ANNOTATIONS INCLUDE 170 N. C.

NORTH CAROLINA REPORTS

VOL. 41

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

FROM

JUNE TERM, 1849, TO JUNE TERM, 1850,

BOTH INCLUSIVE.

REPORTED BY

JAMES IREDELL.

(VOL. 6.)

ANNOTATED BY

WALTER CLARK.

(3D ANNO. ED.)

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CASES REPORTED

CASES CITED

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JUNE TERM, 1849

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(1)

JAMES H. BELL, ADMINISTRATOR, ETC., v. LEMUEL WILSON ET AL.

Before the act of 1848, ch. 101, a widow could not dissent from her husband's will by attorney, although she was too unwell or infirm to travel to court so as to dissent in person.

CAUSE transmitted form Court of Equity of GUILFORD, at Spring Term, 1849.

James Nelson died in 1844, having previously made and published in writing a last will and testament. By his will he devised to his wife, the plaintiff's intestate, a portion of his estate, both real and personal; and within the time limited by law, one D. H. Starbuck, claiming to be her counsel and attorney, on motion of the court, caused her dissent to the will to be entered of record, she not being present nor (2) appearing in court. She is dead, and the plaintiff is her administrator. The bill is filed for an account of the personal estate, and claims one-seventh, or a child's part, upon the ground of her dissent to her husband's will; and the bill charges that, at the time her dissent was made by her attorney, she was unable from bodily infirmity to attend court to make known her dissent in person.

J. T. Morehead for plaintiff.
No counsel for defendants.

NASH, J. The bill was filed at Spring Term, 1847, and at June Term, 1846, *Hinton v. Hinton,* 28 N. C., 274, was decided, which, in connection with the act of the last General Assembly, ch. 101, sec. 1, disposes of this case. It is not necessary to recite the facts of the case referred to, and

we presume this bill was filed in consequence of what fell from the Chief Justice in the last section of his opinion. He observes that, in the preceeding part of the opinion, the case had been considered solely as a question of law, upon the construction of the act of 1784, without adverting to the petitioner's sickness, which is stated in the *case*. "If it were material, it could not operate here, *because* it is not stated in the petition," etc. "But," the opinion proceeds, "if the petition had been otherwise framed, and had set out that excuse, it would have made no difference." It is true, the case then before the Court did not call for the expression of opinion upon that point, and it may, therefore, be considered extra-judicial; yet the individuals then composing the Court were united in it, and a majority of those who were then upon the bench are still so, and see no reason to alter their opinion. I am authorized to say *Judge Pearson* concurs in the opinion. The Legislature so considered the law to be after that decision, for in the act referred to, passed at their
(3) recent session, they give the widow a right, where she is sick or too infirm to travel to court, to cause her dissent to be entered by her attorney.

PER CURIAM. Bill dismissed with costs.

GAVIN H. LINDSAY v. THOMAS D. HOGG.

A testator by his last will, directed as follows: "I direct that my nephew L. be educated at my expense at the Episcopal School in Raleigh; I mean that all the expenses of the school be paid by my executors. The other expenses not belonging to his education to be paid by his father. In case, for any reason, he cannot be educated at that school, I direct my executors to pay for his education at any school in this State, and at the University; the school to be designated by his father or mother." *Held*, that the testator's estate was not chargeable with the clothes of L. while he lived with his father before he was sent to school; but that it was chargeable with his board and clothing when sent to school; and that the words "other expenses, not belonging to his education," referred to the expenses of nuture, while he was too young to be sent from home and was boarded and clothed by his father at home, to the pocket money which boys are usually allowed while at school and at the University, and to the expenses during his vacation.

CAUSE removed from the Court of Equity of GUILFORD, at Spring Term, 1849.

The bill is filed for the purpose of having a construction put upon a clause in the will of the late Gavin Hogg. The clause is as follows: "I direct that my nephew Lindsay be educated at my expense at the Episcopal School in Raleigh: I mean that all the expenses of the school be

paid by my executors. The other expenses, not belonging to his education, to be paid by his father. In case, for any reason, he cannot be educated at that school, I direct my executors to pay for his education at any school in this State and at the University; the (4) school to be designated by his father or mother."

At the death of the testator in 1835 the plaintiff was quite young; and before he was old enough to be sent from home to board, the Episcopal School in Raleigh was discontinued. For several years he was sent to school in Greensboro, where his father resided; his father boarded and clothed him, and the defendants paid for his tuition and school books.

In 1846 his father failed, and is now totally insolvent. The bill was filed in 1848. It alleges that the plaintiff was enabled to continue at school the year before by the kindness of David C. Mebane, who advanced $200 to pay for his board and his clothes, and that if he is kept at school another year he will be prepared to enter the University; but he is entirely without means and will not be able to abtain an education unless the estate of the testator is liable for the expense of his board and clothes, as well as his tuition and books. He insists that the estate is liable for his board and clothes, and he also insists that some allowance should be made for his board and clothes while he lived with his father. The defendant Sarah never qualified. The other defendant admits that he is liable for tuition and books, and that if the plaintiff had been placed as a boarder at the school in Raleigh, he would also have been liable for his board, but not for his clothes; and insists that, while he lived with his father, he was only liable for his tuition and books; and submits to the decision of the court whether he is liable for his board and clothes while the plaintiff is boarded out at school, or while he may be at the University.

Iredell for plaintiff.
Badger for defendant.

PEARSON, J. We think it clear that the defendant is not charge- (5) able for the board and clothes of the plaintiff while he lived with his father. It was conceded in the argument by the defendant's counsel that he is chargeable for board, as well as tuition and books, during the time that the plaintiff has been or may be placed, as a boarder, at school, or at the University. The only question then is, whether the defendant be chargeable for the necessary clothing as well as board. If the testator had simply directed that his nephew should be educated at his expense, it is settled by *Cloud v. Martin,* 18 N. C., 399, s. c., 22 N. C., 274, that the expense of board and *clothes,* while at school, as well as of tuition, would have been included. But it is urged that the words, "I mean that all the expenses of the school be paid by my executors. The other ex-

penses not belonging to his education, to be paid by his father," qualify and control the general words. This raises the difficulty.

It is apparent from the whole clause, and particularly from the provision that "in case, for any reason, he could not be educated at the school in Raleigh, he was to be sent to some other school," that the testator anxiously desired his nephew to be well educated. This is the paramount and leading intent, and such a construction should be given as to carry it into effect.

To confine the testator's bounty to tuition and school books, which would not exceed one-fifth of the expense of an education, would be inconsistent with the general tone of the clause, and with the assumption, which the testator, from the largeness of his bounty, thought he was at liberty to make, in *directing* that his nephew *should* be educated, and in selecting the school. The defendant's counsel conceded that something more was intended than the expense of tuition and school books, and that board was to be included, embracing, of course, washing, wood, candles, etc.

(6) It is as necessary to enable him to obtain an education that a boy should be *clothed* as that he should be *fed;* and the inquiry is, whether there be any ground for making a distinction between the expense of clothes and the expense of board.

It is urged for the defendant that the words above recited suppose "other expenses" besides those of "the school," which the father was to pay; and if clothes be included, as well as board, no meaning can be given to these words. The reply is, the argument proves too much; if clothes are excluded, the same meaning would exclude board, which would be unjust to the testator, by supposing him to make large professions—"I direct my nephew to be educated at my expense"—I mean I will pay *one-fifth* of the expense, the other four-fifths to be paid by his father.

But a further reply is, that the words are not simply "the other expenses," but "the other expenses not belonging to his *education.*" This explains what is meant by "all the expenses of the school," and reducing it to the single question, what are the expenses belonging to, or incidental to, or necessary for, his education, which, as before stated, include the expense of board and clothes, while at school, as well as tuition and books. Upon the whole, we think, the testator meant that his nephew should be educated at his expense, which includes board, clothes, tuition, and books; and that the words, "other expenses, not belonging to his education," are satisfied by referring these to the expense of nurture while he was too young to be sent from home, and was boarded and clothed by his father at home, to the pocket money which boys are usually allowed while at school and at the University, and to the expenses during vacation.

It may be that the testator meant to make some other distinc- (7) tions. If he did, he has not expressed it with sufficient clearness to make himself understood, or to justify a construction which may defeat his bounty entirely and prevent the execution of what seems to have been his main intent—that his nephew should have a good education.

There must be a reference to ascertain the amount expended for the plaintiff's board and clothes during the time he has been boarded out; the amount that will be necessary for his board, clothes, tuition, and books until he is prepared to enter the University, and the amount that will be necessary for board, etc., while he is at the University.

PER CURIAM. Decree accordingly.

Cited: Holderby v. Walker, 56 N. C., 50; *Harrison v. Bowie,* 57 N. C., 262.

JOHN STAMPER v. JOHN D. HAWKINS.

1. It is an established rule of a court of equity to grant relief in cases of a mistake in matters of fact when the mistaken fact constitutes a material ingredient in the contract of the parties. But to authorize this interference, the mistake must be made out entirely satisfactory.
2. Where upon a contract for the sale of land by the acre it was agreed that it should be referred to a particular surveyor to ascertain the number of acres, and the surveyor made the survey, but it was impossible to make a plat from his field notes, so as to ascertain the number of acres: *Held,* that on the ground of this mistake of the surveyor, either party was entitled to demand a resurvey.

CAUSE removed from the Court of Equity of GRANVILLE, at Spring Term, 1849.

The defendant contracted, in writing, to sell to the plaintiff a (8) tract of land, supposed to contain 1,000 acres, at the price of $6 per acre. It was agreed between the parties that Lewis Reavis should survey the land and ascertain the number of acres. In this agreement the defendant contracts to deliver to the plaintiff within one week a good and sufficient title in fee simple to "the 1,000 acres (or less, if the whole of the land does not amount to that quantity)."

The land was surveyed by Reavis, but he delayed making his estimate so long that the defendant, to enable himself to perform his part of the contract by delivering a conveyance within the time specified, procured the field notes of the surveyor, platted the land, and made an estimate of the number of acres. By calculation, the tract contained 982 $^{11}/_{16}$ acres. On the day appointed for closing the contract, they met, when the defendant apprised the plaintiff that in consequence of the delay of

Reavis, he had made the estimates from his field notes, and proffered to convey the land to him, and required payment for the number of acres according to his estimate, at $6 per acre. The plaintiff declined accepting the conveyance or making payment until the estimate should be made by Reavis or some other practical surveyor. The parties then entered into a new agreement, which is as follows:

"Articles of agreement between John D. Hawkins and James Stamper. The said John D. Hawkins has this day sold and conveyed to the said James Stamper a tract of land in the county of Granville, etc., containing $982\frac{11}{16}$ acres, at the rate of $6 per acre, which land has been surveyed by Lewis Reavis; and it is mutually agreed between the parties aforesaid that the field notes of the said Lewis Reavis, or a true copy of them, shall be furnished to a competent and accurate surveyor and platter; and if upon a statement made out by such surveyor the number of acres shall fall short of the quantity in the said deed of John D. Hawkins, then the said Hawkins shall refund to the said Stamper the
(9) value of such deficiency, at the rate of $6 per acre," etc. This agreement bears date 27 January, 1843. The field notes of Lewis Reavis were put into the hands of Benjamin Sumner and Thomas B. Littlejohn by the plaintiff, both of whom were skillful surveyors and accurate platters, in whom both parties had full confidence, with directions "to plat the said tract of land from the said field notes, and to ascertain and make out a statement of the quantity and number of acres therein contained." Upon executing this new agreement, the plaintiff paid the defendant the price agreed on, towit, $6 an acre, supposing the estimate of the defendant to be correct. The bill charges that Mr. Littlejohn and Mr. Sumner each reported, from some error in the field notes, it was impossible to make out a plat or to determine from them, with any accuracy, the quantity or number of acres in the said tract; that this fact was made known to the defendant, with a request that he would have the land resurveyed, which was declined. The plaintiff then employed Edward Bullock, the county surveyor, to survey the land and ascertain the number of acres, which he accordingly did, and found the unmber of acres to be 932 and 32 poles, less by 50 acres than what the defendant had been paid for. The bill further charges that the field notes of Lewis Reavis were mislaid by Mr. Littlejohn and not found by him until a short time before the filing of this bill. The prayer of the bill is that the land, if necessary, may be resurveyed, and the defendant decreed to refund to the plaintiff so much as it shall appear he has overpaid, with interest, etc.

The answer admits the contracts as set forth in the bill, and the defendant avers that from the field notes of Lewis Reavis an accurate plat could be made of the land sold by the plaintiff, and the number of acres

truly ascertained, and that the calculation made by him from (10) them was correct; that in entering into the agreement of 27 January, 1843, it was the understanding, as expressed therein, that in ascertaining the number of acres the calculation should be made from the field notes of Lewis Reavis. He further avers that the land belonged to Mr. Jones, for whom he was surety to a large amount, and had been conveyed in trust to pay the debts of the said Jones—those for which he was bound with others; that at the trustee's sale he purchased the land in question and immediately thereafter sold it to the plaintiff, and paid the money, received from him, over to the trustee, and had with him a final settlement; and that this payment was made by him after waiting some considerable time to enable the plaintiff to have the number of acres in the tract accurately ascertained; and that the plaintiff ought not to be permitted, after lying by so long, to sustain his claim.

Lanier for plaintiff.
Badger and T. B. Venable for defendant.

