. The first question that presents itself is as to the nature of the bequests of the bank stock: Are they general or specific? Mr. Roper defines a general legacy to be a testamentary gift of personal estate generally; and a specific legacy to be a bequest of *particular* things, distinguished from all others of the same kind. In the will of Mr. Kelly, in every instance in which he gives the Cape Fear Bank stock, he uses the general words, *so many shares* of the capital stock of the Bank of Cape Fear. If the answer to this question depended alone upon the words used in making the bequest, we should, without hesitation, pronounce the legacies general. Nor would the fact that the testator, at the time he made his will, had stock in that bank to the amount bequeathed, vary the construction. 1 Roper on Leg., 157. In order to have that effect it must appear upon the face of the will that the testator meant the identical stock owned by him. The intention to make it specific must be clear; for courts of equity incline to consider legacies general rather than specific. Thus the word "my," preceding the word "stock," will sufficiently show the intention. *Barton v. Cooke,* 5 Ves., 461, 4 Ves., 750; *Davis v. Cain,* 36 N. C., 304. To render such a bequest specific, it is essential that the testator, in the will, in connection with the bequest, should refer to the stock he then has, or express the intention that it should come out of that stock. If such intention does clearly appear from the will itself, his intention will make the bequest specific. 1 Rop., 164; *Sleech v. Thorington,* 1 Ves., Sr., 561. If
(273) the will of Mr. Kelly be tested by the above rule, it will, we think, very clearly appear that the bequests of the stock are specific. In the 14th clause the language is clear as to the stock he had in his mind when he devised it. His words are: "In case there shall be any deficiency in the bank stock which I hold at my death, *as compared with* the amount bequeathed in my will and testament," etc. There can be no doubt what stock the testator meant. He meant, evidently, the stock he then had; and if so, they are specific legacies, not general.

The second question submitted is as to the legacy to the two Fitzharrises. We are of opinion that the bequest fails because of the failure of the fund out of which it was to come. This bequest is specific in its nature, and it is of the nature of specific legacies that when the specific fund fails the legatee will not be entitled to any satisfaction out of the personal funds of the testator. 1 Rop., 150.

The third question is as to the negro Caroline. In the first clause she is given to Mrs. Kelly under the name of Caroline, and in the sixth she is given to Frances Casey under the name of Etty. When the same property is by the same will given to two different legatees, they take by moieties. So that one-half of the value of Caroline belongs to the estate of Mrs. Kelly, and the other half to Frances Casey. *Field v.*

Eaton, 16 N. C., 283. Another question was made at the bar as to the maintenance of the aged negro Tibby. We do not decide that question, as it is one which arises exclusively between two of the defendants, and with which the plaintiffs have no concern.

PER CURIAM. Declared accordingly.

Cited: Heath v. McLauchlin, 115 N. C., 402; *Pigford v. Grady,* 152 N. C., 181.

(274)

NANCY McDANIEL ET AL. V. DANIEL STOKER ET AL.

There is a difference in the course of the court upon an injunction to stay proceedings at law and a sequestration. In the former the injunction will be dissolved upon the coming in of the answer, if the equity of the bill be denied fully and fairly, and a dissolution will be decreed. But in the case of a sequestration, the right of the plaintiff to have the property secured during the litigation does not depend upon "the equity confessed by the answer"; and the court having secured the fund, will keep it secured until the rights of the parties are adjudicated, unless the application was improvidently granted, or unless, upon the coming in of the answer, it appears, taking the whole together, that the claim of the plaintiff is unfounded, or the security which has been obtained is unnecessary.

APPEAL from the Court of Equity of STANLY, at Fall Term, 1846, from a decree ordering a sequestration, which had been theretofore issued in the cause, to be dismissed. *Settle, J.*

The bill alleges that James Coleman died in 1811, leaving a will, which was admitted to probate in the county of Montgomery, and that Elizabeth Coleman, his widow, who is one of the defendants, being therein appointed executrix, duly qualified as such; that in the said will a bequest is made to Eliza Coleman, a daughter of the testator, of a negro woman Edy, one horse, bridle and saddle, and one bed and furniture; that Eliza died intestate before she received any of the property; that Edy had a child, Ellick, both of whom are in the possession of the defendant Daniel Stoker; that the plaintiffs Richmond P. Coleman, James Coleman, Mary McDaniel, and Nancy Roseman, and the defendants Elizabeth Coleman and Sally, the wife of the defendant Daniel Stoker, are the next of kin of the said Eliza; that James Coleman, for a valuable consideration, has sold his interest in the estate of the said Eliza to Mathias Moore, one of the plaintiffs, and Nancy (275) Roseman has sold her interest to Daniel A. G. Palmer, one of the plaintiffs; that Mathias Moore, at the November session of the county court of Stanly, was appointed the administrator of the said Eliza; that,

as administrator, he applied to the defendants for the property bequeathed to his intestate, for an account of the hires and profits, and for any residuary portion of the estate of the said James Coleman to which his intestate was entitled; but the defendants refused to deliver the property, or to render any account, insisting that the defendant Elizabeth had some years before been appointed the administratrix of the said Eliza in the county of Montgomery, and had, as administratrix, taken possession of all her estate, and had delivered the slaves, Edy and Ellick, to the said Stoker, one of the defendants, who now sets up claim to them under an alleged gift, made to him by the defendant Elizabeth.

The bill charges that the plaintiffs are not able to ascertain whether the said Elizabeth was appointed administratrix in Montgomery, as alleged, or not, because the records of that county have been destroyed by fire; that if she was not so appointed, the plaintiff Moore, as administrator, is entitled to the property and to an account, to enable him to settle with her next of kin. If she was so appointed, then the plaintiffs, being entitled to distributive shares, are entitled to an account; that the defendant Stoker, at the time he received the negroes, well knew that the said Elizabeth had no property, having conveyed all she owned to the said Stoker; that they have no remedy upon her administration bond, if she ever gave one, as it was destroyed with the records of Montgomery County, and no proof can be made of its execution or who were her sureties; and that the defendant Stoker is a man of but little property, *besides the negroes,* and as he sets up an absolute claim to them,
(276) the plaintiffs fear that he will abscond, and carry them to parts unknown.

The prayer is for an account, and that a writ of sequestration issue, commanding the sheriff to take the negroes into his possession and hold them subject to the order of the court, unless the defendants give bond for the forthcoming of the negroes.

The defendant Elizabeth died before she answered. Stoker and wife deny that James Coleman left a will, and insist that he died intestate, alleging that the paper-writing executed by him was inoperative as a will for the want of capacity, and had never been admitted to probate. They allege that, at April Term, 1827, of the county court of Montgomery, Elizabeth Coleman was appointed the administratrix of Eliza Coleman, and insist that the appointment of the plaintiff Moore is void. They insist that the legacy to Eliza, if James Coleman left a will, never vested, as she died under age and without children. The answer then alleges that Elizabeth had in her possession the negro Edy, from 1842, when she sold Edy and her child, Ellick, to the defendant; and that during all that time Elizabeth *claimed* Edy, and Ellick, after his birth, to be her own; *believed* her to be her own, and exercised acts of ownership

and exclusive dominion over her; that in 1842 Elizabeth became old and infirm, and conveyed Edy and her son, Ellick to the defendant for a valuable consideration, towit, $250, and an agreement on the part of Stoker to maintain her. He denies any intention of removing the slaves, and alleges that he has *property sufficient to discharge all his liabilities.*

The defendant Stoker also alleges that in 1838 the plaintiffs Mary McDaniel and Richmond P. Coleman, for valuable consideration, conveyed to him all their interest in the estate of James Coleman, which conveyance, he alleges, includes Edy and Ellick; and that in November, 1845, he purchased the interests of the plaintiffs (277) James Coleman and Mary Roseman in the estate of James Coleman, Sr., and that the plaintiff Palmer, for a valuable consideration, agreed to dismiss the bill and enter a *retraxit.*

At the filing of the bill the plaintiffs obtained an order directing the sheriff of Stanly County to take the slaves Edy and Ellick into his possession, and hold them subject to the order of the court, unless the defendants entered into bond in the penal sum of $1,200 for the forthcoming of the slaves. The defendant Stoker gave the bond accordingly.

Upon the coming in of the answer the defendants moved to discharge the sequestrations, and "it appearing to the court that the defendants had sufficient property to meet their liabilities, and that there was no intention to remove the property, it is ordered and decreed that the writ of sequestration be discharged." From which order the plaintiffs were allowed to appeal.

Strange for plaintiffs.
Winston for defendants.

PEARSON, J. The question is whether the motion to discharge the sequestration ought to have been allowed. We think it ought not, and that there is error in the interlocutory order appealed from.

The plaintiffs claim to be entitled to an account, and to a portion of the property, as a part of the next of kin of Eliza Coleman, alleging that it was bequeathed to her by James Coleman; that Elizabeth Coleman, the executrix, committed a breach of trust, by transferring the property to the defendant Stoker; and that they fear the property will be removed, because the defendants have but little property, and Stoker denies their right, and sets up an absolute title in himself; and that they will lose the fruits of their recovery if they should succeed in establishing their claim, unless the property is secured. (278)

The plaintiffs, by this will, certainly make out a *prima facie* case, and if the fund be in *any danger,* they have a right, by the practice of this Court, to have it secured until the hearing, by the ap-

pointment of a receiver, or by a sequestration, as was done in this case, which is, in effect, the appointment of a receiver, but in a manner less apt to injure the defendants, by allowing the property to be retained, provided a bond be given for its forthcoming.

We apprehend his Honor fell into the error by not adverting to the distinction between a case like the present and the ordinary case of an injunction to stay execution upon a judgment at law.

In the latter case, upon the coming in of the answer, if the equity of the bill be denied fully and fairly, the defendant is entitled to a dissolution of the injunction; for, the right at law being admitted, a court of equity will not interfere with the legal remedy, except upon "equity confessed," or, at least, "not denied by the answer."

In a case like that under consideration, the right of the plaintiffs to have the property secured pending the litigation does not depend upon the "equity confessed by the answer"; and the court, having secured the fund, will keep it secured until the rights of the parties are adjudicated, unless the application was improvidently granted (which will sometimes be the case, because, by our mode of proceeding, the application is an *ex parte* one), or unless upon the coming in of the answer it appears, taking the whole together, that the claim of the plaintiffs is unfounded, or that the security which has been obtained was unnecessary.

Taking the bill and answer together, it does not appear that the claim of the plaintiffs is unfounded.

It is admitted that the property once belonged to James Coleman. If he bequeathed the property to Eliza Coleman, of whom the plain-
(279) tiffs are a part of the next of kin, their rights are clear, and the fact that Elizabeth Coleman administered upon the estate of Eliza, as is alleged by the defendants, does not affect their rights, but merely the mode of asserting them; indeed, this fact raises a strong presumption that Eliza was entitled to some property; otherwise, why take administration upon her estate? And it is difficult to conceive how the title of James Coleman was ever divested. Elizabeth Coleman must have retained the possession, either as executrix rightfully or in her own wrong, or as one entitled to a distributive share; and her long possession could not divest the title while the estate was unrepresented; so that there is an obvious contradiction and want of fairness in the defendants' allegation of her long possession, and great hardihood in the attempt to set up title in her, "because she claimed Edy to be her own, believed her to be her own, and exercised acts of ownership and dominion over her," which circumstances may induce the belief that the defendant Stoker has been temped by the destruction of the records of the county of Montgomery to set up an exclusive claim to property which in truth

belongs to him in right of his wife and the plaintiffs, as tenants in common of the equitable estate.

Nor does it appear that the application to have the property secured pending the litigation was unnecessary.

It is true the defendant Stoker swears "that he has property sufficient to discharge all his liabilities," but it does not appear whether he includes among his liabilities that of being called upon to account for this property. It is also true that he denies any intention of removing the property. That may or may not be so. It is certain that he sets up an exclusive claim to it, and is not able to account satisfactorily for the manner in which Elizabeth Coleman, under whom he claims, acquired title, otherwise than by a flagrant breach of trust, which he must have known. The interlocutory order discharging the sequestration must be reversed, and the plaintiffs have costs in this Court and (280) the court below.

This Court does not intend to intimate an opinion that the bill as now framed is sufficient to enable the plaintiff to obtain relief. We do not enter into that consideration, as the bill, if defective, is open to amendment, and the case is now before us upon an interlocutory order.

PER CURIAM. Reversed with costs.

Cited: Griffin v. Carter, post, 416; *Lloyd v. Heath,* 45 N. C., 41; *Kendall v. Stoker, id.,* 207; *Wilson v. Mace,* 55 N. C., 8; *Swindall v. Bradley,* 56 N. C., 356; *Parker v. Grammer,* 62 N. C., 30.

DANIEL A. GILLESPIE AND WIFE v. JOHN FOY ET AL.

1. A. purchased a tract of land in fee, and died intestate, leaving two infant children, one of whom died intestate and without issue, leaving her brother B. her heir at law. B. afterwards died intestate, without issue, mother or brother or sister. In his lifetime his guardian sold the land under an order of the county court. B. left a paternal grandfather and maternal grandmother, and also one paternal aunt, and several maternal aunts, the children of the grandmother by a second marriage: *Held,* that the land would have gone to the paternal aunt if it had not been sold, and the proceeds of the sale, under our act of Assembly, must go in the same way.

2. As to the personal estate of B.: *Held,* that the grandfather or grandmother takes to the exclusion of the aunt.

3. The grandfathers and grandmothers, as to the personal estate, take equally.

CAUSE removed from the Court of Equity of ROCKINGHAM, at Fall Term, 1848.

George Webster purchased a tract of land in fee, and died intestate in September, 1846, leaving two infant children, Mary E. Webster and John F. Webster, to whom the land descended from him. After-
(281) wards Mary E. died, and her share of the land descended to her brother. On the petition of John Foy, the guardian and maternal grandfather of John F. Webster, the land was sold by a decree of the court of equity and the proceeds came into the hands of the guardian. John F. Webster was also entitled to a considerable personal estate; and he died intestate in January, 1848, without issue, mother, brother, or sister. Administration of his estate was taken by John Foy, the grandfather. His nearest relations at his death were his grandfather, just mentioned, and his paternal and maternal grandmothers, and the plaintiff Gillespie, who is his paternal aunt, and was the only child of her parents except the said George, and also several uncles and aunts, the children of the said Foy and wife, and of the paternal grandmother by a second marriage.

The bill is filed by Gillespie against the grandfather and the two grandmothers, and it prays that she may be declared to be entitled to the money which arose from the sale of the land, and also to the whole or a part of the intestate's personal estate.

No counsel for plaintiffs.
Morehead for defendants.

RUFFIN, C. J. As the land descended to the *propositus* from his father and from his sister, who derived her share by descent from the father, it would, if not sold, have descended from John F. Webster to the plaintiff, under the fourth canon of descents, as the only sister of his father and the nearest relation of the *propositus ex parte paterna,* except the grandmother, who is not within the proviso to the sixth rule. *Wilkerson v. Brackett,* 24 N. C., 315. Then, by the act of 1827, Rev. St., ch. 55, sec. 27, the money into which the land was converted goes as the land itself would had it not been sold; for the owner of it, the *propositus,* being an infant at his death, could not make a valid disposition
(282) of it as money. It therefore belongs to Mrs. Gillespie and her husband, the plaintiffs, as land, and it must be invested and secured as such, unless they dispose of the fund in a legal manner as if it were land.

The questions made as to the personal estate have been long settled. The grandfather or grandmother, being one degree nearer than an uncle or aunt, takes to the exclusion of the latter. *Blackborough v. Davis,* 1 Wms. Pr., 40; *Woodruff v. Wickworth,* Pr. in Chan., 527. Indeed, the grandparents are in equal degree with brothers and sisters, and that is

said to be the only exception to the rule that relations in equal degree take equally; for brothers and sisters exclude the grandparents. For that exception Mr. Christian thinks no good reason can be given. 2 Bl. Com., 516, note. But it seems evidently to arise by implication from the provision of the St. 1 Jac. II., ch. 17, sec. 7, which, when the father is dead, makes an equal distribution between the brothers and sisters of the intestate and the mother, which by necessary construction excludes the grandfather or grandmother, who are one degree removed further than the mother. Besides, the brothers and sisters may take as representing the father, under the general provision for representation within the degree of brothers' and sisters' children. For, as the father would take all if living, his children must be entitled to the same when he is dead, except as far as the mother comes in with them under the express provision of the statute, which forms a part of our act of distributions. The plaintiffs are, therefore, not entitled to any part of the personal estate, and the bill must be dismissed so far as it prays for it.

The foregoing declaration would suffice as between the plaintiffs and the defendants. But, as the defendants desire to ascertain how the estate is to be divided between themselves, and the matter is quite plain, the Court has no objection to state that the grandfather and grandmothers take equally—that is, each of them takes one-third (283) part. They take in those proportions because they are in equal degree of kindred to the intestate, and in that case the statute says the estate shall be distributed equally to every one of them. The only exception to that rule is that of father and mother, and that did not originally exist; for the statutes of Charles II. made no distinction between the father and the mother, and therefore they succeed together to the estate of a child, who left no child or widow. That continued to be the law until the beforementioned act of James II., which gave the mother an equal share with their children, when her husband was dead, and by implication excluded her when the husband was living. But there is no such provision between grandfather and grandmother, or between the grandmother and uncles and aunts; and, therefore, the grandmother succeeds equally with the grandfather, and, of course, one grandmother stands upon an equality with the other.

PER CURIAM. Declared accordingly.

Cited: March v. Berrier, 41 N. C., 525; *Allison v. Robinson,* 78 N. C., 222; *Wells v. Wells,* 158 N. C., 331; *Floyd v. R. R.,* 167 N. C., 59.

(284)

SHEPHERD R. SPRUILL v. JESSE MOORE ET AL.

A testator bequeaths to his four daughters, Sarah, Elizabeth, Marina, and Agnes, certain negro slaves, and directs that no division shall take place until his eldest daughter arrives at the age of 21, when she was to receive her share, and so on as to each of the other daughters upon her arriving at the same age. The will also directs "that if either of my said daughters should die without lawful issue, then and in that case the survivors or survivor of my said daughters shall have all the said negroes and their increase forever." Marina died first under age and without issue; then Sarah died under age, but leaving a child and her husband surviving; then Agnes died under age and without issue; lastly, Elizabeth, after having intermarried with S., died under age and without issue.

1. *Held, first,* that this was a vested legacy, subject to go to the survivors or survivor upon the death of any of the daughters under age and without issue.

2. *Held, secondly,* that on the death of Sarah, her share having become absolute by her having issue, vested in her husband who had the slaves in possession, and that her share also included one-third of the share bequeathed to Marina.

3. *Held, thirdly,* that the share of Agnes, on her death, survived exclusively to Elizabeth, and that the child of Sarah was not entitled to any part of it.

4. *Held, fourthly,* that the share to which Agnes became entitled on the death of Marina, of the legacy bequeathed to her, also went to the last survivor, Elizabeth.

5. The general rule is that if legacies be given to three or more persons as tenants in common, in distinct shares, with a limitation over to the survivors, upon the death of any of them under age or without leaving issue, and two of them die, then only the original share of the one dying last, and not the survived share, goes over. But there is a distinct exception to the rule, and that is, where a fund is left as an aggregate fund, and made divisible among many legatees, with the benefit of survivorship, in which case the whole fund may go to the last survivor. The word "all," applied to the fund to go over, makes it an aggregate fund.

CAUSE removed by consent from the Court of Equity of MARTIN, at Fall Term, 1848.

David Latham made his will 28 October, 1833, and died shortly
(285) afterwards. By it he bequeathed to his wife, Charity, certain slaves for life; and then made the following dispositions:

"I give to my four daughters, Sarah, Elizabeth, Marina, and Agnes, the following negroes, viz.: Wilson, Dunn, Sabra, Sandy, Charlotte, and Mary; and also, after the death of my wife, the negroes Jesse, Sharper, Quash, Esther, Amy, Jude, Isaac, Nancy, and Jude, Sr., and all the increase of the said negroes. It is my will that no division of the said negroes between my daughters take place until the eldest daughter then

living arrives to the age of 21; and at that age to take her proportional share of the said negroes and increase, if she thinks proper, and so on until the youngest arrive at 21. Also it is my will that if either of my said daughters should die without lawful issue, then and in that case the survivors or survivor of my said daughters shall have all the said negroes and their increase forever."

The executors assented to the legacies, and the widow, she having been appointed the guardian of her daughters, received all the said slaves. In March, 1838, Marina died under age and without issue. In July, 1841, Sarah died under age, but left an infant daughter, Sarah E. Moore, by her husband, Jesse Moore, who also survived her. Agnes died in March, 1844, under age and without issue. Charity, the widow, died intestate in 1846. The remaining daughter, Elizabeth, married the plaintiff Spruill, and died in March, 1848, under age and without issue. After the intermarriage of Jesse Moore with Sarah, he was in 1840 appointed guardian of Agnes and Elizabeth, and then received all the negroes bequeathed immediately to the daughters, and, at the death of Mrs. Latham, those that had been given to her for life and over to the daughters.

By other parts of his will the testator provides for his only sons, David and Simon, by devises and bequests to them in severalty of land and slaves, with cross-remainders between them. David (286) died intestate, and his brother Simon is his administrator. Jesse Moore administered upon the estates of his late wife and of her mother, Mrs. Latham. The plaintiff administered upon the estates of his late wife and her two sisters, Marina and Agnes. He then filed this bill against Jesse Moore, Simon Latham, and the infant Sarah S. Moore, claiming that all the negroes and their increase belong to him and Jesse Moore, in the proportion of two-thirds to the plaintiff and one-third to the other, and praying for a division accordingly. It prays also for an account of the profits of the slaves and a settlement of the guardianships of the plaintiff's intestates; and likewise that the defendants should set forth their respective claims to the slaves and other parts of the fund.

Biggs for plaintiff.
Rodman for defendant.

RUFFIN, C. J. The only questions at present presented to the Court are in respect to the rights in the slaves given to the daughters and in the profits of them at different periods.

The defendants set up claim that in the event, which has happened, of the deaths of both Agnes and Elizabeth without issue, their interests are undisposed of by the will, and so are to be distributed as in a case of

intestacy. But that claim is entirely unfounded. The whole interest is given among the daughters to them or the survivor of them, and no one can have any part of the property except through the daughters or one of them.

There is no doubt that each of the daughters took a vested interest in the slaves, subject to be divested upon her death without leaving issue, and to go over as long as there was one or more of them who could take by survivorship. The will contains words of immediate gift either in possession or remainder." The division only is postponed.
(287) Upon the death of Mrs. Moore, her share, having become absolute, by her leaving issue, vested in her husband, who had the negroes in possession and has since administered on her estate. One inquiry is, What was her share? It was one-third part, if the interest of her sister Marina, upon her death in 1838, survived to her and the other two sisters. It did so by force of the limitation to the "survivors," notwithstanding it was upon a dying "without lawful issue." *Zollicoffer v. Zollicoffer,* 20 N. C., 574. But whatever doubt may have before existed on that point, there is none now, as the act of 1837, ch. 7, enacts that such a limitation is to be interpreted as one to take effect upon the death of the party without leaving issue living at the death, unless the contrary be plainly declared in the will. In like manner the plaintiff's wife was entitled to one-third, as her original portion and her proportion of Marina's portion, which now belongs to the plaintiff, either as surviving husband or as his wife's administrator, it not being material to inquire in which capacity.

Then all that remains is to dispose of the interest of Agnes. She died in 1844, after Mrs. Moore and before Mrs. Spruill. The plaintiff claims that interest also in right of his late wife, as the last survivor. As respects the original share of Agnes, it went over to Elizabeth, upon the same ground that Marina's interest survived to her three sisters. Although one may regret the exclusion of Mrs. Moore's child, yet the Court cannot help it. *Threadgill v. Ingram,* 23 N. C., 577, and *Skinner v. Lamb,* 25 N. C., 155, are in point.

It is true that there is here a second death among the sisters, without issue, and, perhaps, some argument might be founded upon the word "either" in the limitation over, as restricting the contingency to the death of the daughter first dying without issue. But that is giving to that word a sense as inaccurate as any in which the testator could
(288) have used it in applying it to four persons. And whatever there might be in argument in other cases, it is of no weight here, because it is clear that the testator contemplated and intended to provide for the happening of the death of more than one of his daughters without issue, from the fact that the limitation over is, first, to the survivors,

and, then, to the survivor, in the singular. This is conclusive that the survivorship, as to the original portions, at least, was to continue on until a sole survivorship should happen; after which, of course, there was to be an end of the matter, as there could be no one else to take.

It is next to be considered how the law disposed at her death of that part of the share of Agnes which accrued to her on the death of Marina. Upon that question also the opinion of the Court is for the plaintiff. The general rule, undoubtedly, is that if legacies be given to three or more persons as tenants in common, in distinct shares, with a limitation over to the survivors upon the death of any of them under age or without leaving issue, and two of them die, then only the original share of the one dying last, and not the survived share, goes over. It is unnecessary at present to go through the cases, as they were all cited and considered in the elaborate opinion of *Chief Justice Taylor* in *McKay v. Hendon,* 7 N. C., 21. There is nothing, however, to prevent a testator by proper words from making the right by survivorship embrace the accrued as well as the original shares of the second, third, or any number of donees dying within the period or under the circumstances limited. An express provision to that effect is the usual and the most effectual method. But the *Chief Justice* remarks, upon the authority of *Wooledge v. Churchill,* 3 Bro. C. C., 465, that there is established a distinct exception to the rule, and that is, when a fund is left as an aggregate fund, and made divisible among many legatees, with the benefit of survivorship; in which case the whole fund may go (289) to the last survivor. *Mr. Justice Buller* sat in the case referred to, and considered that the testator's directing a fund, arising from the sales of his estate, to be laid out in public securities by the trustees in their names for the benefit of four infant children, among whom it was to be equally divided upon their attaining 21, but upon the death of any before 21, then such deceased child's share to go to the survivors or survivor of them, and calling this fund the "trust money" in that clause, and again calling it by the same name in an ulterior limitation to other persons in case of all the four children dying under 21, did constitute it "an aggregate fund" to be so kept by the trustees as to make the "whole fund" go over together. He remarks that though the expression "the whole," or "all," is not used, the words there used were tantamount to them; and the plaintiff, who was the sole survivor of the four children, was upon that ground entitled to the whole fund. Now, this will uses the term "all," which *Mr. Justice Buller* thought would be so decisive: the disposition being, that if any of the daughters should die without issue, "the survivors or *survivor* of my said daughters *shall have all the said negroes* and their increase." This seems to be nearly as express and positive as a provision of the kind could be. And it was

no doubt the testator's intention that it should be so, as we must presume from the separate provisions for his sons, with cross-remainders between them, and then these cross-limitations between the daughters of a fund in which each of them had the same interest. The meaning was, that if all the daughters died without leaving issue but one, then that one should take *all* the slaves, implying, necessarily, an exception that as to any one or more of them who should leave issue, the portion or portions of her or them so dying should not go over, but become absolute.

It must be declared that the plaintiff is therefore entitled to (290) two-thirds of the slaves and their increase.

As the testator gave no directions for investing the profits of the negroes for an accumulation, and it is clear that he had no such intention, inasmuch as he makes no other provision for the support and education of his daughters, it follows, according to the general principle, that the proportion of the profits to which each of the daughters was entitled up to her death was hers, and must be accounted for accordingly to her administrator, or be in his hands subject to distribution amongst the next of kin of the daughters respectively.

There must, therefore, be the usual inquiries upon those points, and a decree for ascertaining and dividing the negroes.

PER CURIAM. Decreed accordingly.

Cited: Albritton v. Sutton, 31 N. C., 390; *Kornegay v. Morris,* 122 N. C., 202; *Ham v. Ham,* 168 N. C., 493.

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(291)

RICHARD F. YARBROUGH v. NICHOLAS ARRINGTON ET AL.

A. filed a bill alleging that B. was indebted to him in a certain sum for which he had obtained a judgment by attachment; that B. had removed to another State and had no property in this State on which an execution could be levied, but that he was entitled to a distributive share of an estate in the hands of C., an administrator, and prayed that C. might be decreed to apply such distributive share to the payment of A.'s debt. There was no personal service of process on B., but he was brought in by publication: *Held,* that, as a decree would not be binding on B. in another State, and as therefore C. would not be protected by it against any suit that might be brought against him by B. in another State to recover his distributive share, the Court would dismiss the bill.

CAUSE removed from the Court of Equity of NASH, at Spring Term, 1848.

Thomas E. Yarbrough married Mary, a daughter of Frederick Battle of Nash County, in 1836, and shortly afterwards the father delivered

to the husband several slaves. In 1840, Thomas E. Yarbrough removed to Arkansas, and carried the negroes with him. Being considerably indebted, and in the expectation that the slaves might be taken in execution if they remained any longer in his possession and apparent ownership in Arkansas, he requested his father-in-law early in 1843 to convey to the children of himself and his wife the said slaves, instead of conveying them to himself; and in May of that year Frederick Battle, by deed, conveyed the slaves, then being six in number, to Frederick and Emily, the two children of Thomas E. Yarbrough and his wife. In 1844 Frederick Battle died intestate, leaving a widow, and the said Mary and several other children; and Nicholas W. Arrington became his administrator and sold the personal estate, except some of the slaves. In that year, also, James S. Yarborough took from (292) Thomas E. Yarbrough and his wife, Mary, in Arkansas, their joint bond for $1,200, and indorsed the same to the present plaintiff, who instituted an action of debt thereon in Nash County Court on 1 May, 1845, by original attachment, levied on the share of the land which descended to Mrs. Yarbrough from her father, and obtained judgment therein for the debt, interest, and costs. The land levied on was sold and discharged a part of the judgment, and *fieri facias* was returned *nulla bona* as to the residue.

The plaintiff then filed this bill against Thomas E. Yarbrough and his wife, Nicholas W. Arrington, the administrator, and against the widow and other next of kin of Frederick, the intestate, praying satisfaction of the judgment out of Mrs. Yarbrough's distributive share of her father's estate, and to that end that all proper accounts should be taken which might be necessary to ascertain it. The bill charges that the defendants Yarbrough and wife have no other property in this State out of which satisfaction could be had.

The bill was taken *pro confesso* against Yarbrough and wife, after notice by advertisement for them, as nonresidents.

Arrington, the administrator, answered and insisted that the plaintiff had no right to call him to account in the premises. He admits that there are some slaves unsold, and that probably there will be a surplus of the estate after the payment of the intestate's debts, for division among the next of kin. But he insists that no part of it will belong to Mrs. Yarbrough, or very little, for the reason that the negroes, which her father, at the request of her husband, conveyed to their children, were intended and were in reality an advancement by the intestate to the daughter and her husband; and he states that they are of value nearly and probably fully equal to a distributive share of the estate. (293)

Winston, W. H. Haywood, and Miller for plaintiff.
B. F. Moore for defendant.

RUFFIN, C. J. There seldom arise, upon as few facts as exist in this case, as many legal questions of interest. That respecting the advancement, and the effect upon it of the act of 1806, is particularly so. Another is whether a share of a general residue, or a distributive share of an intestate's estate, be equitable property, out of which the court of equity should decree satisfaction of a judgment debt, even against persons resident here; or is it in the nature of a chose in "action," to be reached by the creditor through an assignment coerced by a *capias ad satisfaciendum?* As subsidiary to the latter question, it would be fit also to consider what effect the statute exempting females from imprisonment for debt would have upon it. And another question is, whether the Court should assume the jurisdiction and decree the satisfaction even out of the debtor's equitable property here upon a return of *nulla bona* in an attachment against a nonresident, or should not leave the creditor to his legal remedy in the country of the debtor's domicile, or, at least, require him to establish that there, as well as here, the debtor had no property liable to legal process. In addition, it would be a subject for serious consideration whether the Court would aid a judgment rendered in attachment on a bond obtained from a married woman and not respecting her separate property, or whether those facts in themselves do not constitute a case of surprise and undue advantage taken of a person not *sui juris* and incapable of making defense, which would induce this Court to let the creditor get on as well as he could at law. Several of those points were made at the bar, and argued with much ability; and, perhaps, the Court might safely decide them upon (294) the lights derived from the discussion. It is deemed best, however, to pass them by for the present, as the cause may be decided, we think, upon another point, about which there seems to be little doubt.

The Court holds that the plaintiff cannot have a decree, because none that could be made would effectually protect the defendant Arrington for making the payment to the plaintiff which it would require of him. Independent of that objection, it may be much doubted, as the bond on which the demand arose was made in Arkansas, whether the case, as against the nonresident judgment debtors themselves, does not fall within the sixth proviso of the first section of the act of 1787, which says that the act (authorizing proceedings in equity against nonresidents) shall not be construed to warrant proceedings against a person residing without the State, unless the ground or cause of action on which the bill be brought took place within the State. But admitting that the proviso

does not embrace this case, and that the Court would decree between the plaintiff and the absent defendants, were they the only persons to be affected, it is quite clear that no decree ought to be made which would also affect third persons, unless it would be a complete protection to them for doing whatever the decree should require of them. The Legislature did not intend that, under color of a decree against a nonresident, one should be made against a citizen, also, which nevertheless would leave him exposed to further litigation and liabilities abroad. Such would be the case here. For, as Yarbrough and wife have not been served with process nor appeared in the cause, the decree would have no binding extra-territorial effect; and at the suit of the present plaintiff, the courts of Arkansas would not enforce the decree, if it were necessary to its execution to ask their aid. *Irby v. Wilson,* 21 N. C., 568. That would, indeed, be no reason why the courts of North Carolina should not decree against the nonresidents in a case within (295) the act of 1787; for they must obey the Legislature, and it would be for the plaintiff to consider what use he could make of a decree elsewhere, in case he should wish it. But it is otherwise in respect to a third person resident here, who is brought in as a defendant, against whom a decree is asked, which affects both him and the absent party personally. In that case he has a right to say the Court ought not to bind him unless the absent party can be also bound, as between them, so that the decree shall bar any claim of the one defendant on the other. Now, it is perfectly clear, if the plaintiff could not enforce this decree abroad against Yarbrough and wife, because they were not parties to it, that for the same reason it could not be set up as a defense by Arrington to a demand of Yarbrough and wife on him for her distributive share. The consequence would be that Arrington dare not put his foot out of North Carolina without exposing himself to a suit for the distributive share, in which he would be compelled to pay it over again. That is so obviously unjust that no court ought to be drawn by any hardship into making such a decree, unless compelled by a positive legislative mandate. Such is the case in respect of attachments at law. But there is no statute in this State authorizing attachments in equity, which in substance this is; and, therefore both in respect of the justice due to the absent parties and, still more, in respect to the security of the garnishee, as he may be called, the Court cannot make the decree asked, but must dismiss the bill with costs.

PER CURIAM. Bill dismissed with costs.

Cited: Logan v. Simmons, 41 N. C., 182; *Love v. Bowen,* 55 N. C., 50.

(296)

BENJAMIN SADLER ET AL. v. CORRINDON WILSON ET AL.

1. A. in 1831 devised to his ten children a tract of land in fee, equally to be divided among them, and also gave them several negroes; and then follows this clause: "Should any of my children die before they have lawful heirs of their bodies, the property of my child that may decease shall be equally divided among my children that may survive." *Held*, that under this will each of the children took an estate in fee, defeasible upon his or her death before having a child; and upon the birth of such child the fee became absolute, whether the devisee had or had not issue living at the time of his death.

2. A partition of the land having been made, A., one of the devisees, purchased two other shares and sold them, together with his own, to B., who was aware of A.'s title, and who gave his bond for the purchase money. C., one of the devisees, whose share A. purchased and sold to B., was a female, has never had any children, and is now past the age of childbearing. On a bill of injunction filed by B. to rescind the contract and have his bond surrendered to him: *Held*, that B. had no right to have the whole countract rescinded, but was only entitled to compensation for any loss he might sustain in not obtaining a title to C.'s share.

APPEAL from an interlocutory decree made at the Fall Term, 1846, of ROCKINGHAM Court of Equity, *Battle, J.*, by which decree the injunction theretofore granted in the cause was dissolved in part and continued in part until the hearing.

Jesse Wilson was seized of a tract of land, and, in 1831, devised it to his wife for her life or widowhood, and after her death or marriage, to his ten children, Greenberry, George, John, Nancy, Ann, James, Corrindon, Acquilla, Parthena, and Mary, in fee, equally to be divided between them. He also bequeathed to each of his children several negroes and other chattels. The will then adds: "Should any of my children die before they have lawful heirs of their body, the property of my child that may decease shall be equally divided among my children that
(297) may survive." After the death of the widow, partition was made between the children, and the three shares of John, Corrindon, and Parthena fell together, and contained, together, 291 acres—the lot of Parthena being between the other two. Corrindon Wilson purchased from John and Parthena their lots and took conveyances in fee; and in July, 1842, he contracted to sell the whole 291 acres to the plaintiff Benjamin Sadler, in fee, at the price of $583, payable December, 1845, with interest from the contract; and he then executed a conveyance accordingly and took the bond of the plaintiff Benjamin, and of the two other plaintiffs, as his sureties for the purchase money. The bill states that at the same time, the brothers Greenberry, George, and Acquilla, and the sister Ann, and her husband, H. Smith, executed to the pur-

chaser releases and conveyances of all their interest in the land sold; and Corrindon Wilson and his brother Greenberry joined in a bond to the plaintiff Benjamin, in the penalty of $80, with condition which recites "that the said Benjamin had that day bought from the said Corrindon, a certain piece of land, situate, etc., which included a certain tract of land which the said Corrindon purchased from Parthena Wilson, and which fell to the said Parthena under the will of Jesse Wilson, and was to revert back to the heirs of Jesse Wilson's property, provided the said Parthena should die without issue, for a division among the said legatees; and Milton A. Browder, and his wife, Mary, John Wilson, James Wilson, and Thomas P. Owen and his wife, Nancy, are entitled to shares in the said lot of the said Parthena," and then obliges the obligors to cause the said Browder and wife, Owen and wife, and John and James Wilson, "to make a final relinquishment of the interest and right of the said legatees in the above mentioned parcel of land."

The bill states that Corrindon and Parthena Wilson had never been married, and that the latter was advanced in age beyond the (298) period of child-bearing. It also states that while treating for the purchase, the plaintiff had doubts whether upon the proper construction of the will the children took an absolute fee in their several shares, and that the defendant Corrindon assured him that eminent counsel had been consulted and had advised them that they did; and that as a further assurance thereof the defendant Corrindon proposed to give and did give the obligation above set forth; and that upon the faith of those declarations the plaintiff closed the contract by accepting a deed, as aforesaid, and entering into the premises, and by giving his bond for the purchase money, and also, as a further security, conveying the land to the other defendant, Bethell, as a trustee, with power to raise the money, if not punctually paid, by a sale of the premises. The bill further states that Ann Smith has not acknowledged her release upon privy examination, and that no conveyances or releases have been made by Browder and wife, Owen and wife, and John and James Wilson, or either of them; and therefore that the title is defective, and the plaintiff may be greatly injured, as he has made valuable improvements on the land, and especially if he should lose the parcel allotted to Parthena, which is so situated that without it the other two lots are of little value: that the defendant Corrindon had removed from the State, but had recently recovered a judgment at law on the bond for the purchase money, and threatened to raise the money by a sale under execution or the deed of trust.

The prayer is that the defendant Corrindon may be compelled to complete the title to all the land, if it can be done; and, if it cannot, that the whole contract be rescinded and the defendant Corrindon be com-

pelled to take back the land and pay a reasonable sum for the outlays and improvements on it, and for general relief; and, in the mean-
(299) while, for an injunction against any proceeding to raise the purchase money.

Both of the defendants put in answers; but that of Bethell is not material to the present point. That of the other defendant admits the will of Jesse Wilson, the partition, the relative situation of the shares, the contract of sale, conveyance and releases, and the obligation from the defendant and Greenberry Wilson, as stated in the bill. It also admits that Parthena was never married and was past the age of child-bearing. But it states that both the defendant and John Wilson were married and have large families of children. The answer denies that the defendant made to the plaintiff the representation that counsel had given an opinion that under the devise the children took an absolute estate in fee, or anything to that effect. It states that, on the contrary, it was expressly understood by both parties that the title to the part allotted to Parthena was then defective, and, probably, for the want of issue, would not become good under her conveyance; and that to supply that defect in part was the purpose of the several releases of Greenberry, George, and Acquilla Wilson, and of Smith and wife; all of which were prepared by the plaintiff's son and were satisfactory to him. It further states that the other four brothers and sisters, John, James, Mary, and Nancy, resided out of the State, so that releases or conveyances from them could not be had; and that to provide an indemnity against that defect the bond in the penalty of $80 was given, in case those persons would not release or convey their several contingent interests; and the defendant states that, though he has removed from the State, Greenberry, the surety, remains here and is well able to pay the bond, or any damages which the plaintiff might sustain in the premises. He further states that finding he would probably have some difficulty with the plaintiff, he proposed to him, several months after the contract, to rescind
(300) it, and that the plaintiff positively refused, alleging as the reason that he had bought a bargain and would hold on to it; and that then the plaintiff executed the deed of trust to Bethell.

Upon the filing of the bill in May, 1846, an injunction was granted as prayed for. On the coming in of the answers the defendant moved to dissolve it, which was allowed, except as to $80; and as to that sum the injunction was continued to the hearing. From that order the plaintiff was allowed an appeal.

Morehead for plaintiff.
No counsel for defendants.

RUFFIN, C. J. There is no ground for rescinding the contract in respect to the whole of the tract of 291 acres, or for any greater relief than the order gives the plaintiff. The will gives no estate to the issue of testator's children; but it makes the fee of each defeasible upon his or her death before having a child, and in that event makes a limitation over to the surviving children. The fee was therefore contingent upon the birth of issue. The testator meant, if his children should have issue, that they should have the means of advancing them in their lives, and not that they should be restricted to the power of disposing of the estate, if they should leave issue at their deaths. This not only results from the terms of the limitation over, but from the consideration that it is not confined to the land, but embraces all the property bestowed by the testator on his children, without which they could make no provision for their families. As both John and Corrindon have married and had issue, as stated in the answer and to be inferred from the obligation, which only speaks of Parthena's lot, the title to those two lots had become absolute and the plaintiff got a good title to them, as he expected.

To the remaining third the title is not perfect, and from pres- (301) ent prospects only an estate for her life will be obtained under the conveyance of Parthena. What is to follow from that? Certainly, not the consequence, asked by the plaintiff, of rescinding the whole contract, nor more, we think, than allowing him a proportionable abatement of the price, or a just compensation for what he loses. It is beyond a doubt that no imposition was practiced on him. He does not pretend that he did not see the will; and he certainly did, as he says he entertained doubts of the construction. He says, indeed, that the defendant assured him that counsel had given an opinion that the children took an absolute fee. But the defendant denies making the representation; and he certainly could not have made it, for the obligation expressly recites that the title to this lot of Parthena was not good, and that it would "revert back to the heirs of Jesse Wilson's property, provided the said Parthena should die without issue." Then the plaintiff's case is, that he knowingly purchased the land with a defect in the title of one-third of it, and took a conveyance from the vendor, and at the same time took from other persons, who had a contingent interest in fee in that third after the life of the person under whom he claims, conveyances of his own preparing, for that interest, being four-ninths, in addition to that of his vendor, and took also a collateral engagement from the vendor, and a surety, that those to whom the other four-ninths belonged would convey the same. Upon that case it is manifest the purchaser cannot rescind the contract even as to that lot, but, at most, is entitled only to compensation out of the purchase money. Mr. Sugden

says, indeed, that even when the contract rests in articles, if the purchaser, before executing the articles, has notice of an encumbrance which is contingent, and it is agreed that the vendor shall covenant against encumbrances, the purchaser has entered into the articles with his eyes open, and chosen his own remedy, and equity will not assist him, (302) and he cannot retain any part of the purchase money. Sug. Ven., ch. 9, sec. 6. But here the party took a conveyance from the vendor for the whole, with a separate covenant in relation to four-ninths of a third—as to which latter part alone there is a defect of title. The plaintiff has not shown his deeds, so that it may appear what covenants they contain. If they contain none, the plaintiff is clearly entitled to no relief, unless in respect of the separate obligation, because he knew of the defect and ought to have provided against it. And certainly the bond can entitle him to not more than a proper deduction at the hearing for the loss of part of the land, if to that. Indeed, the plaintiff asked in his bill for, as far as it appears in the argument, nothing less than a decree for completing the title, or putting an end to the bargain as to the whole tract of 291 acres. That last he was clearly not entitled to under the circumstances. Being obliged to keep two of the lots, it is to be presumed that it was the plaintiff's object and interest to hold as much of the intermediate lot as he could get a good title for; and it was for that reason that he did not ask to rescind the contract as to that lot alone upon the ground of losing so much as four-ninths of it. As he did not ask it, the court, of course, would not frame the decree with a view to that result. We think the court went far enough in retaining a sum which seems amply sufficient to indemnify the plaintiff. The price of the whole tract was $583, which makes the price of each lot $194.33⅓. Hence the value of the fee in possession of four-ninths would be a little under $80. But here the purchaser has at all events an estate for the life of Parthena, which he has already enjoyed for six years; so that the sum for which the injunction was held up must, apparently, prove adequate to anything decreed, as an abatement, on the hearing. Therefore the Court is of opinion that the decree is not erroneous, at least, (303) as against the plaintiff, and ought to stand affirmed, with costs in this Court.

PER CURIAM. Affirmed.

Cited: Mills v. Abrams, 41 N. C., 462; *Kelly v. Williams,* 113 N. C., 438; *Whitfield v. Garris,* 134 N. C., 31.

JOHN HALL v. NELSON HARRIS ET AL.

When a paper is signed, sealed, and handed to a third person, to be delivered to another, upon a condition which is afterwards complied with the paper becomes a deed by the act of parting with the possession, and takes effect presently, without reference to the precise words used, unless it clearly appear to be the intention that it should not then become a deed, and this intention would be defeated by treating it as a deed from that time.

CAUSE removed from the Court of Equity of MONTGOMERY, at Spring Term, 1848.

The facts in this case are fully stated in a case between the same parties, *Hall v. Harris,* 38 N. C., 289, and so much of them as is necessary to the understanding of the decision now made is set forth in the opinion of the Court here delivered.

Strange for plaintiff.
No counsel for defendants.

PEARSON, J. When this case was before this Court at June Term, 1844, it was decided that an execution does not bind equitable interests and rights of redemption from its *teste,* as in ordinary cases, but from the time of "execution sued"; and it was declared that the plaintiff would be entitled to a decree, provided the deed under which he claimed took effect before the execution under which the defendant Harris (304) claimed was issued. *Hall v. Harris,* 38 N. C., 289.

We are satisfied that the view then taken of the case was correct. The rights of the parties depend upon that single question.

The execution issued on 7 March, 1840. The plaintiff alleges that the deed took effect on 2 March, 1840. The facts are that on 2 March the plaintiff and the defendant Morgan made an agreement, by which the plaintiff was to give Morgan $725 for the land, to be paid a part in cash and the balance in notes and specific articles, as soon as the plaintiff was able, which he expected would be in a few days, and Morgan was to make a deed to the plaintiff and hand it to Col. Hardy Morgan, to be by him handed to the plaintiff when he paid the price. Accordingly, on that day the plaintiff paid to Morgan a wagon and some leather, which was taken at the price of $57.50, and Morgan signed and sealed the deed and handed it to Colonel Morgan to be handed to the plaintiff when he paid the balance of the price. The deed was witnessed by Colonel Morgan and one Sanders, and is dated on 2 March. Afterwards, on 10 March, the plaintiff paid to Morgan the balance of the $725, with the exception of $152, for which Morgan accepted his note, and the deed was then handed to the plaintiff by Colonel Morgan.

The question upon these facts is, whether the deed takes effect from 2 or from 10 March? We are of opinion that it takes effect from the 2d, at which time, according to the agreement, it was signed, sealed, and delivered to Colonel Morgan, to be delivered to the plaintiff when he should pay the price. The effect of the agreement was to give the plaintiff the equitable estate in the land, and to give Morgan a right
(305) to the price. The purpose for which the deed was delivered to a third person, instead of being delivered directly to the plaintiff, was merely to secure the payment of the price. When that was paid, the plaintiff had a right to the deed. The purpose for which it was put into the hands of a third person being accomplished, the plaintiff then held it in the same manner as he would have held it if it had been delivered to him in the first instance. This was the intention, and we can see no good reason why the parties should not be allowed to effect their end in this way.

It is true, the plaintiff was not absolutely bound to pay the balance of the price. Perhaps he had it in his power to avail himself of the statute of frauds, and it would seem from the testimony that at one time he contemplated doing so, on account of some doubt as to the title; but he complied with the condition and paid the price. His rights cannot be affected by the fact that he might have avoided it. If the vendor had died after the delivery to the third person and before the payment, the vendee upon making the payment would have been entitled to the deed; and it must have taken effect from the first delivery; otherwise, it could not take effect at all. The intention was that it should be the deed of the vendee from the time it was delivered to the third person, provided the condition was complied with. If this intention is *bona fide* and not a contrivance to interfere with the right of creditors, of which there is no allegation in this case, it must be allowed to take effect.

A distinction is taken in the old books between a case when a paper, being signed and sealed, is handed to a third person with these words, "Take this paper and hand it to A. B. as *my deed,* upon condition," etc., and a case where these words are used, "Take *this deed* and hand it to A. B. upon condition," etc. In the latter case it takes effect presently, while in the former it is held, in most cases, not to take effect until the second delivery. Shepherd's Touchstone, 58, 59.

(306) The distinction upon which this "diversity" is made would seem too nice for practical purposes—to be a mere play upon words. The intention of the parties, whether one set of words be used or the other, is to make it a deed presently, but to lodge it in the hand of a third person as the security for the performance of some act. If it was not to be a deed presently, provided the condition be afterwards performed, the maker would hold it himself, and the agency of the third

person would be useless. Indeed, the idea that the third person is a *mere agent* to deliver the paper as a deed, if particular words be used—"escrow," for instance—even by the old cases, has many exceptions, and the deed is allowed, in such cases, to take effect. As if the maker dies, as in the case above put; or becomes *non compos mentis;* or, being a *feme* sole, marries; or if the vendor should create any encumbrance, as by making a lease: in all such cases, when the paper was handed to the third person to be *delivered as a deed* upon condition, etc., it is allowed to take effect from the first delivery, in order to effectuate the intention of the parties. In other words, when it can make no difference, the deed takes effect from the second delivery; but if it does make a difference, then the deed takes effect from the first delivery. This entirely settles the question. The last exception cited above, as to the relation of the deed in cases of "escrow" to avoid a lease, takes in the case under consideration, for it is the same whether the encumbrance to be avoided proceeds from the act of the party or from the effect of an execution, as the object is to make the deed effectual and to carry out the intention. *S. v. Pool,* 27 N. C., 105.

But, in truth, the distinction cannot be acted upon—it is merely verbal, and whether one set of words would be used, or the other, would be the result of mere accident. The law does not depend upon the accidental use of mere words "trusted to the slippery memory of (307) witnesses." It depends upon the act, that a paper, *signed and sealed,* is put out of the possession of the maker. It must be confessed (and with reverence I say it) that many of the *dicta* to be found in the old books in reference to deeds are too "subtle and cunning" for practical use, and have either been passed over in silence or wholly explained away.

We are satisfied from principle and from a consideration of the authorities, that when a paper is signed and sealed and handed to a third person to be handed to another upon a condition which is afterwards complied with, the paper becomes a deed by the act of parting with the possession, and takes effect presently, without reference to the precise words used, unless it clearly appears to be the intention that it should not then become a deed, and this intention would be defeated by treating it as a deed from that time, as if, no fraud being suggested, the paper is handed to the third person before the parties have concluded the bargain and fixed upon the terms, which cannot well be supposed ever to be the case, for, in ordinary transactions, the preparation of deeds of conveyance, which is attended with trouble and expense, usually comes *after* the *agreement* to sell.

There must be a decree for the plaintiff, with costs against the defendant Harris.

PER CURIAM. 215 Decree accordingly.

Cited: Dis. op. of Pearson in Gaskill v. King, 34 N. C., 222; *Roe v. Lovick,* 43 N. C., 91; *Phillips v. Houston,* 50 N. C., 303; *Robbins v. Rascoe,* 120 N. C., 82; *Perkins v. Thompson,* 123 N. C., 179; *Craddock v. Barnes,* 142 N. C., 96; *Buchanan v. Clark,* 164 N. C., 63, 65; *Huddleston v. Hardy, ib.,* 215; *Lynch v. Johnson,* 171 N. C., 613.

(308)

THOMAS DAVIS v. WILLIE J. GILLIAM ET AL.

1. A husband is dispunishable for waste, because, while in the possession, he is not tenant for life in his own right, but is seized with his wife in fee in her right. But the assignee of the estate of the husband is liable for waste, because his seizin and possession are several, and he is strictly a tenant for the life of the husband.

2. Though a tenant for life of land entirely wild may clear as much of it for cultivation as a prudent owner of the fee would, and sell the timber that grew on that part of the land, yet it is waste in such a tenant to cut down valuable trees, not for the purpose of improving the land, but for the purpose of sale.

APPEAL from an interlocutory decree of the Court of Equity of MARTIN, at Fall Term, 1848, perpetuating an injunction theretofore granted in the cause. *Caldwell, J.*

The bill is to restrain waste; and upon the bill and answer the case is this: Maer and wife were seized in possession of land in fee in her right, and had issue; and a judgment was held against Maer and on a *fieri facias* the land was purchased by the defendant in 1833. In 1838, Maer and wife assigned the reversion to the plaintiff; and in April, 1848, Maer and wife being still living, this bill was filed for an account of the proceeds of timber, shingles, and staves made of the oak and cypress timber that had been felled on the land and sold, and for an injunction against cutting any more for sale. The land consists of two tracts. One of them contains 100 acres, of which the defendant had about 40 in cultivation. The residue thereof is what is called swamp, on the Roanoke, which lies so low that, for the greater part of the year, it is covered by water, and in its natural state is unfit for agricultural cultivation, if the timber on it were all felled. The other tract contains 250 acres, of which 150 consist of highland, and 100
(309) acres of swamp like the other. On the highland there was once a field of 40 acres in cultivation, but it was exhausted and turned out some years before the defendant purchased, and is still in that state. The residue of the highland is broken and of but little value for culti-

vation; but it has on it oak and other timber fit for staves and boards. The swamp on each tract is heavily timbered with cypress and other growths; and in 1846 the defendant sold cypress timber from the first tract to the value of $100, and in 1847 and in 1848 he felled cypress in the swamp of the other tract, of which he made shingles, and red oaks on the highland of that tract, of which he made staves to the value of about $900—of which he had sold a part and was about to sell the other part when the bill was filed. The timber thus felled is not of one-twentieth part of the value of all the timber on the several tracts, and there is a great abundance left for fencing, firewood and the like. But the defendant insists on the right to continue the cutting of the timber on the swamp land, and also to some extent more on the highland.

On the hearing, the injunction was perpetuated and an account ordered; but the defendant was allowed to appeal.

Biggs for plaintiff.
B. F. Moore for defendants.

RUFFIN, C. J. The husband was dispunishable for waste, because, while in possession, he was not tenant for life in his own right, but was seized with his wife in fee in her right. Besides, the wife, in whom the inheritance was, could not sue him. But it is otherwise with the defendant; for, although he purchased the husband's estate, his seizin and possession are several, and he is strictly a tenant for the life of the husband.

The case is similar to that mentioned by Lord Coke of tenant (310) in tail after possibility of issue extinct, who was not liable for waste in respect that he once had the inheritance in him. But the privilege was personal, and his feoffee was but tenant for life, and as such liable for waste.

The question, then, is whether the acts done and contemplated by the defendant amount to waste. We think they do, and the plaintiff had the right to the decree, both as to the injunction and the account. Of course, the question is to be treated as embracing the case of dower as well as curtesy. It is certainly proper, in cases of this kind, to have a view to the spirit and reason of the common law; and therefore many things that constitute waste in England and may hereafter do so here, because prejudicial to the inheritance, ought not to be so held here at present, because they do not prejudice, but rather improve, the inheritance. Hence, turning woodland into arable, though the timber felled be sold, is not absolutely waste in our law; for cutting the timber on land fit for cultivation, or that may be made so, and reducing it to that state may, in the condition of our country, be a benefit, rather than an

injury, to the reversioner. If this swamp be of the fertile quality that much of the Roanoke alluvial bottoms are, it might add greatly to the value of the inheritance to take off the whole of the timber, if the tenant would go on by embankments and ditches to prepare the land for crops. The rules, therefore, of the common law, determining what is or is not waste, are not entirely applicable to the condition of things here. But the principle on which those rules were formed applies here, as, indeed, it does everywhere; for it is founded in the nature of justice itself. It is that a tenant for a limited period or a particular estate cannot rightfully so treat the estate as to destroy the value of the reversion or materially reduce it below what it would be, regard being had (311) merely to the postponement of the enjoyment. The tenant may use the estate, but not so as to take from it its intrinsic worth. We have, indeed, said, in this State, that a widow may do a little more than that, by allowing her, for example, to make turpentine, as her husband had made it, on the land assigned for dower. That privilege may be supposed to have been estimated in assigning the dower, which is according to value. We have also held that a widow may clear land reasonably, as a prudent person would, for the purpose of supplying the place of fields previously cleared and exhausted by cultivation, leaving timber for building, fencing, fuel, and the like; and some regard, moreover, is to be had to a widow's making a comfortable livelihood. But she cannot be allowed to begin the making of turpentine, though the land on which the pines grow be fit for nothing else, or, rather, would not in her time pay for the expenses of clearing and manuring for farinaceous crops. That is upon the principle on which the common law restrained a tenant for life from opening a mine. It is not a thing yielding a regular profit in the way of production from year to year from labor, but it would be taking away the land itself, and there is no knowing how to apportion the share of the minerals which the tenant might extract. Upon the same principle the tenant ought not to cut down timber for sale merely. We should hold, as the state of the country now is, that a tenant for life of land entirely wild might clear as much of it for cultivation as a prudent owner of the fee would, and might sell the timber that grew on that part of the land. Clearing for cultivation has, according to the decisions, peculiar claims for protection; and a sale of the timber from the field cleared may be justly made, in compensation for clearing and bringing it into cultivation. But it seems altogether unjust that a particular tenant should take off the timber without any adequate compensation to the estate for (312) the loss of it; for he takes, in that case, not the product of the estate arising in his own time, but he takes that which nature has been elaborating through ages, being a part of the inheritance itself, and

that, too, which imparts to it its chief value. As in the case of the mine, how is it possible to apportion the timber between the tenant for life and the remainderman, since it is altogether uncertain what the duration of the life will be? If a tenant for life can claim a share of the trees for sale as a part of the profits, then the whole might be taken from the owner of the inheritance when there happens to be a succession of life estates limited. It is said, however, that unless he be allowed to take some of the timber, his estate will be of no value when the land is swamp, not fit for cultivation, or that cannot be made so without great expense in drains and dikes. That, we suppose, could not alter the principle. But this case does not call for a decisive answer to that suggestion; for, in the first place, the greater part of the sales have been of shingles and staves made of timber felled on the highland on one of the tracts; and, in the next place, one-half of one of the tracts and three-fifths of the other are arable, and, consequently, the timber on the swamp might by a prudent proprietor be preserved as a provision that would enable him to reduce to actual cultivation the whole of those portions of the land which are arable. Certainly a tenant for life cannot insist on being allowed to make the greatest possible profit out of the land that can be made in his time. Indeed, he ought not, for the sake merely of enhancing his profits and without any view to the cultivation of any parts of the land, to cut the timber in which the chief value of the fee consists, and thus leave the exhausted or barren parts of the land, which are arable or might be made so, to the reversioner, with only timber enough on the several tracts to fence those worthless parts. That would really be to give to the particular estate the (313) kernel, and the shell to the fee.

PER CURIAM. Affirmed with costs.

Cited: King v. Miller, 99 N. C., 596; *Dorsey v. Moore,* 100 N. C., 44; *Jones v. Britton,* 102 N. C., 187; *Sherrill v. Connor,* 107 N. C., 633.

DUNCAN BEDSOLE v. MALCOM MONROE.

1. Multifariousness consists in joining in one bill two or more distinct grounds of suit against the same or different persons.

2. To support the objection of multifariousness because the bill contains different causes of suit against the same person, two things must concur: First, the different grounds of suit must be wholly distinct, and, secondly, each ground must be sufficient, as stated, to sustain a bill.

3. If the grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the same transaction or series of transactions, forming one course of dealing, and all tending to one end; if one connected story can be told of the whole—then the objection cannot apply.

4. Where there appear to be two distinct objects in the bill, but the allegations as to one of them are so defective that no decree can be had on them, the bill is not multifarious, so as to admit of a general demurrer to the whole bill; for the objection of multifariousness, in its very nature, is that the bill contains two distinct causes of suit, in respect of each of which, as the bill is framed, the plaintiff may have a decree.

5. In such a case the proper course would be to refer the bill to have it reformed for impertinence, or to demur to the defective part of the bill, or to answer and insist on the defense as to so much of the bill at the hearing.

APPEAL from an interlocutory decree of the Court of Equity of BLADEN, at Fall Term, 1848, overruling a demurrer filed in the cause. *Pearson, J.*

Elizabeth Rials made her will on 2 February, 1847, and, after giving small pecuniary legacies, bequeathed and devised as follows: "It
(314) is my will that all my just debts and funeral expenses be paid, as soon after my decease as possible, out of any money that shall first come into the hands of my executors from any portion of my estate, real or personal. I give to my excutors, to the use of Rhoda Parker, $100, to be given as she may require it. If she depart life before she receive it, I then give and bequeath it to my executors. I give to my brother Duncan Bedsole, and my friend Malcom Monroe my black woman Dinah, my boy Jim and boy Henry, and my girl Mary and the child that she now has or may hereafter have, and all my land in the county of Bladen, lying on or about the beaver dam and elsewhere. I give and bequeath all the residue of my estate, real and personal, to my brother Duncan Bedsole and friend Malcom Monroe, and appoint them my executors. And it is my will and desire that my executors take into possession all my estate, real and personal; and that if any difficulty should arise about my estate, my executors should defend the same."

The testatrix soon after died and the will was proved by both of the executors, who are the parties to this suit. The bill was filed in October, 1848, and states that the plaintiff was an unlearned and ignorant man and the defendant shrewd and acquainted with business, and that in consequence thereof it was agreed between them that the defendant should take on himself the whole burden of executing the will; and that accordingly the defendant took into his exclusive possession all the estate, both real and personal, but omitted to return any inventory. The bill further states, "that the defendant, practicing upon the ignorance of your orator, through fraud and misrepresentations induced your orator to make to the

defendant a conveyance of all his interest in the said lands on or about the beaver dam, dated 1 June, 1847, alleging and declaring that such was the will of the testatrix: whereas your orator charges the same to be false and fraudulent." The bill then states that the residue of (315) the estate was considerable, and that, after paying all the particular legacies, there would remain a considerable sum for division between the plaintiff and defendant; but that the defendant had failed to pay off the pecuniary legacies, and, especially, that to Rhoda Parker. The prayer is for a discovery of the consideration of the deed for the land and of the representations and other circumstances under which it was made, and for an account of the personal estate, and that all legacies should be paid, and the clear residue be divided between the plaintiff and the defendant, and that the negroes should also be divided, and "that the said deed made by the plaintiff to the defendant may be decreed to be canceled, as having been obtained through fraud and misrepresentation."

The defendant put in a demurrer for multifariousness, in that the bill seeks to compel the defendant to account for the personal estate of the testatrix and pay to the complainant the legacies bequeathed to him, and also to compel the defendant to surrender a deed from the plaintiff conveying to the defendant certain real estate; the same being matters separate, distinct, and independent in their nature, and wholly unconnected with each other. Upon argument the demurrer was overruled; but the defendant was allowed an appeal to this Court.

W. Winslow, D. Reid, and A. T. Smith for plaintiff.
Strange for defendant.

RUFFIN, C. J. The Court is of opinion that the demurrer was properly overruled. It seems from the books that multifariousness consists in joining in one bill two or more distinct grounds of suit against the same or different persons. It exists, then, where there is a misjoinder of persons or a misjoinder of the subjects of litigation. (316) The objection is commonly made on the first ground: as one person, in having a controversy between the plaintiff and himself decided, ought not to be obliged to submit to delays that might arise out of a separate controversy between the plaintiff and another defendant. That reason does not ordinarily apply when there is but one defendant, though there be several distinct subjects, as the objection goes only to the convenience in the modes of proceeding, and a single defendant may, and generally does, prefer all disputes between him and the plaintiff to be settled in one suit, rather than incur the expense of two or more. Although the objection seems, thus, not to be as forcible against entertaining a bill when there is a joinder of distinct subjects against the

same person as it is against a bill in which there is both a joinder of different subjects and persons, yet it seems to be thought that a misjoinder of subjects against the same person is, of itself, a good objection to a bill, if the defendant thinks proper to take it. It may be remarked, however, that very few cases are to be found in which a bill against a single person has been dismissed on that ground. That of *Johnson v. Johnson,* 6 John. C. C., 163, is an instance of the application of the rule, and was pressed in the argument at the bar. But that case can hardly be considered a precedent upon the general doctrine, as it proceeded upon very special grounds. It was a suit for divorce *a mensa et thoro* and also for one *a vinculo matrimonii* upon the distinct grounds of cruelty and adultery; as to which the statute required different defenses, namely, as to one, on oath; as to the other, not; and likewise different modes of proceeding to ascertain the facts. Therefore the case has no general application; and no other was cited which was precisely apposite. But it is not requisite to look for other cases on that point or to determine how far the Court should go in refusing cognizance of a bill upon the ground simply that it seeks relief against a single person in respect to two distinct matters; for, admitting that such a bill
(317) would not be sustained, the present, as it seems to the Court, does not fall within the rule.