NASH, J. The mistake of the defendant in this case, in refusing to have the land in controversy resurveyed, rests, apparently, upon an opinion formed by him that, as the agreement of 27 January, 1843, required the number of acres contained in the tract to be ascertained from the field notes of Lewis Reavis, the parties were bound by them, so that neither was at liberty to depart from them. It is certainly correct, as a general rule, that where the parties to a contract have reduced its terms to writing, the whole sense of the parties is presumed to be contained in the written instrument, and a departure from it is not allowable. But it is one of the established rules of a court of equity to grant relief in cases of a mistake of matters of fact, when the mistaken fact constitutes a material ingredient in the contract of the parties. But to authorize this interference, the mistake must be made out by proofs (11) entirely satisfactory Story Eq., secs. 151-2-3. In the case before us the land was sold for so much per acre, and in order to ascertain what the plaintiff had to pay and the defendant to receive, it was essential to have the tract surveyed. Neither party knew at that time what it did contain. Lewis Reavis, in whose capacity as a surveyor each had confidence, was elected, his survey was made, and, upon his delay to make a plat to estimate the quantity of acres, the defendant procured his field notes and made the calculation himself. The plaintiff declined being governed by the defendant's calculation, and there was no obligation upon him to receive it as correct. After some difficulty, the new agreement of 27 January, 1843, was made, and in this it was stipulated that the field notes of Mr. Reavis should be put into the hands "of a compe-

tent and accurate surveyor and platter," and from them an estimate should be made. The mistake upon which relief is to be granted is that the field notes of Reavis were supposed to be such as from them an acurate estimate might be made. It is fair to presume that at the time this agreement was entered into each party believed such to be the fact, and it is clear the plaintiff so thought. The fact, however, turns out not to be so. Both Mr. Littlejohn and Mr. Sumner, the parties selected for their skill and competence, testify that no approach to accuracy could be made in platting and estimating the quantity of acres from the field notes of Reavis; that the last line could not be made to close the plat. To the same effect is the testimony of Mr. Bullock, the county surveyor. According to this testimony, then, the agreement of 27 January could not be literally carried out—the parties were mutually mistaken in so believing. The substance of the agreement was the accurate ascertainment of the number of acres contained in the tract, and
(12) for the purchase of which the plaintiff had contracted. The survey made by Reavis was of no value; and it was absolutely necessary that another should be made. The proposition made by the plaintiff, to have the land resurveyed, was a proper one, and the only one by which the contract could be carried into execution; and it is to be regretted that it was not acceded to.

The defendant's allegation that he had settled with the trustee, from whom he purchased, upon an estimation based upon Reavis's survey, and that the plaintiff, after waiting the time he has before filing his bill, ought not to be permitted to call in question its accuracy, cannot avail him. He paid the money to the trustee on his own responsibility, upon an estimate made by himself, the accuracy of which he knew was questioned. The plaintiff had no concern or interest in his contract with the trustee, or with his payment of the money to him; and to him the defendant must look, if he has paid him more than he was bound to do.

The plaintiff is entitled to the relief he seeks, upon the footing of the mistake in Reavis's survey. But the Court will not proceed definitely to determine, upon the evidence, the deficiency in the tract of land, as the defendant requires a resurvey, which is granted according to the course of the court.

PER CURIAM. Decree accordingly.

Cited: Morrisey v. Swinson, 104 N. C., 564; *King v. Hobbs,* 139 N. C., 173.

(13)

JONATHAN GUTHRIE v. JOHN A. SORRELL'S HEIRS.

In a bill to redeem a mortgage, the personal representative of the mortgagee is a necessary party.

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

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

Guion and Craig for plaintiff.
J. H. Bryan and Iredell for defendants.

PEARSON, J. This is a bill to redeem a tract of land, which is under mortgage. It was intended to present the very interesting question whether one who has taken a deed absolute upon its face, but with the understanding that it is to be a security for certain debts, to be liable to redemption, and who purchases the interest of the *mortgagee* at execution sale, at the instance of a creditor, not secured by the mortgage, takes an absolute estate, or merely acquires the right to add the amount of his bid to the debts secured by the mortgage.

This would have been a grave question, and one well worthy of consideration; but we are not at liberty to entertain it, because the proper parties are not before us.

In a bill to redeem a mortgage, the personal representative of the mortgagee is a necessary party. He is the person entitled to receive the money, and must necessarily be a party in taking the account.

The bill must be dismissed for the want of a proper party, and, (14) of course, without prejudice, but at the costs of the plaintiff. It has been pending six years, and it has been in this Court more than three years, awaiting the motion of the parties.

PER CURIAM. Bill dismissed.

Cited: Webber v. Taylor, 58 N. C., 37.

ROBERT W. BURTON ET AL v. JAMES STAMPER ET AL.

1. Examining a party in a suit in equity, as a witness, is an equitable release to him as to the matter to which he is examined.
2. If the party examined be the one primarily liable, and the other defendant only secondarily, the plaintiff gives up his claim against both by the examination of the former.

CAUSE removed from the Court of Equity of GRANVILLE, at Spring Term, 1849.

The bill alleges that the defendant Joseph J. Williams held two notes upon one Burroughs, payable to one Jordan, and indorsed by him in blank; one for about $800, and the other for about $331, in trust for the plaintiffs, the notes having been delivered to him upon such trust by William Williams, the grandfather of the plaintiffs. After the death of William Williams, about 1840, the said Joseph J. Williams, who was the executor of the said William, unmindful of the trust reposed in him, and regardless of the rights of the plaintiff, sold and assigned the notes to Robert Stamper, the intestate of the two defendants, James and
(15) George Stamper, in satisfaction and discharge of a debt due to the said Robert by the said Joseph; and that the said Robert, at the time of the transfer, had notice of the trust, and afterwards collected the amount of the notes. The bill further alleges, in aid of the plaintiff's rights, if necessary, that William Williams, by his will, after some specific legacies, bequeathed the residue of his estate to the other defendant, Elizabeth Williams, who has assigned all the interest she may have in the notes or money collected to the plaintiffs.

Joseph J. Williams is alleged to be insolvent; and the prayer is that the defendants James and George Stamper be decreed to pay to the plaintiffs the money collected on the notes by their intestate.

The answer of Elizabeth Williams admits the transfer of the notes, or her interest therein, to the plaintiffs. The bill was taken *pro confesso* against Joseph J. Williams.

The defendants James and George Stamper admit that the notes were transferred to their intestate, and that he collected them; but deny that the transfer was made to him with notice of the trust; and insist that he was a *bona fide* purchaser for valuable consideration without notice.

The plaintiffs obtained leave and took the deposition of the defendant Joseph J. Williams, which establishes the trust, and proves that Robert Stamper had notice at the time the notes were transferred to him.

Badger, B. R. Gilliam, and Graham for plaintiffs.
J. H. Bryan for defendants.

PEARSON, J. It is clear that Joseph J. Williams, the trustee, is primarily liable for the breach of trust, and the defendants James and George Stamper are only liable secondarily; for the decree, if made for the plaintiffs, ought and must be to recover the amount from Joseph J. Williams in the first place, and in the event it cannot be made out of him, then to recover from the defendants James and George Stamper.

This case is fully decided by *Lewis v. Owen,* 36 N. C., 290;
(16) where it is held, "Examining a party is an equitable release to

him as to the matter to which he is examined. If the party examined be the one primarily liable and the other defendant only secondarily, the plaintiff gives up his claim against both by the examination of the former."

The bill must be dismissed with costs, except as to the defendant Joseph J. Williams.

PER CURIAM. Decree accordingly.

Cited: *Wilson v. Allen,* 54 N. C., 26.

BENJAMIN H. HAWKINS ET AL. v. ALFRED SIMMONS ET AL.

Where a negro slave was sold by an order of court, upon the application of the administrator, who was also the guardian of the infant distributees, for a division among them, and the slave was purchased by the guardian, and afterwards a settlement was made between the guardian and the husbands of the infant distributees, with a full knowledge of the circumstances, and the guardian charged with the amount of the price he bid for the negro, and sixteen years had elapsed after the sale of the negro: *Held*, that neither the distributees nor any that represent them had any right to set aside the sale.

CAUSE removed from the Court of Equity of HALIFAX, at Fall Term, 1848.

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

Badger for plaintiffs.
B. F. Moore for defendants.

NASH, J. Archibald Green died in 1824, leaving a widow, (17) Margaret, and three children, Mary, Martha, and Rhoda, the plaintiffs. By his will he devised to his wife, Mary Green, for her life, among other things, a negro woman, Betty, and her increase, and, in a subsequent clause, he directs that all the estate he has lent to his wife shall after her death be equally divided between his children. Betty had a child named Matilda, who has since had two children, Missouri and Charles. Mrs Green, the widow, intermarried with Asa Powell, who thereupon became the guardian of the female plaintiffs. Mrs. Powell and Asa Powell are both dead, and the defendant is the administrator, with the will annexed, of the latter, and has taken into his possession the negroes Betty, Matilda, Missouri, and Charles. The bill charges that Asa Powell, while he was their guardian, caused the girl Matilda

to be put up to sale at his own house, and caused her to be bid in for him by one Uriah Smith at the price of $50; that the possession never was changed, she remaining in the possession of Powell up to the time of his death; that this sale was fraudulent, and made by their guardian in violation of his trust, and under pretense of an order of the county court of Halifax County. It further charges that, if such order was obtained, it was irregular and void, not having been obtained on petition in writing, but by motion. The bill further alleges that the plaintiffs demanded the said negroes of Asa Powell and of his administrator, the defendant offering to pay back the sum of $50, "with which the said Powell seems to have charged himself in his account as guardian returned to court." The bill prays that the defendant may be decreed to surrender the negroes and account for their hire since the death of their mother, Mrs. Powell.

The answer alleges that the girl Matilda was born during the lifetime of the testator, Archibald Green, between the making of his will
(18) and his death, and that he therefore died intestate as to her; and that in 1847 his intestate obtained an order from the county court to sell her for the purpose of division among the plaintffs, his wards, she being the only property undisposed of by the will of Archibald Green. The answer further alleges that the plaintiff Benjamin Hawkins, in right of his wife, Mary, in March, 1837, with a full knowledge of all the circumstances, received his share of the proceeds of the sale of Matilda, and in January, 1838, Thomas Weldon, in right of his wife, Martha, settled with Asa Powell, as guardian of his wife, and received, with the same full knowledge of the circumstances, his share of the proceeds of the sale. It further alleges that after the death of Asa Powell the plaintiff Thomas King brought suit against the defendant, as the personal representative of his intestate, upon his guardian bond, and obtained judgment against him for what was due to him in right of his wife, Rhoda; and that in this judgment was included his share of the sale of Matilda; and that the said King had full knowledge at the time of all the circumstances.

Replication was taken to the answer.

From the evidence in the cause the negro girl Matilda was born between the making of the will and the death of the testator, Archibald Green, and, there being no residuary clause, she is undisposed of, and, as to her, the testator died intestate.

The plaintiffs allege that the sale of the girl Matilda by their guardian, Asa Powell, was void, first, because there was no sufficient order of court authorizing a sale, and secondly, because the guardian was the real purchaser. It is not important that any opinion should be expressed as to

the sufficiency of the order of sale made by the county court. Asa Powell acted under it, sold the girl Matilda, and became the purchaser himself.

The order of sale was made in November, 1827, and the sale made before February, 1828, and this bill was filed in the Fall of 1844—a period of sixteen years. The plaintiffs have not only delayed (19) for that length of time to make known their dissatisfaction, but they have, with full knowledge of the facts, received from Asa Powell their ratable proportion of the price of Matilda. It was in their power to repudiate the sale or to affirm it. They have chosen the latter. From the exhibits filed in the case it appears that in the inventory of the estate of Archibald Green, returned to May Court, 1826, of Halifax, the negro girl Matilda is inventoried as not disposed of by the will. She was sold under the order of court and a return day made of the sale to February Term, 1828. The returns of the guardian, Asa Powell, are regularly made down to February Term, 1837, when, according to the guardian's account, he owed his ward Mary Green $36.15, and on 4th March he paid in full to the plaintiff Benjamin Hawkins what was due him as her husband, $65.97; and on 24 January, 1838, he paid to the plaintiff Thomas S. Weldon, in right of his wife, Martha Green, $29.12½, as being what was due to her at that date. The defendant states in his answer that these same embraced what was due to the wards Mary and Martha of the price of Matilda. The receipts are in full, and when given, his wards were married women. His guardianship had ceased. Their husbands had a right to receive what was due them; and, unexplained, the receipts were a discharge to the guardian. It is to be recollected, the object of the bill is to procure a conveyance to the plaintiffs of the slave Matilda and her children; and the above statement is no further important than in showing that the plaintiffs have, by receiving their shares of the price of Matilda, adopted their guardian's sale of her. To the same end the defendant has filed, as an exhibit, a copy of the record of a suit brought by the plaintiff Thomas C. King and (20) his wife, Martha, against the defendant, as the administrator of Asa Powell, upon the guardian bond given by Powell. That action was brought to the May Term, 1844, of Halifax County Court. In the progress of the cause the guardian's accounts were referred by the court to the clerk. His report was duly returned and confirmed, and according to it the jury returned a verdict in favor of the plaintiffs, assessing their damages to the amount of the sum reported due. This verdict concludes the plaintiff King and his wife, Rhoda.

PER CURIAM. The bill dismissed with costs.

Cited: *Harrell v. Lee,* 51 N. C., 283.

HENRY WILLIAMS' EXECUTORS v. SUSAN E. WILLIAMS.

Where a tract of land is bought for a wife, and paid for partly out of the proceeds of her own real estate, to the sale of which she assented only on condition that the proceeds of the sale should be so invested, and part of the price was paid by her husband: *Held*, that so far as the proceeds of her estate went to the payment of the price, she was a *cestui que trust*, and, as to the residue, her husband; and that this, being a mixed trust, was not subject to execution.

CAUSE removed from the Court of Equity of GREENE at Spring Term, 1849.

The bill alleges that one Guilford Murphy, being much indebted, purchased of one Hooker a house and lot in the town of Hookerton for $2,750, and, to evade the payment of his debts, procured the said
(21) Hooker to make the deed to Hannah Murphy, the wife of the said Guilford; that afterwards many executions issued against the said Guilford; among others, an execution in favor of one Loften for $700, and another in favor of one Smith for $132.12, which executions were levied upon the house and lot, as the property of the said Guilford; and that at a sale made by the sheriff the house and lot were purchased by Henry Williams and John W. Taylor, who took a deed therefor. The plaintiffs are the personal representatives and heirs at law of the said Williams and Taylor. The defendant is the heir at law of the said Hannah Murphy. The prayer of the bill is for a conveyance from the defendant to the plaintiffs, and a surrender of the possession of the house and lot to them.

The answer avers that the house and lot were purchased for Hannah Murphy and paid for with her funds, which were raised by a sale of two tracts of land belonging to her, with the express understanding that the proceeds should be invested in the purchase of the house and lot and the deed taken in her name; she positively refused to join in a conveyance of her land unless the price was invested in the purchase of the house and lot and the deed made to her, which was *accordingly done*, the deeds from her husband and herself to the purchasers of the land being executed at the same time that the deed was executed to her for the house and lot. Guilford Murphy died before the institution of this suit.

Mordecai for plaintiffs.
J. H. Bryan and Husted for the defendants.

PEARSON, J. We are satisfied from the evidence that much the larger part of the price of the house and lot was paid out of the funds arising from the sale of land belonging to Hannah Murphy, and the deed was

fairly made to her in pursuance of an express understanding that the proceeds of the sale of her land should be so invested and the title made to her.

The case falls directly within the decision in *Gowing v.* (22) *Rich,* 23 N. C., 553. The statute 13 Elizabeth does not apply, for the conveyance is not made by the debtor of land before owned by him, to defraud creditors, but the conveyance is made by a third person to a trustee for the debtor, to enable him to avoid the payment of his debts to the amount of the price paid by him. If the statute applied, so as to make the conveyance void as to the creditors, the title would be in Hooker, the vendor, which would not serve the plaintiff's purpose.

Guilford Murphy had not such a trust estate as was liable to execution sale by the act of 1812, ch. 45, sec. 4; for Hannah Murphy did not hold purely in trust for him, but held the legal estate for herself, so far as the part of the price was paid by her, and in trust for Guilford Murphy so far as the part of the price was paid by him. It was, then, a *mixed trust,* and not the case of "one person seized simply and purely for the debtor, without any beneficial interest in the party having the legal title, or in any other person, except the debtor in the execution," which kind of trust estate alone can be sold under execution by this provision of the act; for the sale passes the *legal* as well as the equitable estate, and the purchaser having the legal estate may bring ejectment, and cannot call upon a court of equity for a conveyance of the legal title, because he has it already, and is not without remedy at law.

This case is plainly distinguishable from *Temple v. Williams,* 39 N. C., 39. In this the contract was *executed,* the funds arising from the sale of the wife's land were actually paid to the vendor of the house and lot, and the deed was made to the wife, so as to vest the legal title in her. In that the contract was *executory.* After the husband purchased the land and had taken a conveyance to himself, the wife consented to a sale of her land, with the understanding that the husband should apply the proceeds to the payment of the price of the land purchased by him, and make her a deed for a ratable part of the land, including (23) the house, etc. It was a parol agreement for the purchase of land. voidable by the statute of frauds; and although a husband and wife are allowed in equity to deal with each other, their agreements, like all others, "to sell or convey land" are void unless put in writing. When the agreement is executed and the deed made to the wife, the statute of frauds has no application.

PER CURIAM. Bill dismissed with costs.

EUGENE COFFIELD, BY HIS GUARDIAN, *v.* THOMAS D. WARREN AND WIFE.

A testator, living and making his will in the county of Chowan, directed by his last will and testament "that A. B. should receive a plain, practical education." A. B. then resided with the testator, his uncle, in the county of Chowan. After the death of the testator, the mother of A. B. removed him to Baltimore: *Held*, that the executors of the testator were bound to pay such a sum as would furnish him with a plain, practical education, according to the Chowan prices, including board, clothing, tuition, school books, medical charges, etc., and that by the terms, "a plain, practical education," it is to be understood a good English education, without reference to the languages or the learning taught at the universities.

APPEAL from an interlocutory order made at Spring Term, 1849, of CHOWAN Court of Equity, *Manly, J.*

James Coffield died in 1843. By his will the defendant Margaret was appointed his executrix; and he bequeathed that "Eugene Coffield (the plaintiff) should receive a plain, practical education at the expense
(24) of his estate." The plaintiff was then a boy about 11 years of age, living with the testator, his uncle, in the county of Chowan. Soon after the death of his uncle, the plaintiff's mother carried him to Baltimore in the State of Maryland, and filed this bill, praying for an allowance of such sums, annually, as would be necessary to give him a "plain, practical education" in Baltimore. The defendants were willing to pay what would be necessary to give the plaintiff a plain, practical education in the county of Chowan, but objected to paying what might be necessary in Baltimore. It is admitted that in the expense of his education, clothes, board, and medical bill, if any are incurred, are to be included, as well as the expense of tuition and school books. They submit to do what the court may decree.

The case was continued from term to term in the Superior Court, until Spring Term, 1846, when there was a declaration that the plaintiff was entitled according to the prices in Baltimore, and a decree referring it to the master to inquire what was a proper allowance; from which the defendants appealed.

Heath for plaintiff.
Burgwyn for defendants.

PEARSON, J. We agree with the court below, that the plaintiff is entitled to a sum necessary to defray the expenses of obtaining the education intended, whether he remained in the county of Chowan under the supervision of the defendants or was taken by his mother to the city of Baltimore. But, we think, the sum necessary must be estimated accord-

ing to the prices in Chowan, where the testator had his domicile, and not according to the Baltimore prices. If a departure is made from the domicile, there is no better reason for stopping at the city of Baltimore than at London or Paris.

We are also of opinion that the plaintiff is entitled to recover (25) such a sum as will pay his mother, or any other friend, for the expenses incurred for his clothes, board, tuition, books, etc., according to the Chowan prices, during the time that he has been actually kept at school. If during the time he has been kept at school he has acquired a "plain, practical education," by which we understand a good English education, without reference to the languages or the learning taught at the universities, then the plaintiff, who is now 18 years of age, will be entitled to a decree for the sum which has been expended upon his education, having reference to the prices in Chowan. But if during the six years that this bill has been pending the plaintiff has not received such an education, he is entitled to a decree for such a sum as will now enable him to finish his education, and also to pay any expense that may have been incurred while he has been kept at school.

The decree below must be reversed, with costs in this Court, and a reference be made to the clerk to ascertain how long the plaintiff has been kept at school, at what expense for clothes, board, tuition, school books, medical charges, etc., while at school, according to the rate of charges in the county of Chowan; whether the plaintiff has obtained a plain, practical education; if not, then what yearly allowance, according to the prices in the county of Chowan, ought to be made to enable him to do so.

PER CURIAM. Reversed.

JACOB J. Q. TAYLOR v. THOMAS W. TAYLOR.

Though fraud, circumvention, *or* undue influence will avoid the execution of a deed, yet *fair* argument and persuasion may be used without having that consequence.

CAUSE removed from the Court of Equity of NASH at Spring Term, 1849.

The plaintiff is the administrator of Mrs. Mary Taylor, who died in 1848 at the advanced age of 90. He alleges that for the last five or six years of her life his intestate had entirely lost her intellect, and was incapable of making a valid contract; or, at all events, her mind had become very feeble, so as to render her easily influenced, liable to be imposed on, and an easy prey to any one who chose to take advantage of her

weakness; that in 1844 the defendant, by fraud, circumvention, and undue influence, procured his intestate to execute a deed by which she conveyed to him, absolutely, all of her personal estate; that his intestate left her surviving a daughter and several grandchildren, among whom are the plaintiff and defendant, who are brothers, and made no provision for any of them, except the defendant by the deed aforesaid. The prayer is that the deed may be declared void and surrendered up to be canceled.

The defendant admits the execution of the deed. He denies that his grandmother had entirely lost her intellect, but he admits that her mind was quite feeble from old age. He alleges that she executed the deed voluntarily and with a full knowledge of its contents, and denies that any fraud, circumvention, or advantage was used to obtain its execution.

He had the deed registered soon after it was executed, took pos-
(27) session of the property, and supported the old lady for the rest of her life.

B. F. Moore for plaintiff.
Miller and Busbee for defendant.

PEARSON, J. Many depositions were read on the hearing. We are satisfied that Mrs. Taylor had mental capacity to make a deed, but she was very feeble, both in body and in mind, and was in a condition to be easily imposed on.

There is no proof that any fraud or circumvention was used, or any advantage taken of the old lady. The donee was her grandson; she executed the deed voluntarily and surrendered the possession of the property; the deed was registered; and she lived four years afterwards, during which time she made no complaint of having been imposed on, and expressed no wish to have the deed set aside. Indeed, it appears that the deed makes nearly the same disposition of her property that she had made by a will executed the year before.

Fair argument and persuasion may be used to obtain the execution of a deed or will. There is no evidence in this case that any advantage was taken or any *undue* influence exercised. The plaintiff fails entirely to make out a ground to assail a will, much less a deed.

PER CURIAM. Bill dismissed with costs.

Cited: Deaton v. Monroe, 57 N. C., 43; *Futrill v. Futrill,* 59 N. C., 340; *In re Craven,* 169 N. C., 569.

WILLIAM J. HARDY ET AL v. JOSEPH H. POOL, ET AL.

A. gave to B. a letter to C., a merchant, in the following words: "My friend B. goes to your city for goods on a short credit. I am satisfied you will be safe in selling him any amount he may see proper to purchase. From my long acquaintance with him, I do not hesitate to say that he is as punctual a man as any I know." *Held*, that this was not a letter of credit, but a representation merely of A.'s opinion of B.'s solvency and punctuality, and, if not given *mala fide*, subjects A. to no responsibility.

Cause removed from the Court of Equity of PASQUOTANK, at Fall Term, 1848.

In June, 1839, Thadeus Freshwater of Pasquotank, wrote, by Willis W. Wright, a letter to the plaintiffs in the following words:

Messrs. Hardy & Brother, Norfolk, Va.:

My friend, Mr. W. W. Wright, goes to your city for goods on a short credit. I am satisfied you will be safe in selling him any amount he may see proper to purchase. From my long acquaintance with him, I do not hesitate to say that he is as punctual a man as any I know.

The plaintiffs supplied Wright with goods, for which they state a balance of $698.39 is still due, and they allege that they supplied them upon the faith of the foregoing letter, as a letter of credit. In October, 1839, Wright became embarrassed and executed an assignment to the defendant Pool for real and personal estate, in trust to secure sundry debts enumerated, among which were some to Freshwater. Among its provisions are the following: "And whereas Thadeus Freshwater has given the said Willis W. a letter of credit to Messrs. Hardy & Brother of Norfolk, Virginia, on which said letter the said Willis W. purchased goods from the said Hardy & Brother." And afterwards it directs the trustee, out of the proceeds of the property, "to discharge (29) the aforesaid debts and liabilities due and owing to the said Godfrey, Freshwater, and Davis." Freshwater afterwards died and Wright became a bankrupt, and the plaintiffs filed this bill against the trustee, Freshwater's executor, Wright, and the assignee in bankruptcy, and the other creditors mentioned in the deed for an account of the trust fund and satisfaction of their debts.

J. H. Bryan and Hill Burgwin for plaintiffs.
No counsel for defendants.

RUFFIN, C. J. The bill, we think, cannot be sustained. There is no trust to discharge this debt, or in favor of the plaintiffs *nominatim*, and their counsel admit that they can only claim by subrogation to the rights of Freshwater, who, they say, was the surety for the plaintiffs' debts and

is secured in the deed from loss by his liability. It is true that between creditors and sureties there is the right that one of them shall communicate to the other the benefit of all collateral securities. But the misfortune of the plaintiffs is that here the instrument is not a security for his debt, but only provides an indemnity for Freshwater against loss upon his liability for Wright, which, in truth, amounts to nothing, as Freshwater was not under any liability of the kind. It is true, the assignment says he had given Wright a letter of credit to the plaintiffs, on which they had furnished goods to a certain amount; and if the letter had not been in existence, and the cause stood upon the contents of the deed alone, it would be a fair inference that a letter was really given upon which the plaintiffs might have held Freshwater liable, and therefore might have insisted on being substituted directly to his right to indemnity out of the property. But that is not the state of the case, and

Wright was mistaken, for the letter of Freshwater, on which the
(30) plaintiffs sold the goods, is produced, and it is plainly not a letter of credit, in which Freshwater undertakes anything for Wright, but a representation merely of his opinion of the other's solvency and punctuality. It is not an engagement at all; and, indeed, as there is no intimation of *mala fides* on his part, he must be taken to believe what he said, and, therefore, no recovery could have been made from Freshwater on it in any form. Of course, Freshwater could not have been damnified, and therefore he could not demand that the fund should be applied to the plaintiffs' debt for his relief, nor paid to him as an indemnity, if he had voluntarily paid the plaintiffs. Freshwater, then, had no interest in the fund in this respect to which the plaintiffs could be subrogated; and, consequently, the plaintiffs cannot rely on the deed as a specific security for his debt, but must come in as a general creditor in the court of bankruptcy.

PER CURIAM. Bill dismissed with costs.

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(31)

JOHN H. DOBSON v. THOMAS F. PRATHER ET AL.

There was a judgment against the principal and two sureties, and an execution levied on the property of one of the sureties. A. bought this property from this surety, pending the levy, and afterwards obtained an assignment of the judgment to enable him to have the whole amount satisfied out of the property of the cosurety, and issued an execution for that purpose. *Held*, that a court of equity will restrain him from collecting out of the cosurety more than the fair proportion which the latter owed, whether A. had actual notice of the lien of the execution or not.

DOBSON *v.* PRATHER.

APPEAL from an interlocutory order made at Spring Term, 1849, of Surry Court of Equity, *Ellis, J.*

This is an appeal from an order dissolving an injunction, and upon the pleadings the case is as follows: The plaintiff and George W. Brown and several other persons became cosureties for one Waugh to the Bank of Cape Fear, at Salem, by a note for $450, and in April, 1842, judgment was taken by the bank against Waugh, Dobson, Brown, and the other sureties; and from that time to the filing of the bill, in September, 1848, writs of *fieri facias* were regularly sued out and delivered to the sheriff of Surry, in which county the debtors lived. On 15 May, 1844, the defendant Prather purchased from George W. Brown a house and lot in Rockford, in Surry, at the price of $1,000, and took a conveyance in fee. At the time of the purchase, Prather inquired of Brown and the sheriff whether there were any executions against the property, and was informed by them that there were several, amounting to (32) upwards of $1,000, which they showed him; but that of the bank against Waugh and his sureties was not among them. Prather thereupon closed the contract, and paid the consideration money, and out of it Brown then paid the sum of $800 to the sheriff toward the discharge of the executions shown to Prather, and he afterwards discharged the balance due on them. Prather took also, from the sheriff, a covenant that there was no other execution against Brown's property, and to indemnify him against it or them, if there should be any. Subsequently the property of Waugh was sold on executions for this and other large debts to the bank, and out of the proceeds a sum was applied to this debt, which reduced it to $276.08 on 18 February, 1845, and $10.80 for costs. Waugh then became insolvent, and so also did all the sureties except the plaintiff and Brown; and, indeed, Brown was insolvent and had no estate subject to execution for this debt, excepting only the house and lot, which he had sold to Prather, and which was subject to it, inasmuch as an execution was in fact out and in the hands of a deputy sheriff at the time Prather made his purchase, though unknown to him. On 8 May, 1844, the plaintiff and some other sureties for Waugh, not including Brown, requested the bank not to have Waugh's property then sold under the bank's executions, as it was thought by them that, with indulgence, Waugh would avoid a sacrifice of his property and be able to pay all the debts; and the bank acceded thereto, and also upon another subsequent occasion before the sale in February, 1845. Some time thereafter Prather, discovering that there had been an execution in the hands of the deputy sheriff when he purchased from Brown, and that *alias* and *pluries* writs had been regularly kept up, and that the sheriff was about to levy half the balance of this debt from the plaintiff and sell the house and lot for the other half unless he would pay it, applied to the (33)

bank to accept from him the sum due on the judgment and assign it to him, so as to give him the control of it, with a view to save himself from loss by having the whole of the money raised out of the plaintiff's property. The plaintiff then filed this bill against Prather and the bank, praying an injunction against all further proceedings on the judgment. Besides the facts on his behalf already stated, the plaintiff sets forth in the bill that as much of the money raised by the sale of Waugh's property as would satisfy this debt ought to have been applied to it; but that the bank had caused the same to be misapplied to executions on junior judgments, so as unlawfully and unjustly to leave the before mentioned balance apparently due thereon. The plaintiff further sets forth that Brown was and still is indebted to Waugh in a larger sum than the balance on the judgment, and that before his sale to Prather he had agreed with Waugh to pay on this judgment the amount of his debt to him. On the bill the injunction was granted as to the whole debt as prayed for.