It is obvious that the principle can only apply when two things concur: first, when the different grounds of suit are wholly distinct; and, secondly, when each ground would, as stated, sustain a bill. If the grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the same transaction or series of transactions, forming one course of dealing and all tending to one end; if one connected story can be told of the whole, then the objection cannot apply. Suppose a guardian to make an unfair bargain with a late ward, just of age, and to obtain several conveyances for realty and personalty. Undoubtedly, one bill could cover the whole case; and that, even if the person obtaining the deeds were dead, and the relief was sought against his heirs and executor. The same defense would be applicable to the different parts of the case. It must be the same with respect to dealings between other trustees or *quasi* trustees, from their confidential relation, and *cestui que trusts.* In such cases a bill may be filed in affirmance of the original right of the plaintiff, and in order that the relief in respect to it—which is the main relief—may be effectual, the plaintiff may state in his bill any number of conveyances improperly obtained from him, either at one or more times or respecting different kinds of property, and ask to have them all put out of his way or to have reconveyances; for the several conveyances do not so much constitute distinct subjects of litigation, but are rather so many barricades erected by the defendant to

impede the plaintiff's progress towards his rights. The same equity, we think, must exist against conveyances of property devised under a will, whether real or personal, obtained by an executor from devisees or legatees to be the better or the more easily managed or disposed (318) of, with a view to the purpose of the will, or upon such a suggestion. If taken upon a suggestion of that kind, and they do not state the purpose on their face, and the executor should, on that ground, set them up as absolute conveyances to himself, after the purposes of the will have been answered, or when there were, in truth, no such necessities of the estate, though suggested, it is apparent that there ought to be relief against such conveyances; and that, within the principle we are considering, the relief may and ought to be had upon a bill for administering the estate and settling the actings of the party as executor, or connected with the office. If the executor obtained the conveyance by reason that he was executor, and upon a suggestion that it would enable him the better to discharge his office or promote the interest of the maker of the deed, the latter may, in a bill for an account of the estate, insist likewise on a reconveyance, upon the ground that the account will show either that the purposes for which the conveyance was made have been answered, or that they never existed, and that the suggestion was false from the beginning; for it is plainly a fraud, committed in the course of the defendant's administration and arising out of the relation created thereby. Such seems to be the case which it was an object of this bill to state. The statement, it is true, is very imperfect, and the writer may not have had a clear conception of the particular equity on which the right to relief in this suit depended. We cannot say, indeed, that there is enough in the bill to authorize a decree for the plaintiff on this part of this cause, when it comes to a hearing. Whether there be or not is not at this time to be considered, as the case is here by appeal from an interlocutory decree on a special demurrer. What we have to say is, that such an equity exists, and that there is a manifest propriety in connecting the obtaining of such a conveyance and the trusts and purposes on which it was given and to which it has been applied (319) or misapplied, and asking relief in respect thereof in the same bill in which relief is sought in respect to the other acts of the executor, whether those that are strictly *virtute officii* or those arising out of trusts imposed or supposed to be imposed on him as executor.

Here the will gave land to the plaintiff and defendant and directed that the *executors* should take into possession, not only the personal, but the real estate, and defend it if any difficulty should arise about it, and, further, that they should pay the debts and funeral expenses out of the money that should first come into the hands of the *executors* from any portion of the estate, *real* or personal. The land, then, although de-

vised, was charged with the debts and expenses, and the executors were required to enter into it and apply the profits to those purposes. The bill states, also, that the parties, owing to the superior capacity for business of the defendant and the incapacity of the plaintiff, agreed, immediately after the will was proved in May, 1847, that the defendant should act solely as the executor, and that accordingly the defendant took exclusive possession of the whole estate—real as well as personal. Then it was that the defendant also induced the plaintiff to execute a deed for the land, "alleging, and declaring, through fraud and misrepresentation, that such was the will of the testatrix," and the plaintiff, through ignorance, and confidence in the defendant, believed the representation. Viewing the statement of the bill as to the occasion and reason for the conveyance, in connection with the provisions of the will and the absence of any valuable or good consideration, it must be supposed, whether sufficiently expressed or not, that it was the purpose to charge in the bill that the defendant, the sole acting executor, required the conveyance from the plaintiff upon the idea that the will imposed duties on the executor, as such, in respect of the land and the payment of
(320) the debts out of its produce, and that, as the plaintiff was giving up the executorship, he should also give up the land to the defendant, and to that end make a conveyance of it. Thus regarded, the arrangement and conveyance were but acts, whether at the time rightful or wrongful, in the course of the administration of the estate, and they form proper subjects for consideration in a bill like this, as arising out of the administration. On this ground the demurrer would be properly overruled, if the statements of the bill be sufficient to show that the deed was made under the circumstances and for the purposes supposed.

If, however, the allegations be so defective on that head that the plaintiff could not get a decree in respect of the land, then the point raised by the demurrer is still as conclusively against the defendant. We rather suppose that the bill is too barren of facts and vague to entitle the plaintiff to a decree for any land. It does not identify the land conveyed, nor, indeed, allege that the testatrix was seized of any particular land, nor what estate she had in it, if any; and it is difficult to see what in particular constituted the "fraud and misrepresentation" by which the defendant got the conveyance. Supposing, then, the statement in the bill to be insufficient to authorize a decree for the land, it follows that the bill cannot possibly be multifarious; for, in its nature, the objection of multifariousness is, that the bill contains two distinct causes of suit, in respect of each of which, as the bill is framed, the plaintiff may have a decree; whereas this bill would then be one, in which there was as to one subject a good case, and as to the other a bad

one, so that, in fact, the plaintiff could not have a decree for distinct subjects, but only for a single one. Such a bill is not multifarious in any proper sense of the term, so as to admit of a demurrer to the whole bill on that ground and cause it to be dismissed as well in regard to the good case as the bad one. Certainly not; for *utile per* (321) *inutile non vitiatur.* Instead of demurring for multifariousness, the proper course, according to circumstances, would be to refer the bill to have it reformed for impertinence; or to demur to that part of the bill, if the party does not choose to answer; or to answer and insist on the defense, as to so much of the bill, at the hearing; for, as far as the plaintiff has a good cause, he ought to be relieved, and not turned out of court merely because he unnecessarily introduced other matter that is impertinent to that case, and, at the same time, does not constitute another substantive ground for a decree.

It must be certified that there was no error in the interlocutory decree, and the defendant must pay the costs in this Court.

PER CURIAM. Ordered accordingly.

Cited: May v. Smith, 45 N. C., 197; *Land Co. v. Beatty,* 69 N. C., 333; *Young v. Young,* 81 N. C., 97; *King v. Farmer,* 88 N. C., 26; *Heggie v. Hill,* 95 N. C., 305; *Daniels v. Fowler,* 120 N. C., 16; *Fisher v. Trust Co.,* 138 N. C., 229, 235, 246; *Hawk v. Lumber Co.,* 145 N. C., 50; *Ricks v. Wilson,* 151 N. C., 49; *Quarry Co. v. Construction Co.,* 151 N. C., 349, 350; *Ricks v. Wilson, ib.,* 49; *Chemical Co. v. Floyd,* 158 N. C., 462; *Lee v. Thornton,* 171 N. C., 213.

AMY ASKEW v. WILLIAM DANIEL.

The deed of a married woman, without her privy examination, is so entirely void as to her that even if an agreement be incorporated in it for her benefit, she cannot obtain a specific performance.

CAUSE removed from the Court of Equity of GRANVILLE, at Fall Term, 1848.

The plaintiff's bill alleges that, under the will of her first husband, Merryman Barnes, she had a good title to a tract of land, described in the bill, together with her three children, among whom was Washington L. Barnes; that after her intermarriage with her second husband, William Askew, they sold and conveyed to Washington L. (322) Barnes all their interest in the land, but that she never was privily examined, whereby the conveyance was void as to her, and car-

ried nothing but the life estate of her husband, William Askew, who is since dead; and that she has brought an action of ejectment against Samuel Barnes, the tenant in possession, and to whom it was sold by her son. She further states that the object of the conveyance and its consideration was to secure to herself a comfortable subsistence for the remainder of her days, which her son promised to provide for her. This conveyance was made a part of her bill, and the consideration expressed in it is to compromise and settle controversies which had arisen between the plaintiff and her children, conveying the land and other property of her former husband, Merryman Barnes, and $1. The prayer is that the defendant, who is the administrator of the said Washington, upon her surrendering her title to the land, may be compelled to comply with his intestate's (the said Washington L. Barnes) agreement as above set forth, by paying to her such sum or sums of money as upon a reasonable allowance for her yearly support may be found justly due to her.

Gilliam and Lanier for plaintiff.
Badger for defendant.

NASH, J. The plaintiff's bill cannot be sustained. The deed of a *feme covert* is of no effect in conveying her land until she is privily examined by the proper authorities. Until then, the deed as to her is a blank paper; the title still remains in her. But though void as to her, it is good and available as to her husband, and transfers his life estate. Washington Barnes, by the conveyance from the plaintiff and her husband, acquired nothing but the life estate of the latter, which (323) expired at his death. As soon as that event took place, the plaintiff being the legal owner, was entitled to the possession of the land. She accordingly brought her action of ejectment to recover it from the tenant in possession. She says she is willing to confirm the title of the vendee of her son, if the contract, made by her and her husband with him, is established, towit, a comfortable support under a decree of the court is provided for her. The Court has no power under that conveyance to make any such decree. The deed, which is made a part of the case, recites that the consideration of it was the compromise of controversies which had arisen concerning the property of her former husband. The compromise of a doubtful title is a valuable consideration to sustain a conveyance. The deed says nothing of any support to be provided for the plaintiff by her son Washington.

The plaintiff never having been privily examined touching her execution of the deed, it is void as to her, and she stands as if she had never executed it, having the same title to the land which she had before that instrument was made. If the parol agreement attempted to be set up

by the bill had been incorporated in her conveyance to her son, it would not alter the law. The deed was void as to her, and she, therefore, could not have obtained a specific performance.

PER CURIAM. Bill dismissed.

Cited: Scott v. Battle, 85 N. C., 188; *Smith v. Ingram,* 130 N. C., 105; *Cameron v. Hicks,* 141 N. C., 32.

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(324)

ROBERT HARRIS ET AL. v. WILLIAM A. PHILPOT ET AL.

1. A testator bequeathed to his wife "two choice horses," fifteen choice sheep," etc., and the wife died before receiving her legacy: *Held,* that the administrator of the wife was not entitled to his choice, but that the selection must be made by the executors of the husband, and should be of the best sheep.

2. A testator bequeathed as follows: "I give to my daughter S. G. four negroes, by name Dice, etc., which she has already received"; and in a subsequent clause he says: "It is my desire that my daughter S. G. have three small negroes more, which will make her number seven, equal with her brothers' number." After making his will, the testator conveyed three negroes to his daughter S. G. by deed of gift: *Held,* that this was a satisfaction of the legacy of three small negroes.

3. A testator in the residuary clause of his will devised and bequeathed as follows: "My other two tracts of land, etc., and all my negroes, not mentioned, etc., to be equally divided between my two sons W. H. and R. H. and my daughter S. G. and the heirs of my son L., deceased." *Held,* that the words "heirs of L.," as here used, mean "the children of L.," and that the division must be *per capita,* in which each of the children of L. will take one full share.

CAUSE removed from the Court of Equity of PERSON, at Spring Term, 1848.

Robert Harris died in 1847, leaving him surviving his children, William Harris and Robert Harris, and Sarah Gillis, and grandchildren, Robert L., William H., Ann, and Sarah Harris, who were the children of his son Lawson Harris (who died before his father) and Sarah Harris, his widow, who died a short time after her husband and upon whose estate William Philpot took out letters of administration. The bill is filed by William and Robert Harris, the executors, against the administrator of Sarah Harris, Sarah Gillis and her husband, and the children of Lawson, praying that a construction may be put upon the will of Robert Harris to enable the plaintiff to make dis- (325) tribution.

The will is as follows:

"In the name of God, amen: I, Robert Harris, Sr., of Person County, State of North Carolina, being of sound and perfect mind and memory (blessed be God), do this 10 May, 1842, make and publish this my last will and testament in manner following: that is to say, after all my just debts are paid:

"Item 1. I give and bequeath unto my son William Harris one horse, bridle, and saddle; one cow and calf; one bed and furniture, 273½ acres of land whereon he now lives; six negroes, by name, Linda, Stephen, Frank, Henry, Dice, and Ann, unto him and his heirs forever; which he has already received.

"Item 2. I give and bequeath unto my son Lawson Harris one horse, bridle, and saddle; one cow and calf; one bed and furniture; 300 acres of land, joining the land of Allen Yancey, William Harris, and others; which he has already received, and expended the value to his own use.

"Item 3. I give and bequeath unto my daughter Sarah Gillis one feather bed and furniture; one mare, bridle, and saddle; four negroes, by name, Dice, Jinny, Peggy, and Jacob, to her and her heirs forever; which she has already received.

"Item 4. I give and bequeath unto my son Robert Harris one horse, bridle, and saddle; one bed and furniture; seven negroes, by name, Oxford, Sarah, Gaston, Green, Lethe, Tine, and Elijah, to him and his heirs forever; which he has already received.

"Item 5. I leave to my beloved wife, Sarah Harris, the tract of land whereon I now live, during her life as my widow; also as many of my negro men and women as she chooses, out of the number I leave; two choice horses; four cows and calves; all my stock of hogs; fifteen (326) choice sheep; all the stock of geese; all the household and kitchen furniture, or as much as she cares to keep; one yoke of steers and cart; the rest of my black people to be divided after William Harris receive one, the value of Tine, which my son Robert Harris has over the number of his brother William; also it is my desire for my son William to have $53 to make his tract of land equal of value with the tract I gave my son Lawson; also it is my desire that my daughter Sarah Gillis have three small negroes more, which will make her number seven, equal with her brothers' number.

"I give and bequeath unto the heirs of my son Lawson Harris, deceased, two negroes, Milly and Jeff, to them and their heirs forever.

"Item. I give and bequeath unto my son Robert Harris the tract of land whereon I now live, containing 600 acres, after the death or marriage of my wife, to him and his heirs forever. Also the negroes which I leave her to return to my estate at her death or marriage.

"I give and bequeath unto my daughter Sarah Gillis the tract of land whereon my brother Overton Harris lived at his death, containing 150 acres, to her and her heirs forever.

"My other two tracts of land not mentioned, including the mill tract above, containing 640 acres, and all my negroes, not mentioned, to be equally divided between my two sons William Harris and my son Robert Harris, and my daughter Sarah Gillis, and the heirs of my son Lawson, deceased, and the rest of my property, wagon, still, etc. It is my desire that my son William shall have 30 acres of land surveyed off from the tract on which I now reside, adjoining the tract which I have given him, and then the balance of the tract to my son Robert, as before recited.

"I nominate and appoint my son William Harris and my son Robert Harris executors to this my last will and testament. In (327) witness whereof, I have hereunto set my hand and affixed my seal, this 1 June, 1842. ROBERT HARRIS. [SEAL]

"In presence of
JOHN HUMPHRIES,
AMBROSE GRISHAM."

The bill alleges that Mrs. Harris died a few days after the testator, before she had received the horses, sheep, etc., bequeathed to her, and that her administrator insists upon having *his choice* of the horses, etc.; that the testator, after the will was made, gave Mrs. Gillis three negroes, and that she and her husband insist upon having three more, before the general division is made; that the testator, before the will was made, had given to his son Lawson five negroes, of which no mention is made in the will, and that the children of Lawson insist that in the general division they will each be entitled to one full share, making four-sevenths.

The answers submit these questions to the decision of the Court.

E. G. Reade and Norwood in behalf of the children of Lawson Harris, deceased.

Gilliam and Lanier for defendants.

PEARSON, J. Upon the first question, it is clear that the ad- (328) ministrator of Mrs. Harris is entitled to the horses, sheep, etc. It is the duty of the executors to make the selection. A confidence is reposed in them that they will select good articles of the several descriptions of chattels. The administrator is entitled to "two *choice* horses," by which is meant two of the best horses, and to fifteen of the best sheep.

Upon the second question, assuming, as we must do, that the three negroes were given to Mrs. Gillis by a valid *deed of gift,* we think these

three negroes are a satisfaction of the legacy of the three small negroes. If no other words had been added, this would have been the conclusion; for gifts and bequests to children are considered as portions or provisions made for them, and the law will not allow of a double portion to one child unless there be a clear intent to give it; but in this will the matter is put beyond all question by the words, "three small negroes *more,* which will make her number *seven, equal* with her brothers' number"—the will having mentioned before that she had already received *four.* Here the reason for giving *the three* small negroes is expressly stated. That reason ceased by the gift of the three negroes made afterwards, and, as the reason ceased, the gift was satisfied, upon the same good sense with the maxim, *"Cessanti ratione cessat lex."*

Upon the third question, without putting any stress on the fact that Lawson is spoken of in the will as being *alive,* which we presume is to be attributed to the fact that the will has two dates, being dated at the commencement, 10 May, 1842, and at the end, 1 June, 1842, we are forced to the conclusion by the cases decided in this State and in England, and in our sister States, that the word "heirs," as used in this will, means the children of Lawson Harris, and that the division must be *per capita,* in which each of the children of Lawson will take one
(329) full share. This is fully settled by *Ward v. Stowe,* 17 N. C., 509, when it was last before this Court, and when all the cases were fully examined and discussed. The history of that case shows the importance of abiding by the rule, *stare decisis,* and as it was so solemnly decided, we should follow it, even if disposed to question its correctness; in which, however, we entirely concur. To take this case out of the general rule, our attention was called by the counsel for the plaintiff to the fact that in another clause two negroes are given to the "heirs" of Lawson, where it is insisted the children take as a class. This suggestion does not aid the plaintiff. It is certain that in that clause the word "heirs" does mean children, and the division *between them* will be *per capita.*

The main reliance, however, was put upon *Spivey v. Spivey,* 37 N. C., 100, and *Martin v. Gould,* 17 N. C., 305. We have examined these cases attentively. They do not enable us to say that this case is an exception to the general rule. In the case of *Spivey v. Spivey* the words, "those who have received a part of my estate will account to the balance of my children for what they have received," were held sufficient to make that case an exception; for, although the word "heirs" was held to mean children, yet as they were expressly required to *account* for advancements made to their mother, as a *class,* it was held that they should also *receive* as a *class.* There are no words of the kind in the case under consideration.

In *Martin v. Gould* the provision which gave out of the fund, before the division, the *average* price of 100 acres to Daniel, the son, "in order to make him *compensation* for 100 acres which I gave to my son Malichi," was held to make that case an exception; for it showed that the testator meant to deal equally between his two sons.

In this case it does not appear *from the will* that the testator meant to *deal equally* between all of his children, but to make such a disposition of his property as he thought right, without reference to a (330) precise equality.

William and Lawson are made equal in land by adding $53. Robert has no land until the death of his mother, when he is to get the "home place," 600 acres. No reference is made to equality in land with William and Lawson—no *average price* is to be fixed on.

Sarah Gillis is given a tract of 150 acres of land. No reference to value, so as to show that equality is intended.

William and Robert Harris and Sarah Gillis each receive *seven negroes.* The number is equal; nothing is said about value.

And the children of Lawson receive *two negroes.* No mention is made of any negroes having been given to Lawson. Nor is it said that the *two* negroes are to make the *share* of Lawson equal. So it would not appear that equality was intended, even if we could go out of the will to take notice of the fact that five negroes had been given to Lawson, which could not be done without violating the rules of evidence, that written instruments are not to be added to, varied, or explained by parol testimony.

We, therefore, can see nothing to take this case out of the general rule, and we do not feel at liberty to depart from a series of cases "to be traced back for more than a century," for the purpose of speculating upon what *might* have been the intention of the testator.

PER CURIAM. Declared accordingly.

Cited: Bivens v. Phifer, 47 N. C., 438; *Cheeves v. Bell,* 54 N. C., 237; *Burgin v. Patton,* 58 N. C., 427; *Lane v. Lane,* 60 N. C., 631; *Grandy v. Sawyer,* 62 N. C., 10; *Culp v. Lee,* 109 N. C., 677.

(331)

DAVID M. DEANS v. WILLIAM T. DORTCH ET AL.

1. In the case of lost bonds the jurisdiction of courts of equity affords relief more complete, adequate, and perfect than can be done by courts of law, the former requiring indemnity to be given to the alleged obligor against the bond.

2. In a suit in equity to recover the amount of a lost bond, the court requires the same degree of evidence as a court of law does, and therefore the plaintiff must produce satisfactory proof, not only of the contents of the bond, but also that it had been signed, sealed, and delivered by the party sought to be charged.

CAUSE removed from the Court of Equity of NASH, at Fall Term, 1848.

The bill charges that David M. Deans was in the year ____ appointed guardian to the infant children of William D. Strickland, and upon stating the accounts with Granberry Vick, the former guardian of his wards, found him largely indebted to them; whereupon he immediately brought an action upon his guardian bond against him and his sureties, towit, Jordan Joiner, John H. Drake, and Samuel W. W. Vick. This suit was compromised by the plaintiff's taking the several bonds of each of the sureties for his ratable proportion of what was due. The bill charges that Samuel W. W. Vick executed his bond for $595.33, his proportion of the sum due, and gave as his surety Josiah Vick. The bond was dated about 9 November, 1842, payable one day after date, and witnessed by J. J. Taylor. The bill then alleges that a few minutes after the execution and delivery of the bond, he delivered it to Josiah Vick, at his request, to enable him to procure an additional surety with himself, and that he has never seen it from that time, and he believes that it was lost or destroyed by Josiah Vick. It charges that the plain-
(332) tiff frequently demanded the bond from Josiah Vick, who never would deliver it up, but promised that it should be arranged, and that no part of it has ever been paid, but the whole remains due. Samuel W. W. Vick died in June, 1845, and the said Josiah soon thereafter; and at November term of the county court of the same year the defendant Dortch was appointed administrator of Samuel, and the defendant Blount, of Josiah; and they possessed themselves of all the estate of their several intestates. The bill prays that the defendants may be decreed to pay the said bond, etc. To this bill the necessary affidavit is affixed.

The answers admit that the plaintiff was the guardian of the children of William Strickland, and that he instituted a suit against the former guardian, Granberry, and his sureties, who were the persons mentioned in the bill; that they are the legal representatives of the two Mr. Vicks, Samuel and Josiah, but deny all knowledge of the alleged settlement of that suit, or of the bond charged to have been executed by their intestates; that they never heard of it except from the plaintiff, and that not until about the time the bill was filed. They deny having it in their possession, and aver that after the death of their several intestates, and after procuring letters of administration, they examined the papers belonging to each, and found no such bond.

Replication was taken to the answers, the case set for hearing, and transferred to the Supreme Court.

Miller for plaintiff.
B. F. Moore for defendants.

NASH, J. The object of the bill is to set up a lost bond against the estates of the two Mr. Vicks. Courts of equity originally obtained jurisdiction in such matters upon the ground that in a court of law the plaintiff could not obtain redress, for the reason that he could not (333) make profert of the bond. This reason has long ceased, and with it the jurisdiction acquired by courts of equity would also, in all probability, have ceased, but for the rules adopted there in granting relief. The courts of equity, in doing justice to the plaintiff, will also take care he shall do justice to the defendants, they requiring him to indemnify the defendants against the bond. It is not in the nature or composition of a court of law to cause the indemnity to be given or to adjust its terms. Equity, therefore, has retained this jurisdiction, equally beneficial to the obligee and the obligor, because the relief afforded is more complete, adequate, and perfect than at law. 1 Story Eq., 418. When the plaintiff has given to this Court jurisdiction of the case, by his affidavit, the cause is then to be tried by those rules of evidence which are common to both tribunals. The first thing for the plaintiff to do in this case was to prove, by competent testimony, the existence of the bond alleged to be lost. He must show that it was, in law, a perfect instrument. He, in his bill, affirms such to be the fact. The laboring oar is on him; and a court of equity ought not, and will not, grant him relief when his testimony leaves that fact in doubt and uncertainty. In general, rules of evidence in courts of equity are the same as in courts of law. In this case, then, it is necessary the plaintiff should show that the instrument was perfected in all its parts; that it had been sealed and delivered by the party he seeks to charge. If the action were at law, and the paper had a subscribing witness, it would be necessary to prove the execution by him. The plaintiff has filed the deposition of Mr. Taylor, who, he alleges, was the subscribing witness. He states that he was present at the settlement, wrote the bond, saw Josiah Vick sign it as surety for S. W. W. Vick, and that he signed it as a witness. This took place somewhere about 1842 or 1843, and he *thinks* (334) *Mr. Deans took it.* Delivery is an essential part of a deed, without which, though the paper may be signed and sealed, it is not a deed. Mr. Taylor leaves this important fact in doubt, and the other testimony, if it does not increase the doubt, does not remove it. A witness of the name of A. D. Barnes states that he saw the bond which was given by

Samuel W. W. Vick upon the settlement, at which he was present, "and he *believes* Josiah Vick was a security to the said bond, though he has no distinct recollection of this." J. D. W. Barnes states that in 1842 or 1843 he met with Mr. Josiah Vick coming out of the courthouse, who stated to him that he had told David that he would have the bond filled up for Samuel Vick, and he was going out to look for security. In another deposition he states that when he met him, as above stated, he had a bond in his hands, which, he said, he was going to have filled up. On their way home the same night Vick told him the bond was not yet filled up. About a month before J. Vick's death he told him at his mill he would have that bond to pay. We cannot say the testimony satisfies us that the paper ever was delivered by Josiah Vick. Not one of the witnesses proves it. Mr. Taylor, who wrote the paper, and states that Vick signed it, only thinks the plaintiff took it. Immediately after, however, it is seen in the hands of Josiah Vick, who stated he was going out to get security. The plaintiff in his bill alleges that he handed it to him, at his request, but no witness proves it, and subsequently Josiah Vick stated to Barnes that the bond is not yet filled up. A remarkable circumstance in the case is that the witnesses who speak to time can none of them fix it, even as to the year. Such want of memory is not calculated to beget much confidence in the correctness of these statements. If the facts were such as the bill states, it is very extraordinary that the plaintiff did not sooner commence his action. He alleges
(335) that the transaction took place in 1842, and he did not file his bill until October, 1846, and not until both Samuel Vick and Josiah Vick were dead. His allegation, that he frequently demanded the bond of Josiah, is not proved. For four years and more he suffers this paper to remain in the hands of Josiah without even a demand for it. The thing is strange and unaccountable. The case is not without its difficulties on the part of the defendants; but as it was the duty of the plaintiff to sustain his allegations by sufficient testimony, whatever doubts we may have, we cannot declare that the paper-writing ever was delivered by Josiah Vick as his deed. If the bill had been filed during the life of Josiah Vick, the plaintiff would have been entitled to his evidence as to the delivery, and the Court might have been freed from the necessity of groping in the dark after probabilities, and if the plaintiff sustains an injury, it is the consequence of his own folly.

PER CURIAM. Bill dismissed with costs.

Cited: Loftin v. Loftin, 96 N. C., 100; *Harding v. Long,* 103 N. C., 7; *Sallinger v. Perry,* 130 N. C., 138.

WILLIAM R. CATON v. STEPHEN WILLIS ET AL.

1. When a bill is filed to set aside an instrument on the ground that it was executed by mistake or accident, the nature of the mistake or accident must be set out with certainty in the bill.
2. Exhibits do not made a part of a bill, but are a part of the proof, and cannot aid defective statements in the bill any more than any other part of the proof.

CAUSE removed from the Court of Equity of CRAVEN, at Spring (336) Term, 1848.

The bill charges that one Adam Gaskins died intestate, seized and possessed of a parcel of land lying on Swift Creek in the county of Craven; that this land descended to Guilford Gaskins, Stephen Gaskins, _____, who were the heirs at law of the said Adam; that partition was duly made, and a share, designated as lot No. 5, was assigned to Guilford Gaskins. The record of the proceeding for partition is referred to as an exhibit.

The bill further charges that Guilford Gaskins contracted to sell to Stephen Gaskins the said lot No. 5 for the sum of $195, "and accordingly executed a deed dated 29 September, 1835, whereby the said Guilford honestly intended to convey in fee simple to the said Stephen the said lot No. 5, but by *mistake* or *accident* the land was so described therein as not to embrace or convey the same"; that the said Stephen, believing the deed did convey the said lot, as was intended, entered into possession and made valuable improvements, and remained in possession until 1842, "when he sold the same for full value to the plaintiff, who had full confidence in the validity of his title to the said lot," and thereupon the plaintiff entered upon the land, and has expended much labor thereon; that Guilford and Stephen Gaskins were ignorant and illiterate men, not acquainted with the form of legal conveyances.

The bill further charges that the defendant Stephen Willis, well knowing that Guilford Gaskins intended by the deed to convey lot No. 5 to Stephen, and being, as he was a surveyor, well acquainted with the land, found out that the deed did not embrace lot No. 5. Under pretense of buying some "vacant land," as it was called, which had also descended to the heirs of Adam Gaskins, he procured Guilford Gaskins to execute to the defendant Major a deed which included a large part of the lot No. 5, and that the said Major Willis, after getting the deed, in 1845 commenced an action of ejectment against the plaintiff. (337) The prayer is that the defendants may be perpetually enjoined from proceeding in the action, and from commencing any other action whereby to turn the plaintiff out of possession, and for general relief.

The defendants deny all the material allegations of the bill. They allege that Guilford, by his deed to Stephen Gaskins, conveyed or intended to convey lot No. 4, which he had purchased of one Luton and wife, to whom it had been allotted in the partition; and that he did not intend to convey lot No. 5 by his said deed. They further allege that Guilford Gaskins, by his deed to Major Willis, conveyed only a part of lot No. 5, and not the whole of the lot; and that Stephen Willis, in making the purchase, acted as the agent of Major Willis, and had no interest in the land.

J. H. Bryan for plaintiff.
Mordecai for defendants.

PEARSON, J. Many depositions were taken on both sides, but it is not necessary to advert to the proof, because the allegations of the bill are so general and uncertain that it is impossible to declare the facts necessary to entitle the plaintiff to a decree.

In all bills, to entitle the plaintiff to a decree, there must be proper allegations. Proof without allegations will no more answer the purpose than allegations without proof. There must be *"allegata et probata."* It is true, the same degree of certainty is not required in pleadings in equity as is required in pleadings at law; but there must be some certainty, and the facts material to make out the plaintiff's equity must be alleged in a manner to enable the defendant to take issue, and to enable the Court to see what it is that the plaintiff insists upon. If a bill should charge "that the defendant practiced a fraud upon the plaintiff,"
(338) without stating in what the fraud consisted, or in what way it was effected, every one would admit that the allegation was too general and uncertain.

The allegation of the mistake or accident by which it happened, in this case, that the deed made by Guilford to Stephen Gaskins did not include the land, which the parties intended, is as general and uncertain as in the case supposed above. The allegation is that in the partition of land of Adam Gaskins, lot No. 5 was allotted to Guilford Gaskins; that he contracted to sell lot No. 5 to Stephen Gaskins; but that "by mistake or accident the land was so described therein as not to embrace or convey the same." This is wholly uncertain, and yet it is the "gist" of the plaintiff's case.

The bill should have set out the metes and boundaries of lot No. 5, or identified the land in some other way, the metes and boundaries of the deed and the manner in which the alleged mistake or accident occurred, as that the draftsman copied the metes and boundaries of lot No. 4 by mistake, instead of the metes and boundaries of lot No. 5, if such was

the fact; or that in the boundaries a certain line was by mistake written *"south"* so many poles, instead of *"north"* so many poles, if such was the fact. In short, it should have stated the manner in which the thing happened, and given some idea of what it is about which the plaintiff complains.

The bill in another allegation states that after his purchase Stephen Gaskins took possession of the said lot, and continued in possession until 1842, "when he sold the same, for the full value, to the plaintiff, who had full confidence in the validity of his title to the same." It does not appear whether the deed made by Stephen Gaskins to the plaintiff, if he made one, correctly describes lot No. 5 or follows the description of the deed made by Guilford, in which latter case it would be material to allege that the plaintiff intended to buy lot No. 5, and how it happened that there was the mistake or accident in this deed, if (339) such was the fact. Copies of the report of the commissioners who made the partition, of the deed of Guilford Gaskins to Stephen Gaskins, and of the deed of Stephen Gaskins to the plaintiff are filed as exhibits.