The answers deny any misapplication of the money raised on the executions, and they state that in truth the sum, which was a very large one, was applied under the directions of an eminent attorney who represented the present plaintiff on that occasion, as well as others of the sureties for the several debts. The defendant Prather also denies that Brown was, to his knowledge or belief, indebted to Waugh, or under any engagement or legal obligation to pay anything upon the debt in question, except as one of the sureties therefor.

Upon the reading of the bill and answers and the motion of the defendants on the circuit, his Honor dismissed the injunction *in toto,* but allowed the plaintiff an appeal.

J. T. Morehead for plaintiff.
Iredell for defendant.

(34) RUFFIN, C. J. Although copies of the records of the judgments at law and the executions are not before us, yet it must be understood from the pleadings that, at the time Prather purchased from Brown, the house and lot were subject to the lien of a *fieri facias* for this debt, and that the lien has been kept up ever since; for a *fieri facias* binds from its teste against a purchaser from the debtor, and an *alias* and *pluries* preserve the lien by relation to the teste of the first writ. *Gilkey v. Dickerson,* 9 N. C., 341; *Brassfield v. Whitaker,* 11 N. C., 309. Very clearly, then, the house and lot are liable at law to be sold on this process; and, indeed, the sole object of the defendant Prather in taking an assignment of the debt from the bank was, by his power over it, to prevent the law having its course. The question, then, is whether there be any equity on his side to entitle him thus to deal with the process; and

we own that we see none. At law the property is subject in the hands of Prather precisely as it would be in those of Brown. That is simply the nature and legal effect of the lien of an execution. It takes no notice of the debtor's alienation, but considers the thing as still belonging to him; and, consequently, it does not recognize any rights of the purchaser, as such, in the property. Therefore the defendant Prather cannot allege that, when he bought, he had no knowledge that the execution was out or might be taken out of a *teste* elder than his purchase, although upon inquiry from the sheriff himself he received information which caused him to believe that in fact there was no execution; for every one is bound to take notice of a lien created by the law itself, and, above all, of that arising from a judgment and execution. This defendant, then, cannot claim the equity which, in many other cases, is held to belong to a purchaser without notice. That doctrine applies as a bar only to relief which is sought in respect of an equitable right asserted by the plaintiff. But with respect to the lien of executions the whole is (35) a matter of strict legal right, without any regard to the actual state of a person's knowledge. If, instead of buying from Brown, and taking an indemnity from the sheriff, the defendant Prather had suffered the house to be sold under the executions in the sheriff's hands against Brown alone, then he would have obtained a good title, although those executions might have been junior to this one of the bank. *Bell v. Hill,* 2 N. C., 72; *Ricks v. Blount,* 15 N. C., 128; *Jones v. Judkins,* 20 N. C., 591. But, taking the course he did, the defendant cannot, as against the plaintiff, avail himself of the representation made to him by the sheriff, or of the application that was made of the price he paid. He was simply a purchaser from the debtor of property over which a *fieri facias* was then and still is impending; and it must be regarded here, as at law, as his folly or misfortune thus to have purchased. Prather therefore stands, in relation to the other parties and in reference to the lien of the executions, precisely in the shoes of Brown. Now, clearly, the relation between Brown and the plaintiff was that of perfect equality; and that of the creditor towards both of them was that of equal benevolence. If Brown had continued to be the owner of the house, he would not only be bound to pay half the debt as surety, but, having no other property but the house, he would not be allowed, by collusion with the creditor, to acquire the control of the process and use it so as to exonerate the house from the lien of the execution, and thereby throw the whole of the debt on the cosurety, as a total loss. The creditor, it is true, may raise the debt from one of the sureties, as a legal right. So he may in equity, for any sufficient reason growing out of his own interests. But he has no just right capriciously to deal with one of the sureties so as to enable him to rid himself of the debt and make the other pay all; and equity will not

(36) sustain such dealing. It has been commonly said that the equity between these parties arises out of a right of sureties to be subrogated to the rights and remedies of the creditor against the principal and cosureties. This, of course, is equal in each of the sureties; and hence, if one of two sureties pay half the debt, the creditor is a trustee of the security to that extent for him. But when the other shall pay the other half, the creditor is in like manner a trustee for him. Thus the sureties are brought to an equality. But if one of the sureties pay the whole debt, the creditor thereby becomes a trustee of the entire security for him; yet it is subject, necessarily, to this provision, that the other surety may still place himself upon an equality with the first by paying his half; and upon doing so, it would be contrary to the duty of the creditor to require him to pay more and disturb the equality then existing between them. It can make no difference in the principle, whether the surety who pays all the debt in the first instance take an assignment to a trustee for himself or leave it with the creditor, as above supposed, for the assignee merely stands as the creditor did, and subject to all the equities that existed against the creditor. But resort need not be had to the refined equity of substitution in order to do justice between sureties; for the doctrine of contribution between sureties is so well settled as a substantive principle of equity as to suffice to bring about the same end. Then, suppose a surety to have paid the debt and to have taken an assignment to one to his use: it is clear that he ought not to raise the whole sum from another surety; for, although he might at law do so on an execution, equity will restrain him at once, because he is liable to contribution in equity, and, to avoid circuity, the court will prevent him from raising more than the half in the first instance. Suppose this plaintiff had taken an assignment from the bank, with the view of selling the house which Prather bought from Brown, for the whole debt.

(37) Although that could be done at law, Prather's equity, as representing Brown and as a purchaser, would have been very clear to restrain the other party to the one half which ought justly to be raised out of that property. On the other hand, there is the same equity against Prather, that he should not levy the whole debt from Dobson, but that he should contribute the half for which the house might be sold. The Court holds, therefore, that the injunction in this case was proper as to one-half the debt, interest, and costs, and that to that extent it was erroneous to dissolve it.

But the Court likewise holds that, as to all but the one-half, the injunction ought to have been dissolved. The grounds on which relief is sought as to the other half are completely answered. As to the application of the money arising from Waugh's property, the question was one properly for the court of law, and the plaintiff ought to have sought his

redress there. But without recurring to that, the plaintiff has made no case on the point, for he does not specify the various executions and point out the misapplication of which he complains, and he only alleges in general terms that the money was improperly applied to younger executions. That is denied by the defendants in general terms also, and, besides, they say that the proceeds of the sale were distributed among the executions under the direction of an attorney who represented the plaintiff as well as the sureties for the other debts.

In like manner the other ground fails the plaintiff upon the facts. The defendants deny, as far as they can, that Brown had engaged with Waugh to pay this debt, or that he was indebted to Waugh at all. We need not, therefore, now inquire what the equity would be between the plaintiff and Prather had there been such indebtedness or engagement on the part of Brown, unknown to Prather. Leaving that point, if there be anything in it, for the hearing, if the plaintiff should think it worth his while to proceed to proof on it, it is sufficient at present to say that the facts are denied in the answers, as far as the defendants know or believe; and therefore the decree must be upon the supposition that those (38) facts do not exist.

The decree must be reversed, with costs in this Court; and the motion of the defendants for a dissolution of the injunction allowed as to one-half the sum due on the judgment; and as to the other half, the injunction must be continued to the hearing.

PER CURIAM. Decree accordingly.

JOHN BLACKWELL v. DAVID OVERBY ET AL.

1. A deed absolute on its face, may be shown to have been intended merely as a security, though not by parol evidence, by itself, that it was meant by the parties to be a mortgage; but, it must be by clear and cogent evidence, as by proof *dehors* of facts and circumstances which to the apprehension of men versed in business and judicial minds are in compatible with the idea of a purchase and leave no fair doubt that a security only was intended.

2. Thus where A. made a conveyance to B. and C., absolute on its face, for his interest in a gold mine, for the consideration of $40, when it was shown to be worth $400; when A., at the time, was in great distress for money; when the alleged price was not paid at the preparation or execution of the deed, or any security given for it; when upon the interest being afterwards sold by B. and C. for $400, they retained $40 and paid A. $60 more out of the amount received on the sale; when A. asserted, in the presence of B. and C., that he had made the conveyance in trust, and they did not deny it; when A., after the conveyance, continued in

possession of the mine, taking the profits as he had done before. *Held*, that upon these circumstances the conveyance must be deemed and taken by the court as intended for a security only, and that A. is entitled to the same relief as if it had so appeared on the face of the instrument.

CAUSE removed from the Court of Equity of GRANVILLE, at Spring Term, 1849.

(39) On 19 June, 1843, the defendant David Overby granted to the plaintiff and John Lewis, for the term of twenty years, a lease of a gold mine, rendering as rent one-tenth of the gold, with a stipulation, among others, that within two years Lewis might, if he chose, take the mine and 40 acres of land adjoining it, in fee, at the price of $1,600, whereof Overby should retain $1,200 for himself and pay $400 to the plaintiff. In a few months afterwards Lewis and the plaintiff began to operate the mine separately, each one for himself. The plaintiff, being quite a poor man, was unable to procure any laborers besides himself, and could do but little. After some time, however, it was agreed between him and the defendants, David Overby and John Overby, that the two latter should, each, furnish a slave to work under the plaintiff, and that the three should divide the net gains equally; and under that agreement the plaintiff collected ore to some small value, perhaps about $100. Soon afterwards the plaintiff was pressed for the payment of about $40, for which executions were in the hands of a constable; and he applied to the defendant David for it, who agreed to let him have that sum, and did so in May, 1844. The bill alleges that the sum thus advanced to the plaintiff was a loan, and that it was agreed between him and the defendant David that the plaintiff should, as a security therefor, assign his interest in the mine, which was all the property he had. An instrument was then drawn up by an acquaintance of the parties, and executed by the plaintiff in the following words: "This instrument is the witness of an agreement or bargain made this....day of May, 1844, between John Blackwell of one part and John S. Overby and David Overby of the other part, the conditions of which are as follows, to wit: The said John Blackwell, in consideration of the sum of $40 to him in hand paid by the said, etc., doth bargain, sell, and convey unto the said John S.
(40) and David and their assigns all his rights and interest, legal and equitable, in and to a certain gold mine and parcel of land, situate, etc., which was conveyed by the said David to the said Blackwell and John Lewis by lease for the term of twenty years, upon the conditions in said lease specified. The said John Blackwell doth hereby, for himself, his heirs and assigns, forever release, bargain, sell and convey to the said John S. Overby and David Overby, their heirs and assigns forever, all his interest and title in said lease to said gold mine, with all the privileges to him jointly with John Lewis conveyed by David Overby; also

including his right and interest in and to the sum of $40 conditionally to him the said Blackwell by David Overby to be paid, should Lewis make the contemplated purchase of Overby within two years. In testimony whereof the said Blackwell hath hereunto set his hand and seal," etc.

The bill states that the plaintiff was an illiterate person, able to read very little, and that he had implicit confidence in the integrity and friendship of the defendants, and was assured by them that the instrument was only a security for the plaintiff's debt, and that he should have whatever might remain of the proceeds of the property when it should be sold, after paying the said debt; and that upon the faith thereof the plaintiff executed the deed or agreement without reading it or understanding it.

The bill further states that, after executing the instrument, the plaintiff continued in possession of the mine, and worked the same with the two negroes of the defendants and himself upon their joint account, as he had done before; that he put the ore then raised with that which he had raised before the execution of the deed; and that he so continued to do until the defendant David made a contract with Lewis to sell him the interest in the lease, formerly belonging to the plaintiff, at the price of $400, whereof $100 was paid down and $300 secured by a bond payable some few months afterwards; that then the defendant (41) John S. Overby made an indorsement on the deed in the following words: "1844, 24 May. I assign the whole of my interest in the within conveyance to David Overby," and the defendant David then granted the term to Lewis at the price above mentioned. Of the $100 received from Lewis, the defendants paid the plaintiff, immediately, the sum of $60, thus reserving $40, as the bill alleges, in satisfaction of the sum borrowed by the plaintiff from David Overby. Afterwards the parties had the ore, to the value of about $200, ground and the gold extracted; and, after paying the rent to David and the expenses of grinding the ore, they divided the net proceeds equally, each share being nearly $40. The defendant David subsequently collected the residue of the purchase money, and refused to pay any part of it to the plaintiff, claiming the whole as his own absolutely, under the instrument executed by the plaintiff. The bill then charges that if such be the nature of that instrument, the plaintiff was induced by the defendants to execute it under a total mistake on that point, for they gave him explicitly to understand and believe that it was but a security for the debt he then contracted, and all parties so treated it afterwards, until the refusal of the defendant David to pay to the plaintiff the residue of the purchase money given by Lewis. The prayer is that the deed may be declared to be but a security for the plaintiff's debt to the defendants, and the defendant David may be decreed to come to an account with the palintiff for the sum for which he

sold the lease to Lewis, and pay him what may be found due him on that account.

The defendants put in a joint answer, and deny that at the time of the assignment the plaintiff was indebted to David Overby in the sum of $40, or any other sum, except $5, which, they say, is still due. They deny that the assignment was intended as a security for $40, or
(42) any other sum, or that it was understood that the plaintiff's interest was to be sold and the proceeds applied to the satisfaction of any debt of the plaintiff and the surplus paid to him; or that the plaintiff was assured by either of the defendants that the deed was merely a security for any sum of money; or that the plaintiff was ignorant of the contents and legal effect of the deed. On the contrary, the defendants say that the plaintiff had before frequently offered to sell them his interest in the lease, and that the contract between them was for the absolute sale and purchase of his interest; that the reason which induced the plaintiff to sell his interest was that he was obliged to raise money to meet several executions that were then pressing on him to the amount of about $40; that after they bargained, they applied to one Willie to draw the deed, and that he did so in the presence of the plaintiff and the defendants, and in pursuance of instructions received from them jointly, and then read it to them, and inquired whether it was in accordance with the agreement, and they all replied that they were satisfied with it; and that, in fact, the deed was intended and understood to be an absolute sale and assignment of the plaintiff's interest for the consideration therein expressed; and that the said price was applied at the request and by the direction of the plaintiff in discharge of the said claims and executions.

The answer further states that, at the time of the contract, the defendants did not suppose the plaintiff's interest was of much value, or that it could be resold for much more than the defendants gave for it, and that Lewis was induced to give the price he did from peculiar circumstances, which were: that the plaintiff continued, after the assignment, to mine with the defendant, as he had done before, and that his operations interfered with those of Lewis to such an inconvenient extent that Lewis determined at once to purchase the interest formerly owned by the plaintiff, and thus put an end to the annoyance and collisions
(43) to which he was then subject; and he was thereby induced to make the purchase at $400. The answer further states that the defendant David put into the hands of the defendant John S. the $100 received in cash from Lewis, with directions to give it to the plaintiff; and the defendant John S. states that, by the direction of the plaintiff, he applied thereof the sum of $40 to the satisfaction of a certain claim which he held against the plaintiff for collection, as a constable; and

that he paid the balance thereof to the plaintiff. The defendant David states that he sent the $100 to the plaintiff simply as an act of kindness, and not because he was under any obligation so to do; and that his reasons for it were that the plaintiff first discovered there was gold on the land and informed him of it, and that he had got a larger price for the interest than he had expected.

The material evidence is that the plaintiff is illiterate and has little or no knowledge of the nature of conveyances, though with a natural capacity, probably equal to that of the defendants; that in the Spring of 1844 a constable, named Hart, had executions against the plaintiff for about $35, which he was unable to pay, unless out of his interest in the mine; that Hart advised him, instead of having that levied on and sold under execution, to endeavor to borrow the money by making a deed of trust for his interest, and that soon afterwards Hart saw the plaintiff and the defendant David together, at Granville Court, the first week in May, and the plaintiff mentioned that he had taken his advice and made a deed of trust to the defendant David, who had agreed to pay the debt for him and was ready to do so; and that he, the said defendant, assented thereto, as the witness understood, and accordingly paid the executions for the plaintiff.

Another witness, Clark, states that he had a note of the plaintiff on which near $40 was due, and that he gave it to Johns S. Overby, as a constable, for collection; that some time afterwards, and after (44) the sale to Lewis, the defendant John S. paid the witness the debt, and both of the defendants told him that they (or we) had sold Blackwell's interest in the gold mine to Lewis for $400, and that Lewis had paid $100, out of which the debt to the witness was paid by Blackwell's directions; and that the defendant David said to the witness: "If it had not been for me you would not have got your money."

Willie states that at May court one of the Overbys applied to him to write a deed conveying to the two Overbys from Blackwell his interest and title in and to the land and gold mine, and stated to the witness the terms of the contract, which were as expressed in the deed; and that he drew the deed, and read it to the two Overbys, and also to Blackwell, he thinks; and asked them if they were satisfied, to which Overby said it was just what he wished, and Blackwell made no objection. The witness went away before the deed was executed.

The deed is not dated of any particular day in May, and is attested by two other persons, neither of whom was examined.

MacRae and T. B. Venable for plaintiff.
Gilliam and Lanier for defendants.

RUFFIN, C. J. Although the form of the instrument is very strong evidence that an absolute deed was intended as a conveyance upon a purchase, especially when supported by an answer, yet it has been often held not to be conclusive. It cannot, indeed, be met by parol evidence, merely, of an agreement at the time for a mortgage. Nor can it be repelled by any evidence which is not clear and cogent. But proof *dehors* of facts and circumstances which, to the apprehension of men versed in business and judicial minds, are incompatible with the idea of a purchase and leave no fair doubt that a security only was intended,
(45) has been deemed sufficient to let in the apparent vendor to redeem.

The leading case in our courts is *Streator v. Jones,* 10 N. C., 423. The questions of evidence and equity were there much discussed, and it was ruled that the distresses of the maker of the deed, proposals for a loan, great disparity between the sum paid and the value of the estate, the possession continuing afterwards as before, an accounting between the parties as if the vendee were still a creditor, and the vendor had still an interest in the property, and the like, were facts constituting a body of evidence as to the real purpose of the deed, stronger than the form of the instrument and the oath of an interested person. The case was followed by *Kimbrough v. Smith,* 17 N. C., 558; *Hauser v. Lash,* 22 N. C., 212; *Howlet v. Thompson,* 36 N. C., 369; and several others to the same effect. For, although deeds must be presumed to speak the truth, yet we know that, in reality, instruments intended to be but securities are sometimes put into the form of absolute conveyances, from the ignorance of the writer, the mistake of the parties, great confidence on one side and undue advantage taken on the other of the necessities of a distressed and dependent man. Therefore, in such cases, courts must consider the circumstances, in the hope of discovering the true character of the transaction; and such circumstances as those enumerated have been held to amount to clear and cogent proof—which is necessary—either that the agreement was for security only or that the bargain was a hard and unconscientious one, and relief given accordingly.

The case has every material ingredient on which the equity was sustained in those cited, and others equally strong. The first—always deemed the most material—is a gross inadequacy of the money paid, as a price, being just one-tenth of the value. Ten times the price was got for the mine almost immediately after the deed; and therefore
(46) the value at the time may properly be thus estimated. It is true, the answer says that the sale to Lewis was for much more than the parties expected and more than the value. But as the case stands, that account cannot be credited. The defendants have not examined Lewis in support of their answer, as to his motives for buying, nor proved by him or any one that the value was less than the price he gave.

Indeed, the original lease fixed on the very sum which Lewis did give as that he should give in case he chose to buy within two years; and the operations of the plaintiff, after the deed, were no greater annoyance to Lewis than they had been before. Consequently, the price given by Lewis must be taken as the value; and it seems impossible that a man in his senses and with a free will could agree to sell out and out, for $40, property for the sale of which he had contracted conditionally at $400, and which in three weeks was finally sold at that price to the person who had before contracted for it. It is further admitted in the answer that the plaintiff was in great distress for a small sum of money. The defendants say that, for that reason, he had often offered to make a sale to them. But there is no proof of that assertion; and there is evidence that he wished to borrow the money upon the security of this property. There is, indeed, no direct evidence of the negotiation between the plaintiff and the defendants, which was to themselves, and does not seem, in its particulars, to have been communicated to any person. It is true that Willie says Overby stated to him the terms of the contract. But he does not give them to us further than merely saying they "were expressed in the deed," which is certainly very unsatisfactory and amounts only to this, that he wrote the deed according to his understanding of the terms. He should have given us the words of the parties, so that the court could see whether the instrument conformed to the contract or whether the true nature of the contract, in respect to the important point (47) now investigated, was at all explained or understood by the witness. The defendants asked him no questions on that point, but leave the case upon the vague terms used by that witness. The truth, probably, is that the witness, as a neighbor and not as an adviser, was asked to write a deed for the parties, and that he did not think of inquiring whether it was founded on an agreement for a sale, or for a security, nor did they think of giving information. The understanding of the matter by the witness, separate from the facts on which it was founded, is entitled to very little weight, as the instrument itself shows that he had but a slender capacity for the task he undertook, beyond mere writing legibly. The testimony of the writer of the deed, therefore, leaves the case much as it would be without it, and upon the paper by itself. Then, it is clear that the price or alleged price was not paid at the preparation or the execution of the deed, nor any security given for it. The defendants have given no evidence of it, and have not thought proper to examine either of the subscribing witnesses. On the contrary, it is proved that David Overby paid it afterwards to the constable in discharge of the executions against Blackwell and in his presence; the latter saying at the time that he made Overby a deed of trust for the mine, and the other not disputing it. There is also something singular in the fact that the deed is

made to John S. Overby as well as to David, inasmuch as he does not appear to have paid any part of the $40 mentioned as the consideration, and he assigned his share to David without value, as far as is expressed in the assignment or shown by proof, and he got no part of the price paid by Lewis, excepting that he retained out of the money received from Lewis enough to satisfy a debt in his hands, as constable, for collection.

It is, under such circumstances, much more than simply a con-
(48) jecture that he became a party to the deed merely to obtain a security by way of indemnity from loss for indulging the plaintiff on Clark's debt, and, therefore, when he got payment of that debt, he gave up all claim under the deed, and assigned his naked legal title to David, in order that he might make a clear conveyance to Lewis. This is fortified by the fact that, upon the execution of the deed by the plaintiff, John S. Overby did not discharge nor take on himself the plaintiff's debt to Clark; but he waited until the sale of the mine to Lewis, and paid the debt out of the price—both of the defendants saying that they had sold Blackwell's interest to Lewis. It would seem, then, almost certain that John S. Overby was not a purchaser in this transaction; and it follows that the other defendant also was not one.

The circumstances hitherto adverted to receive great additional force from the indisputable facts that, after the deed, the plaintiff continued in possession, taking the profits, as he had done before, and that upon the sale to Lewis the defendants accounted to him for the money received. The possession, it is true, was but for a short period; but it continued up to the sale to Lewis, and that alone was the reason for its termination. But the continuing in possession at all of a gold mine, after the deed, without a new contract, creates a strong presumption that the sale was not absolute. If it had been, the vendor could not have thought of working the mine afterwards; but he would have been stopped instantly, just as the plaintiff and the defendants all did, as soon as a real sale was made to Lewis. The other fact, that the defendants paid the plaintiff the money received from Lewis upon the sale, puts the matter beyond doubt, if any remained. Unexplained, that act, concurring in tendency with the other circumstances, completes the evidence, so as to make it irresistible. The defendants felt the force of it, and, when they could not deny, endeavor to avoid it by saying that it was a gra-
(49) tuity. But there is not the slightest proof in support of the averment. They do not show that they accompanied the payment with any declaration of the kind, so as to afford some presumption that the plaintiff received the money on those terms. The payment, therefore, must naturally be taken to have been made on an acknowledged right of the plaintiff to the money—agreeing with the defendant's declaration to the witness, that the money was got for the plaintiff's interest in the

mine. And, upon the whole, the case seems a strong one for holding, upon presumptions arising from undoubted facts, that the deed was unduly obtained in this form, and declaring that it was intended as a security only. Confirming the sale, as he does, the plaintiff is entitled to the proceeds, deducting what he may owe the defendants or either of them on prior debts or for advances for him after the deed; and it must be referred to make the usual inquiries on those points.

PER CURIAM. Decree accordingly.

Cited: Moore v. Ivey, 43 N. C., 197; *Colvard v. Waugh,* 56 N. C., 337; *Porter v. White,* 128 N. C., 44, 45.

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THOMAS B. POWELL ET AL. v. MILDRED A. T. POWELL.

1. A. devised and bequeathed as follows: "It is my will and desire that my executors hereafter named dispose of such of my property, at public or private sale, real and personal, for the purpose of raising money sufficient to pay my debts." *Held,* that by this clause the land is made a *primary* fund, at the discretion of the executors, for the payment of debts; that the price of the land because personalty as soon as it was sold, and, being a primary fund for the payment of debts, the personal estate is not liable to make good to the real estate the amount that has been so applied, and if any part of the price of the land is undisposed of, that is now a part of the personal estate.
2. The testator then directs that his property, remaining after payment of his debts, should be kept together for the maintenance of his wife and unmarried children, and also for the education of his unmarried children. The widow made advances out of her own funds for the maintenance and education of her younger children: *Held,* that she was entitled to be reimbursed out of the general fund.
3. The testator also directs the balance of the property, as above mentioned, to be divided as follows, towit: one share to each of his children (except two sufficiently provided for in his lifetime) as they should respectively come of age or marry. Rosa, one of the children, died under age and unmarried. *Held,* that this share must remain with the common fund until such time as she would, if living, having arrived at full age, when it may be called for by her personal representatives, and held subject to the rights of her distributees.

CAUSE removed from the Court of Equity of WAKE, at Spring Term, 1849.

The parties are the devisees and legatees of Jesse Powell, deceased. Two of the defendants are also executors. The bill is filed to obtain a

construction of the will; and the plaintiffs pray for an account and to have their shares allotted. Rosa Powell, one of the testator's children, died under age, and would not now be of age if living. There
(51) were nine children, including Rosa. The widow, Mrs. Mildred Powell, is entitled to a child's share of the personalty. Two of the children are fully advanced; so that the partition will make eight shares, excluding the two children who have been advanced, and including Rosa.

The following is a copy of the will of Jesse Powell:

"I, Jesse Powell, of the county of Wake and State of North Carolina, do make and publish as my last will and testament as follows, viz.:

"1st. It is my will and desire that my executors, hereafter named, dispose of such of my property at public or private sale, real or personal, as they may think best for the interest of my estate, for the purpose of raising money sufficient to pay my debts.

"2d. I give unto my son John D. Powell two negro men, by name Alfred and Moses, valued at $800 each; a woman, by name Rachel, and her two children, by name Ellen and Sidney, valued at $1,200, and their increase from the time I put them in his possession, to him and his heirs forever. Also other property to the amount of $507. All of which will fully appear by reference to my guardian book. All of which said property hereby given has by him been received and in his possession.

"3. I give unto my daughter Rebecca A. Hilliard one negro man, by name Henry, valued at $800; one girl, by name Ellen, valued at $600; a woman, by name Cloe, and her three children, by name Lipsia, Ailsey, and Jane, valued at $1,459, and their increase from the time of their delivery to my said daughter Rebecca. Also other property to the amount of $255. All of which will fully appear by reference to my guardian book, which will show the amount. All of which said property hereby given has been put in her possession, I give to her, and her heirs forever.

"4th. After the payment of my debts as aforesaid, whatever of my estate may remain, either real or personal, except the property
(52) already advanced to my son John and daughter Rebecca, I wish kept together and managed by my executors, as they may think best for the maintenance of my wife and unmarried children. I also wish my wife and children who are under age or unmarried should live together and be supported out of the property, and at the discretion of my executors, and my children to be educated out of the proceeds of the estate in hand, with an education at least equal to those that I have already educated, without an extra charge.

"5th. My wish is, when one of my children marries or arrives to lawful age, that my personal estate be divided into one share more than

there are children, who have not received their portion of my estate, by five discreet persons to be appointed for that purpose by the county court, any three of which to act the same as if all five were present; and my wife to take her first choice of lots and then one share to be divided out and given to him or her for whom divided; the remainder to be kept together until another arrives at age or marries, and the same proceedings to be had in every case, as they respectively arrive at age or marry. I further wish my wife to have her share out of my estate at any time she may see proper to desire it.