Exhibits do not make a part of the bill, but are a part of the proof, and cannot aid defective statements in the bill any more than any other part of the proof.

But if we go out of the bill and look into the exhibits, we can see no light. Lot No. 5 has certain metes and bounds; the deed of Guilford Gaskins has metes and bounds entirely different, and makes no reference to lot No. 5, nor do its metes and bounds correspond with those of any of the other lots, or with any one corner or line of any of the lots. The deed of Stephen Gaskins to the plaintiff has the same metes and bounds as the deed of Guilford, and makes no mention of lot No. 5.

We think the bill is defective for uncertainty, and it must be

PER CURIAM. Dismissed with costs.

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(340)

HENRY DOGGETT v. CHRISTOPHER HOGAN ET AL.

After a bill has been depending for some time, testimony taken and the cause set for hearing and transferred to this Court, a petition will not be granted to a defendant to have the cause remanded, so as to bring before the court grounds of defense not properly or sufficiently set forth in the answer, and to take additional testimony; especially when the object is to introduce matter which is the subject of a cross-bill, and to get rid of the plaintiff's claim, not upon the merits, but upon the matter which is in a great degree technical.

CAUSE removed from the Court of Equity of HALIFAX, at Fall Term, 1848.

The plaintiff complains that Robert H. Wilson, a citizen of the then territory of Florida, died in the year ____, having previously made and published his will, which was duly proved, and the executor therein appointed having refused to qualify, administration, with the will annexed, was granted to his widow, then Mrs. Wilson, now the defendant Mrs. Hogan. At the time of his death, the plaintiff alleges Robert Wilson was largely indebted to him, and the administratrix having sold a large quantity of the property of the deceased, he came to a settlement with her, and received from her, in part payment of his debt, two bonds, each for $5,032.32, executed by John D. Edwards, one payable 1 January, 1840, and the other 1 January, 1841, bearing interest at the rate of 8 per cent per annum from 15 April, 1838. These bonds were given to John D. Edwards for purchases made by him at the sale of Robert Wilson's property; he, the said Edwards, and the administratrix, both of them being at the time citizens of Florida and resident there. These bonds, it is alleged by the plaintiff, were transferred to him by
(341) indorsement by the administratrix. The plaintiff charges that at the time of the settlement and transfer of the bonds to him he delivered to the administratrix bonds, notes, and open accounts, due him by the testator, to an equal amount, with proper receipts indorsed on them, as the bonds were received by him in discharge of so much of the debt due to him. These bonds, he states, were by him placed in the hands of Mr. Mosely, a practicing attorney of Florida, with directions to put them in suit, which was immediately done, in the name of the administratrix, and in the same suit was included another bond, executed by the said John D. Edwards, and payable to her as such administratrix. The plaintiff charges that judgment was obtained on all the bonds, and the marshal of the district, having raised the money, or nearly all, by sale of the property of John D. Edwards under an execution, on demand of the defendant Christopher Hogan, who had married the administratrix of Robert H. Wilson, paid the whole amount to him, after deducting the costs, he (Hogan) well knowing that a large portion of the money thus received by him was the property of the plaintiff. The bill charges a demand of Hogan and a refusal to pay over to the plaintiff the money received by him, and which belonged to the complainant, and prays a decree against the defendants for the money so received.

The defendants admit the death of Robert H. Wilson, and that administration upon his estate was committed by the proper authorities to Harriet Wilson, the widow, and their intermarriage. The defendant Harriet alleges that by the advice of the plaintiff she obtained an order of the proper authorities in Florida to sell the whole of the estate, real and personal, of her late husband, and it was sold by the plaintiff, as

her agent, to John D. Edwards for $62,000, for a portion of which sum he executed his notes, or bonds, each for $5,032.32, except one, which was for $4,837.35, and to secure the payment of what was (342) due by Edwards, he executed a mortgage for the slaves sold to him, about fifty in number, which mortgage, through the negligence of the plaintiff, was not registered for nearly a year thereafter, and not until Edwards had mortgaged the slaves to the Union Bank of Florida to secure a debt he owed it, and which was immediately registered. She denies that her former husband, to her knowledge and belief, owed the plaintiff anything. That while very feeble from a recent confinement, the plaintiff called upon her in company with McBride, and, producing two papers, requested her to sign them, which she did, though entirely ignorant of their contents, and she supposes they are the bonds or notes now claimed by the plaintiff. That when she did sign them, she was unable from weakness to get out of her bed, or to raise herself up, but was raised up and supported by pillows, and that no papers of any kind were delivered to her by the plaintiff, at that or any other time, as evidences of any debt due to him by Robert H. Wilson.

The defendant Hogan answers that after his marriage with the other defendant, he went to Florida to attend to her business, and upon getting there he was advised to institute a suit against the Union Bank to recover the slaves, and which is still pending. He learned that Edwards had confessed a judgment to his wife upon three of the sale bonds, one of which was for the sum of $4,837.32, and each of the others for $5,032.32, and that the attorney who recovered the judgment had collected under it and paid to the plaintiff $2,000. He was advised that the whole of the judgment belonged to his wife. He, therefore, caused an execution to issue, and had it levied on twenty-three slaves, all of which he purchased at the sale, but three; one of them, by the name of Levy, was purchased by John Doggett, the nephew and agent of the plaintiff. The whole of the sales, including some small (343) articles other than the slaves, amounted to $8,732. After the sale a controversy arose between him and the agent, John Doggett, the latter claiming the proceeds of the sale for the plaintiff, and he, the defendant, claiming them as his, in right of his wife, when they came to an arrangement, which was reduced to writing, and by which it was agreed that the plaintiff should retain the $2,000 and the $150, the price of Levy, and the sum of $12 raised by the sale of wagon wheels, and that he should surrender to him a negro man by the name of Jacob he had purchased at the sale at the price of $700—the whole amounting to $2,862, and he (Hogan) was to retain the other slaves at the sums he bid them off at, amounting to $8,070. By the agreement the right was

retained by the plaintiff to assert his right to the slaves in contest with the bank, if they were recovered, and to the defendant to resist his claim.

The answer of Hogan further alleges that if, as the plaintiff charges, the bonds were transferred to him, his debt was paid, and if the defendant afterwards received it, *he* was answerable singly and not jointly with his wife, and if so, the plaintiff had full and adequate relief, and the agreement as before set forth as a compromise, on the consideration set forth, is a full and complete bar to the relief sought; and, independent of its being a compromise, the fact that the defendant took the slaves with the consent of the plaintiff, given by his agent, is also a full and complete bar to the bill; of all and each of which matters the defendants claim the same benefit as if specially pleaded.

Replication was taken to the answers, and the cause transferred to the Supreme Court.

B. F. Moore and Whitaker for plaintiff.
W. H. Haywood for defendant.

(344) NASH, J. To enable the plaintiff to obtain the relief he seeks, he must show that Robert Wilson was indebted to him to the amount claimed by him. (2) That the two bonds for $5,032.32 each were transferred to him by the administratrix, Mrs. Wilson. (3) That the amount of these bonds, or so much as was realized from them on the sale of Edwards' property, was received by the defendants.

That Dr. Wilson was indebted to the plaintiff is sufficiently proved by the evidence. By a deed of trust executed by him to the plaintiff, and bearing date 25 August, 1835, he states "that Robert H. Wilson is justly indebted to Henry Doggett in the sum of $12,000 or thereabouts," and to secure that debt, together with one to a man by the name of Preston for $4,000 or thereabouts, he executed the deed of trust conveying a number of slaves. The deposition of Peter Morgan proves that he was present at a settlement of accounts between the plaintiff and R. H. Wilson in 1836, for which he gave his notes or bonds. In addition is the inventory returned to the probate court of the county of Gadsden in the State of Florida. In it is the following return: "Notes in favor of H. Doggett against the estate of R. W. Wilson"—a total amount $15,878.94. This inventory was returned by Judge McBride, who is proved to have been the agent of the administratrix to make it, and to transact other business of the estate, and in whose house she lived for a length of time after the death of her husband. From the testimony of Morgan it appears that the plaintiff and R. H. Wilson were, at the time he spoke of, engaged in mining in the county of Rutherford in

this State. Dr. Wilson died in 1837. The above testimony satisfactorily proves the indebtedness of the estate of Dr. Wilson to the plaintiff to a very large amount.

The second inquiry is as to the transfer of the two notes or bonds by the administratrix to the plaintiff.

Mrs. Hogan in her answer states that at the request of the (345) plaintiff she did sign her name upon two papers; she did not know what their contents were, but she supposes they were the bonds or notes in question. This was done in the presence of Mr. McBride, who, it is shown, was her agent in managing the business concerning her accounts, and has since died. Upon inspecting the bonds, which are identified and are in evidence before us, we find that the indorsement is in her representative capacity; she signs her name as administratrix, with the will annexed. The handwriting was admitted by the defendant Christopher Hogan to be that of his wife, Mrs. Hogan, when the bonds or notes were examined by him in Florida. This is proved by the testimony of Mr. Mosely. Mrs. Hogan did then indorse the notes, and, we have little doubt, knew for what purpose it was done.

The remaining inquiry is as to the reception by the defendant of the proceeds of the two bonds or notes.

Mr. Mosely informs us that the plaintiff delivered to him a number of notes or bonds executed by John D. Edwards and payable at different periods to Mrs. Wilson. That two of them, each for $5,032.32, were indorsed in the name of Mrs. Harriet Wilson. These two and another for $4,837.35 were put in suit by him in the name of Mrs. Wilson. He was asked whether, at the time the plaintiff delivered them, he informed him that the two largest bonds or notes which were indorsed belonged to him, and why he sued on them in the name of Mrs. Wilson. His answer is, the plaintiff did not so inform him; but we understood from him, at the time, that the estate of Dr. Wilson was largely indebted to him; and he brought the suit in the name of the administratrix because he considered the plaintiff as her agent, to whom he would have to pay the money when collected, and they could settle their own matters. He further states, and the exhibits before us prove it, that judgment was obtained on those three bonds or notes, and the execution (346) was levied on twenty-three negroes, as the property of the defendant Edwards, and at the sale the defendant Hogan purchased all but three, at the price of $8,770. The whole amount of the sale of the slaves, including some wagon wheels, which sold for $12, was $8,932, John Doggett, the nephew of the plaintiff, and who professed to be acting for him, having purchased one of the slaves named Levy for $150. That after the sale a dispute arose between the defendant Hogan and John Doggett, the latter claiming for the plaintiff the whole amount of

the sales, and the former claiming the whole for himself in right of his wife. By his advice the parties came to an agreement; the defendant retained all the negroes purchased by him, except one by the name of Jacob, bid off by him at the price of $700, and which he let John Doggett have for his uncle, the plaintiff, and who also returned the boy Levy and the value of the small articles. So that John Doggett received of the proceeds of the sales the sum of $862, and the defendant Hogan $8,770. This being so, as admitted in the answer, the defendant Hogan has received money, collected on the sale of the negroes under the judgment, which belonged to the plaintiff, and for which he is bound to account, for the judgment, though in his wife's name, was in reality for the benefit of the plaintiff jointly with her.

The defendants in their answers allege that the agreement made by John Doggett and themselves, being made by an agent of the plaintiff, amounted to a compromise, and the plaintiff is bound by it. Mr. Mosely is asked, on his examination, whether John Doggett did not say he was the agent of the plaintiff. His answer is, "I do not know he was the agent of the plaintiff, but he held himself out as such, and I treated with him as in that character"; and on his cross-examination he states that he never saw any written authority from the plaintiff to John Dog-
(347) gett to act as his agent. John Doggett swears he never was the plaintiff's agent to interfere in the matter of the sales, nor to make any compromise or agreement, and that when the plaintiff was told of it, he expressed great surprise and anger, and declared he would not abide by it. We do not consider the compromise, set forth in the answer, binding upon the plaintiff—it having been made by a person not authorized to act as his agent.

The defendants further insist that if the notes were indorsed to the "plaintiff, as he alleges, it was a full and complete discharge of the debt due from the estate of R. H. Wilson," and if the defendant Christopher Hogan afterwards received the money due on them, "it was an act for which he alone, and not jointly with his wife, was responsible to the plaintiff, and, therefore, his bill cannot be supported," and for the further reason that the plaintiff had, by his own showing, full and adequate relief at law. Mrs. Hogan is a proper and necessary party to the bill, if for no other purpose but to procure from the Court a declaration that the judgment now rendered in Florida, in her name, is in part in trust for the plaintiff.

After the cause had been heard in this Court, a petition was filed by the defendants, praying that the case might be remanded to the court of equity of Halifax County, to enable them to amend their answer, so as to bring before the Court grounds of defense not properly or sufficiently stated therein, and to take additional testimony. If we understand

rightly the object which the defendants have in view, it is twofold: one to introduce matter which is the proper subject of a cross-bill, and the other to escape from the responsibility they have incurred, by getting rid of the plaintiff's bill, not upon the merits, but upon a matter which is in a great measure technical.

We do not feel disposed to deprive the plaintiff of an advantage which he had acquired, upon either ground, more particularly as we think the petition comes too late.

The plaintiff is entitled to a decree, and there must be a ref- (348) erence to the master to ascertain what portion of the money raised by the marshal's sale was due and coming to the plaintiff. And in taking the account he will charge the plaintiff not only with the value of negroes Levy and Jacob, at the price at which they were bought at the sale, and with the $12 which the small articles brought, but also with the $2,000 paid him by Mr. Mosely.

PER CURIAM. Decree accordingly.

Dist.: Graham v. Skinner, 57 N. C., 99.

JACOB A. McCRAW ET AL. V. MORDECAI FLEMING ET AL.

1. The act of 1715 is no bar to the right of a legatee to have an account.
2. The presumption of satisfaction or abandonment under the act of 1828, Rev. Stat., ch. 65, sec. 14, does not apply to the equitable interest of legatees and persons entitled to distribution.

CAUSE removed from the Court of Equity of SURRY, at Spring Term, 1848.

The bill alleges that in 1815 Jacob McCraw died, leaving a will, duly executed to pass real and personal estate. The defendants Fleming and James McCraw, two of the executors named, proved the will, and qualified as executors, and took into possession the real and personal estate, including several tracts of land, many negroes, and other personal estate of great value.

The bill, among other things, gives to Elizabeth McCraw, the (349) widow of the testator, the tract of land on which he lived; the following negroes, Jim, etc.; stock of every description, and many other articles, during her life; and at her death to be equally divided among the children of the testator, the land excepted. By the residuary clause several tracts of land are to be sold, and the proceeds, together with all the balance of the estate, are to be divided among all the testator's "heirs" after the payment of debts.

The executors sold several of the negroes belonging to Elizabeth McCraw, sold the land, and collected the debts, and failed to account for the moneys received. In 1828, James McCraw, one of the executors, died intestate, and the defendant Neill Davis administered upon his estate. In 1836, Elizabeth McCraw died, and the defendant Fleming then took possession of the balance of the negroes and property given to her for life, sold the same, and failed to account.

The plaintiffs are children and personal representatives of deceased children of the testator, and claim to be entitled as residuary legatees. The prayer is for an account and distribution.

Judgment *pro confesso* is taken against Fleming and such of the children as are made defendants.

Morehead for plaintiffs.
Borden and Iredell for defendants.

PEARSON, J. The defendant Davis, in his answer, resists a decree for an account, upon four grounds: (1) He insists that, as administrator of James McCraw, who was one of the executors, and who died in 1828, he is not bound to account with the legatees of the testator, but is liable to account with the surviving executor, Fleming. (2) That the act of 1715 is a bar to the right of the plaintiffs. (3) That the act of 1826 raises a presumption of satisfaction or abandonment of the plaintiffs' equitable interest as residuary legatees. (4) That in 1824, Jacob
(350) A. McCraw, one of the plaintiffs, filed a petition against Fleming and James McCraw, as executors, for an account of the estate of the testator, which petition, after pending for several years, was dismissed at the cost of the petitioner; and that a petition to rehear was afterwards filed, which was also dismissed at the cost of the petitioner; and the defendant insists that these proceedings are a bar to any recovery on the part of the said Jacob A. McCraw.

The plaintiffs, who are the children of the testator, are entitled to an account. The first objection is clearly untenable. The second and third are also untenable.

In *Blount v. Salter,* 22 N. C., 218, it is held that the act of 1715 is no bar to the right of a legatee to have an account, and in the same case it is decided that the presumption of satisfaction or abandonment, under the act of 1828, does not apply to the equitable interest of legatees and persons entitled to distribution. *Bailey v. Shannonhouse,* 16 N. C., 416, is also an authority in point as to the act of 1715. The fourth objection only applies to one of the plaintiffs, and is not tenable as to him. There was no adjudication. The proceedings were dismissed for the want of security for the prosecution.

There must be a decree for an account. The master will distinguish between the receipts and disbursements before and after the death of James McCraw.

The bill must be dismissed as to the plaintiffs who are the children of George McCraw. His share can only be claimed by his personal representative, when one is appointed.

The bill must also be dismissed as to the defendants who are the children of George McCraw, and as to the defendants who are the children of Neill McCraw and of James McCraw. They are not proper parties. The respective administrators represent their interests. (351)

PER CURIAM. Decreed accordingly.

Cited: Wilkerson v. Dunn, 52 N. C., 129; *Wyrick v. Wyrick,* 106 N. C., 84.

THOMAS P. DEVEREUX v. HENRY K. BURGWYN ET AL.

1. A right can only be lost or forfeited by such conduct as would make it fraudulent and against conscience to assert it.
2. If one acts in such a manner as *intentionally* to make another believe that he has no right, or has abandoned it, and the other, trusting to that belief, does an act which he would not otherwise have done, the fraudulent party will be restrained from asserting his right, unless it be such a case as will admit of compensation.

CAUSE removed from the Court of Equity of NORTHAMPTON, at Fall Term, 1848.

The parties, being entitled as tenants in common to many valuable tracts of land in the counties of Halifax and Northampton, in February, 1840, came to an agreement for a division, by which the plaintiff, who was entitled to one moiety, should take the land in Halifax, with certain exceptions, and the defendants, who were entitled to the other moiety, should take the land in Northampton, with certain exceptions. The several tracts of land taken by the parties respectively are set forth in the pleadings.

In pursuance of this agreement the parties took possession, and have retained possession ever since, claiming the parts so taken in possession, respectively, as their own in severalty. The plaintiff has greatly improved his part by the erection of necessary farm buildings, (352) making dikes and ditches, and a good course of husbandry. Some of the defendants have sold the shares or parts of the shares allotted to

them in a subdivision which they made among themselves, and the defendant Henry K. Burgwyn has, like the plaintiff, greatly improved the value of his shares by the erection of suitable buildings, the application of manure and lime, and by a judicious rotation of crops. The agreement in pursuance of which the division was made in 1840 did not fix the value of the respective lots. A valuation which had been made by Mr. Britton was considered sufficiently certain to enable the parties to make the division, but not sufficiently accurate to form the basis of a definite valuation. To fix his definite valuation, the parties on 20 April, 1840, entered into an agreement which recites that a division had been made, and the parties thereby agree that a valuation shall be made by Mr. Britton and Mr. Smith; "if either of the parties refuse to abide by the valuation made by Britton and Smith, the party refusing shall pay to the other party the sum of $1,000 as stipulated damages, and not as penalty." Britton and Smith, on 22 June, 1841, made a valuation, by which the share allotted to the defendants is valued at $77,936, and the share allotted to the plaintiff at $77,760, showing an excess of $88.24 in the value of the share of the defendants, which sum the defendants are to pay to the plaintiff with interest from 1 January, 1841, for equality of partition.

The parties were notified of this valuation. The plaintiff promptly agreed to abide by it. The defendants did not agree to abide by it, nor, on the contrary, did they in so many words refuse to abide by it, although they alleged that the share of the plaintiff had been valued much too low, and avoided giving a definite answer.

(353) The main purpose of this bill is to set up and establish the division made in February, 1840, and since acted on. The defendants agree that the division shall be established.

Another purpose of the bill is to have a specific performance of the agreement in reference to the valuation made by Messrs. Britton and Smith, and for the payment of the $88.24. The plaintiff admits that by agreement, in reference to the valuation made in April, 1840, that valuation was not to be conclusive, but that either party had the right to refuse, subject to the payment of the $1,000, as "stipulated damages." The plaintiff also admits that, in consequence of the nonage of Sarah, one of the defendants, he submitted to the delay on the part of the defendants, and their evasion to give a definite answer one way or the other, until the spring of 1844, when Sarah arrived at full age; but that, after that time, the defendants still evaded giving a definite answer; and he therefore insists that they have lost or forfeited their right to refuse to abide by the valuation of Messrs. Britton and Smith, especially as, in consequence of the improvements he has made, it will now be very diffi-

cult to ascertain the value of the land in February, 1840, when the division was made; and he would, for that reason, be prejudiced by any valuation that can now be made.

The defendants, in their answers, distinctly refuse to abide by the valuation of Britton and Smith. They allege that the valuation was made under such circumstances that a court of equity should not decree a specific performance, if there were not other considerations bearing upon the question, but should leave the plaintiff to his remedy at law, where they are advised he will likewise be unable to effect a recovery. They further allege that by the agreement under which Britton and Smith acted, the parties expressly reserved the right of refusing to abide by the valuation, and that they have done nothing to give the plaintiff ground to insist that they have lost or forfeited this *ad-* (354) *mitted right;* that the delay from June, 1841, to the spring of 1844 is reasonably accounted for, and so admitted to be by the plaintiff, on account of the nonage of the defendant Sarah; that from that time up to the filing of the bill, only a period of about nine months, a delay was necessary, because they lived at remote distances from each other, and had not an opportunity of consulting and fixing upon the course to be taken, but they had determined upon filing a bill against the plaintiff in the fall of 1844, and were making preparations to do so when informed of the intention of the plaintiff to sue; that by Britton's first valuation the plaintiff's lot was valued at $117,000, and their lot at $102,000, making a difference of $15,000 in their favor; whereas by the last valuation the plaintiff's lot is valued at $77,760, and theirs at $77,936, making a difference of $88.24 in the plaintiff's favor. This difference in the result, they allege, is so enormous and unaccountable that the plaintiff could not for one instant have supposed they did not intend to avail themselves of their right to refuse to abide by it. They have not at any time given the plaintiff any reason to believe to the contrary; nor did the plaintiff ever give them notice that he should look upon a failure on their part to refuse positively to abide by the valuation as a forfeiture of their right, even supposing he had a right to have put them upon those terms; and that the plaintiff was not induced to make the improvements he alleges he has made, because he supposed the valuation was fixed, which is a minor point; because he knew that the *division was fixed,* which was the main object, and which they do not wish to disturb; in fact, that the plaintiff had commenced and was carrying on his improvements before the valuation was made, and has continued to do so since the filing of the bill.

P. H. Winston, Badger, and B. F. Moore for plaintiff. (355)
J. H. Bryan, W. N. H. Smith, and McRae for defendants.

PEARSON, J. Upon the main point we are relieved from all difficulty by the agreement of the parties. The division as made in February, 1840, and recited in the agreement dated 20 April, 1840, will be established.

Upon the other point, as to the valuation, we are relieved from the necessity of putting a construction upon the agreement, because the parties agree that under that instrument each party had the right to refuse or to abide by the valuation, subject to the payment of the "stipulated damages." The case, then, is narrowed down to the single question, Have the defendants acted in such a manner as to have lost or forfeited this *admitted right?*

A *right* can only be given up by the consent of the party, evidenced by a release. A right can only be lost or forfeited by such conduct as would make it fraudulent and against conscience to assert it. If one acts in such a manner as *intentionally* to make another believe that he has no right, or has abandoned it, and the other, trusting to that belief, does an act which he would otherwise not have done, the fraudulent party will be restrained from asserting his right, unless it be such a case as will admit of compensation in damages. If one stands by, or allows another to buy property to which he has the title, he will not, on account of this fraud, be permitted in a court of equity to assert his title. *Sasser v. Jones,* 38 N. C., 19, is an instance of a right being lost in this way. If one allows another to make improvements upon land belonging to the former, he is not permitted in equity to assert his title to the land, and take the benefit of improvements innocently made by the other, without making compensation. *Albea v. Griffin,* 22 N. C., 9.

(356) But the proof falls very far short, in this case, of making out a state of facts whereby the defendants should be deemed to have lost or forfeited their right. There was no intention to deceive. True, the defendants evaded giving a direct answer, not for the purpose of deceiving, but evidently for delay and to put off a controversy as to the $1,000 stipulated damages. The plaintiff was not deceived. There was nothing to lead him to suppose that the defendants intended to abide by the valuation. The plaintiff did no act which he would not otherwise have done. In fact, the plaintiff does not allege that he was deceived. He complains very properly that, instead of giving him a direct answer, the defendants failed to do so, from time to time, and his only course was to apply to a court of equity, as he has done, where they would be required to decide one way or the other. The defendants have not made it necessary to be required by the Court to do so, because in their answers they expressly refuse to abide by the valuation, and the plaintiff now has his remedy at law open to him. If a mortgagor, who has a right to redeem, neglects to make payment or evades answering whether he in-

tends to redeem, or expects to have it in his power to do so, although this state of uncertainty is kept up for years, the mortgagee cannot say that the right of redemption is lost or forfeited. He must go into a court of equity to foreclose, and the court will require the mortgagor to redeem in a reasonable time. This is common learning.

There must be a decree establishing the division, as made in February, 1840, and recited in the argument set out in the pleadings.

There must be an order for a valuation of the respective shares by commissioners. The valuation to be put upon the land as in February, 1840, when the division was made, and the parties took possession, and the excess in the valuation for equality of partition will bear interest from 1 January, 1841, since which time the parties have been in possession and in receipt of the profits. (357)

PER CURIAM. Decree accordingly.

Cited: Sherrill v. Sherrill, 73 N. C., 12; *Redmond v. Graham,* 80 N. C., 235; *Thornburgh v. Masten,* 93 N. C., 262; *Loftin v. Crossland,* 94 N. C., 83; *Lumber Co. v. Price,* 144 N. C., 54.

SIMON P. HAUSER ET AL. V. HENRY P. SHORE ET AL.

1. Where a testator directed land to be sold by his executors and the proceeds to remain in their hands, and they to pay interest annually to A. during her life, and the principal after her death to her children: *Held,* that a *bona fide* purchaser from the executors, who had paid them the purchase money, was not bound to see that it was properly applied to the purpose of the trust.

2. Either upon a trust or a charge to pay debts on land directed to be sold by an executor, a purchaser is not bound to see that the purchase money is applied either to the payment of the debts generally or to the satisfaction of legacies out of the surplus after the debts are paid.

CAUSE removed from the Court of Equity of STOKES, at Fall Term, 1848.

After the decision of June Term, 1843, 37 N. C., 565, this cause was remanded, and it has since been revived against the administrators of Conrad, and sent here again. It is now ascertained that Lehman, as well as Henry Shore, the executors of Henry Shore, the elder, is insolvent; and the object of the present proceeding is to render Conrad liable for the value or the price of land he purchased. The bill was originally filed by Simon Peter Hauser and his wife, Mary Barbara, and their children, and was amended by making the administrators of Mary Har-

(358) ris and Magdalene Hauser parties as plaintiffs. The facts affecting Conrad's liability are these, as they appear in the pleadings, exhibits, and a report from the master:

Henry Shore, the elder, made his will in September, 1819, and by different clauses devised and bequeathed as follows: "It is my will that my executors shall pay all my debts out of my estate, and collect all debts due me. *Thirdly.* It is my will that all my household furniture be sold to the highest bidder, and money accruing from the sale be distributed among my children Henry Shore; Mary, the wife of John Harris; Magdalene, widow of George Hauser; Elizabeth, wife of John C. Lehman, and Mary Barbara, wife of Simon Peter Hauser, in manner following, that is, the parts of the four first mentioned shall be delivered to them, but the last mentioned Mary Barbara's share shall be left by my executors in trust for her children. Nevertheless, my executors shall pay to my daughter Mary Barbara the interest of her share annually during her life for her use. *Sixthly.* It is my will"—after directing legacies of $10 each to several grandchildren—"that all the rest of my property, real or personal, consisting of cash, bonds, notes, book accounts, and the amount of sales, etc., be distributed among my children named in the third section of my will, and in the manner prescribed therein. Of course, the part coming to my daughter Mary Barbara to be managed as directed in the third section of this my will. *Seventhly.* It is my will that of the 1,000 acres of land on the Obion River in Tennessee, that I am possessed of, my son Henry and my son-in-law John C. Lehman, in consideration of their trouble in attending on me in my old age, shall each have 150 acres extra; that the remaining 700 acres be sold by my executors and the money arising therefrom be equally divided between my five children, Henry, Mary Harris, Magdalene Hauser, Elizabeth, wife of John C. Lehman, and Mary Barbara, wife of Simon Peter Hauser; the part of the last mentioned to remain in the

(359) hands of my executors in trust for the children of my daughter Mary Barbara, on condition that my executors are to pay to her annually the interest on her share as specified in the third section." Henry Shore, the son, and John C. Lehman were appointed executors, and proved the will in December, 1819. Soon afterwards they sold and conveyed the whole tract of land in Tennessee, containing 1,000 acres, to Conrad for $2,000; of which the sum of $600 was paid down in cash, and for the residue of $1,400 Conrad gave his bond, payable 21 January, 1822, with a provision, however, that any sums he might pay before that time, and that any debts the executors of either of them might owe him, should be allowed in payment of his bond. At different periods Conrad made payments to Henry Shore in cash to the amount, in the whole, of $926, and in January, 1822, he came to a settlement with the

executors, and had credit for those payments, and discharged the residue of the bond with bonds and accounts due him from Henry Shore, one of the executors.

Iredell for plaintiff.
Mordecai for defendant.

RUFFIN, C. J. The first ground on which it is sought to charge Conrad is that he was bound to see to the application of the purchase money of the land.

If the case stood on the seventh clause of the will, by itself, and the bill had been filed by the daughters Mary Harris and Magdalene alone, it would have raised the question on which opposite opinions have been expressed in modern times by eminent lawyers, namely, whether a purchaser is bound to see to the application of the purchase money further than to place it in the hands which the owner of the estate appointed to receive it. The position is at least plausible, that when a trustee has express authority to sell land and it is made his duty to re- (360) ceive and distribute the price among particular persons, it should be considered that, though not expressly conferred, it was intended he should also have the power, upon the receipt of the money, to give the purchaser a discharge. 1 Pow. Mort., 312; *Balfour v. Welland,* 16 Ves., 156. It is not necessary, however, to embarrass this case with that point, since there are others on which it is plain that this purchaser was no longer responsible after paying the money to the executors.

The case may be considered, first, with respect to the claim of the original plaintiff, Simon Peter Hauser and wife, and their children, on its peculiar grounds. The share of the different parts of the property given for their benefit was by the third, sixth, and seventh clauses of the will to be left by the executors, or to remain in their hands, on interest, so that the daughter Mary Barbara should have the interest annually for life, and then over to her children. The words, "to be left," or "to remain in the hands of my executors," may possibly mean that the executors themselves were to use the money during the daughter's life and pay her the interest yearly. If so, it would be plain the intention of the testator could not be that the purchaser should be responsible for the integrity and solvency of the executors, for he could never expect the land to be sold on these terms—at least, not for anything like a reasonable price. The testator had confidence in his executors, and might have been willing to trust them with the money, which, for the sake of a provision for his daughter and the family, he was obliged to trust to some one; but he could not suppose that any stranger would be willing to become answerable for the fund in the hands of the executors for an

indefinite period, and, perhaps, to children then unborn. But the fair construction of the will may be that the money should be laid out in securities bearing interest, by which the annual interest would (361) be enjoyed by the daughter and the capital be preserved for her children at her death. If so, the case would be equally clear for the purchaser; for the will does not direct an investment in any particular securities, so as to afford the purchaser an opportunity of providing that the money, when leaving his hands, should be laid out in the prescribed securities. It must be implied, then, either that the testator intended that his estate should be put to the expense of a chancery suit to authorize a sale or order the investments, or that it should be done by the executors in the exercise of an honest discretion. There can be little doubt that, between the two, the latter was the intention; and then it cannot be supposed the purchaser would be expected to look further to the money after he had paid it into the hands which were appointed thus to receive and "manage" the fund. In *Balfour v. Welland, supra,* there was a trust to sell, and with the money to pay such creditors as should come in under the deed within a certain period; and it was held that there was a discretion in the trustees to make the sale before the creditors were ascertained among whom the money was to be divided, and, therefore, that the payment of the money to the trustees discharged the purchaser, as he could not know to whom it ought to go. So, in *Doran v. Willshire,* 3 Swanst., 699, one tract of land was to be sold, and the trustees were to receive and lay out the money in other land, and, until a fit purchase could be made, they were to invest the money in public securities; and the chancellor held that a general trust to lay out money was a personal trust, and that it was impossible to suppose it could have been intended to confide it to any stranger who might happen to buy a part of the real property. If a purchaser were not allowed to pay the money in such a case to the executor, but became entan- (362) gled in trusts of such duration as those here, and over which he could have no control, it could hardly be expected the land could ever be sold, unless it belonged exclusively both at law and in equity to the vendor.