"6th. In case my wife should think proper to marry, I desire that she be allowed one-third of my real estate, if not previously sold by my executors, during her life, and the balance of my estate of every description (the land excepted) then on hand to be divided between her and all of my children who have not been provided for. Also after her marriage, for my children to remain with her, and their respective portions of my estate also, or otherwise to be removed into the hands of a guardian, as my executors may see proper and most advisable for the interest of my children.

"7th. At the death of my wife, should any land remain unsold, I desire that my executors should expose it at public sale, giving one or two years credit, with interest from the date of sale, and the (53) proceeds arising therefrom to be equally divided between all my children, or their lawful representatives. Also, every species of property, except the negroes, which may remain belonging to my estate, not before disposed of, I desire to be sold, and an equal division of the proceeds thereof to be equally made between all of my children aforesaid, or their lawful representatives.

"8th. Now, I wish this my last will to be understood that on a final division of my estate of every denomination whatever, my children be made equal heirs, share and share alike; and as John and Rebecca have had about $60 each advanced to them, that is not before mentioned in this will, I wish each of my younger children to have $60 allowed to them extra, in the price of a horse, valued to them as in money; and if I should advance any of my children any property or money after the date of this will, I shall charge it to them in my guardian book, which I wish them to be charged with on a settlement of my estate.

"9th. I nominate and appoint my wife, Mildred A. T. Powell, executrix, and my son John D. Powell, and my friend John Ligon, executors to this my last will and testament, revoking all former wills by me made.

"In witness whereof, I the said Jesse Powell, have hereunto set my hand and seal, this 12 February, 1842. All corrections made before assigned."

The executors have sold the land and applied the proceeds of the sale to the payment of the debts. The fund on hand consists mostly of negroes. The executor John D. Powell alleges in his answer that the debts are not yet all paid, and remain a charge upon the estate. Mrs. Powell, who is also an executrix, alleges that she is in advance out of her own funds for the maintenance and education of the younger
(54) children, after applying the profits of the unsold part of the estate to those purposes, with the exception of a large amount received for the hire of negroes, which has been applied to pay the debts of the testator.

The negroes have been divided, by an order of the court below, into eight shares, and such of the children as are married or of age have had their shares allotted. The shares of the widow and the children who are unmarried and under age remain in common. No exceptions are filed to the report of the commissioners who made the division.

G. W. Haywood for plaintiffs.
W. H. Haywood for defendants.

PEARSON, J. We think it clear that the will makes the land a *primary* fund for the payment of debts, at the discretion of the executors, which has been properly exercised by selling the land to save the negroes. The price of the land became personalty as soon as it was sold, and being a primary fund for the payment of debts, it follows, of course, that the personal estate is not liable to make good to the real estate the amount that has been so applied, and if any part of the price of the land is undisposed of, that is now a part of the personal estate. This is the principal question.

We think the shares of Rosa ought to remain with the common fund until such time as she would, if living, have arrived at full age, when it may be called for by her personal representative and held subject to the rights of her distributees.

The fund in the hands of the executors is liable for the unsatisfied debts of the testator, and is also liable to reimburse Mrs. Mildred Powell for the amount she is in advance for the maintenance and education of the younger children, over and above the profits received by her
(55) and applied to that purpose, to the extent, if necessary, of the negro hire which has been applied to the payment of debts; for the negro hire formed a part of the profits applicable to the purposes of maintenance and education, and its application to the payment of debts increases the fund now on hand.

The report of the commissioners will be confirmed, and a decree for

the plaintiffs to receive the shares allotted to them, subject to contribution for the liabilities above stated. The costs will be paid out of the fund in the hands of the executors.

PER CURIAM. Decree accordingly.

Cited: *Conly v. Kincaid,* 60 N. C., 595.

ELI MURRAY ET AL. v. WILLIAM OLIVER ET AL.

Adding a codicil to a will is a repudiation, and the codicil brings the will to it and makes it a will from the date of the codicil.

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

On 30 January, 1827, Stephen Oliver made his will, in which the residuary clause is as follows: "If there should be any remaining, after paying the moneys that I am security for him for, as for the balance of my estate, my desire is that it shall be equally divided among the whole of my children during their natural lives. But my will is that if either of them die without a lawful heir, the whole of the property loaned them by me be returned for an equal division among the rest of the children." By a codicil written on the same sheet of paper, and dated 28 May, 1828, he says: "My will is that when any of my children (56) shall have children that are lawfully begotten, then and in that case the property I have loaned them shall be theirs in fee simple, to dispose of as they please."

The testator died, leaving eight sons, who were his only children, and leaving a considerable number of slaves, which formed a part of the residue of his estate and were divided among the children.

In 1847 the testator's son Robert died without a child, leaving twelve slaves, devised under his father's will. He made a will bequeathing the slaves to the defendants, who are two of his brothers.

The plaintiffs, who are the other children of Stephen Oliver, and the representatives of Reuben, a son, who died leaving children, insist that, by the will of their father, Robert took but a life estate, and as he died without having a child, the slaves, by the limitation over, are to be divided among the children.

The defendants insist that Robert had an absolute estate, and claim the slaves under his will.

Norwood for plaintiffs.
J. H. Bryan and T. B. Venable for defendants.

PEARSON, J. Whatever might have been the construction of the residuary clause, had it stood upon the original publication in 1827, it is put beyond doubt by the republication in May, 1828, by the codicil of that date. For, by the republication, the will is made to speak and operate from that time. The act of 1827, ch. 7, had then gone into effect, and gave efficacy to the limitation over. Whatever doubt was once entertained, it is now unquestionably settled that adding a codicil is a republication, and the codicil brings the will to it, and makes it a will
(57) from the date of the codicil. Much more must it have that operation in putting a benignant sense on the words of the will, so as to make its provisions, in reference to personal property, take effect.

Therefore, it must be declared that upon the death of Robert Oliver without having had a child, the slaves allotted to him, and their increase, under the will of his father, belonged to his surviving brothers and the present representatives of Reuben, who died leaving children. There must be a decree for a division accordingly, and for an account of the property since the death of Robert.

PER CURIAM. Decree accordingly.

THOMAS R. STEPHENS v. JOHN HARRIS ET AL.

1. Though a voluntary bond is good between the parties, in this Court as well as at law, yet in the course of administration it is to be postponed to any just debts, though due by simple contract.
2. Equity regards it as a fraud to give a voluntary security which, by its form, gets a preference to a just debt, and, therefore, interposes to prevent the preference, in whatever way it may become necessary to effect that end. So that, if the voluntary obligee receive the money from the executor, the real creditor may file his bill to be satisfied out of the money, if he cannot otherwise get his debt; and if the creditor has the fund in his possession, he may retain it in satisfaction.

CAUSE removed from the Court of Equity of PERSON, at Fall Term, 1848.

The plaintiff alleges that he is the illegitimate child of Anderson Harris, and that his father had lent to the defendant W. J. Hamlett the sum of $838.94, and, being disposed to make a provision for him, took from the said Hamlett a bond made payable to the plaintiff for
(58) that sum, and delivered it to his mother, Joan Stephens, for his use and benefit. He states that, subsequently, it was by his

mother delivered to his father for collection, who lost it, and shortly thereafter died; and that John Harris, his father, administered on his estate, and took from W. J. Hamlett a bond for the money so lent him in his own name, as such administrator, and claims to hold it as assets of the estate of Anderson Harris.

The defendant John Harris denies that he has any knowledge of the making of the bond of W. J. Hamlett payable to the plaintiff; and if it was made, he denies it was ever delivered to the plaintiff or to any one for him. He alleges the facts to be, as he had heard, that Anderson Harris was convicted in the Superior Court of Person County for an offense for which the court sentenced him to be imprisoned three months and pay a fine of $300, and that to evade the payment of the fine, he made the loan spoken of to Hamlett, and took the bond payable as stated. He further states that at the time the loan was made to Hamlett and the bond taken, Anderson was very largely indebted to him for rents of lands and money lent him, to an amount much larger than the bond in controversy, and that, after paying the just debts of the intestate, Anderson, there will not be assets to an amount exceeding $175.

Gilliam for plaintiff.
E. G. Reade and Norwood for defendants.

NASH, J. We are satisfied from the evidence that the bond made by W. J. Hamlett to the plaintiff was delivered to his mother for him, and was intended to enable Anderson Harris to evade the payment of the fine imposed upon him by the court on his conviction, and that it was, therefore, fraudulent and void as to the State; but the fine and the costs of the prosecution have been paid, and the State is not (59) making any complaint. But, although the debt due the State is paid, still, as the bond, or the money secured thereby, was a gift by Anderson Harris to the plaintiff, it is void as to the creditors of the donor; yet it is binding on Harris, and on the defendants who stand in his shoes. The defendant Hamlett is also bound to make it good. At the time he gave the second bond to John Harris, the administrator of Anderson Harris, he knew the original bond was the property of the plaintiff. John Harris, however, in his answer alleges that his son Anderson was, at the time of the gift of the Hamlett bond to the plaintiff, largely indebted to him and that those debts are unpaid, and that there are not assets sufficient to pay what was due him, over and above the Hamlett bond.

There must be a reference to the master to take an account of the assets of Anderson Harris which came to the hands of his administrator, John Harris, the amount of the debts due from the estate, and par-

ticularly the amount of the debt due from the estate to John Harris, and how due.

RUFFIN, C. J. The plaintiff would be entitled to recover from the defendant Hamlett upon the single ground of the bond which he gave payable to the plaintiff, and the loss of it, as admitted in the answer; and, if he had sued him by himself, it is not seen how that defendant could have raised any question as to the rights of the creditors of Anderson Harris. But as the two defendants came to an arrangement between themselves whereby the fund to which the plaintiff, as obligee in the bond, is entitled has been placed in the hands of the defendant Harris, and the plaintiff has framed his bill upon the idea of following that fund, that defendant must be allowed to assert any claim upon the fund in this suit which he might do in a bill by him against the plaintiff if he had himself received the money from the obligor, Hamlett. Now,
(60) although a voluntary bond is good between the parties in this Court as well as at law, yet it has been long settled that in the course of administration it is to be postponed to any just debts, though due by simple contract. *Powell v. Jones,* 1 Eq. Cas. Abr., 84; *Lechmere v. Carlisle,* 3 Pr. Wms., 211; *Cary v. Rooke,* For., 153. Equity regards it as a fraud to give a voluntary security which by its form gets a preference to a just debt, and, therefore, interposes to prevent the preference. It follows that it will interpose in whatever way it may become necessary to effect that end; and, therefore, that if the voluntary obligee receive the money from the executor, the real creditor may file his bill to be satisfied out of the money, if he cannot otherwise get his debt. The same reason applies with equal force to the voluntary assignment of an obligation or a debt, as to a debtor's own voluntary obligation. Therefore, the defendant Harris, as a creditor of Anderson Harris, might maintain a suit against the present plaintiff for satisfaction out of his debtor's bounty, if it were in the plaintiff's hands. And it is the necessary consequence that, having the funds in his own hands, he has the right to retain out of it what will pay his demand, if there be no other assets. The principle of law involved in the case seems to be simple and clear enough; and the doubt probably is, whether the sum now demanded as debts from the son were not advancements to him. That question, however, will arise when it is known what debts the son owed the father and what assets the latter has as administrator of the son, and how the same have been administered; as to all which there must be a reference to make the usual inquiries.

PER CURIAM. Decree accordingly.

(61)

WILLIAM W. PUGH, GUARDIAN, ETC., v. GEORGE W. MORDECAI.

The acts of Assembly, Rev. Stat., ch. 54, sec. 23, which authorizes guardians who have been appointed in another State to orphans who have removed to that State and have guardians here, to demand and receive of the latter the estate of the wards, does not apply to testamentary guardians appointed in this State.

CAUSE removed from the Court of Equity of EDGECOMBE, at Spring Term, 1849.

Joseph R. Lloyd died in 1841, leaving a widow and four infant children, to whom, by his will, he gave all his estate, real and personal, equally to be divided between them, with a power to his executor to sell the real estate and convert it into money for the purpose of division. By the will the defendant Mordecai was appointed testamentary guardian of the four children, "to rear and educate them in the State of North Carolina." The executor administered the estate, and delivered to the defendant, as guardian of the four infants, about thirty slaves and about $20,000 in cash, arising chiefly from the sale of land.

In 1845 the widow removed to Louisana where she had resided before her marriage, and married a second time, and has since resided there; and during the past year the children were taken by their mother to that State to reside with her—the eldest being about 20 and the youngest nearly 14 years of age. In November, 1848, a maternal uncle of the children was appointed, by a court of Louisiana, dative tutor to them—an office, it is said, which is the same there as that of guardian appointed by a court in this State; and that the tutor duly entered into bond in the sum of $60,000, with sufficient sureties, for the faithful discharge of his duties and accounting for the estates of his wards. This (62) bill was then filed, stating that the children will be better taken care of by their mother than they can be in this State, and also that their estates will be more productive in Louisiana than here, because the profits of negroes there are greater and the interest of money higher, and praying that the defendant may be decreed now to account and deliver the slaves and pay the money belonging to the infants to their Louisiana guardian.

The defendant answers that he believes it will be for the advantage of his wards to grant the prayer of the bill, and that he admits it may be done, if the court deem it lawful, so that he can be protected in delivering over the estate.

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

RUFFIN, C. J. We think the object of these parties cannot be legally effected, as it seems to us that a testamentary guardian cannot be displaced in this manner. It need not be questioned that the domicil of an infant may generally be changed by the removal of the mother to another State and carrying the infant with her, and that, in such a case, the act of 1820, Rev. Stat., ch. 54, sec. 23, requires an executor or guardian appointed by a court in this State, and having the estate in possession, to account with a guardian appointed in the State of the infant's residence. But we think a testamentary guardian is not within the purview and meaning of the act. It is true that the terms of the act are broad enough to cover the case, as it speaks of guardians generally, and there is no express exception therein of testamentary guardians. But it would seem
that the exception must be implied from the power conferred by
(63) the law on a father "to dispose of the custody and tuition" of his
infant child and the management of the estate. After giving such a power, and when the father of a child, residing here, appoints a guardian and thereby confers on him the custody and tuition of the child here—expressly directing in the case, indeed, that the child shall be reared and educated in this State, by the testamentary guardian—it seems impossible to suppose the law could mean to allow any person whatever to change the custody, tuition, or domicil of the child, unless in the single case where the guardian was wasting the estate or otherwise demeaning himself improperly. Suppose the father to direct particular investments in stocks, or loans, or lands in the State. It cannot be imagined that the Legislature intended to interfere with those special provisions and trusts by allowing them to be defeated by any one who could manage to get the child into another State and procure a guardian to be appointed there for him. It is plain that it was the very object of this father to prohibit the removal of his children from this State on any pretense; and the probability from the circumstances, is that his objection was directed against their present domicil in the particular. He thought there was more in what he deemed the proper nature and tuition of his children, in the proper place and under a fit person, than in the rapid accumulation of their property during the short period of their infancy. Indeed, such are always the views of a father who appoints a guardian for his children, instead of leaving the selection to the courts from time to time. It seems to us that the act in question did not mean, in the least, to impair that privilege of a father—especially through the agency of the courts of another State, acting upon infants improperly carried within their jurisdictions, in opposition to the will and lawful directions of the father. This, we have said, should be implied from the nature of the case, notwithstanding the general
(64) term "guardian" used in the act. But that implication is so for-

tified by other provisions in the act as to become almost a necessary one. For example, section 5 authorizes the Superior or county courts to appoint a guardian to take charge of the estate of an infant whose father is alive and resident here. But clearly in such a case, a guardian appointed abroad would not supersede the one appointed here. There must, then, be some limitation on the sense in which the term "guardian" must be received in the act; and, as we conceive, this case of a guardian appointed by the father furnishes another instance of it. The act says the guardian of an orphan "regularly appointed in the State where he resides" may call an executor or guardian here to account. But whom can our law deem guardian "regularly appointed" in such a case? Surely those were not intended who could not, according to our law, be appointed by our own courts. Now, the statute confers the power upon our courts "to appoint guardians where none have been appointed by the father," and in that case only, unless in the case of an unfaithful guardian, according to section 18. If, in this case, our courts were to appoint a guardian for the children, the appointment would be without authority or validity; and it seems contrary to every sound principle of construction to allow a general term in a statute so to operate as to make the Legislature confer on a foreign jurisdiction an authority which is expressly denied to our own tribunals by the same statute, and which cannot be exercised by either tribunal without impugning powers expressly conferred thereby on the father and his nominee exclusively. In such a case the orphan cannot be rightfully taken from the guardian here and carried abroad; and therefore our law cannot deem one, there appointed, to be a lawfully and regularly appointed guardian.

PER CURIAM. Bill dismissed.

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(65)

MALCOLM MONROE ET AL. v. WILLIAM MCINTYRE.

1. In an injunction case, if upon the hearing of the answer the statements are such as to leave in the minds of the court a reasonable doubt whether the plaintiff's equity is sufficiently answered, the unjunction will not be disolved, but will be continued to the hearing.

2. Where A. upon a good consideration gave to B. a power of attorney to prosecute a suit at law in the name of A., but for the benefit of B., B. indemnifying A. against all responsibility for the costs, a court of equity will enjoin A. from dismissing the suit.

APPEAL from an interlocutory order of the Court of Equity of SAMPSON, at Spring Term, 1849, *Caldwell, J.*

This was an injunction bill filed in May, 1848. The plaintiffs Malcolm Monroe and David B. Melvin, executor of Robert Melvin, allege in their bill that one Wiley M. Fort was a constable in the county of Bladen in 1839; that the said Malcolm and Robert were sureties to his official bond; that the defendant William McIntyre placed sundry papers in the hands of said Wiley M. Fort, as constable, for collection, among which was a note under seal made by one William Reeves and Thomas Fort, payable to the said William McIntyre, for the sum of $71.64, one day after date, and dated 14 January, 1840; that the said note was put into hands of the said Wily Fort on the same day it bears date; that, without taking any steps to collect the said note, the said Wiley, early in the month of February, 1840, absconded, leaving the said note, which was taken possession of by the said Malcolm and Robert;

(66) and the bill further alleges that the said Malcolm and Robert, feeling it their duty to do so, instituted a suit against the said William Reeves and Thomas Fort for the recovery of the said debt, in the name of the said William McIntyre, and obtained a judgment, from which judgment an appeal was taken to the county court of Bladen; that while the suit was pending in this court the said William McIntyre, through his attorney, Thomas L. Hybart, Esquire, who was duly authorized to act as such by the said McIntyre, applied to the said Malcolm and Robert for payment of his said claim on Reeves and Fort, and it was agreed between the said Hybart, as attorney for the said McIntyre, and the said Malcolm and Robert, that the latter would pay the said McIntyre the amount of his claim upon his transferring to them his interest in it, but as there was a suit pending on it, no legal transfer could be made without affecting the plaintiff's right to recover therein; that it was therefore agreed that McIntyre should execute to the said Malcolm and Robert a power of attorney to carry on the said suit in the name of the said McIntyre, for the use and benefit of the said Malcolm and Robert; that the said Malcolm and Robert accordingly gave to the said Thomas L. Hybart, as attorney, their promissory note payable to the said McIntyre for the amount of the said claim; that the said Hybart in return brought and delivered to the said Malcolm and Robert a power of attorney signed and sealed by the said McIntyre and witnessed by the said Hybart, authorizing the said Malcolm and Robert to prosecute the said suit in the name of the said McIntyre, but for the use and benefit of the said Malcolm and Robert, and that the said Malcolm and the executors of the said Robert, after his death, executed and delivered to the said attorney of McIntyre their bond, conditioned to indemnify him against all liability for the costs of the said suit. The bill further charges that the said suit was pending for many terms in the county court of Bladen, where it was decided in favor of the plaintiff;

that the defendant appealed to the Superior Court, and the cause (67) was removed on affidavit to the Superior Court of Sampson County; that at the Spring Term, 1848, of the said court the plaintiffs being fully ready for trial, the said McIntyre refused to let the trial proceed, and intimated his purpose to dismiss the suit. And the plaintiffs allege that they fear the said McIntyre will carry this threat into execution, unless prevented by the interposition of this Court. It is further stated in the bill that Robert Melvin is dead, and the plaintiff David B. Melvin is his sole surviving executor. The bill then prays for an injunction and for general relief.

The injunction was granted.

At Fall Term, 1848, of Sampson Court of Equity the defendant McIntyre filed his answer. The answer admits that the defendant placed in the hands of Wiley M. Fort, constable, the note described in the plaintiff's bill, that the said note has been paid to him, and that he has not now, nor has he had since 1841, any claim against Reeves or Fort. It avers that the defendant never instituted any suit, nor authorized one to be instituted, in Bladen or elsewhere, against the said Reeves and Fort. It says that the defendant's regular attorney and legal adviser was Thomas L. Hybart, who had the management of his claims. The defendant then states in his answer that if he ever executed the particular power of attorney set out in the bill as of date of 7 April, 1841, which he by no means admits, but puts the plaintiff to strict proof thereof, then the defendant declares that it was not read to him nor read over by him, and must have been signed upon the application of Mr. Hybart, with the impression on the mind of the defendant that it was some paper connected with his business necessary to be signed, and in total ignorance of its contents; and the defendant avers that it was not delivered when signed, nor for four months thereafter, for the defendant (68) has in his possession an application in writing under date of 7 August, 1841, from Robert Melvin, requesting the defendant to execute a power of attorney to the said Melvin and the complainant Malcolm, to enable them to sue on the note of William Reeves and Thomas Fort, which had been paid and satisfied. The answer further states that in 1841 the defendant was surprised to learn that a suit was pending in Bladen County Court, and another in Bladen Court of Equity against William Reeves and Thomas Fort, at the instance of the defendant; that the defendant had no knowledge of the institution of these suits until informed, as is admitted in the plaintiffs' bill, that Robert Melvin and Malcolm Monroe had taken upon themselves to use his name, without his consent, and therefore directed his said attorney to dismiss the suit forthwith. The answer further alleges that the debt of Reeves had been paid to the defendant by the said Hybart, but how collected and of whom

the defendant is totally ignorant, and the defendant has now no claim against Reeves; that when the payment was made, not a word was said of any purchase of the note or assignment thereon, but the payment was made as a payment and discharge of the debt. The defendant then denies that he ever authorized Hybart to make any contract or agreement whatever with Robert Melvin or Malcolm Monroe touching the use of his name in any suit against Reeves and Fort, or either of them. The defendant then states that he was amazed to find that the suit which he ordered Mr. Hybart to dismiss was still pending, having been taken to the county of Sampson from the county of Bladen, and he admits he authorized Mr. Dobbin, an attorney at law, to dismiss it, and he still insists upon his right to do so. He avers that the bond of indemnity of which the plaintiffs speak was never delivered to the defendant; that Mr. Hybart was not authorized to take such bond and never com-
(69) municated the fact to the defendant, and that, although the plaintiffs allege its execution in 1846, the defendant never heard of it nor saw it, after the filing of this bill, it was found among Mr. Hybart's papers.

The defendant says he is advised that if the paper under the date of 7 April, 1841, is genuine and binding upon him, still, as it was coupled with no interest in Melvin and Monroe, and they were under no liability whatever for Reeves and Fort, nor at all interested in the note, it was a mere naked power, appointing them the attorneys and agents of the defendant to conduct a suit, and, as such, it was revocable, and, in point of fact, was revoked by the order to dismiss in July, 1841, of which Melvin and Monroe had notice

Upon the coming in of the answer, the defendant moved for a dissolution of the injunction, which motion was refused and the injunction continued to the hearing. From this interlocutory order the defendant, by leave, appealed to the Supreme Court.

Strange for plaintiffs.
W. Winslow for defendant.

NASH, J. It is a well established rule in equity that where an answer to a bill praying for an injunction fully denies the plaintiff's equity, the injunction must be dissolved. To have this effect, however, the whole, equity must be denied. The statements of the answer must be credible and exhibit no attempt to evade the material charges of the bill. *Sharpe v. King,* 38 N. C., 402. If upon the hearing of the answer the statements are such as to leave in the mind of the court a reasonable doubt whether the plaintiff's equity is sufficiently answered, the injunction will not be dissolved, but continued to the hearing. *James v. Lemley,* 37 N. C., 278; *Miller v. Washburn,* 38 N. C., 161.

It is impossible in this case to say that if all the facts set forth (70) in the defendant's answer be true, the whole equity of the plaintiffs is denied, or that we have no doubt on the subject. The answer is so drawn—whether from haste or some other cause, we cannot tell—that it cannot have the effect desired by the defendant. It is unsatisfactory, and is, apparently, evasive—in no one instance meeting the averments of the bill with a direct response, and in some material matters giving no reply whatever. Thus, the plaintiffs state that Monroe and R. Melvin were the sureties of the constable, Wiley M. Fort, on his official bond—the answer neither admits nor denies it; that Fort ran away, and that they were held liable by him, the defendant, for an amount of the Reeves and Fort note—it makes no reply. In several other particulars it is defective in fullness and frankness, and is, therefore, unsatisfactory. For these reasons, alone, the injunction ought not to be dissolved. But enough does not appear on the answer to entitle the plaintiffs to that aid from the court which they seek. The equity of the plaintiffs is that, as sureties of the constable, Fort, on his official bond, they paid to the defendant, at his request, the amount of the Reeves and Fort note; and that under an agreement made by them with Mr. Hybart, the defendant's attorney, that he would procure from the defendant a power of attorney authorizing them so to do, they had instituted a suit in the name of the defendant against Reeves and Fort to reimburse themselves, which suit the defendant threatens to dismiss. The answer admits that Mr. Hybart was the defendant's attorney to collect the money due on the note; that it was collected and paid over by Mr. Hybart to him; and that he has not, since its payment, had any claim upon the note upon Reeves and Fort; and it substantially admits that the defendant did execute a power of attorney to the plaintiffs Monroe and Robert Melvin. This power of attorney is filed in the cause as (71) an exhibit, and is witnessed by the defendant's attorney, Mr. Hybart, and fully authorized the use of his name by the sureties of the constable in the suit they had brought. The defendant then has no claim upon Reeves and Fort upon their note, and it is a matter of no importance that Mr. Hybart neglected to tell him from whom he received the money; against the costs of the suit he is indemnified, for the delivery of the bond of indemnity to Mr. Hybart was a delivery to him. The defendant further admits that he had directed Mr. Dobbin to dismiss the suit at law. This he had a clear legal right to do, being the plaintiff of record. It is a power, however, the exercise of which a court of equity will not permit, under the circumstances of this case. It will not suffer the defendant to interpose his mere legal right to prevent the plaintiffs from their endeavor to ascertain their rights. 2 Sto. Eq., sec. 903.

The equitable right of the plaintiffs to the aid they ask is not shaken

by the statement of the answer, but is rather strengthened and confirmed by the manner in which the averments of the bill are answered. The attempt of the defendant to dismiss the suit at law is capricious, unjust, and iniquitous.

We see no error in the interlocutory order appealed from.

RUFFIN, C. J. The plaintiffs had in their hands the notes of Reeves and Fort and could have returned them to the defendant, and thus exonerated themselves from liability as the sureties of the constable for anything more than the actual damages arising to the defendant from the negligence of the constable. As there is no suggestion of the insolvency of the debtors at the time, those damages would have been but nominal. *S. v. Skinner*, 25 N. C., 564. That would have been of no sub-
(72) stantial benefit to the creditor, while it would have subjected the sureties to the costs of an action. It was, therefore, thought by the plaintiffs, and by the defendant's attorney and agent, to be the best for all parties that there should be no expensive, though fruitful, litigation between them; and to that end, that the sureties should make the debts their own by paying the amount to the creditor, and it was agreed by the defendant's attorney and agent that if the sureties would do so they might, at their expense, sue the debtors on the notes in the name of the original creditor, the present defendant. That contract was accordingly made, and it was complied with by the present plaintiffs. Upon these facts a plain obligation arose on the defendant to fulfill the engagement of his agent and allow the plaintiffs to recover the money from those from whom it was really due, in his name, though for their benefit; and it is clear equity that the defendant should be restrained from interfering with the plaintiffs' efforts to do so, they indemnifying him against any costs of the action. Such is the state of the case between the parties, if the facts be as above supposed. That the facts are so cannot be disputed in this stage of the cause, because they are alleged in the bill, and the answer in no one particular denies them. It is true, the bill proceeds to say that his attorney and agent further agreed with the plaintiffs that the defendant would give the plaintiffs a written letter of attorney to prosecute in his name the suit which they immediately commenced on the notes; and that the defendant approved of and confirmed the transaction of his agent by subsequently executing the power of attorney. And it is also true that the defendant answers to this latter matter that he did not, by any act of his own, intend to confirm the alleged agreement of his agent, for it was not communicated to him; and that, if he executed any power of attorney, its contents and purpose were unknown to him. But that does not meet the plaintiff's equity at all, for
(73) those subsequent events are stated but as some of the evidence of

and the acts done under the original agreement with the agent upon which the plaintiffs paid their money, whereby their equity arose. The answer, indeed, is not explicit as to those circumstances—not meeting the allegations of the bill on those points fairly, and denying or admitting them plainly; and if the merits depended on those matters, the answer would not be sufficient to dissolve the injunction. But those are really but collateral circumstances, and, therefore, need not be particularly noticed, the substance of the case being the original agreement by defendant's agent and the payment of the money by the plaintiffs and receipt of it by the defendant under the agreement—which is not at all met by the answer. Therefore the order was right, and must stand affirmed, with the costs in this court.