But there is still a broader ground upon which the case is against all the plaintiffs on this point. The first clause in the will directs his executors to pay the testator's debts out of his "estate," which of course embraces the present fund, if needed for debts. It has long been settled that, either upon a trust or a charge, a purchaser is not bound to see that the money is applied either to the payment of debts generally or to the satisfaction of legacies out of the surplus after the debts are paid. *Humble v. Bill,* 1 Eq. Cas. Ab., 358, 5 Vern., 444; *Williamson v. Curtis,* 3 Bro. C. C., 96; Co. Lit., 290, Butler's note 1; *Rogers v. Shellecome,*

Amb., 188, and notes; *Jenkins v. Hiles,* 6 Ves., 654, note. The reason is that it would defeat a sale if the law obliged a purchaser to attend to the execution of a trust so indefinite as the payment of all debts which he would have no means of ascertaining. Legacies out of the fund after the debts paid stand on the same footing, because the purchaser would necessarily have to go through the administration of the assets and see, at his risk, that the debts were paid, before he could let the legatees have anything.

In the views hitherto taken, it has been assumed that Conrad made a fair bargain, and in good faith paid the purchase money to the executors. But the plaintiffs deny those facts; and for that, as a second reason, they seek to charge him in this suit. The bill states that the executors were largely indebted to Conrad, and that by means thereof he had them in his power, and compelled or induced them to sell the land much below its value. But the master does not say anything on this head, further than to state that Henry Shore, the younger, was at the time of the contract in debt to Conrad about $336. It does not appear that the price was inadequate, nor that Lehman owed Conrad a cent; and the answer states that the price was the full value and that Conrad's heirs are willing the plaintiffs should have the land at the same (363) price. That ground, therefore, fails.

But the plaintiffs further contend that the mode of payment, being partly in the debts of the trustees to Conrad, and with a probable knowledge of the executor's insolvency or embarrassments, and that he was taking up the money for his own use, entitles the plaintiff to insist on the lands being still a security for their legacies. There is no doubt that the purchaser's paying off his debt for the land with the insolvent executor's debts to him would be a wrongful act, and leave him to make the payment over again, as far as it was made in the executor's debt, or in any other fraudulent manner. For such a concurrence in the executor's breach of trust makes the party responsible, as the executor is, on that transaction. *McLeod v. Drummond,* 17 Ves., 153; *Exum v. Bowden,* 39 N. C., 281. The difficulty in the plaintiff's way is not in the rule of law, but in bringing his case within it upon the facts. It is, however, first to be observed that the principle cannot apply to the purchaser's using a debt of the executor, in discharge of his own, to the extent of any interest of the executor himself in the trust fund; for, if he had paid the money, there would have been no moral or legal objection to the executor's immediately taking his share of it and paying it back in discharge of his own debt; and this is substantially doing that and no more, provided the debt of the trustee does not exceed his part of the purchase money. Such was the case here. Of the $1,400, the two executors, both of whom made the settlement with Conrad, owned two-fifths, amounting

to $560, whereas the payment in the debts of the executors' share was only $474, being the residue of the purchase money after deducting the cash payment of $926, and being $86 less than the shares of the executors in that part of the estate. Then, as to the insolvency or
(364) embarrassment of Shore, and Conrad's knowledge of it, or of the misapplication of the money paid to him, the case is barren of evidence. It does not appear in the report when Shore became insolvent, much less that it was before the payments were made to him, or the settlement; or that Conrad knew it or suspected it or had any reason to suspect it. The master reports nothing on these points, and the plaintiffs have submitted to the report by not excepting to it and allowing it to be confirmed in the court below. On the other hand, Conrad's answer is positive that he paid the money from time to time, as he got it, in good faith, and without a suspicion that the executor was converting or wished to convert any of it to his own use, as he then was thought to be in easy circumstances and there was no question of his solvency. The answer further states that the plaintiffs were aware that he was making the payments to Henry Shore, and that no one of them intimated a wish that he should stop them, but acted as if they had the fullest confidence in the fidelity and solvency of their brothers, the executors. The whole foundation of the plaintiff's argument on this part of the case, therefore, fails. But it is not seen that it would have been otherwise if there had been a notorious insolvency of the executor. In respect to the question now under consideration, this debt, though arising out of the purchase of land, is like any other debt to the testator or executors. A debtor may and must pay his debt to the executor, solvent or insolvent; and he will be discharged by such payment, unless there be some bad faith in the mode of making it; for if the testator chooses to appoint an irresponsible man his executor and trustee, it is his own fault, and the consequences must be on his estate. They cannot reach a debtor to the estate who pays the executor. What else can he do? The executor may compel payment to him by writ, and therefore it may be made
(365) voluntarily. The debtor is not obliged to continue in debt in order to serve the legatees. He is only to take care and refrain from concurring in a misapplication of the assets, whether consisting of his own debt or of property purchased by him from the executor, in order to save a demand he may have on the insolvent executor. That some or all of the debt was paid before the bond fell due can make no difference; for the bargain was that the purchaser might pay as he could, binding himself, however, to pay the whole by January, 1822. He could not know but that the purposes of the estate required the immediate use of the money; and there was no harm in his getting an

abatement of interest for prepayments, and there is no intimation that he got more, nor, indeed, any evidence that he got that.

The Court, therefore, perceives no reason for impeaching any part of Conrad's dealing, as far as it appears; and the bill must be dismissed as against his administrators, with costs, both those incurred by him and by the administrators.

PER CURIAM. Decree accordingly.

Cited: Rogerson v. Leggett, 145 N. C., 12; *Kadis v. Weil,* 164 N. C., 87.

MALCOM CARMICHAEL ET AL. V. ARCHIBALD RAY ET AL.

An administrator in South Carolina of the estate of an intestate whose domicil was in that State cannot sue in this State an administrator appointed here, to recover the amount of assets remaining in the hands of the latter after payment of the debts.

CAUSE transmitted from the Court of Equity of CUMBERLAND, (366) at Fall Term, 1848.

John Ray, formerly of Cumberland County in this State, removed into Marion district in South Carolina, and there died intestate in 1842. Administration of his estate was granted in South Carolina to Malcom R. Carmichael, one of the plaintiffs, and in North Carolina to Archibald Ray, one of the defendants. At the time of his death the intestate held several notes and bonds given to him by the defendant Archibald, who was his son, and was also, as alleged in the bill, otherwise indebted to his father. Those bonds and notes were left by the intestate among his papers at his residence in South Carolina, and came to the hands of the plaintiff Malcom R. Carmichael after he administered, and he still has them. The intestate also left a widow and several other children, and also grandchildren, the issue of children of the intestate, who died in his lifetime, who, as stated in the bill, are entitled to have the whole personal estate distributed equally among them, the several sets of grandchildren representing their parents respectively. The bill is filed by M. C. Carmichael as the administrator in South Carolina, and by some of the children and grandchildren, against Archibald Ray, one of the sons and the administrator in this State, and against the widow and the remaining children and grandchildren; and it seeks to charge the said Archibald with his said debts to his father, and to have an account of the assets in both States, and for the distribution thereof.

The defendant Archibald denies the right of the plaintiff Carmichael to call him to account in the premises or to receive any part of the assets in his hands; but he admits his indebtedness to his father upon some of the notes mentioned in the bill, and submits to account therefor and for the personal estate in North Carolina with the other plaintiffs and the defendants, the widow and next of kin of the intestate.

(367) *Strange for plaintiffs.*
No counsel for defendants.

RUFFIN, C. J. The counsel for the plaintiff, Malcom R. Carmichael, endeavored to maintain the bill, as his bill, upon his right, as the administrator in the State of the intestate's domicil, to receive the estate remaining in the hands of the administrator here after the payment of debts, for the purpose of making distribution of the whole estate among those entitled by the law of South Carolina. But he has no such right as that supposed. It is true that an intestate's estate, wherever found, is to be distributed according to the law of the country of his domicil—that is, among the persons and in the proportions prescribed in that law. But each country claims the power of administering those parts of the effects that are within it, for the security of domestic creditors, and, of course, by the distribution of the surplus. There is no obligation on the administrator here to pay the surplus to an administrator abroad, though he be appointed in the country of the intestate's domicil. There are two clear reasons why there cannot be any such obligation. One is that an administration has no extra-territorial operation, so as to enable the administrator abroad to demand the surplus from the administrator here, more than it would enable him to sue an ordinary debtor to the intestate. *The Governor v. Williams,* 25 N. C., 154. The other is that it would be a vain and useless thing for the one administrator to pay over the effects to the other; for, by whosesoever hand they be distributed, they go to the same persons, and therefore it is immaterial which hand distributes, and the law will not take the fund from the one for the mere purpose of making it pass through the other.

The bill, therefore, as far as it is the bill of the administrator appointed in South Carolina, must be dismissed at his costs.

(368) There would be some question, perhaps, whether the other plaintiffs could maintain the bill after improperly joining with Carmichael. But we are not disposed to consider it at all in this case, forasmuch as the administrator here is desirous of settling the estate, and to that end submits to an account in his answer, and makes no objection on the hearing to a reference. The usual order for an account must, consequently, be made as between the defendant Archibald Ray and the other parties.

It may possibly become material to consider the acts of the administrator in South Carolina, as if it should turn out on inquiry that he has paid to any of the next of kin their full shares of the estate or parts thereof, since that would *pro tanto* bar them from the distribution here. But nothing of that kind can be anticipated, as there is no suggestion upon the subject, either in the bill or answers. That circumstance might make it convenient and proper that he should have been made a defendant, but it will not enable him to maintain a bill against the administrator here.

PER CURIAM. Decree accordingly.

Cited: Grant v. Reese, 94 N. C., 730.

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(369)

STEPHEN B. FORBES v. ANN SMITH ET AL.

1. A. having a judgment against B. as principal and C. as surety, C., without the consent of A., has an execution issued and levied upon B.'s property. A. has a right to withdraw the execution and discharge the levy without making herself liable to C.
2. The land of a *feme covert* is sold by order of a court of equity for partition: the husband is entitled to a life estate in the proceeds of the sale, in the same manner as he would have had a life estate in the land if it had remained unsold.

CAUSE removed from the Court of Equity of CRAVEN, at Spring Term, 1847.

The bill alleges that at a sale of the land of the heirs at law of one John F. Smith, made by the clerk and master in equity for Craven, the defendant James Shakleford purchased a part of the land, at the price of $2,975, for which he gave his note to the clerk and master, Edward Graham, with the plaintiff and one John Shakleford as sureties. The sale was confirmed, and an order made that the clerk and master collect the sale notes and pay over the amount to Ann Smith. The clerk and master, instead of collecting the note, assigned it to Ann Smith, and made a deed to Shakleford. Afterwards Shakleford made a payment on the note of $1,014.33, by a sale of three slaves to Ann Smith, and judgment was taken at November Term, 1842, of Craven County Court, in the name of Ann Smith against Shakleford and the plaintiff, for the balance due upon the note. John Shakleford, being insolvent, was not sued.

Soon after the rendition of the judgment the plaintiff applied to the clerk of the county court and obtained an execution, which he delivered

to the sheriff of the said county and caused to be levied upon several slaves as the property of Shakleford, which slaves were the prop-
(370) erty of the said Shakleford and liable to execution, notwithstanding a pretended deed of marriage settlement made by Shakleford and wife to Ann Smith, before their intermarriage, the deed not having been proven as required by law. Ann Smith thereupon took the execution out of the hands of the sheriff, returned it to the clerk's office, discharged the levy, and directed that no execution should issue without her order.

The slaves were sold under other executions levied at the same time, and James Shakleford had no other property out of which the debt could be made. The plaintiff avers that the value of the slaves so levied on was more than sufficient to have paid off the judgment, and insists that Ann Smith ought not in equity now to collect it out of him.

The bill alleges, as another ground of relief, that the negroes conveyed by James Shakleford to Ann Smith, as a part payment of the debt, and the judgment for the balance, are held by Ann Smith in lieu and as a substitution for real estate of the other defendant, Laura, the wife of James Shakleford, in which real estate Shakleford was entitled to a life estate as husband, he having children by the said Laura; and avers that Shakleford is thus entitled for his lifetime to the profits of the slaves, and the interest upon the balance of the debt secured by the judgment, and insists that the plaintiff has a right to such profits and interest applied towards the satisfaction of the judgment.

The prayer is that the defendant Ann Smith be enjoined from the collection of the whole judgment upon the first ground, and, if that is not sustained, then for a proper credit upon the judgment for an amount equal to the value of the life estate of Shakleford.

The answers admit the facts alleged, except the allegation that the slaves had been levied upon before the execution was called in by Ann Smith. And she insists that she had a right to call in the exe-
(371) cution, because the plaintiff had improperly procured it to be issued without her consent. She alleges that the deed of marriage settlement made by Shakleford and wife to her before their marriage was proven before the clerk of the county court and had been registered, and that she held the negroes in her possession as trustee for Mrs. Shakleford, and that she was not bound to allow an execution in her name to be issued and levied upon negroes which she held in her possession and claimed as trustee.

She alleges, further, that after the execution had been called in, she gave the plaintiff notice in writing that if he would pay her the amount of the judgment he might take the control of it, and she would assign it to some third person for his benefit, which he declined doing. As to the

second ground taken in the bill, she alleges that only one-third of the debt for which the plaintiff was bound as the surety of Shakleford belonged to Mrs. Shakleford, as the other two-thirds were received by her as the trustee of Mrs. Vanbocklin and as the guardian of Julia Smith; so that, if the deed of marriage settlement was void as to the creditors, Shakleford was only entitled to a life estate in one-third of the fund; and his interest had been transferred to the assignees in bankruptcy under a proceeding by which he was declared a bankrupt, before the filing of the plaintiffs' bill.

J. H. Bryan and Iredell for plaintiffs.
Badger, Miller, and W. H. Haywood for defendants.

PEARSON, J. It is unnecessary to decide whether the negroes had been levied on or not, for we think, as the execution issued without her consent, Ann Smith had a right to call it in and discharge the levy, if it had been made. She was under no obligation to allow an execution to be taken out in her name for the purpose of selling negroes held by her as trustee. Indeed, she could not do so in good faith to (372) Mrs. Shakleford, the *cestui que trust.* All that the plaintiff, as surety, had a right to ask under the circumstances was the benefit of having the control of the judgment, provided he paid up the debt, and this he failed to do.

The plaintiff has not made a case coming within the well settled principle that a surety is entitled to the benefit of all the securities for the debt which the creditor obtains; and if the creditor releases any such security, the surety is discharged in equity to the extent of the security so released.

Upon the other ground, it is clear that Shakleford is entitled to a life estate in the fund; the plaintiff, as surety, is entitled to have the benefit of it.

The proceedings in bankruptcy did not transfer the life estate of Shakleford to the assignee for the benefit of his creditors; for, as to his life estate in the $1,014.33, that being in the hands of Ann Smith, she was entitled to it as security for the balance of the debt, and the plaintiff, as surety, if he pays the said balance, becomes thereby entitled to the security. And, as to the life estate to which Shakleford *will be* entitled in the balance of the debt when paid, the surety, who pays the debt, is entitled to it.

There must be a reference to the clerk to inquire whether the whole sum for which the plaintiff was the surety of Shakleford, or one-third, or any part thereof, belonged to Shakleford and wife as the proceeds of the sale of Mrs. Shakleford's real estate.

PER CURIAM. Ordered accordingly.

Cited: Hamilton v. Mooney, 84 N. C., 15; *Bank v. Homesley,* 99 N. C., 533.

(373)

JAMES E. KEA v. JOHN A. ROBESON ET AL.

1. To give a deed any sensible operation, it must describe the subject-matter of the conveyance so as to denote upon the instrument what it is in particular, or by a reference to something else which will render it certain. The want of such description or reference in a deed is a defect which renders it totally inoperative.

2. In construing a deed, words may be transposed, if necessary, in order to give it efficacy. But this cannot be done unless there is something in the instrument which shows that reading the deed as it is will defeat the intention, and that by transposing words or sentences, or leaving out parts, the deed will be rendered effectual in the manner intended by the parties, though badly expressed.

3. A provision relative to one subject cannot be torn from that subject and applied to another in order to give a different meaning to the instrument.

CAUSE removed from the Court of Equity of BLADEN, at Spring Term, 1848.

The object of this bill is to set up a deed alleged to have been made to the plaintiff by his uncle, John Kea. The instrument was exhibited with and annexed to the bill as a part of it. It is in these words:

"This indenture, made this 3 April, 1830, between John Kea of the first part and James Edwin Kea, son of Kinchen Kea, of the second part, witnesseth: That the said John Kea, after all my just debts are paid, as well for and in consideration of the natural love and affection which he hath and beareth to the said James Edwin Kea, his nephew, as also for the better maintenance and preferment of the said James Edwin, hath given, granted, aliened, enfeoffed, and confirmed, and by these presents doth give, grant, alien, enfeoff, and confirm unto the said James Edwin all that messuage or tenement, with all and singular its appurtenances, and all houses, outhouses, lands, negroes, stock of horses, cattle, sheep and hogs, and notes and money, remainder and re-
(374) mainders, rents and services of the said premises, and all the estate, right, title, interest, property, claim and demand whatsoever of him the said John Kea of and in and to the said messuage or tenement land and premises, and of, in and to every part and parcel thereof, with the appurtenances, and all deeds, evidences, and writings concerning the said premises only now in the hands or custody of the said John Kea, of which he may get or come by without suit in law: to have and to hold the said messuage or tenement, lands and premises hereby given and granted unto the said James Edwin, his heirs and assigns, to the only proper use and behoof of him the said James Edwin, his heirs and assigns, at my death. And the said John Kea for himself, his heirs and executors, doth covenant and grant to and with the said

James Edwin, his heirs and assigns, by these presents, that he, the said James Edwin, his heirs and assigns, shall and lawfully may inherit the above mentioned property or properties at my decease, peaceably and quietly have, hold, occupy, possess, and enjoy the said messuage, tenement, lands, hereditaments, and premises hereby given and granted or mentioned or intended so to be, with their appurtenances, free, clear, and discharged of and from all former and other gifts, grants, bargains and sales, feoffments, jointures, dowers, estates, entails, rents, charges, arrearages of rents, and of and from all other titles, troubles, and encumbrances whatever, had, made, committed, done or suffered, or to be had, made, committed, done or suffered by him, the said John Kea, his heirs, executors, or any other person or persons lawfully claiming, or persons lawfully claiming or to claim by, from, or under him, them or any or either of them. In witness whereof I have hereunto set my hand and seal. And I hereby make and ordain my loving brother, William Kea, and my friends, William Jones and John B. Brown, guardians for the said James Kea." It was signed and sealed by John Kea, and attested by three witnesses, and appears to have been canceled by crossing with a pen the name of the maker, John Kea, so as (375) nearly to obliterate, but still to leave it legible with care.

The bill alleges that this instrument was written by John A. Robeson and was executed by John Kea as his act and deed, on the day of its date, for the purpose of advancing the plaintiff, who was his nephew, and at that time about 9 years old; the said John Kea being then advanced in life and without issue and never having been married. The bill further states that the deed was immediately delivered by Kea, the maker, to his intimate friend, William Jones, one of the persons therein named a guardian of the plaintiff. John Kea died in 1833, and shortly afterwards the defendant John A. Robeson and the said William Jones produced a paper in the handwriting of the said Jones purporting to be the will of John Kea, bearing date 8 May, 1832, and to appoint the said Robeson and Jones the executors thereof, and to devise and bequeath the whole of his estate, real and personal, to David G. Robeson and Andrew J. Jones, infant sons of the two executors; and they also then produced the deed to the plaintiff, canceled in the manner mentioned above, and stated that they had found it in that condition among the papers of John Kea at his death. The alleged will was not attested, and so did not pass real estate; but it was offered for probate as a will of personalty, and after opposition from the next of kin—of whom the plaintiff was not one—it was established, and letters testamentary issued to the said executors, and they took into their possession divers slaves and other chattels, and divided them between the two legatees already mentioned.

The bill states that by the deed John Kea conveyed or intended to convey to the plaintiff all his estate, at the death of the uncle, and that the plaintiff then became justly entitled to all the land and the
(376) slaves, with the other property mentioned in the deed; that the plaintiff was, however, unable to assert his right at law, by reason that the deed was canceled or obliterated as aforesaid before it was registered, and could not in its present state be registered. The bill then charges that John A. Robeson and William Jones, or one of them, fraudulently canceled the deed, in order to divest or defeat the title of the plaintiff and vest the same in their own sons; and it insists that the cancellation, whether done by those persons or any other, cannot defeat the plaintiff's title, as the instrument had taken effect by the execution and delivery of it, as a deed for the benefit of the plaintiff.

The bill further states that, at the filing of the bill, there were forty-two of the slaves, and a list of their names is given in a schedule annexed to the bill, and it alleges that the said slaves were owned by John Kea at his death, or are descendants of such.

William Jones died intestate, and administration of his estate was granted to Josiah Maultsby. The bill was filed in February, 1841, against John A. Robeson, David G. Robeson, Andrew J. Jones, and Josiah Maultsby; and the prayer is that the deed to the plaintiff may be declared to have been duly executed and delivered for the benefit of the plaintiff, and that it had been unduly and wrongfully canceled or mutilated, and that it may be set up as a proper conveyance, and that the defendants may be decreed to convey to the plaintiff the said slaves, and any others, if any, which John Kea left at his death, as well as any other personal property so left by him; and that the defendants might discover whether the forty-two slaves were not the property of John Kea at his death, or the descendants of such, and what others there were or other chattels, and come to an account for the hire and profits, and for general relief.

(377) The answers admit that the instrument was written by the defendant John A. Robeson, and that John Kea executed it by signing and sealing it and having it attested; but they deny that he delivered it to William Jones or any other person for the benefit of the plaintiff or for any other purpose, or that it was canceled by John A. Robeson and William Jones, or either of them, or with their or his privity. They state that in fact John Kea never delivered nor intended to deliver it to any person, and that he intended it to be testamentary in its nature, and that after he executed it, he, John Kea, kept it in his own possession, that he might always have it under his control. The answers further state that, after John Kea's death, John A. Robeson and William Jones, as the executors named in his will, took possession

of his effects and papers, and that they then found among the papers of the deceased this instrument, canceled by obliterating the name of the maker, as it now appears; and that the defendants have been credibly informed by other persons, and they believe, that John Kea, himself, thus canceled it almost immediately after its execution.

Strange for plaintiff.
W. H. Haywood and D. Reid for defendants.

RUFFIN, C. J. The parties have taken voluminous proofs upon the questions of fact on which they are at issue, in respect to the delivery of the alleged deed and its cancellation. It is a subject of regret that the cause cannot be determined on its merits as, on those proofs, they seem to the Court to be. If the plaintiff's uncle had the instrument prepared, and executed and delivered it, as alleged in the bill, there would be little doubt that if he did not convey, he intended to convey, his estates to the plaintiff, and it must be the wish of every one that such intention should not fail by reason of deficiencies in the instrument which the law will not allow the Court to supply.

Could the decision be made on the matters of fact, it might, in (378) a case of the nature and magnitude of the present, be the duty of the Court to arrange and handle the evidence in detail. But it is unnecessary, if it would not be, in some degree, improper, to go into it on this occasion, as the instrument appears to the Court to be in itself so vague and uncertain that the plaintiff must fail, however clear his proofs might be of its formal execution.

Courts are always desirous of giving effect to instruments according to the intention of the parties, as far as the law will allow. It is so just and reasonable that it should be so that it has long grown into a maxim that favorable constructions are to be put on deeds: *benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat.* Hence, words, when it can be seen that the parties have so used them, may be received in a sense different from that which is proper to them; and the different parts of the instrument may be transposed in order to carry out the intent. Yet instruments are not unfrequently brought under adjudication which are so repugnant or uncertain that they cannot be upheld. The degree of uncertainty which shall vitiate a deed, it is admitted, must be such that the meaning cannot be ascertained: who, for example, are the contracting parties, or what thing is the subject of the contract. An effort is to be made to give some meaning to the deed, if possible. If, however, there be such an uncertainty as one of those supposed, the instrument of necessity must fail; for, to give a deed any sensible operation, it must describe the subject-matter of the conveyance so as to denote upon the instrument what it is in particular, or by a

reference to something else which will render it certain. The want of such a description or reference in this deed is a defect which renders it totally inoperative.

It purports to give "all *that messuage and tenement,* with all
(379) and singular its appurtenances, and all houses, outhouses, lands, negroes, stock of horses, cattle, sheep and hogs, and notes and money, remainder and remainders, rents and services of *the said premises,* and all the estates, right, title, interest, property claim and demand whatsoever of him, the said John Kea, of, in, and to *the said messuage or tenement, lands and premises,* and of, in, and to every part and parcel thereof, with the appurtenances." If one is asked, *what* messuage and tenement is *that* meant, or *what* are *the* lands, or *which* are *the negroes,* stock or horses, etc., described and intended to be passed by this deed, the answer must be, there are none in certainty, nor are there any means of rendering them certain. The deed professes, for example, to convey *"that* messuage," but without going on to describe or in any manner designate *the* messuage; it leaves, as it were, a blank. The parties could have filled it up, but the Court has no power to do so. The same uncertainty exists as to the negroes and other articles of personalty mentioned. The deed does not describe a negro by name or in any other manner. If there had been a reference to those then owned by the maker, it would have been sufficient. But it only says "negroes" at large, as it speaks of the messuage and lands and houses. The plaintiff does not even construe it as conveying the land or negroes which John Kea owned at its date; for the bill does not state that he owned any land or a single slave at the date of the deed. Indeed, it claims the particular negroes set forth in the schedule annexed to it as belonging to the plaintiff under the deed, because they belonged to Kea at his death or are their descendants. It was argued, indeed, that the subjects of the conveyance, namely, the lands, negroes, stock of horses, etc., are indentified as those owned by John Kea at the making of the deed by the words preceding the clause of *habendum,* "now in the hands of (*or*)
(380) custody of the said John Kea." But the argument cannot possibly be supported. It is directly opposed to the claim of the bill, just mentioned, which, however, is only material as it shows that even the plaintiff could not read the deed in that sense. But the construction is in itself altogether wrong. Those words do not at all refer to the lands, negroes, etc., previously mentioned, as descriptive of such lands and negroes, etc., and intended to certify them, but solely to the "deeds, evidences, and witnesses concerning the said premises only," which immediately precede the expressions, "now in the hands or custody of the said John Kea, or which he may get or come by without suit in law." This is a familiar provision in the precedents of deeds, and it means simply

that the maker of the deed intends to pass all the title papers which concern the estate by the deed conveyed, and that only, provided he then has the title papers or can get them without the trouble or expense of a lawsuit; but that if the deed and other writings concern any other land than the premises thereby conveyed, then the grantor does not mean to pass them, but to keep them for his own use and protection. The term "only" after "premises" demonstrates this to be the sense of the clause, and it is made doubly sure by the subsequent words, "which he may come by without suit"—showing that the whole clause has only the title papers in its purview. That is the natural construction from the structure of the sentence and applying the relative to the next antecedent. It is true, as has been already said, that the law does not insist very strenuously on grammar, on the due order of the provisions of a deed, but will, if need be, transpose sentences to give some efficacy to the deed. But that cannot be done unless there be something in the instrument which shows that reading the deed as it is will defeat the intention, and that by transposing words or sentences or leaving out parts, the deed will be rendered effectual in the manner intended by the parties, though badly expressed. When parts of the deed are transposed, (381) it is because the sense requires it; and it can never be done against the sense. A provision relative to one subject cannot be torn from that subject and applied to another, in order to give a different meaning to the instrument. It is only when it can be plainly seen that kindred provisions are unskillfully separated that they can be brought together in order to effect the construction. Here nothing like that can be seen. The clause under consideration is appropriately expressed, as applied to the title papers, and cannot be misunderstood. It is obviously copied, as well as other formal parts of the deed, from some printed precedent by an ignorant person who did not know how to fit it to a particular case. The precedent, of course, did not describe any land in particular, but left that blank, and the copy was made exactly, both in its words and its blanks, where negroes, houses, etc., and the appointment of guardians are awkwardly introduced. To carry back this clause respecting the title papers (which is perfectly intelligible and proper where it stands) so as to make it qualify the description of the subjects of the conveyance in the former parts of the deed would do violence to the obvious sense of the provision and defeat, instead of effecting, the intent of the parties in that clause. The truth is, that the deed is for "land and negroes" at large, and so vague as not to be susceptible of a construction which will fit anything in particular to it, and, therefore, it did not convey anything, and the plaintiff has sustained no loss by its being canceled.

PER CURIAM. Bill dismissed with costs.

Cited: Cobb v. Hines, 44 N. C., 347; *Institute v. Norwood,* 45 N. C., 69; *Sharpe v. Pearce,* 74 N. C., 602; *Harrell v. Butler,* 92 N. C., 23; *Rowland v. Rowland,* 93 N. C., 218; *Blow v. Vaughan,* 105 N. C., 208; *Gudger v. White,* 141 N. C., 514; *Beacom v. Amos,* 161 N. C., 365; *Ipock v. Gaskins, ib.,* 679; *Brown v. Brown,* 168 N. C., 10; *Weil v. Davis, ib.,* 303; *Mining Co. v. Lumber Co.,* 170 N. C., 276.

(382)

BENJAMIN A. SIMMONS ET AL. v. JACOB GOODING ET AL., EXECUTORS, ETC.

1. Where a testator disposed of his land, slaves, and perishable estate as distinct funds, and directed, among other things, that the slaves should be equally divided among his children, and that his daughter E. S. should have an equal share of his slaves "and, as I have given my said daughter E. S. no part of my lands, in lieu thereof I give unto the said E. S., in addition to her share of slaves, *fifteen hundred dollars worth* of slaves," and then directed his perishable estate, after payment of his debts, to be equally divided among his wife and his children: *Held,* that the legacy of "fifteen hundred dollars worth of slaves" to E. S. was to be taken out of his slave estate.

2. A testator devised certain lands and personal property to his daughter M. S., "and on the marriage of my said daughter, said property to be held by my said daughter and her husband during their joint lives and the life of the survivor, and, at the decease of the said M. S. and her said husband to be equally divided between the children of my said daughter who may survive their said parents and be living at their death," etc. M. S. married O. and died in the lifetime of the testator, having no children, and her husband survived the testator: *Held,* that O. took nothing, because by the death of M. S. the legacy and devise failed, and both the subject and the description of the person failed, there being no distinct substantive devise or legacy to O.

3. A testator left land and personal property to his daughter M. S., and if she died without children surviving her, "then I give said land to my own heirs at law and said slaves and their increase to my next of kin." The said M. S. died in the lifetime of the testator. The children of another daughter, who died also in the lifetime of the father are entitled to the share which the mother would have had in the land so devised, if she had lived, but not to any part of the personal estate, "next of kin" meaning "nearest of kin," without some explanatory words in the will.

CAUSE removed from the Court of Equity of JONES, at Spring Term, 1847.

This was a bill filed by the widow and two of the children of Lemuel H. Simmons, deceased, against the executors of the last will and testament of the said Lemuel, and against three others, defendants, who claimed to be entitled as legatees under the said will, praying an

account of the said estate in the hands of the said executors, and (383) that they may be paid their respective shares of the said estate.

The facts were admitted on both sides, and the only questions in dispute were those arising upon the construction of the will.

The following is a copy of the will as admitted by the pleadings and proved by an exhibit:

In the name of God, amen.

I, Lemuel H. Simmons, of the county of Jones and State of North Carolina, being of sound and disposing mind and memory, do make, publish, and declare my last will and testament in manner and form following:

Imprimis—I give unto my beloved wife, Maria Simmons, two horses, four cows, all my household and kitchen furniture, one year's provision for herself and family, and, after my debts are paid, an equal share with my children, of my personal estate, to hold the same to her and her executors, administrators, and assigns.

Item. I give unto my said wife, Maria Simmons, during her natural life, the one-third part of my cleared and wood land, including the dwelling and other improvements.

Item. I give to my son-in-law, William P. Ward, the negro slaves now in his possession, hertofore loaned him by me. I desire that said slaves may be fairly valued, and as many more slaves may be added as to make this share equal to the shares of my other children (except Emily Simmons). I also give and devise unto my said son-in-law my lands purchased of John Marrite, to have and to hold said slaves and the said lands to the said William P. Ward, my said son-in-law, until his children (the children of said William P. Ward and my daughter Elizabeth, his wife, lately deceased) respectively attain the age of 21 years or marry. At the arrival of each of my said grandchildren (the children of my said daughter Elizabeth) to the twenty-first (384) year of his or her age, or at the marriage of each of my said grandchildren, it is my will, and I do hereby devise and direct, that there shall be allotted and set off to said grandchildren, respectively, as they marry or arrive at age, one share and dividend of said slaves and their increase, and said lands, devised to their father in this clause, in proportion to the number of my said grandchildren (the issue of my said deceased daughter, Elizabeth Ward) who may be then living, to be held by said grandchildren, respectively, who may receive said share at their arrival at age or day of marriage, in absolute property; the residue of said slaves and lands to remain in their father's possession until the whole shall be allotted to said grandchildren on their marriage or arrival at age; and if any one or more of my said grandchildren should die

under age and unmarried, my will is that said share or shares which would have been allotted to said child or children of said land and slaves on their marriage or arrival at the age of 21 years under this clause of my will shall become the property in absolute estate of such surviving brother or sister of said deceased (the children of said daughter Elizabeth) as may be then under the age of 21 years or unmarried; but should all my said grandchildren die and leave no lineal descendant or brother or sister or their issue living at their decease, then I give said lands and slaves to my own heirs at law or next of kin. The lands to be held in fee simple, and the slaves by my next of kin in absolute property. But, moreover, I do expressly authorize each and every of my said grandchildren, devisees as aforesaid, on arriving at the age of 21 years, whether having a lineal descendant or not, by will or deed to appoint, give, devise, or sell, absolutely or otherwise, any part or parts or the whole of the devised premises whereof he or she, at the time of the execution of said will or deed, may be seized.

(385) Item. I give unto my daughter Mary Ann Simmons all my right, interest, and share in the Buckner Hatch Mills, held in common with John Oliver; two beds and furniture and an equal share with my children of my slaves and a share of my perishable estate after my debts are paid, and on the marriage of my said daughter Mary Ann Simmons, said property, mentioned in this clause of my will, to be held by my said daughter and her husband during their joint lives and the life of the survivor, and at the decease of the said Mary Ann and her said husband, to be equally divided between the children of my said daughter who may survive their said parents and be living at their death; but should my said daughter Mary Ann and her husband die and leave no child or children of the said Mary Ann living at the death of said Mary Ann and her husband, then I give said lands to my own heirs at law, and said slaves and their increase to my next of kin; but I do, moreover, authorize and empower each and every of my said grandchildren devisees as aforesaid, at the age of 21 years, whether having a lineal descendant or not, by will or deed to appoint, give, devise, or sell absolutely or otherwise, any part or parts or the whole of the devised premises whereof he or she, at the time of executing said will or deed, may be seized.

Item. I give to my daughter Emily Simmons an equal share in my slaves with my other children, and as I have given the said Emily no part of my lands, in lieu thereof I give unto said Emily Simmons, in addition to her share of slaves, $1,500 worth of slaves; and should my said daughter Emily marry, the said slaves and their increase to be held by said Emily and her husband, and the child or children of said Emily

who may survive their parents, upon the same terms and subject to the same conditions and limitations mentioned in the devise to her sister, Mary Ann Simmons.

Item. I give and devise unto my son Benjamin Franklin Sim- (386)
mons all my lands not already given away and devised in this will, also an equal share of my slaves with my other children, and a share of perishable estate after my debts are paid; and should my said son marry, the said lands and other property to be held by my said son Benjamin and his wife and the child or children of said Benjamin, surviving their parents, upon the same terms and subject to the same uses, conditions, and limitations mentioned in the devise to his sister, Mary Ann Simmons.

Item. That I may not be misunderstood, it is my will that, after my debts are paid, the balance of my perishable estate shall be equally divided between my wife and all my children (except my daughter Elizabeth Ward).

Item. I give to my sister Mary, wife of George Hatch, $100, and to Lemuel S. Hatch, son of said Mary Hatch, I give $100. Lastly, I constitute and appoint Jacob Gooding, Amos L. Simmons, and William P. Ward my executors. In testimony whereof, I hereunto set my hand and seal, this 14 June, A. D. 1844. LEMUEL H. SIMMONS. [SEAL]

Signed, sealed, and published by testator in our presence:

NATHAN FOSCUE,

JOHN STANLY.

It was also admitted in the pleadings that Richard Oldfield, one of the defendants, before the death of the said testator and after the making of the said will, intermarried with Mary Ann Simmons, who was a daughter of the testator and one of the legatees and devisees mentioned in the said will, and that she died in the lifetime of the said testator, leaving no children, but leaving the said Richard, her husband, surviving her, who also survived the said testator, and that the defendants Maria and William were the children of a daughter of the testator who died in his lifetime. (387)

The questions upon which the respective parties differed in the construction of the will are stated in the opinion of this Court.

Iredell for plaintiffs.

J. H. Bryan and Mordecai for defendants.

PEARSON, J. Three questions are presented by the bill and answer upon the construction of the will of Lemuel H. Simmons.

Obscurity is as often caused by the use of too many words as by not using words enough. This will is an instance of the bad effect of using too many.

The first question is, whether the $1,500 worth of slaves, given to Emily Simmons in lieu of land, are to be taken out of the slaves belonging to the testator at his death, or are to be purchased by the executors; whereby the perishable estate (as it is termed), which, after the payment of debts, is to be equally divided between the wife and all the children, except Elizabeth, who was dead, will be diminished to that amount.

From the whole will, the testator seems to have treated his estate as divided into three funds: land, slaves, and perishable estate. The latter he directs to be divided equally between his wife and children after the payment of his debts. This is the only charge which he has expressly put upon the "perishable estate," and in the absence of any direction that it should also be burthened with the "$1,500 worth of slaves," we can see no reason for doing so.

The slave fund is to be divided between the three children who were living and the children and husband of a deceased child. To the share of Emily is to be added $1,500 worth of slaves, in lieu of land. (388) There is no intimation that this share is to be made up out of the perishable estate fund, for the sake of increasing the slave fund. In giving a share of the slave fund to his son-in-law Ward and his children, he directs the fund to be increased by the value of slaves before put into his possession, and as many more slaves to be added to what Ward already had as will make his share equal to the shares of the other children, except the share of Emily. The slaves to be added in this instance certainly come from the slave fund; and not from the fund of the "perishable estate," and yet there is no better reason to be assigned for taking this addition from the slave fund than for taking Emily's addition of $1,500 worth from that fund. The words "except Emily Simmons," in the connection in which they are used, are significant to show that her share was to be taken entirely from the "slave fund."

2. Mary Ann Simmons married the defendant Oldfield, after the will was made, and died in the lifetime of the testator, without children. The second question is, whether Oldfield is entitled to a life estate in the legacy that was intended for her. We think that he is not. The legacy intended for her lapsed by her death. Oldfield takes nothing, because both the subject and the description of the person fail. There is no distinct substantive legacy given to the husband of Mary Ann. The legacy given to her should she marry is to be held by her and her husband during their joint lives and the life of the survivor. She got no legacy, and, therefore, the subject of the legacy, intended for the husband, failed. When the principal fails, the incident fails with it. The description of persons also fails. Oldfield *was* the husband of Mary Ann, but at the death of the testator, when the will takes effect, he *was not* her husband,

and did not answer the description; nor did he answer the description when the will was made. It may be added, the *reason* for giving him anything had ceased.

3. Mary Ann having died in the lifetime of the testator, with- (389) out children, the third question is, Do the "heirs" and "next of kin" of the testator take by purchase, as "devisees" and "legatees"? Or do the slaves and land, intended for Mary Ann, fall back into the estate as undisposed of property and go to the persons who would be entitled as in case of intestacy? In the latter case the widow would be entitled to a distributive share of the slaves under the statute of distributions. In the former case the widow takes nothing, and it would be a question whether the children of Elizabeth Ward take any part.

We think the "heirs" and "next of kin" of the testator take by purchase, as "devisees" and "legatees." It is settled law that where a particular estate is given by will, with a remainder over, whether vested or contingent, the remainder takes effect, notwithstanding the particular estate fails by the death of the person for whom it was intended, before the death of the testator. The law is the same in respect to executory devises and bequests, unless there be an intention expressed that limitations over should depend upon the vesting of the preceding estates as a condition precedent, which is not usually the case, for most generally the limitations over are intended to take effect whenever the preceding estates are out of the way, without reference to the *manner* in which they get out of the way. 2 Williams Exrs., 764, and the cases there cited.

In this case there is an estate for life to Mary Ann, subject to be enlarged so as to let in a life estate for her husband, remainder to her children, if she has any; if not, remainder, as to the land, to the heirs of the testator, and as to the slaves, to the next of kin of the testator. These limitations over clearly do not depend upon the vesting of the preceding estate in the tenant for life as a condition precedent, and, therefore, cannot be affected by the fact that the life estate lapsed.

As to the land, the word "heirs" is a term of the law having a (390) known and fixed meaning, and there is no difficulty in saying that the children of Mrs. Ward are entitled to represent her and take the share of the land to which she would have been entitled, if alive.

As to the slaves, there is some more difficulty; for, although the words "next of kin," like the word "heirs," has a fixed meaning, yet it does not seem to be as well known. Next of kin means nearest of kin. This meaning is fixed by the cases, unless there be something to introduce the idea of representation, by which one who is not next, or as near, or equal in degree, may bring himself up to the same degree by taking the place of one who, if living, would be as near. *Jones v. Olive,* 38 N. C., 369.

We have looked at this case with an inclination to take in the children of Mrs. Ward, but are unable to find any ground upon which to stand in their favor.

If to the words "next of kin" these words had been added, "as in case of intestacy" or "as by the statute of distributions," or if the language of that statute had been adopted, "to the next of kin in equal degree, or to those who legally represent them," we might have included the grandchildren; but upon the words "next of kin," simply, they cannot be included. Children are in the first degree; grandchildren are in the second degree. We have no right to bring grandchildren as near as children, unless the testator had made known to us by his will that such was his intention.

If the land and slaves had been disposed of together, so as to show an intent that they should go to the same persons, then, as the word "heirs" embraces the idea of representation, perhaps, the grandchildren might have been allowed to take by representation, in reference to both funds. But in this will special care is taken to separate the two funds, and to give the land to the heirs and the slaves to the next of kin, indicating thereby, if there be any meaning in the separation, an intention
(391) that the funds should go to different persons; and as the word "heirs" takes in the grandchildren as to the land fund, the words "next of kin" cannot take them in as to the slave fund also, without giving the land fund and the slave fund to the same persons, whereby making it idle for the testator to have been at such pains to keep the two funds separate, and give one to the heirs and the other to the next of kin.

There must be a decree declaring: (1) That the $1,500 worth of slaves given to Emily Simmons are to be taken out of the slaves belonging to the testator at his death, before a division is made. (2) That Richard Oldfield is not entitled to a life estate in the legacy intended for Mary Ann Simmons. (3) That the children of Elizabeth Ward are not entitled to any part of the slaves that would have fallen to her had she lived. The costs must be paid out of the estate in the hands of the executors.

PER CURIAM. Declared accordingly.

Cited: Roach v. Knight, 44 N. C., 104; *Mebane v. Womack,* 55 N. C., 299; *Harrison v. Ward,* 58 N. C., 237, 241; *Carson v. Carson,* 62 N. C., 58; *Redmond v. Burroughs,* 63 N. C., 245.

(392)

EDWIN BARNES v. ZILLA SIMMS ET AL.

1. When a will fully describes a person or thing, whether by many or few particulars, it is not competent to receive parol evidence of what was intended, though nothing be found to answer the description; for to pass another thing, or to pass the thing to another person than that described in the will, would be to give operation to the will over a thing or in favor of a person not mentioned in it.

2. Thus, where a testator bequeathed a negro by the name of "Aaron," and it was shown that he had no negro of that name, but had one by the name of "Lamon," not mentioned in the will: *Held*, that the Court could not say that the latter passed by this bequest.

3. A testator gave to his daughter "M., wife of D.," a tract of land and several negroes and other personal property, and directed that the negroes should work on the land he had given her, "for the support of her and her children; and if the negroes don't make a support, rent out the land and hire out the negroes." *Held*, that this could not be construed as a devise or bequest to her separate use, as there was not enough to amount to the plain exclusion of the husband: *Held, also*, that the children of M. took no estate under this devise and bequest.

CAUSE removed from the Court of Equity of EDGECOMBE, at Fall Term, 1848.

James Simms made his will and therein made a number of specific bequests of slaves and other things, among which were the following: "I give to my wife six negroes, Champion, Tony, Chany, Venus, Anaka, and Aaron. Item. I give to my youngest son, Benjamin, eight negroes, Amos, George, Peter, Turner, Pike, Creecy, Rose, and Jack. Item. I give to my daughter Martha, wife of John Dew, a tract of land, called the Bridge and Robinson tract, to her and her heirs forever; also seven negroes, Olive and child, Edy, Hardy, Clarke, Bridget, and Hannah; also one mule; also what stock she is in possession of; also (393) $1,000. Also it is my desire that the negroes I have left her shall work on the tract of land that I gave her, for the support of her and her children; and if the negroes don't make a support, rent out the land and hire out the negroes. I also reserve two negroes to wait upon her; and if she and child should die without any heir, they shall come into the old stock again. Item. My will is that all the residue of my estate, if any, after taking out the devises and legacies above mentioned, shall be sold and the debts owing to me collected, and, if there should be any surplus over and above the payment of debts and expenses, that such surplus shall be equally divided between my wife and all my children."

The bill is filed by the executor against Mrs. Simms, the son Benjamin, Dew and wife, and their child, and the other residuary legatees, to have the rights of those several parties declared. It is stated in the bill

that the testator had no slaves by the names of *Aaron* or *Pike;* but that he had two by the names of *Lamon* and *Pite,* and that Lamon was the child of the woman Anaka, bequeathed to Mrs. Simms, and a small boy at the making of the will. It appears upon the will and pleadings that the testator professes to dispose specially of forty-eight slaves among his wife and children, of whom *Aaron* and *Pike* are two; that he had in fact four others, who are not mentioned in the will, namely, *Lamon* and *Pite,* before mentioned, and two other young children, born recently before the making of the will. He had, therefore, in fact, fifty negroes when he made the will. It is contended by the widow and the son Benjamin that the testator intended to give to the former the boy *Lamon* and to the latter the negro *Pite,* and that by a mistake of the writer of the will—who was somewhat deaf and did not distinctly hear the testator's directions—the name of *Aaron* was written for *Lamon,* and that of *Pike* for *Pite;* and the executor states that he believes such to
(394) be the truth, and that he is willing to dispose of those two slaves accordingly, if upon the construction of the will he is authorized to do so.

B. F. Moore for plaintiff.
Biggs for defendants.

RUFFIN, C. J. It is extremely probable from the admissions of the parties and the circumstances of the case that the alleged mistake really took place in writing this will; and the Court would gladly correct it if it could be done consistently with the law. But it is manifestly impossible to do so upon the basis of any guide furnished by the will; and, therefore, that, if done at all, it must be exclusively on intrinsic evidence of an intention to give a negro who is not given by any words in the will. That would in truth be to strike one word out of the will and insert another in the place of it by parol proof, which cannot be done without introducing a multitude of mischiefs, with which the private hardship and inconvenience sustained by these parties can bear no comparison. It has long been settled that written instruments, whether deeds or wills, are to be construed upon their own terms. At least, there must be *enough in them,* in respect both to the person to take and the subject to pass, to enable the Court to say that the person *does* take and the thing *does* pass by the instrument itself. There are, indeed, cases of ambiguity of description in which resort may be had to evidence in aid of the will: for example, to show which person or thing is meant, when there is in the will a sufficient description to which the evidence may fit the person or thing. That is the case when two things or persons come completely within the description: as two white acres, or two cousin Johns. So it

is, also, if the person or thing be described in more particulars than one, some of which are true and some false; then, if enough remains, after rejecting the parts that prove to be false, to identify the (395) donee or the subject, the instrument shall be effectuated. In all those cases there is upon the face of the will no ambiguity, and it arises only when the description comes to be applied; then it is found that there is an uncertainty, which of two persons or things was meant, which are within the words, or whether a thing or person was meant who is correctly described in some particulars, but not in others. But, clearly, if a will describe a person or thing by many particulars, and one is shown who comes up to the description in every particular, it would not be competent to prove by witnesses that the testator did not mean that, but another, though the latter be not within the description, and to give effect to the will as if the description were altered in the instrument itself. That would be to make the will upon the evidence. So, in like manner, when the will fully describes a person or thing, whether by many or few particulars, it cannot be competent to receive such evidence, though nothing be found to answer the description; for, to pass another thing, or to pass the thing to another person, than that described in the will, would be to give operation to the will over a thing or in favor of a person not mentioned in the will at all—in effect, to fill a blank in it, or, rather, to make a blank by striking out and then filling it in another manner. That cannot be done upon any safe principle. In this case there are two terms of description, and two only, of the subject of the bequest. He is said to be named "Aaron" and to be a "negro." The latter is so indefinite as to designate no one in particular. A gift of eight negroes would, indeed, be good as a general legacy of eight slaves. But the present is a specific gift, and the question is, Who are the very negroes given? In such a case the term "negro," designating merely the *status personæ,* cannot be construed to be a gift of any individual negro, and therefore cannot be applied to one by evidence. That, (396) then, is the case of a description by a single particular, that of the name; and there is no negro of that name. One would think that there is but one principle applicable to such a case, which is that the gift must fail because there is nothing for it to operate on. It is no case of ambiguity. It would be if there were two Aarons; and, then, it would be admissible to show which of the two was *the* Aaron. But the attempt is to prove that the testator did not mean to give any *Aaron* at all, but a different person altogether, namely, *Lamon.* There is an old case, *Beaumont v. Fell,* 2 Pr. Wms., 140, that seems to go far to support the proposition, if it be law. A legacy was given to *Catharine Earnley,* and, there being no such person, it was decreed to *Gertrude Yardly,* upon evidence that she was the person intended, and that the testator fre-

quently called her by the nickname of *Gatty,* which the writer of the will mistook for *Katty.* It is to be observed, in the first place, that the master of the rolls put the decision upon the right to receive such evidence by the civil law, in respect to personal legacies, and admitted, in terms, that it could not be heard, by the common law or the statute of frauds, as a devise of land; because, said he, a devise must be in writing, "and there would be no writing to entitle *Gertrude Yardly,* had this been a devise of land." That admission must be sufficient at this day to destroy the authority of the case, as a decision upon the construction of the will, since it is certain that now the terms of a bequest can no more be altered by parol than those of a devise. Then it is to be observed that the report is explicit, and that the judgment was put upon the ground that there was no writing to entitle the person to whom the legacy was bequeathed; and, therefore, she took it by force of the extrinsic proof entirely, saving only that the will showed that the testator meant to give it to some person. That is a proposition opposed to every princi-
(397) ple for the construction of writings, or establishing their superiority in the scale of evidence over the testimony of witnesses. It has, moreover, not been followed by any similar decision; but there have been many directly opposed in principle to it. There is, indeed, a single case in this country which, upon the authority of *Beaumont v. Fell,* ruled the point in accordance with it, in a case somewhat like that before the Court. A person, owning a considerable number of slaves, bequeathed in his will by name exactly the number he had, and among the bequests there was one of fifteen slaves to his wife, and two of the number were designated by the name of *Phillis,* whereas the testator had but one *Phillis,* and he had a man, *Phillip,* not mentioned in the will. It was held that the wife took *Phillip* in the place of one of the women named *Phillis. Tudor v. Terrell,* 2 Dana (Ky.), 47. That case, indeed, differs from ours in this, that here there were two negroes in number more than are named in it; and the Court in Kentucky greatly relied on the coincidence in the number. Certainly, that was a strong circumstance, if one person or subject can be substituted for another, which is fully described to show that the Court could in that case probably hit on the right one to be substituted. But the difficulty is to lay down any principle on which the terms of the will can be thus dealt with and one description of the thing substituted for another. The Court thinks it cannot be done. In all the cases hitherto decided in this State there was enough on the face of the will to indentify the subject after leaving out every part of the description which was inappropriate. It was so in *Proctor v. Pool,* 15 N. C., 370; in *Simpson v. King,* 36 N. C., 11; and in *Ehringhaus v. Cartwright,* 30 N. C., 39; in the latter of which cases the rule is stated as we understand it, and applied. And as understood

and applied there, it is deduced not only from the text-writers, (398) but from judicial determinations of the highest respectability. Thus in *Thomas v. Thomas,* 6 Term, 691, *Lord Kenyon* said that the sense of the maxim, *falsa demonstratio non nocet,* was that the *falsa demonstratio* should be superadded to that which was sufficiently certain before; for there must be *constat de persona,* and if to that be added an inapt description, it will not avoid the devise. Thus in *Goodtitle v. Southern,* 1 M. and S., 299, it was held that a clause "of all my farm and lands, called *Trogues farm,* now *in the occupation of A. C.,*" passed not only such parts of Trogues farm as were occupied by A. C., but also those occupied by other persons; because the name identified it, and the will gave *all* of it, and those general terms were not to be cut down by the subsequent inconsistent description. But in *Doe v. Oxender,* 3 Taun., 147, and *Doe v. Chichister,* 4 Dow. P. C., 65, it was held that a devise of "my estate of Ashton," or "my estate at Ashton," could not be extended by evidence so as to take, in addition to lands in Ashton, lands in an adjoining parish. In a more recent case, which, indeed, is in point with the present, that doctrine was solemnly reaffirmed. A testator devised "all my real estates whatsoever, situate in the county of Limerick in the city of Limerick." He had a small real estate in the city, but none in the county, of Limerick. He, however, had other real estates in County Clare; and the question was, whether it could be shown by parol that the testator intended to dispose of the lands in Clare, and that the county of "Limerick" had been by mistake written for the county of "Clare." It was held by the Vice Chancellor that it was competent to hear the evidence, and an issue was ordered to be tried at law. But, upon an appeal, the Lord Chancellor, assisted by *Chief Justice Tindal* and *Chief Baron Lyndhurst,* reversed the decision, upon the ground that it was not a case of latent ambiguity, because there were *in the will* no words describing lands to which the parol evidence could be ap- (399) plied so as to embrace within it the lands in Clare. *Miller v. Travers,* 8 Bing., 244. The opinion was given by *Chief Justice Tindal* and is a very able one, discussing both the principle and the cases, and the result was concurred in by all three of the judges. For the same reason it is impossible, without contradicting the will, to make "Aaron" mean "Lamon," there being no other description but the name—unless, indeed, it could be shown that *Lamon* was sometimes called *Aaron,* so as to be known by both names, which is not pretended; and so, likewise, as to *Pike* and *Pite.*

The Court, therefore, holds that the slaves Lamon and Pite are not specially disposed of in the will, but, with the two others not named, fall into the residue.

Two points are made upon the dispositions in favor of Mrs. Dew, which are, first, whether the dispositions are to the separate use of the wife, and, secondly, whether the gift is exclusively to Mrs. Dew or to her and her children. Upon the first, the Court is of opinion in the negative. It may be inferred from the will that the testator had not much confidence in the prudence or capacity of Dew for managing the property, and that he had a vague purpose not to trust the property in his hands, but secure it in some way for his daughter. But there is not enough in the will to amount to the plain exclusion of the husband, which the law requires before he can be deprived of his marital rights. *Rudisill v. Watson,* 37 N. C., 430. The Court likewise holds that the children took no estate under the will. The words of gift respect the wife alone, as the sole donee. It is true, the testator says he wishes the land rented and the negroes hired, if they do not make a support; but if they can, he wishes the negroes to work on the land "for the support of her [the daughter] and her children." But if the negroes should be hired and the land rented, he does not give the proceeds to the daughter and her children for division between them, but they go, as aris-
(400) ing from the mother's land and negroes, to her. The words, "for the support of her and her children," under those circumstances, express only what the testator supposed would be the appropriation of the profits of the estate by the mother, and were not intended to defeat or in any degree to transfer the estates and money just given to the daughter, from her to her children.

The defendants Dew and wife set up a claim to Lamon and Pite under the reservation of two negroes to wait on her, suggesting that the two thus reserved are those two, and that for that reason they were not mentioned by name in the will. But it is clear that the negroes thus reserved are two of those just before specially bequeathed to Mrs. Dew, and are excepted out of the direction for hiring out the negroes, because they would, at all events, be needed by her as domestic servants.

PER CURIAM. Declared accordingly.

Cited: Stowe v. Davis, 32 N. C., 435; *Knight v. Bunn,* 42 N. C., 79; *Taylor v. Bible Society, id.,* 204; *Institute v. Norwood,* 45 N. C., 70, 73; *Joiner v. Joiner,* 55 N. C., 72; *McDaniel v. King,* 90 N. C., 603; *S. v. Sutton,* 139 N. C., 581.

Dist.: Miller v. Cherry, 56 N. C., 30.

JOHN WARD ET AL. v. WILLIAM D. JONES.

Where a devise of land in a will made since the act of 1784, Rev. Stat., ch. 122, sec. 10, and ch. 93, sec. 1, is to A. for life, and should he have lawful issue, then to be equally divided between his lawful issue; but should he not have lawful issue, then over, etc.: *Held*, that A. took only a life estate in the land.

CAUSE removed from the Court of Equity of WARREN, at Fall Term, 1848.

The bill is filed for an account of the estate of John L. Ward. (401) The defendant, who is the administrator of the said John L. Ward with the will annexed, submits to an account. The only question about which the parties differ is whether by the will of Benjamin Ward the said John L. Ward was entitled to an estate in fee simple or to an estate for life in the tract of land on which he lived.

By one clause of the will of the said Benjamin he devises and bequeaths as follows: "To my son Benjamin, and, should he marry, to his wife, I lend during his or her life all my land on the north side of Chocco Creek; also, I lend to him, and his wife should he marry, my negroes, Abraham, etc., during both their lives, and when they are both dead, to be equally divided between their lawful issue. But if he dies first and without lawful issue, then after his wife's death the negroes, together with the land before lent to him and her, to be all sold on twelve months credit on bond with good security, and the money arising from the sale, when paid, I order to be equally divided between his brother John L. Ward, his sisters by his own mother, also allowing one share to be equally divided between all his brother Richard Ward's children, or such of them as may be then alive."

And by the next clause: "To my son John L. Ward, and to his wife should he marry, I lend for both their lives the *tract of land* in Warren County on which he now lives, bounded as follows, etc." "I also lend to my said son John L. Ward and, should he marry, to his wife during both their lives, my two negroes, Phillis, etc.; and when he and his wife both die, then the said negroes, and the land before mentioned to be lent to him and his wife, I hereby order to be sold to the highest bidder on twelve months credit, taking bond and good security, and the money arising from the sale to be divided in the same manner as I have directed in the same case respecting the division of the money arising from the sale of my son Benjamin's estate. But this sale and division (402) not to take place should my said son leave lawful issue. In that case, I would have the same method observed as I have above directed in respect to Benjamin's issue."

The will was made in October, 1788. After the death of the testator, John L. Ward married and had several children who survived him. He died in 1836, leaving a will. The defendant is the administrator with the will annexed, and the plaintiffs are the children of Mary Ward, who was a daughter of the said John L. Ward.

W. H. Haywood for plaintiff.
B. F. Moore for defendant.

PEARSON, J. The devise is, in effect, to John L. Ward for life and, should he leave lawful issue, then the negroes and land *to be equally divided* between his lawful issue; but should he not leave lawful issue, then the negroes and land to be sold and divided, etc.

The effect of the words *"to be equally divided"* in a devise of land, made *before* 1784, to one for life and after his death to be divided between his lawful issue, and for want of such issue then over, is very ably discussed by *Judge Daniel* in *Ross v. Toms,* 15 N. C., 376, and the Court decided that the words do not prevent the application of the rule in *Shelley's case,* but that the first taker had an estate tail, which by the act of 1784 is converted into a fee simple.

The will in the case under consideration was made in the *year* 1788, and unless Laws 1784, ch. 204, Rev. Stat., 632, and ch. 204, sec. 5, Rev. Stat., 287, alter the law, it is clear that John L. Ward took an estate tail, which by act of 1784, ch. 204, sec. 5, was converted into a fee simple. We think Laws 1784 do alter the law, and that in all devises of land made since that time the words *"to be equally divided"* pre-
(403) vent the application of the rule in *Shelley's case,* and that the first taker has but an estate for life.

Laws 1784, ch. 204, sec. 12, provides that a devise of land shall be held to be a devise *in fee simple,* unless such devise shall in plain and express words show that the testator intended to convey an estate of less dignity.

In *Ross v. Toms, supra,* which was a devise of land, the reason why the words *"to be equally divided"* were not allowed to prevent the application of "the rule," and confine the first taker to life estate, was that the main intent of the testator would be thereby defeated. In the language of *Judge Daniel,* "two intents are manifest, one that the daughter should have only a life estate; the other, that the remainder over should not take effect so long as any of her issue remained. The latter must be presumed to be the main intent and paramount purpose of the testator. This main intent cannot be effected by giving the daughter a life estate and making her children take by purchase, because, there being *no words of inheritance* added to the estate of the latter, they would take at that time, viz., 1777, only a life estate, and after the death of either, his or her share would go over. The testator intended that on the failure of

the issue of his daughter, and only in that event, his estate should go over." To effect the main intent the daughter was held to take an estate tail. If there had been words of *inheritance,* by which her children could take estates in fee simple, both intents would have been effected, and she would have taken but an estate for life. In the case under consideration the will was made in 1788, and the act of 1784, above cited, supplies the *words of inheritance,* so that there is no reason why the particular intent should be made to give way. Both items can be effected.

So in *Coe v. Wright,* decided in the House of Lords, the decision is expressly put upon the ground that the main intent could (404) be effected by giving the first taker an estate tail, and it is admitted that but for this the words "to be equally divided" would have had the effect of making the children take by purchase, and the first taker would have had but a life estate. This is the case upon which the decision of *Ross v. Toms* is founded, and both are put expressly upon the reason that the particular intent—to give the first taker an estate for life only—must give way in order to effect the main intent. As that reason does not apply to the present case, those cases, instead of being authorities against, are authorities for, holding that since the act of 1784, in devises to one for life, and then to be equally divided between the issue, and for want of issue, over, the first taker has an estate for life, and his children estates in fee, as tenants in common by purchase; and so both intents are effected.

This result is not only sustained by the authorities, but it must be so upon principle. The rule in *Shelley's case* only applies when the *same persons* will take the same estate, whether they take by descent or purchase; in which case they are made to take by descent, it being more favorable to dower, to the feudal incidents of seigniories, and to the rights of creditors, that the first taker should have an estate of inheritance; but when the persons taking by purchase would be different, or have different estates than they would take by descent from the first taker, the rule does not apply, and the first taker is confined to an estate for life, and the heirs, heirs of the body, or issue in wills, take as purchasers.

The words "to be equally divided between the issue" take in *different persons* than simply the word "issue," used as a word of descent; for, in the latter case, the person or persons to take would be ascertained by the rules of descent—there would be representation—and the taking would be *per stirpes;* while in the former the rules of descent would have no application, and there must be an equal division (405) *per capita.* Hence, the use of these words prevents the application of "the rule," and the first taker has but an estate for life, except in cases where there is some paramount intent which would be defeated unless the first taker be entitled to an estate of inheritance.

Laws 1784, ch. 204, 5, Rev. St., 258, by which estates tail are converted into estates in fee simple, has also an important bearing upon this question. In a bequest of chattels to one for life, and at his death to his issue, and for want of issue, then over, the first taker has the absolute estate, it being a general rule that words which in a devise of land would give an estate tail, in a bequest of chattels gives the absolute estate. But the words, "to be equally divided between the issue," make an exception to the general rule; it being inferred from these words that the testator could not intend that the issue should take *as issue,* but that they should take distributively as purchasers, so as to give the first taker an estate for life, and then to the issue as tenants in common. *Swain v. Rascoe,* 25 N. C., 201; *Allen v. Pass,* 20 N. C., 207. This is the settled law as to the bequest of chattels, which cannot be entailed, and in reference to which words that give an estate tail pass the interest, so as to leave nothing to be limited over as a *remainder.* But in England, and in this State before 1784, after an estate tail in land a remainder might be limited; hence the same words which in a bequest of chattels give an absolute title, in a devise of land give only an estate tail; but since the act of 1784 *lands* cannot be entailed, and the words which before gave but an estate tail, after that gave an estate in fee simple, or the absolute estate; so that now the same words give an absolute estate in land that would give an absolute estate in chattels, and a *remainder* cannot be limited in either land or chattels after what would formerly have
(406) been an estate tail. The effect of the act of 1784, therefore, has been to put land upon the same footing with chattels, and the same rule is applicable to both. So in a bequest of chattels the words, "without leaving issue," are construed to mean "without leaving issue *living* at the death of the first taker," in order to support a bequest over, which could not be good as a remainder and would otherwise be too remote as an executory bequest; whereas, the same words in a devise of land did not receive that construction, because the devise over was good as a remainder, but since the act of 1784 there cannot be an estate tail in land, and the devise over would not be good as a remainder, and to support it as an executory devise the construction put on the words, "without leaving issue," is now the same in a devise of land as in a bequest of chattels, because the same necessity exists for such a construction, in order to give effect to the limitation over. *Jones v. Speight,* 4 N. C., 157; *Zollicoffer v. Zollicoffer,* 20 N. C., 574; *Clapp v. Fogleman,* 21 N. C., 466.

Our conclusion, therefore, is that the operation of Laws 1784, ch. 204, sec. 5 and sec. 12, is to give to the words, "to be equally divided between the issue," the effect of preventing the first taker from having the absolute estate, and of giving him an estate for life, and then to the issue dis-

tributively as tenants in common by purchase, in a devise of land, in the same way as these words do in a bequest of chattels, and that where the words, "if he should die without leaving issue, then over," etc., are added, as in this case, such a limitation over would be supported in reference to the land as an executory devise as it is in reference to chattels as an executory bequest.

We consider it fortunate that there is *now* this uniformity, and that the same rule is applicable to land and chattels; for, although the same words in the same instrument must sometimes have a *different* meaning put upon them when the subjects are different, yet, as the intent is always the same, it is a matter of regret when by the rules of law a different meaning has to be put on the same words, for the (407) intent is obviously violated in reference to one subject or the other.

It must be declared that the testator, John L. Ward, had a life estate only in the land mentioned in the pleadings.

PER CURIAM. Declared accordingly.

Cited: Moore v. Parker, 34 N. C., 129; *Patrick v. Morehead,* 85 N. C., 68; *Mills v. Thorne,* 95 N. C., 364; *Jenkins v. Jenkins,* 96 N. C., 259; *Howell v. Knight,* 100 N. C., 257; *Leathers v. Gray,* 101 N. C., 168; *Hooker v. Montague,* 123 N. C., 158; *Whitfield v. Garris,* 134 N. C., 29; *Hauser v. Craft, ib.,* 329; *Wool v. Fleetwood,* 136 N. C., 470; *Tyson v. Sinclair,* 138 N. C., 24; *Perry v. Hackney,* 142 N. C., 375; *Jones v. Whichard,* 163 N. C., 244; *Rees v. Williams,* 165 N. C., 208; *Haar v. Schloss,* 169 N. C., 229; *McSwain v. Washburn,* 170 N. C., 365.

EDWARD GRAHAM ET AL. V. GEORGE LITTLE ET AL.

Where a testator directed that his executors should sell any part of his real estate whenever they may think proper to do so "without any order or decree of the court": *Held*, that this real estate, not being charged with the payment of debts nor being directed to be applied in that way, it could not be so subjected in exoneration of the personal estate, but could only be resorted to after the exhaustion of the personal estate, for the purpose of discharging the debts.

CAUSE removed from the Court of Equity of WAKE, at Fall Term, 1848.

William P. Little made his will on 2 March, 1827, and therein made the following disposition: "In the first place, I give to my wife, Ann, all the negroes which came by her and all their past as well as future in-

crease. Secondly, I lend to my wife during her natural life all the residue of my estate, real and personal. Thirdly, at the death of my wife I give to all my children who may be then living an equal part of the residue of my estate, both real and personal; and in case any of (408) them should die previously, leaving issue, I wish said issue to have the portion which their parent would have drawn if living, due regard being had to such as may have received any advances either from me or their mother at any time previous to her death out of my estate. I appoint my wife, Ann, and my sons, Thomas P. Little and George Little, in all of whom I have the most unlimited confidence, my executrix and executors; and they are hereby vested with full power to sell any part of my estate, either real or personal, whenever they may think proper to do so, without any order or decree of any court. Lastly, it is my will and desire that if any of my children die without issue or under age, in either case their portion to go to my surviving children, and to the issue of such as may have died leaving issue in the same proportion their parent would draw if living."

The testator died in the spring of 1829, and in August following the will was proved and Mrs. Little and Thomas P. Little qualified as executors. The testator left seven children, of whom one was Minerva, who intermarried with Hamilton C. Graham and had issue three children, and then both she and her husband died in the lifetime of Mrs. Little, leaving their said children surviving, who are infants and are the plaintiffs in this suit. In 1845 Mrs. Little died, having made her will and appointed her son Thomas P. the executor, and he proved the will.

The bill was filed in September, 1847, against Thomas P. Little, George Little, and the other children of the testator, William P. Little, and states that the testator left a large personal and real estate, and that the latter consisted of land in this State and Tennessee and elsewhere; and that the executors sold large quantities of valuable land and appropriated the proceeds to their own use or misapplied them in the payment of debts of the testator, as they say, instead of his discharging the debts out of the personal estate, as they should have done. (409) The prayer is for a discovery of the personal and real estates, and especially of such parts of the latter as were sold, and an account of the proceeds and also of the residue of the personalty, and that the plaintiffs may be declared to be entitled, as representing their mother, to one-seventh part of the residue of the personalty after the payment of the debts and the charges of administration, and the like share of the prices of the land sold and the profits thereof, and that the same be decreed to be paid to them, and also that partition be made of the land remaining unsold, so that one-seventh part thereof in value should be allotted to the plaintiffs.

The answers of the executors state that the testator was largely indebted when he died, and also when he made his will, and have annexed to them an account of debts and charges paid to an amount exceeding $25,000; that there were about sixty or seventy slaves, and that a considerable number of them were sold for the purpose of raising money to be applied to the discharge of the debts, and that it would have required all of them, or nearly all of them, including those bequeathed specially and absolutely to Mrs. Little, to satisfy all the debts, and that, under those circumstances, it was thought most proper to sell such parts of the land as were unproductive and thus save some of the slaves (which were productive and increasing), by applying such parts of the proceeds of the land as were requisite for that purpose to the discharge of the debts. The answers state that the testator left 21,700 acres of land, consisting of various tracts, of which a schedule is annexed, and that, thereof, particular parts mentioned in a schedule had at different times been sold for the aggregate amount of $23,890.54; and they insist that the same was under the will subject to the payment of the testator's debts in exoneration of the specific legacy to Mrs. Little, or at all events that it was so subject in the discretion of the executors. The answers also state certain advancements made to the children respectively. (410)

W. H. Haywood for plaintiffs.
J. H. Bryan for defendants.

RUFFIN, C. J. The plaintiffs are entitled to partition of the unsold land specifically, or that it should be sold by the executors or under the direction of the court for that purpose, as may be for the interest of the parties. There must also be the usual order for an inquiry as to the debts and administration of the personal estate, and a further inquiry as to the land sold by the executors and its produce, and how the same has been disposed of or invested, and the interest thereon or profits made since the death of Mrs. Little, the tenant for life. Those are orders so much of course as to call for no observations in themselves. But the parties, entertaining different views respecting the duty or power of the executors to apply the proceeds of the real estate to the debts, have asked a declaration of the opinion of the Court on that point as a guide to the master.

It is highly probable that the rule of law requires a decision of the question made that is opposed to the intention of the testator—not that expressed, but that entertained by him. From the amount of the debts which now appear, it is natural to suppose the testator must have expected it would be necessary to sell a considerable portion of the estate, of some kind; and from the value of the slaves compared with the debts,

the necessities of his wife and family, and the direction for the sale of any parts of his estate at the discretion of the executors, one conjectures with some confidence that the testator would prefer, and probably thought he had provided, that the executors should or might sell land for the payment of his debts—especially as the only absolute
(411) immediate gift was to Mrs. Little, to whom the whole estate was given for life, and who was mother of all the children, and, as he supposed, would care equally for them. But one can only make conjectures upon those subjects, founded on what most men would be supposed to have intended under such circumstances, for there is nothing in the will to say that the testator had such intention. He does not mention that he owed a single dollar, much less direct the payment of debts out of any particular fund. Consequently the debts must be paid by the personal and real estate, in the order prescribed by law, that is, by the personal estate as the primary fund, and by the realty for the deficiency. It is true, the land is devised in mass, with the residue of the personalty. But that does not alter the rule of law; for every devise is specific; and the case is the same as if the testator had, in one clause, devised all his land to his wife for life and then to his children, and in a subsequent clause bequeathed the residue of his personalty, in which case the residue would be applicable to the debts in the first place, and then specific legacies, and, lastly, the land would make up the deficiency. It was stated in *Robards v. Wortham,* 17 N. C., 103, as the result of the cases, that even when the land is devised to the heir, he holds, as devisee, exempt from debts until all the personalty is exhausted, unless the devise be to sell for payment of debts or there be a charge of debts on the land in such terms as to exonerate the personalty or a part of it and place the land in front. There is nothing of that kind here; and, therefore, though the executors might sell land, they could not apply the money to the debts to the prejudice of the devisees. It might have made no difference to the parties if Mrs. Little had died intestate, as the personalty saved to her by the land would have gone to those who owned the land and in the same proportions. That, however, it is said, is changed by
(412) her will; and therefore the plaintiffs claim their share of the land itself or its produce. If it be asked, why, if the produce of the land be not applicable to the debts, the testator should have authorized a sale at all, the answer is, that he may have thought it would be best for his family, and especially for his wife, that land, which was unproductive of present income, or not, in the judgment of the executors, likely to rise in value, should be sold and the money invested so as to secure to the several devisees the same benefit they had in the land, that is, the interest to accrue to the wife for life and the capital to go over upon her death to the children; for the effect of a devise to one for life,

with remainder in fee, with power to the tenant for life, alone or with others, to sell, but without any disposition of the money, must be that the money goes, in place of the land, to those who would have had the land itself, and in the same proportions and extent of interest. Therefore, it must be declared that the land given in the will was not charged with the payment of any part of the testator's debts in exoneration of his personal estate, and that the produce of the land sold by the executors was not applicable by them to the debts.

PER CURIAM. Declared accordingly.

Cited: Graham v. Little, 56 N. C., 153; *Swann v. Swann,* 58 N. C., 299; *Knight v. Knight,* 59 N. C., 136; *Baptist University v. Borden,* 132 N. C., 489.

Dist.: Blount v. Pritchard, 88 N. C., 447.

(413)

JESSE GRIFFIN ET AL. v. RICHARD CARTER.

1. A motion to remove or discharge a sequestration does not stand upon the footing of a motion to dissolve an injunction, in the ordinary case of an injunction to stay execution upon a judgment at law. The court having secured the fund, will keep it secured pending the litigation, unless the application was improvidently granted, or unless, upon the coming in of the answer, it appears, taking the whole together, that the claim of the plaintiff was unfounded or the security unnecessary.

2. Although a court of equity will not *adjudicate* upon a legal title, yet it will take notice of what is necessary to constitute a valid legal title, when its aid is asked for upon the ground of a legal title, and will require that the party should come forward with fairness and show a title which, *prima facie,* is a good one.

3. *Prima facie,* without proof to the contrary, the Court presumes that a limitation over, by deed, of personal property, made in another State, is void, because the presumption is the common law prevails there.

APPEAL from a decree of the Court of Equity of NORTHAMPTON, at Fall Term, 1848, disallowing a motion to remove the sequestration in the case theretofore granted. *Settle, J.*

The bill alleges that the defendant, in the county of Surry and State of Virginia, where he then resided, during the year 1818, executed a deed of gift to Nancy, one of the plaintiffs, who was his reputed daughter, by which he conveyed to her a negro woman, to take effect at the death of the defendant, which said deed was properly attested and delivered, and afterwards proven by the subscribing witnesses, and regis-

tered in the said county of Surry; a copy is filed and prayed to be taken as part of the bill; that in 1825 the defendant removed to the county of Northampton in this State, where he now resides; that in 1842 the plaintiff Griffin intermarried with the other plaintiff, Nancy, and both reside in the said county of Northampton; that in 1843 the said
(414) deed of gift was exhibited in the court of pleas and quarter sessions of Northampton County, and ordered to be certified and registered; and that the negro woman has now six children.

The bill further alleges that the defendant intends to remove to some of the western States, and to carry the negroes with him, and the plaintiffs fear, from the bad feeling which the defendant now has towards them, that if he is allowed to take the negroes out of the State he will so manage as to deprive them of the use and enjoyment of the property after his death.

The prayer is that the defendant may be enjoined from removing the negroes beyond the limits of this State, and that they may be secured so as to be forthcoming to abide the final decree.

The defendant, in his answer, admits that he did sign and seal a paper-writing in the presence of witnesses in the county of Surry, State of Virginia, purporting to be a gift of the negro woman to the plaintiff Nancy, after his death, and that the copy, made part of the bill, he believes to be correct. But he denies that the paper was ever delivered as his deed, and avers that the plaintiff Nancy was, in 1818, an infant, not over 4 or 5 years of age. He regarded her as his daughter, though not born in wedlock, and felt desirous to provide for her in case of his death, for which reason he had the paper-writing drawn, and signed and sealed it; but he stated to the subscribing witnesses that he did not intend to part with it, but would keep it in his possession, believing that if he should die it would be effectual to pass the title after his death; and he avers that he never did deliver the paper as his deed, or consent to part with the possession; that in 1825 he removed to Northampton County, in this State, bringing with him the plaintiff Nancy, who continued to reside with him until 1830, when she married one John Carstophen; that he had kept the said paper all the time in his possession, and
(415) continued so to keep it until some time in 1832, when he had a severe spell of sickness, and during his sickness the said Carstophen procured access to his papers and purloined the said paper-writing and carried it to Virginia, without his knowledge or consent, and procured it to be registered in the county of Surry; that upon his recovery he instituted suit in Virginia against the said Carstophen to have the paper canceled, but, being outlawed for not appearing in that State to answer a charge for a misdemeanor, his suit was dismissed; and the said Carstophen having soon after fled the country and died in Alabama,

his suit was again instituted; that the said Nancy, after the death of her husband, came and lived with the defendant for some years, when she married the plaintiff Griffin, who in 1843 procured *a copy* of the said paper to be spread upon the register's book of Northampton County.

The answer admits the defendant intends to remove the negroes to the south, as he claims the entire estate.

The paper-writing filed as a part of the bill is a copy in the usual form of a deed of gift, in consideration of natural love and of $1. It appears, by an entry on the back of the copy, that the paper was proved in the county court of Surry County, State of Virginia, as the deed of the defendant, by the two subscribing witnesses, and ordered to be recorded in 1832. It appears from another entry that *a copy of the said paper* was exhibited in the county court of Northampton and ordered to be registered in 1843.

At Fall Term, 1848, upon the coming in of the answer, the defendant moved to remove the sequestration hitherto granted, which motion was refused, and the sequestration continued until the final hearing; and the defendant was allowed to appeal.

B. F. Moore for plaintiff. (416)
Bragg for defendant.

PEARSON, J. It was held in *McDaniel v. Stoker, ante,* 274, that a motion to remove or discharge a sequestration does not stand upon the footing of a motion to dissolve an injunction, in the ordinary case of an injunction to stay execution upon a judgment at law. The court having secured the fund, will keep it secured pending the litigation, unless the application was improvidently granted, or unless, upon the coming in of the answer, it appears, taking the whole together, that the claim of the plaintiff is unfounded, or that the security was unnecessary. The security in this case was admittedly necessary; and the only question is whether the claim of the plaintiffs is unfounded.

The plaintiffs' title rests entirely upon the delivery of the alleged deed of gift. If it was not delivered, the plaintiffs have not title. The answer denies the delivery directly and positively, and the denial is accompanied with such a detail of circumstances as is well calculated to recommend it to belief.

The fact that the supposed donee was an infant of *"very tender years,"* unfit to take charge of a valuable paper; that the paper was not registered for fourteen years, and the absence of any suggestion in the bill as to the person to whom the paper was delivered for the benefit of the infant, especially as the plaintiffs were notified from the bill filed in Virginia that the delivery was denied, and were thus apprised of the

necessity for stating all circumstances and putting all interrogatories calculated to support the allegation that a delivery had been made, or to extract an admission to that effect: these facts, combined, carry to the mind no slight confirmation of the truth of the denial by the defendant, and a very strong doubt of the truth of the allegation of the plaintiffs.

Another circumstance is that the plaintiffs do not allege that
(417) they have the original deed of gift, so as to have it in their power to proceed with the trial of the feigned action necessary to obtain the relief prayed for; but proceed upon the idea that they are entitled to have the property tied up during the life of the defendant, without taking any steps to have their right adjudicated—contenting themselves with a general statement that the deed was properly attested and delivered, and registered in Virginia and in this State, and cautiously concealing the fact that the deed was procured to be registered in Virginia by the first husband of the plaintiff Nancy, and that they did not have the *original* registered in this State, but caused to be registered *a copy* taken from the register's office in Virginia. This want of candor is in striking contrast with the open assertion of title by the defendant, and his frank admission of an intention to remove the property.

But the most conclusive circumstance is that the plaintiffs have not a legal title in the remainder, by their own showing; and, although a court of equity will not *adjudicate* upon a legal title, yet it will take notice of what is necessary to constitute a valid legal title, when its aid is asked for upon the ground of the legal title, and will require that the party should come forward with fairness and set out a title which, *prima facie,* is a good one.

There is no allegation that by the law of Virginia, where the deed was made, a limitation over *by deed,* after a life estate in slaves, is valid.

By the common law such a limitation of a chattel by deed is void, for the life estate consumes the entire interest. We presume the common law prevails in that State, until the contrary appears.

So that the plaintiffs do not show a *prima facie* valid title, and have not entitled themselves to ask the extraordinary aid of this Court.

The interlocutory order disallowing the motion to remove the
(418) sequestration and continuing the sequestration until the hearing must be reversed, with costs in both courts.

PER CURIAM. Reversed.

Cited: Lloyd v. Heath, 45 N. C., 41; *Wilson v. Mace,* 55 N. C., 8; *Swindell v. Bradley,* 56 N. C., 356; *Brown v. Pratt, id.,* 204; *Jones v. Reddick,* 79 N. C., 292; *Gooch v. Faucett,* 122 N. C., 272; *Terry v. Robbins,* 128 N. C., 142; *Lassiter v. R. R.,* 136 N. C., 99; *Hall v. R. R.,* 146 N. C., 351; *Woods v. Telegraph Co.,* 148 N. C., 7; *Carriage Co. v. Dowd,* 155 N. C., 317.

JOHN M. PEGUES v. CLAUDIUS PEGUES.

When A. purchased B.'s land at execution sale, and the purchase money was furnished to A. for the benefit of B.: *Held*, that B. had an equitable estate in the land.

CAUSE removed from the Court of Equity of ANSON, at Fall Term, 1848.

The facts are, that about 1823 the land set out in the pleadings was sold by the sheriff of Anson as the property of the defendant Claudius Pegues, when the plaintiff became the purchaser, and took a deed from the sheriff; that the purchase money was furnished to the plaintiff for the benefit of the defendant Claudius Pegues; that, afterwards, in May, 1823, Claudius Pegues, being indebted to John King to the amount of about $230, and being indebted to the plaintiff to the amount of $350, a deed for the land was executed by the plaintiff and the defendant Claudius Pegues to the said King, in trust to secure the payment of the sum of $582 (the amount of the said two debts) to the said King, who, at the same time, executed to the plaintiff a deed binding himself to pay to the plaintiff the sum of $350, and interest out of the $582, secured by the deed of trust, when the same should be secured; that afterwards the defendant Claudius Pegues made several payments to (419) the said King and his personal representative upon the debt secured by the deed of trust; that in January, 1843, the defendant Claudius Pegues conveyed the land to John Grady, one of the other defendants, who had notice of the claim of the plaintiff; that John King died in the year ____, intestate; that Charlotte King, one of the other defendants, is his administratrix, and the other defendants are his heirs at law.

The plaintiff asks for a conveyance of the land by the heirs of King, and a release by the defendants Claudius Pegues and John Grady.

Strange for plaintiff.
Winston for defendant.

PEARSON, J. We are of opinion that he is not entitled to this relief. The plaintiff insists that if the debt to King has been satisfied, the whole resulting trust belongs to him, and he may call for the legal title. This would be true, provided the equitable as well as the legal estate belonged to him before the deed of trust. But the price paid for the land was furnished for the benefit of the defendant Claudius Pegues. This gave him the equitable estate, although the legal title was in the plaintiff.

The effect of the deed of trust was to vest the estate in King in trust to secure the payment of the debts due to King and the plaintiff, and then in trust for the defendant Claudius Pegues, the equitable owner.

If the debt to King has been paid, the trust is so far satisfied; but if it remains unsatisfied as to the debt of the plaintiff, and although the plaintiff is not entitled to the specific relief prayed for, yet, under the general prayer, he is entitled to a decree that the land shall stand as a security for his debt, or such part of it as has not been paid to King, who by the deed of trust had authority to receive it for him.

(420) The equitable estate belongs to the defendant Claudius Pegues, or his assignee, the defendant John Grady, subject to the right of the plaintiff and King to have their debts, or such parts as may not have been paid, secured by the land. Grady did not acquire the legal estate by the conveyance of his codefendant Claudius Pegues, and can only set up his equity.

It was urged by the defendants' counsel that the effect of the deed by King to the plaintiff was to discharge the land so far as the plaintiff's debt was concerned, and substitute the mere personal obligation of King.

We think that the deed was intended to be, and had the legal effect of, an express admission by King of the plaintiff's right to that portion of the amount secured by the deed of trust; in other words, it was an express declaration of the trust to that effect.

A reference will be made to ascertain whether any, or how much, of the debt of King remains unsatisfied, and the amount of the debt, with interest, due the plaintiff, and whether any, and, if so, what payments have been made to King for an account of the plaintiff's debt.

PER CURIAM. Decree accordingly.

Cited: Thurber v. LaRoque, 105 N. C., 306; *Gorrell v. Alspaugh,* 120 N. C., 366.

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(421)

JESSE WARD'S EXECUTORS v. WILLIAM SUTTON ET AL.

1. When gifts in a will are to "children," the general rule is that, when there are persons who answer that description, grandchildren cannot take under it.

2. A. devised all the residue of his estate as follows: "to be equally divided between Lany Harper's children, Sarah Jarman and her children, Isaac Ward's two children, Elizabeth and Lany, etc., and Winifred Williams' Koonce children to be equal in said residue with Lany Harper's and Sarah Jarman and her children, and my nephew Miles W. Spight to be equal with the two Koonce children"—and there were three of the Koonce children. *Held,* that the Court could not strike out the word "two" in the bequest to Spight, but to effect the intention of the testator that word must be referred to Ward's children.

WARD *v.* SUTTON.

CAUSE removed from the Court of Equity of CARTERET, at Fall Term, 1848.

Jesse Ward, after several specific dispositions, devised and bequeathed as follows: "The residue of my property, both real and personal, to be equally divided between Lany Harper's children, Sarah Jarman and her children, and my brother Isaac Ward's two children, Elizabeth and Lany, for the two last mentioned to have one-half as much as the other two families, and my sister Winifred Williams' Koonce children to be equal in the said residue with Lany Harper's and Sarah Jarman and her children, and my nephew Miles W. Spight to be equal to the two Koonce children in the said residue."

The bill was filed by the executors to have the rights of the residuary legatees declared; and the facts are stated to be these: The testator had a brother Isaac Ward, and three sisters, Lany Harper, Sarah Jarman, and Winifred Williams, all of whom were dead at the making of the will, except Mrs. Jarman. The brother left two children, Elizabeth and Lany, who are mentioned in the will. Lany Harper left several children, who were living at the making of the will and death of (422) the testator; and she also had other children, who died before the execution of the will and left children. Mrs. Jarman had several children living at the date of the will and the testator's death, and she had others who died before the execution of the will and left children. Mrs. Williams had been married three times: the first, to Koonce, by whom she had three children, all of whom were living at the date of the will and the death of the testator; next, to Spight, by whom she had one child, Miles W. Spight, mentioned in the will; lastly, she married Williams, and died before the making of the will.

J. H. Bryan for plaintiff.
No counsel for defendants.

RUFFIN, C. J. One of the points raised in this case is whether Mrs. Harper's and Mrs. Jarman's grandchildren, whose parents were dead, take any part of the gifts to those two families. The gifts being to "children," the general rule is that when there are persons who answer that description, grandchildren cannot take under it. The subsequent use of the term "families," in the gift to Isaac Ward's children, cannot affect the application of the rule; for it refers to the preceding part of the clause, in which it is seen that Mrs. Harper's "family" consisted of her "children," and Mrs. Jarman's consisted of herself and her "children."

Another point is made as to the amount of the share or part of the share given to the nephew, Spight. The will says he is "to be equal with the two Koonce children in said residue." The legatee is to have

a share of the property, if it can be reasonably ascertained; and in ascertaining it, words are not to be rejected except upon necessity, either because they are unmeaning or repugnant to other plain provisions (423) of the will. Every word is to be retained and a sensible meaning put on it, if possible, so as to effectuate the apparent intent; and, if it be necessary to the sense, words and even sentences may be transposed. Those are settled principles of construction, reasonable in themselves and of obvious utility, and, when applied to this will, they seem to point out its just interpretation.

It is said that as there were in fact three of the Koonces, instead of two, the word "two" is to be struck out, so as to make the will read that Spight "is to be equal with the Koonce children." That being done, then, it is contended, on the one hand, that Spight "is to be equal with the Koonce children in the share of the residue previously bestowed on them," or, on the other, that Spight is to have a distinct share in the residue equal to that of the Koonces. With respect to the first position, it is to be remarked that if such had been the testator's meaning, he would have expressed it at once in the simple but comprehensive terms, "my sister Winifred's children." Besides, the provision with respect to Spight is that he shall be equal to the Koonces, not in their share of the residue, but "in said residue," that is, in the whole residue. This would establish the second of the above positions to be the true meaning, and Spight would have as much of the residue as all three of the Koonces together. But that, for other reasons, is as inadmissible as the former construction; for the effect of either would be not only to strike "two" out of the will altogether, but also to leave a part of the residue undisposed of, contrary to the words and the clear general intention of the testator; for the testator, by the direction as to the equal division of his property, gives to Mrs. Harper's children one share of it, to Mrs. Jarman and her children another, to the Koonce children another, and half a share to the two children of Isaac Ward; and then, according to (424) the hypothesis above, he gave to Spight either a share of the Koonce share or a distinct and full share of the whole. Take it either way, and the result is that there would be an intestacy as to a part; for in the one case there would be given away three shares and a half, the whole into four equal parts to be divided; and in the other, four and a half, the whole into five equal parts to be divided. These incongruities prove to our apprehension that the meaning does not require nor admit "two" to be struck out of the will, though it cannot stand where it does, because there it is repugnant and absurd. It follows that by transposition it must be applied to other persons, so as to make the whole provision consistent and sensible. That is done, we think, by reading the will "*the* two Ward children," instead of "*the* two Koonce chil-

dren." Isaac Ward had in fact two children, who are mentioned just before the same clause not only as his brother's children, but are described by the names and number. By giving that application to "two," the whole residue passes by the clause; for Mrs. Harper's, Mrs. Jarman's, and the Koonce families get one share each, "the two Ward children" get half a share, and Miles W. Spight gets the remaining half share, and is thus made equal to the Wards. The question in reality is, whether "two" is to be erased or transposed. Neither is allowable, if all the words can retain their present position and be sensible. But one or the other must of necessity be done in this case, and between them the alternative is to be preferred which reconciles the different dispositions and effectuates the apparent intention.

PER CURIAM. Declared accordingly.

Cited: Mordecai v. Boylan, 59 N. C., 367; *Carson v. Carson,* 62 N. C., 58; *Lee v. Baird,* 132 N. C., 760.

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(425)

JOHN SUTTON AND WIFE v. CULLEN EDWARDS ET AL.

1. When partition is made of lands held by tenants in common, according to the provisions of the statute of 1836, Rev. Stat., ch. 85, sec. 23, the money which is assessed upon any lot, to be paid to another to produce equality of value, is by force of the statute a charge upon the land itself, and follows it, into whosesoever hands it goes.

2. There is no statutory limitation as a bar to the recovery of the money so assessed.

CAUSE removed from the Court of Equity of GREENE, at Spring Term, 1848.

The bill sets forth that Thomas Edwards died in _____, leaving a large real estate, which descended to his children, who were his heirs at law; that the plaintiff Polly Sutton was one of his heirs, and the others were Theophilus, Cullen, Francis, Thomas, Nathan, Rosa, and William T. Edwards, eight in number; and that Theophilus died intestate and without issue. A petition was filed in 1823 in the county court of Greene, by the heirs, to procure partition of the lands so descended, and such proceedings were had according to law that the lands were divided by commissioners duly appointed, who made their report to February Term, 1824, of the said court, which was confirmed and duly enrolled and registered, and the parties took possession of their respective shares. By the commissioners, lot No. 7, which was inferior to the others by $338.78, was assigned to the complainant Polly; and to make her share

equal in value, they charged share No. 1 with $155.22; share No. 5 with the sum of $70.34; share No. 2 with the sum of $132.22, to be respectively paid to share No. 7. Lot No. 1 was allotted to Francis Ed-
(426) wards, No. 2 to Thomas Edwards, and lot No. 5 to Cullen Edwards, all of whom had notice of the charge on their respective shares. Lots Nos. 1 and 2 have been conveyed to Cullen Edwards, and lot No. 5 has been conveyed by Cullen Edwards to John Sugg, who, it is alleged, had notice of the charge. The plaintiff Polly intermarried with the other plaintiff, John Sutton, as is alleged, while under age. The bill states the refusal of the defendants to pay the several sums charged by the commissioners on their respective shares, and that the plaintiffs caused a *scire facias* to issue to the defendants to enforce the collection, which was carried by appeal to the Superior Court of Greene County, where, upon objection by the defendants, the plaintiffs failed, upon the ground that there was no judgment in the county court when the division was confirmed. The bill prays for a partition now, or, at the election of the defendants, for a decree for the money which was charged upon the former partition upon the respective shares.

The answers admit the death of Thomas Edwards, and that the persons named in the bill, as such, are his children and heirs at law; that the partition was made as set forth, and that they were willing to abide by it, and have paid the money. The defendant Cullen admits that he purchased from his brother Francis, lot No. 1, and from his brother Thomas, lot No. 2; at which time, he alleges, he was ignorant that the plaintiffs claimed any charge upon them. The defendants allege that at the time the plaintiffs intermarried, the plaintiff Polly was of full age, and claim the benefit of the statute of limitations as if pleaded; and they further claim the benefit of the presumption of payment arising from lapse of time. They further allege that at May Term, 1826, of Greene County Court the plaintiff John was appointed guardian to the defendants Nathan, Cullen, Thomas, Franklin, and Rosa, and took into possession their property, both real and personal, and from the
(427) rents and profits thereof has retained in his hands money sufficient to pay the charges upon their respective shares.

Replication was taken to the answers, and the cause transferred to the Supreme Court.

J. H. Bryan and Husted for plaintiffs.
Mordecai for defendants.

NASH, J. It is not denied that the partition of the lands of Thomas Edwards among his heirs did take place as set forth in the bill, and that lot No. 7 was assigned to the plaintiff Polly Sutton, and that lots Nos. 1, 2 and 5 were severally assigned to Francis, Thomas, and Cullen Ed-

wards, and charged with the respective sums, as stated, to be paid to lot No. 7. It is further admitted that Cullen subsequently purchased the shares of Franklin and Thomas, and, it is proved, sold his original lot No. 5 to the defendant John Sugg. These were the only shares charged with the payment of money. The object of the bill is to compel a compliance with the judgment of partition by enforcing through a decree of this Court the payment of the money, or, in case the defendants object to that, to obtain partition now. When partition is made of land held by tenants in common, according to the provisions of the statute of 1836, Rev. St., ch. 85, sec. 23, the money which is assessed upon any lot to be paid to another to produce equality of value is, by force of the act, a charge upon the land itself, and follows it into whosesoever hands it goes. *Wynn v. Tunstall,* 16 N. C., 28. The lien is a specific one upon the land. The defendants having agreed that the partition heretofore made shall stand, the only question is whether the sum assessed has been paid; if not, from whom it is to be raised.

The defendants object to the relief sought by the plaintiffs, on (428) several grounds. The first is that their claim is barred by the statute of limitations. The second, that the lapse of time raises the presumption of payment. The third, because the plaintiff John Sutton was their guardian, and took into his possession their land, and from the rents and profits he received and retained in his hands a sum sufficient to pay off the charge upon it; and the fourth, that they are purchasers without notice.

The fourth objection hath already been answered, in holding that the sums assessed are a charge upon the land. Neither can the first and second objections avail the defendants. There is no statutory limitation as a bar by which proceedings of this kind are governed.

The presumption of payment, under the circumstances of this case, does not arise. By the act of 1801, Rev. St., ch. 85, secs. 3, 4, it is provided that when in partition of land a lot assigned to a minor is charged with the payment of a sum of money, it shall not be payable until the minor arrives at full age, unless the guardian shall have assets in his hands sufficient to discharge the lien. The Legislature did not intend the land should be sold to pay the money assessed on it during the minority of the owner. The defendants say they were minors when the partition was made; but they have failed to prove when they were born, and, of course, when they came of age. There is, then, no point of time fixed by the evidence when the presumption of payment could arise.

It is, in the third place, objected by the defendants that the plaintiff John Sutton, as their guardian, had in his hands from the rents of their lands money sufficient to discharge the lien, and that he had retained it for that purpose.

There is no evidence in the case that John Sutton ever was appointed the guardian of Cullen and Francis, or ever acted as such. But there is evidence in the case which satisfactorily shows that he was
(429) guardian of Thomas. A record is produced which shows that a suit was brought against him in the name of the State to the use of Thomas Edwards, which was finally disposed of at August Term, 1841, of Lenoir County Court. In the progress of the suit the accounts of the guardian were referred to two referees, who reported that, upon stating his account, it was found that he owed the plaintiff $55; but that the plaintiff owed him for owelty of partition, in principal and interest, $231.98; and the jury, under the plea of payment, found a verdict for the defendant. So far, then, as lot No. 5 is concerned, the jury have found substantially in that case that Thomas Edwards had paid the sum of $55, and no more, due upon it to the present plaintiff. No evidence, as before remarked, has been laid before the Court to show that John Sutton ever was the guardian in fact or in law of Cullen and Francis, or that he had one cent of their property; so that he could not have been liable, even if it was shown he was their guardian. Such, probably, was the fact, but a court of equity is confined to the *allegata et probata* of the case. A chancellor has no more authority to decide matters of fact without evidence than has a jury.

Finally, the defendants say and prove that the plaintiffs, before the bringing this suit, had sold lot No. 7 to one Isaac Edwards, and have thereby debarred themselves from any right to claim the money assessed to it in the partition. We have looked into the copy of the conveyance to Isaac Edwards filed by the defendants. The deed is an ordinary conveyance of the *land* described in it, with all the right and interest of the bargainors in and to it. Not a word is said of any interest which they might have in lots Nos. 1, 2, and 5 being conveyed. That such owner might not part, by sale, with his land, the share allotted to him, and still retain his right to the money assessed to it, cannot be seriously pretended.

(430) The plaintiffs are entitled to have the former partition established, and to a decree for the payment of the sums charged, and interest. As the former owners, in selling their shares, have not, as far as is shown, left in the hands of the purchasers any funds with which the money charged on their shares might be paid, the decree must, in the first place, be against the original owners, and, if the money cannot be raised out of them, they are entitled to a decree against the land.

And there must be a reference to the master to ascertain the sums due, in principal and interest, from the lots Nos. 1, 2, and 5, respectively.

PER CURIAM. Decree accordingly.

Cited: Young v. Trustees, 62 N. C., 265; *Ruffin v. Cox,* 71 N. C., 256; *Pullen v. Mining Co., ib.,* 565; *In re Walker,* 107 N. C., 342; *Herman v. Watts, ib.,* 650; *In re Ausborn,* 122 N. C., 44; *Smith ex parte,* 134 N. C., 497.

SAMUEL HARGRAVE ET AL. v. ROSWELL A. KING ET AL.

1. A condition in a lease for years or for life, that the lease is to be void if the lessee assigns, is valid. But a lessee under such a condition may associate others with himself in the enjoyment of the term, or may make a *sublease.*

2. If one agrees by parol to buy land for another, and he does buy the land and pay for it with the money of his principal, but takes the deed in his own name, equity will enforce the agreement and compel him to make title to the principal. So of an agreement to procure a lease for another. In these, the statute requiring contracts for selling or conveying land, or leasing or agreeing to lease, to be in writing, does not apply.

APPEAL from an interlocutory order of the Court of Equity of DAVIDSON, overruling the pleas of the defendants, at Spring Term, 1848. *Pearson, J.*

The bill alleges that the plaintiffs and the defendants Adderton (431) and King agreed to associate themselves together as a company or copartnership, for the purpose of procuring a lease from the defendant Sawyer of certain land owned by him, and to search and operate for gold thereon; that in pursuance of this agreement King procured a lease from Sawyer of 75 acres of land for the term of twenty years; that the lease was taken "to King and those he may associate with him"; that after King had obtained the lease, the plaintiffs and the defendant Adderton, in pursuance of their previous agreement, requested King to sign with them written articles of agreement by which their interest in the said lease should be recognized and secured, and by which the parties respectively were to contribute equally towards the expense of working the mine, and to divide the net profits equally; that King, under one pretext and another, from time to time, refused to enter into any written agreement, and finally set up claim in himself to the whole lease. The prayer is that King may be declared a trustee of the lease for the plaintiffs and himself and the defendant Adderton, and may be decreed a trustee to convey to them as his associates, and for other relief.

The defendant King filed two pleas:

"The plea of Roswell A. King, one of the defendants, to the bill of complaint of Samuel Hargrave, James A. Long, and Samuel Gaither, exhibited against said King, Enoch Sawyer, and Jeremiah Adderton in this Honorable Court.

"This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in complainants' said bill of complaint to be true in such sort, manner, and form as the same are hereby set forth and declared, which for plea thereunto saith:

"That the lease mentioned in the bill, and this defendant is required to produce for the inspection of this Honorable Court, is the same of which a copy is hereunto appended, marked (A), and the original (432) of which is ready to be produced, if required by this Honorable Court, and defendant prays that the said copy may be taken as a part of this his plea.

"That by the terms of the said lease it will appear that this defendant cannot associate with himself any persons without the consent of the lessor, one Enoch Sawyer, or sell or transfer any part or interest in the said lease without such consent, on pain of a forfeiture of the entire lease by this defendant; and this defendant doth aver that the said Sawyer, on application by this defendant, hath refused his consent to the complainants, as lessees or associates of this defendant in the said lease, and hath informed this defendant that he shall insist on the condition in the said lease by which such association or transfer or sale to others, without his consent, is declared a forfeiture, and shall proceed to enforce the same should such sale, association, or transfer be attempted; all which matters this defendant doth aver and plead in *bar* of the complainants' said bill and pretended demands.

"And this defendant, for further plea, saith that he is advised that by the act of the General Assembly of this State, passed in the year 1819, Rev. St., ch. 50, sec. 8, 'all contracts to convey lands or any interest in or concerning them shall be void and of no effect unless such contract, or some note or memorandum thereof, shall be put in writing, excepting leases for three years.' And also by the act of the General Assembly, passed in the year 1844, 'all contracts for leasing or leases of lands, for the purpose of digging for gold or other minerals, or for the purpose of mining generally, shall be void and of no effect unless such contract or lease, or some memorandum or note thereof, shall be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.' And this defendant saith that neither he nor any other person by him lawfully authorized did (433) ever sign any contract or agreement in writing to sell or lease, or for the sale of or the leasing of, any lands *to the complainants,* or any lease for digging for gold or minerals generally, or any lands, or any interest in or concerning any such lands, for any such purpose or to any such effect, or any note or memorandum in writing of any such agreement, nor has any one signed any such deed, lease, or agreement, or any such note or memorandum thereof, by authority of this defendant."

Copy of the lease filed, omitting the details:

This indenture, made 22 January, 1848, between Enoch Sawyer of the county of Randolph and State of North Carolina, of the one part, and Roswell A. King, and *those whom he may associate with him* for the purposes therein contained, of the other part, witnesseth: That the said Sawyer, for and in consideration of the sum of $1 to him in hand paid, etc., and in further consideration of the covenants hereinafter contained, hath demised, granted, and leased, and by these presents doth demise, grant, etc., unto the said Roswell A. King and his associates a certain tract or parcel of land, lying, etc., containing 75 acres, more or less, *to have and to hold the said land to him the said King and his associates, their executors, administrators, and assigns,* together with all and singular the privileges for the complete assignment of the same for mining purposes, that is to say, from the date of these presents until 22 January, 1868, that is, twenty years; and the said King doth covenant and promise to commence operations on or before the 10th day of February next, and to pay to the said Sawyer one-seventh of all the gold, silver, and other metal which may be extracted or obtained from the said mine, which toll of one-seventh shall be paid monthly to the said Sawyer, his heirs or assigns. Also my mill-site, etc., etc. (434)

The said King has not the privilege of the timber, without permission. The said King not to sell or transfer this lease, under forfeiture of the same, without consulting said Sawyer.

ROSWELL A. KING. [SEAL]
ENOCH SAWYER. [SEAL]

The plaintiffs set the pleas down for argument, and it was considered by the court that the said pleas be overruled, with costs, and that the defendant King answer the bill; from which interlocutory decree the defendant King prayed leave to appeal to the Supreme Court, which was allowed.

Mendenhall and W. H. Haywood for plaintiffs.
Winston, Waddell, and J. H. Bryan for defendants.

PEARSON, J. The appeal only brings up the interlocutory decree overruling the pleas. Our consideration, therefore, is confined to their sufficiency.

Many objections were taken in this Court for the want of form. It may be that the pleas are defective in form; but as we concur with the opinion below upon the substance, we express no opinion as to the formal objections.

The first plea was objected to because the allegation, "that the defendant cannot by the terms of the lease *associate* with himself any persons,

or sell or transfer any part or interest in the lease, without the consent of the lessor, on pain of a forfeiture," is repugnant to and inconsistent with the terms of the lease, which is made a part of the plea. This objection would be fatal; but to raise the questions which were intended to be presented by this plea we will consider the allegation made so as to conform to the words and terms of the lease. Two questions
(435) are there made: Is a condition valid by which a lease for years is to be void if the lessee assigns? Such a condition is clearly good in a term for years or for life. It is not a capricious exercise of power on the part of the lessor. In a lease for agricultural purposes the lessor is interested in having a good tenant and one who understands his business. He is more so in a lease for mining purposes, where greater skill is required and more confidence is necessarily reposed in accounting for the tolls or rent.

The other question is, Will King, by the terms of this lease, incur a forfeiture by recognizing the plaintiffs and the defendant Adderton as his *associates* and conveying to them as tenants in common *with himself?* Clearly he will not. Conditions are taken strictly because they divest estates; hence, although there be a condition not to assign, the lessee may make a *sublease; a fortiori* he may take in associates or partners. The lease under consideration has an express clause by which King is allowed to associate others with himself. The condition is, "that he is not to sell or transfer the lease"; in other words, he is not to "assign" so as to be *himself* no longer interested in it. The plea is founded upon an entire misconception of the lease and the condition. The object of the lessor was to provide that King should retain an interest in the lease, because he had reliance upon his skill and honesty. It was not intended to cramp his operations by excluding the aid of associates.

The second plea was objected to because the averment that "neither the defendant nor any other person by him authorized did ever sign any contract or agreement in writing to sell or lease, or for the sale of or leasing of, any lands to the *complainants,* or any lease for digging for gold, or minerals generally, or any lands, or any interest in or concerning any such lands," etc., is irrelevant to and does not meet any
(436) allegation made in the bill; for the bill does not allege that the defendant did agree to sell or lease any land, or any interest in or concerning land, to the plaintiffs; but the allegation is that the defendant leased the land of Sawyer (which lease is in writing) for himself and as the agent of the plaintiffs and the defendant Adderton.

This objection is fatal; it goes to the merits. The plea does not allege that the *agreement* set out in the bill was not reduced to writing so as to

raise the question whether that *agreement* comes within the operation of the statutes which are referred to in the plea. So the plea does not *"hit the case"* made in the bill, and is, therefore, no answer to it.

But if the plea had been so framed as to raise the question whether the *agreement* set up in the bill comes within the objection of the statutes referred to, we think it does not.

The effect of the act of 1844 is to except contracts "for leasing or leases" (when the purpose is to dig for gold, etc.) out of the exception in the act of 1812, allowing parol contracts for leases not exceeding three years. In regard to leases, both statutes are, by their terms, confined to cases where one makes a lease or agrees to make a lease to another.

It is well settled that if one agrees, by parol, to buy land for another, and he does buy the land and pay for it with the money of his principal, but takes the deed in his own name, equity will enforce the agreement, hold him to be a trustee, and compel him to make title to the principal; for the statute which requires all contracts "to sell or convey land" to be in writing, has no application. The principle is the same when one, by parol, agrees to procure a lease for himself and others, and does procure the lease in his own name, he is a trustee for those for whom he agreed to act, and the statutes referred to have no application.

The interlocutory decree, appealed from, must be affirmed, with (437) costs.

PER CURIAM. Affirmed.

Cited: Clement v. Clement, 54 N. C., 185; *Cloninger v. Summit,* 55 N. C., 515; *Hanff v. Howard,* 56 N. C., 445; *Shelton v. Shelton,* 58 N. C., 294; *Cohn v. Chapman,* 62 N. C., 94; *Barnes v. Brown,* 71 N. C., 511; *Barnard v. Hawks,* 111 N. C., 337; *Cobb v. Edwards,* 117 N. C., 247; *Gorrell v. Alspaugh,* 120 N. C., 366; *Avery v. Stewart,* 136 N. C., 440; *Russell v. Wade,* 146 N. C., 122; *Jones v. Jones,* 164 N. C., 325; *Brogden v. Gibson,* 165 N. C., 23.

Dist.: Sherrill v. Sherrill, 73 N. C., 14.

MEMORANDUM

The Honorable RICHMOND M. PEARSON, one of the judges of the Superior Courts, was elected by the General Assembly, in December, 1848, a judge of the Supreme Court, to supply the vacancy occasioned by the death of Judge DANIEL.

The Honorable WILLIAM H. BATTLE, who had received the temporary appointment by the Governor and Council to the Bench of the Supreme Court, resigned that office in December, 1848, and the Honorable RICHMOND M. PEARSON was elected to supply the vacancy thus created.

The Honorable AUGUSTUS MOORE, who had received from the Governor and Council the temporary appointment of a judge of the Superior Courts, was elected to the same office by the General Assembly in December, 1848, and soon after resigned it, upon which the Honorable WILLIAM H. BATTLE was elected to succeed him.

The Honorable JOHN W. ELLIS was elected to the office of judge of the Superior Courts by the General Assembly, in December, 1848, to supply the vacancy occasioned by the promotion of the Honorable Judge PEARSON.

The Honorable BARTHOLOMEW F. MOORE, who had received from the Governor and Council the temporary appointment of Attorney-General, upon the resignation of Honorable EDWARD STANLY, was elected to the same office by the General Assembly in December, 1848.

APPENDIX

WADDELL v. BERRY.

In the matter of a contested election before the Senate of the State, between Hugh Waddell, contestant, and John Berry, the returned member, the following resolutions were adopted by the Senate and the following response made by the Supreme Court through the Chief Justice:

SENATE, 17 January, 1849.

Whereas there is a contested election depending before the Senate, in which the following questions of a constitutional character arise, on the making a correct determination of which the Senate feel great difficulty: Therefore,

Be it Resolved, That the said questions be respectfully submitted to the Supreme Court for their consideration, with a request that the said Court would furnish the Senate, as soon as practicable, their opinion on the same, viz.:

Question 1. Is, or is not, the vote of a bargainor in a deed of trust legal?

Question 2. Is, or is not, the vote of a trustee under a deed of trust legal?

Question 3. Is, or is not, the vote of a *cestui que trust* legal?

CALVIN GRAVES, S. S.

A true copy from the Journal of the Senate.

H. W. MILLER,
Clerk of the Senate.

Communication from Chief Justice Ruffin in reply to a resolution of the Senate:

RALEIGH, 18 January, 1849.

SIR:—The resolution of the Senate, passed on 17 instant, requesting the judges of the Supreme Court to furnish the Senate with their opinions on certain questions therein mentioned, touching the qualifications of persons to vote for members of the Senate, under the Constitution of this State, was laid before the judges on the evening of yesterday.

Although not strictly an act of official obligation which could not be declined, yet from the nature of the questions, and the purpose to which the answers are to be applied—being somewhat of a judicial character—the judges have deemed it a duty of courtesy and respect to the Senate to consider the points submitted to them and to give their opinions thereon. I am, accordingly, directed to communicate it.

Three questions are proposed, which are thus expressed:

"First. Is, or is not, the vote of a bargainor in a deed of trust legal?

"Second. Is, or is not, the vote of a trustee under a deed of trust legal?

"Third. Is, or is not, the vote of a *cestui que trust* legal?"

It is to be premised that categorical answers to these inquiries could not be useful to the Senate, for want of the precision in the terms of the questions themselves which is usual and requisite in legal discussions; for neither the subject of the conveyance, nor the nature of the trusts, nor the estates of the bargainor and bargainee are specified. But referring to the nature of the controversy before the Senate, as stated in the resolution, it is supposed that the case to which the Senate alludes is of this kind: That one entitled to at least 50 acres of land, for life or some greater estate, conveys it by deed of bargain and sale to a trustee to secure debts to other persons, with a power to the trustee to sell the estate and out of the proceeds to pay the debts. Then, supposing the proper residences of the parties, the points are, whether the bargainor, the bargainee, or the creditor, and, if either, which of them, hath a right to vote for a member of the Senate.

The judges would have been gratified to have heard, before forming their opinion, an argument on the part of the gentlemen concerned on opposite sides; and if the matter of law involved in the questions of the Senate were deemed by them doubtful, they would have been obliged to defer their answer until the parties or their counsel could submit their views. But as the judges, upon conference, have found that their opinions entirely concur, and that no one of them entertains a serious doubt upon the subject, they have felt safe, and that it was proper, to deliver their opinion at once, in order to remove the difficulty felt by the Senate in determining the pending contest, as far as their opinion can contribute to that end.

The questions depend entirely upon the proper construction of the second clause of the third section of the first article of the amendments to the Constitution of the State. It is, that "all freemen (except free negroes, etc.) who have been inhabitants of any one district within the State twelve months immediately preceding the day of any election, and possessed of a freehold within the same district of 50 acres of land for six months next before and at the day of election, shall be entitled to vote for a member of the Senate." This language is precise and positive, that the right to vote belongs only to him who is possessed of a freehold. The first inquiry, then, naturally is, What is a freehold, and who is a freeholder, within the meaning of the Constitution?

The term "freehold" is a legal one, of very ancient use and of known signification in the common law. It means an estate in land of which a freeman is seized for the term of his own life, or the life of another, at the least. In its proper sense, it is restricted to such an estate at law. In reference to private rights, it is always used in pleadings and statutes

as applicable to legal rights and to legal rights only. It has likewise been used in the same sense in reference to the qualifications of voters. Long before the settlement of the colony of North Carolina, the right of voting for a member of Parliament was limited, by an ancient statute of England, to "freeholders." A conclusive proof that a freeholder, as meant in that statute, was, as at common law, one who had the legal estate in himself, is furnished by the facts that it required a subsequent statute in that country to enable a mortgagor of a freehold estate, continuing in possession, to vote, and another to disable the mortgagee from voting, when he is not in the actual possession of the mortgaged premises or in the pernancy of the profits. So, by an act passed in 1760, by our Colonial Legislature, substantially following a previous one of 1743, it was thought necessary or useful to define the term "freeholder" as descriptive of one entitled to vote for Representatives; and therein it was provided that a person who *bona fide* hath an *estate real* for his own life or the life of another, or *an estate* of greater dignity, of a sufficient number of acres of land, should be accounted a "freeholder" and entitled as such to vote; and in a subsequent clause it was further enacted that the voter must be possessed of a freehold within the meaning of that act—that is, *an estate real* for life at least—"in 50 acres of land." It is thus easy to see whence the framers of the Constitution, in 1776, and in 1835, derived the notion of the particular qualification of a freehold, and also the terms of its description. Certainly, the settled sense of the word "freehold," as a term of the law descriptive of an estate in land, and in like manner as descriptive of a property qualification of voters, both in the mother country and in this colony, is that in which it must be received when used in the Constitution when prescribing such a qualification for voters.

It may be thought by some persons that in favor of the elective franchise the Constitution should receive an equitable interpretation, enlarging the term "freehold" so as to embrace, also, what is called an "equitable freehold." But that instrument is to be fairly construed and received according to the plain and popular import of its language generally, or according to their legal sense when it uses technical legal terms. It is not to be crippled by a rigorous adherence to the letter, on the one hand, nor stretched out of bounds on the other, by a latitudinous construction of words of definite and well-known signification. The very fact of requiring a property qualification repels all attempts to fritter it away upon a plea of favor to the citizen. The Constitution forbids any such favor by the plain implication that such a qualification is deemed indispensably requisite to the security of the citizens or the stability of the Government; and its provisions in this respect ought no more to be enlarged than restricted by construction. Now, "freehold" and "free-

holder" are terms of art, of the definite signification in the law, hitherto mentioned, and therefore they ought so to be understood. It is true that writers on that peculiar branch of our jurisprudence which is called equity, in contradistinction to the common or statute laws, and also chancellors, sometimes use the expression "equitable freeholder." But in thus using it they speak, not in a literal, but a figurative sense. They do not mean that there really is a freehold in equity, but only that one who, in the view of a court of equity, is entitled *in presenti* to the profits of land for life, of which another is seized, is to be regarded in that court, to many purposes, as if he were seized of the land, instead of being entitled to the use and profits merely. But that refers solely to the beneficial rights of property *in equity,* in respect to the enjoyment, disposition, and transmission of the use by descent, or the like, and not at all to legal rights or political privileges. To such rights and privileges the clause in the Constitution relates, and its terms cannot therefore be controlled by any peculiar sense in which a chancellor might figuratively use them in reference to certain equitable interests which, in some respects, have a similitude to freeholds in land, but are not really freeholds.

The foregoing considerations have so much weight in establishing the proposition that a bargainor in such a deed of trust as that supposed, or a mortgagor, is not entitled to vote for a member of the Senate, that the judges would entertain that opinion on those grounds, were there nothing else bearing on the point. But there are various other reasons, arising out of the purposes of the provision in the Constitution, and from the nature of such trusts and the rights of mortgagors, which strongly tend to the same result. Undoubtedly the object in requiring the freehold qualification was to constitute one branch of the Legislature peculiarly the guardian of property by having it chosen by the owners of property. To answer that end, the ownership of the property ought to be *bona fide* and substantial, and not colorable and covinous, or nominal merely. Then, it is to be observed that debtors frequently mortgage their estates, or convey them in trust, as a security for debts to a greater amount than the value of the land. In those cases they have such interests in the equity of redemption or resulting trust that, while they continue in the possession and enjoyment of the land, they may be called "the equitable freeholders" in the court of chancery, though their estates, or, rather, interests, are really of no value. It would be a gross abuse of the Constitution for such persons to vote, as they have neither a legal nor beneficial property. That might, indeed, be otherwise if the Constitution required a freehold of a particular value. In that case, possibly, the value of the land above the encumbrance might be deemed or declared to be the measure of the equitable freehold, as it is called. But

there can be no such discrimination in this State. No act of the Legislature can add to the qualifications for voting or take anything away. No law can now declare what is a freehold, so as to make it different from that described and meant in the Constitution. As, therefore, debtors who convey their estates in mortgage or in trust to secure more than their value cannot, in any just sense or by any intelligent and upright tribunal, be deemed freeholders, to the purposes of the Constitution, and as there is no power to create a distinction between such mortgages and deeds of trust and those in which the debts are less than the value of the estate, it appears to follow necessarily that no mortgagor or bargainor in a deed of trust of that kind is competent to vote; for, as all cannot be admitted at the polls, none can, since they all have rights of the same nature, though of different values in the market, and the Constitution refers exclusively to the quantity of the land and the nature of the estate in it, without regard to value in any case.

Moreover, if persons claiming equitable interests under express reservations or declarations of trust were entitled to vote, so, in like manner, would those entitled by way of resulting or implied trusts. Thus, upon a contract for the purchase of a freehold, the vendor before a conveyance becomes a trustee for the vendee, and the latter the equitable owner of the land, provided he has paid the purchase money or performed the contract on his part. But it seems quite clear that it was not contemplated in the Constitution to make such nice and doubtful equities as often arise out of such dealings, the subject of controversy at the polls, to be decided by the judges of the election. On the contrary, it was proper that the title to the vote should be defined clearly and rendered simple, so that the rights and duties of the citizen could be easily understood and readily determined. By viewing the Constitution in the legal and obvious sense of its language, the right to vote is thus defined, and vested in the owner of the land for life—"the freeholder"—in possession.

The conclusion of the judges is, and they are all of opinion, that the bargainor in such a deed of trust as that supposed is not entitled to vote for a member of the Senate, in virtue of any trust or interest in the land or in the surplus of its proceeds, after payment of the debts, reserved or resulting to him.

It follows that a creditor secured by such a deed cannot, as a *cestui que trust,* vote for a Senator; for he has neither a legal nor an equitable right to the land, but only a right to have his debt raised out of it. Indeed, if a conveyance be made to one upon an express and pure trust for another for life, or any greater interest, the reasons already adduced upon the first point satisfy the judges that the *cestui que trust* is not

entitled to vote; because, in their opinion, merely equitable interests are not within the purview of the Constitution at all, but proper freeholds only.

Upon the remaining question as framed, namely, whether the bargainee or trustee in such a deed be entitled to vote, the opinion of the judges is likewise in the negative. Such a person is a freeholder; and if that by itself would suffice, he would be entitled to vote. But by the words of the Constitution, one must not only have a freehold, but be "possessed" of it. That is a material and, indeed, essential part of the provision. In legal language, "possessed" is not the appropriate term to describe the quantity of an estate as being a freehold. Technically, he who has a freehold is said to be "seized," and we know thereby that he is fully vested of the estate. "Possessed," then, when applied to a freehold, means something more than that the party is seized for life; for such seizin is implied in the term "freehold," by itself. It can therefore only mean that the person must be in possession of the land as his freehold. "Possessed" is therefore very properly applied to the term "freehold" in the Constitution—not as denoting merely that a person hath a lawful right to the land, but, further, that he is in the actual enjoyment by possession or perception of the profits, or, at least, that no one else is.

As has been already remarked, the policy of the Constitution is that voters for members of the Senate should have a substantial interest in the country in the form of a freehold in at least 50 acres of land. Now, there may be such a freehold which gives no beneficial interest to the freeholder, in whom the estate was vested for the use and benefit of another entirely. It is manifest that such a freeholder does not stand in such a relation to the property and the country as affords a reasonable expectation that he will exercise the elective franchise upon the motives and to the ends for which the property qualification is required. A mere mortgagee, that is, one not in possession, has the estate barely as a security for a sum of money; and a trustee in the like condition holds the title exclusively for the benefit of others. It often happens that the legal estate is outstanding in the trustee long after the debts are paid or other trusts are satisfied; in which case the trustee cannot rightfully enter for any purpose, but is bound to reconvey the land upon request. If such a trustee were allowed to vote, it would plainly violate the policy and meaning of the Constitution, and, not less, its language. If, however, a mortgagee take actual possession by himself or his lesses, he becomes thereby a freeholder in possession. Indeed, he has a substantial interest, as well as the estate, and is in fact enjoying it, and therefore his right to vote is unquestionable. It is not so obvious that a trustee in a deed to secure debts to others is within the fair sense of the Constitution, though he take possession; and it can hardly be doubted that were

the Constitution such an instrument as deals in details, such a trustee would have been expressly excluded, or, had the case occurred to the Convention, that to the words "possessed of a freehold" would have been added "to his own use," or some provision of similar import. But the Constitution, in fact, contains no such qualification upon the right of the freeholder in possession to vote; and therefore, though not plainly within the reason of the Constitution, a trustee who is in possession of the actual receipt of the profits, though not to his own use, is fully within the express words of the provision in the Constitution as it is, and consequently he must be admitted to his vote. For there is no authority for a judicial or legislative interpolation of an exception that the person must be "possessed to his own use," when the Constitution is not thus qualified, but is expressed in language, not in itself of doubtful import, but having a clear and settled sense.

The question of the Senate has no reference to the possession of the land by the trustee; and it must, therefore, be understood as referring to the right of a trustee to vote by force, merely, of the conveyance to him, vesting the legal freehold in him. Thus understood, the answer of the judges to it is, that in their opinion such a trustee is not entitled to vote.

But, at the same time, they deem it their duty to say, further, that they are likewise of opinion that if a mortgagee go into possession of the mortgaged premises or receive the profits, or if a trustee in such a deed as that all along supposed actually enter into possession or take the profits for the requisite period, then the former, undoubtedly, and, in the opinion of the judges, the latter also, is entitled to a vote for a member of the Senate.

It will be observed that the effect of these answers is that, except when the trustee is in possession, neither the bargainor nor the trustee can be allowed to vote; and it may possibly occur to the minds of some as an objection to the principles laid down, that the land is thereby excluded from representation altogether, and, in so doing, that the Constitution is disregarded. But the objection, though it may at first appear plausible, has no real force. For the land is in no case represented. The right is in the owner. It is true, the right is conferred on him in respect of the land. But it is only for the security of his rights and interests as a citizen and owner of land; and he is not obliged by the Constitution to vote, or, after once acquiring the right to vote, not to part from it. The truth is, that there is a great deal of land on which no one votes or can vote: as, for example, that belonging to single women and infants, and to persons residing in a different district from that in which the land lies. So, if one conveys his land in such a manner as not to leave in himself a "freehold," he, of course, parts with his right to vote, though he

continue to occupy the land. But it does not follow that by depriving himself of that right, he transfers it to the alienee of the freehold; for, while the former owner cannot vote, for the want of the freehold, the new owner does not become entitled to vote by having the "freehold," unless he also become "possessed" of it. There is, consequently, no inconsistency in holding that neither of them is entitled when the trustee is not in possession either actually or by receipt of the profits.

I am, sir, with very great respect,

Your most obedient servant,

THOMAS RUFFIN.

To the HON. CALVIN GRAVES,
Speaker of the Senate.

Cited: Gill v. Comrs., 160 N. C., 761.

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by the testator, either real or personal, in his lifetime, nor anything bequeathed in the will, is to be brought into hotchpot. *Ibid.*

5. A testator devised as follows: "I direct that my children remain with my wife, to be raised and educated out of my estate. And as one child may become of age and marry, to have allotted off to such child as much of my estate as I have given to my daughter Betsy, and put her in possession of. If my wife should die my widow, I direct that *at her death* my estate of every description be equally divided between all my children, considering in the distribution the part which each child may have received at its marriage or when it came of age. In educating my children, I direct that my son Lewis be continued at college until he graduates; and should the *income* of my estate justify it, I wish my two sons James and Joseph to receive a like education—the best education the *income* of my estate will afford. I wish all my daughters to receive a good English education. Should the *income* of my estate fall short of giving them a good practical education, I wish them to receive one, *even at the expense* of the capital of my estate." *Held*, that upon the death of the widow the estate was to be divided among the children according to the directions of the will. *Amis v. Amis*, 12.

6. *Held, secondly*, that up to the time of the widow's death the infant children were to be educated out of the annual profits of the estate, free from charge and without accounting for it; and after her death the expense of the education of the children then uneducated was to be defrayed out of the income of the portion allotted to each of the said children respectively in the division, if sufficient for that purpose, but if not sufficient, each of the legatees must contribute in proportion to their shares. *Ibid.*

7. *Held, lastly*, that the property allotted to the several children to make them equal to that given to Betsy is to be valued according to the prices of such property at the time of the advancement to Betsy. *Ibid.*

8. A. by will devised certain lands to his wife, children, and grandchildren, and also directed certain parts of his personal estate to be delivered over to them. He then devised as follows: "The balance of my land and other property I appoint and ordain to be sold, and the money arising from the sale thereof, not given away, to be applied to paying my debts; and the balance, if any, to be equally divided among the herein named legatees." The will was afterwards declared good as to the real estate, but not good as to the personal estate. *Held*, that the balance of the proceeds of the land directed to be sold, after payment of the debts, should be divided among those who were named as legatees, though in fact the legacies had failed by reason of an informality in the execution of the will. *Tucker v. Tucker*, 82.

9. Where a testator who died before the passage of the act of 1830 (Rev. Stat., ch. 111, sec. 59) bequeathed certain slaves to A. and B. in trust that they should enjoy the produce of their own labor: *Held*, that this bequest was void, and the said A. and B. being the residuary legatees, that the absolute property in the slaves passed to them. *Bennehan v. Norwood*, 106.

PRACTICE.