PER CURIAM. Order to be certified accordingly.

Cited: Heilig v. Stokes, 63 N. C., 615; *Perry v. Michaux,* 79 N. C., 98; *Bruff v. Stern,* 81 N. C., 188; *Riggsbee v. Durham,* 98 N. C., 78.

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(74)

WILLIAM GRAY ET AL. v. THOMAS T. ARMISTEAD ET AL.

An administrator has a right to sell notes of hand, as well as chattels, belonging to his intestate's estate, and the sale is no breach of duty; and the purchaser, even at a discount, shall not be held liable to creditors or others, unless he is privy to a misapplication of the price, as where he received it in payment of a debt due to him by the administrator individually, or has otherwise actual notice that the administrator intends to commit a fraud.

CAUSE transmitted from the Court of Equity of MARTIN, at Spring Term, 1849.

William Corprew died in 1841. Wilson Corprew, one of the defendants, in October of that year was appointed his administrator and the plaintiffs were his sureties. In November the administrator sold the effects of the intestate, and, among other things, sold a negro boy to one Chesson and took his note with two sureties for the price, $736, payable to the said Wilson as administrator of William Corprew, six months after date, 1 November, 1841. On 23 February, 1842, the said Wilson sold the note to the defendant Armistead at a discount of 25 per cent or to the defendant Latham, and he sold the note to defendant Armistead at a discount of 25 per cent, in the presence of the said Wilson.

The said Wilson was at that time very much embarrassed. His property was under execution for a large amount of debt, and was afterwards

sold without paying his debts, and he has since been insolvent. The said Wilson wasted the estate of his intestate, and the plaintiffs, as his
(75) sureties, have been compelled to pay the sum of $586 to the creditors of the intestate. The note of Chesson was undoubtedly good at the time it was sold to Armistead, and he has since collected it.

The original bill charges that the said Wilson sold the note to the defendant Armistead; that he was insolvent at the time, and this fact was known to Armistead; that the note belonged to the estate of the intestate, as was apparent on its face, and this was known to Armistead; and that Armistead received the note in payment of a debt due to him by the said Wilson. The prayer is for a decree for an amount sufficient to repay the plaintiffs the amount paid by them as sureties.

The answer of Armistead denies that he bought the note from the said Wilson; but admits that he did purchase it from one Latham at a discount, and avers that he paid Latham the price in cash. The answer denies that the said Wilson was insolvent at the time the defendant purchased the note; and avers that "he then owned a considerable amount of both real and personal property, which was not sold for some time afterwards," since which time it is admitted he has been insolvent.

The plaintiffs then amended their bill by making Latham a defendant, and charge that the note was sold to Armistead by the said Wilson, or was sold by the said Wilson to Latham in the presence of Armistead, and immediately sold by Latham to Armistead, and that Armistead and Latham appropriated the proceeds of the note to themselves, in pursuance of a contrivance and conspiracy, well knowing that the said Wilson was insolvent and was committing a breach of his trust and was making a misapplication of funds which, they knew, belonged to the intestate.

The answer of Armistead avers that he bought the note of Latham, and paid him the price in cash; denies any knowledge of an intention on the part of the said Wilson to misapply the funds of his intestate,
(76) and admits the receipt of the amount of the note from Chesson.

The answer of Latham denies that he bought the note from the said Wilson, or sold it to Armistead, and avers that the said Wilson told him he was about to sell the note to Armistead, and requested him to go with him to the counting-room of Armistead, which, he did, and the said Wilson in his presence sold the note to Armistead, and received from him $545 in cash, the net proceeds, after deducting 25 per cent. He admits that the said Wilson was then much embarrassed, but he was not sold out until some time afterwards. He denies that he received from the said Wilson, or any other person, any part of the proceeds of the sale of the note.

The answer of Wilson Corprew admits that he sold the note to Armistead and received the money from him; but he does not recollect whether

he sold the note to Armistead himself or got Latham to act as his agent in making the sale.

It is not necessary to recite the testimony.

Biggs for plaintiffs.
Heath for defendants.

PEARSON, J. The answers of Armistead and Latham, as well as that of Corprew, are evasive and unfair, and, taken in connection with the testimony, create a strong suspicion that the facts are that in January, 1842, Corprew, being pressed for money and his property being all under execution, borrowed of Latham $650, at a premium of 10 per cent, to be returned at March court, when Latham had promised to return it to one Gaither, of whom he had borrowed it to *"accommodate"* Corprew; that on 25 February, in order to raise money for Latham, Corprew, in his presence, sold the note in question, appearing on its face to be the property of the intestate, to Armistead, at 25 per cent discount; (77) received the net proceeds in cash and paid it to Latham, and that Armistead knew that the money was to be so applied. If these facts had been so established by the proof, the plaintiffs would be entitled to the decree prayed for. But the answer denies the material facts, and the proof is not sufficient to weigh them down.

As to Armistead, he bought the note and knew that it was the property of the intestate; but he denies that any part of the price was applied to the payment of the debt due to him by the administrator. This is true. He denies, also, that he knew of an intention on the part of the administrator to misapply the fund. The proof does not show this to be untrue. He knew the administrator was hard pressed and that all his property was under execution—in fact, one of the executions was in his favor for near $1,000; he knew the note was entirely good, and, it being unusual for administrators to sell "sale notes," he must have suspected from the rate of discount submitted to that the object of the administrator was to make a misapplication of the fund. This would be sufficient to subject a purchaser from a trustee who has no power to sell, and, it may be, a purchaser from a guardian; but it is not sufficient to subject a purchaser from an administrator, for an administrator has a right to sell all of the personal estate, notes as well as chattels, and the purchaser is not bound to see to the application of the money, and cannot be made liable, unless he is fixed with notice, as by showing that the proceeds are applied to a debt of his own, which would not only fix him with notice, but make him a participator in the fraud, or by showing in some other way that he had actual notice of the intended misapplication. Putting him on inquiry, or constructive notice, will not do. The exigency of estates some-

times makes a sale of notes necessary. *Tyrrell v. Morris,* 21 N. C., 560; *Scott v. Tyler,* 2 Dickens 725; *McLeod v. Drummond,* 17 Vesey,
(78) 151, which case is taken not to encourage "concerted" fraud. The powers of executors and administrators must not be "cramped." *Exum v. Bowden,* 39 N. C., 281; *Fox v. Alexander,* 36 N.C., 340; *Powell v. Jones,* ib., 337, are cases in which guardians disposed of notes of their wards, and the purchasers took the notes in payment of their own debts. *Bunting v. Ricks,* 22 N. C., 130, was the case of the clerk of a court trading a note deposited in his office, and then, too, the purchaser took it in part payment of his own debt.

When a trustee sells the trust fund the purchaser must put himself on the footing of having an *equal equity* with the *cestui que trust,* and this he cannot do if he has notice, actual or constructive, of the trust; for, as the trustee has no right to sell, the sale amounts to a breach of duty, in which the purchaser, of necessity, participates, without reference to the application of the fund. Whereas an administrator has a right to sell, and the sale is no breach of duty; the purchaser is innocent unless he is privy to a misapplication of the price, and knowingly aids, by his purchase, an intended fraud.

As to Latham, if he received the price from the administrator, he would be liable; but he denies having received any part of it, and the proof does not establish the contrary; for he did pay back the money to Gaither until near three weeks after the note was sold, and the money cannot be traced during the intermediate time.

PER CURIAM. Bill dismissed, but without costs.

Cited: Bradshaw v. Simpson, post, 246; *Wilson v. Doster,* 42 N. C., 233; *Dickson v. Crawley,* 112 N. C., 632; *Liles v. Rogers,* 113 N. C., 202; *Hendrick v. Gidney,* 114 N. C., 546; *Weisel v. Cobb,* 118 N. C., 23; *Cox v. Bank,* 119 N. C., 305; *Wooten v. R. R.,* 128 N. C., 124; *Odell v. House,* 144 N. C., 649.

(79)

JESSE WALKER ET AL. v. WILLIAM COLTRAINE.

1. An unregistered deed does not confer merely an equity. It is a legal conveyance, and, although it cannot be given in evidence until it is registered, and, therefore, it is not a perfect legal title, yet it has, as a deed, an operation from its delivery, and so cannot be redelivered.
2. Such a deed will be set up in equity, whether voluntary or for value.

CAUSE removed from the Court of Equity of RANDOLPH, at Spring Term, 1849.

In 1833 the defendant purchased from Philip Horney a tract of land containing 400 acres, and took a conveyance in fee. Soon afterwards the defendant contracted to sell one undivided part of 200 acres of the land to one Gray, and executed to him a deed of bargain and sale, including a mill. In 1837 the defendant and Gray contracted to sell to Nathan Henly, in fee, the 200 acres, including the mill; and as the deed to Gray had not been registered, it was agreed that it should be surrendered and canceled, and the land should be conveyed by the defendant to Henly; which was then accordingly done, and Henly entered into possession. The price which Henly was to give was $2,000, payable annually in several succeeding years, with interest from the date. He paid $300 thereof, and then, on 7 February, 1838, he gave to Gray and Coltraine his bonds for the residue of the purchase money, with the plaintiffs Walker and James Dicks as sureties thereon; and on the same day Henly conveyed the same land and mill to Benjamin Swaim, two horses, a few cattle, and some furniture, upon trust to raise money by the sale thereof to pay the said debts to Gray and Coltraine, (80) and also a debt for $105 which Henly owed the plaintiff Walker by bond of the same date. The deed of trust was executed by Henly, Swaim, Dicks, and Walker; and it was proved and registered on 28 February, 1838. On 12 August, 1839, Coltraine repurchased the 200 acres and the mill from Henly for the balance then due to him and Gray for the original purchase money. The deed which Coltraine had made to Henly had not been registered; and, instead of taking a conveyance from Henly, the defendant gave him up his bonds and took back the unregistered deed which he had made in 1837. After that transaction Henly continued to reside on the land until the month of November, 1839, though he let Coltraine into the immediate possession of the mill; and in November Coltraine took possession of the land and dwelling-house also. Swaim, the trustee, died in 1844 intestate, leaving his heirs infants, and Henly is insolvent and has no visible property.

The bill was filed on 3 September, 1846, against Henly, Gray, Coltraine, and the heirs of Swaim, praying that the debts to Gray and Coltraine, secured in the deed of trust, may be declared to have been satis-

fied, and that the defendants Henly and Coltraine, or one of them, may be decreed to pay to the plaintiff Walker the sum due on the bond to him, or that it may be raised by a sale of the property conveyed in the deed of trust, under the direction of the court, and that, in order to complete the title and make the land sell for enough to satisfy the plaintiff's debt, the defendant Coltraine may be decreed to produce the deed which he made to Henly, that it may be registered.

The answer of Coltraine states that the reason he did not take a conveyance from Henly upon his repurchase was merely to save the
(81) trouble of writing the deed and the expense of registering it, as it was considered by them that by taking up the deed which he had made, before registration, he would have a good title under Horney's deed to him. He admits that he has in his possession the deed he made to Henly; but he says he is unwilling to produce it and have it registered, and insists that he ought not be compelled to do so, because it was redelivered to him in order that it might be canceled. He says that he had known that Henly was indebted to Walker, but that at the time of his last contract with Henly he had no reason to believe that the debt had not been paid; and that it was some considerable time after he had rescinded the contract with Henly before he heard from any person that in the deed of trust taken by Walker and Dicks to indemnify them as sureties a debt to Walker was included; and that then, upon inquiry of Henly, he informed this defendant that it would be paid out of the personal property conveyed. And he insists that there was a sufficiency of personal property for that purpose, if the plaintiffs had caused it to be sold and had not allowed Henly to consume or dispose of it.

The answer further states that, upon his purchase from Henly, this defendant entered on 13 August, 1839, claiming under Horney's deed to him, and continued in possession more than seven years before the filing of the bill, and he insists on the statute of limitations as a bar to any claim under the deed of trust.

The defendant also insists that, for want of the registration of the deed to Henly, the legal title remained during all the time in the defendant under Horney's deed, and, therefore, that Henly at no time had more than an equity in the land, and his deed of trust assigned no more; and that the defendant repurchased from Henly without notice and is entitled to hold the land against the deed of trust.

No counsel for plaintiffs.
Iredell for defendant.

RUFFIN, C. J. It seems to the Court that the plaintiffs are
(82) clearly entitled to the relief they ask. It is error to say that an

unregistered deed confers only an equity. It is a legal conveyance, and although it cannot be given in evidence until it be registered, and therefore it is not a perfect legal title, yet it has, as a deed, an operation from its delivery, and so cannot be redelivered. It may be true that the party may have to resort to a court of equity to render such a deed effectual; but it will there be set up, whether voluntary or for value. *Tolar v. Tolar,* 16 N. C., 456; *Plummer v. Baskervill,* 36 N. C., 252. Those cases show that at the instance of the person to whom the deed was made, and of course, of his vendee, the court of equity will compel one who withholds a deed from registration to produce it for that purpose, or, if he has destroyed it to supply its place by another. The relief is founded purely on the legal right of the party by force of the deed executed, and the obstructions to that right by the destruction or suppression of the instrument. Therefore, it would not seem material whether the defendant had notice of the deed of trust or not—that is, for the purposes of the relief prayed, however it might have availed him if he had insisted on it as a bar to the discovery; for the ignorance of a legal title in another does not impair it as against a second purchaser. But it is not necessary to decide this point of law, for several reasons; for it is almost impossible to believe that this defendant had no knowledge of the deed made by Henly of the premises sold to him, as a security for the debts to the defendants for the purchase money, and made on the very day the bonds for it were executed, and registered in a few days afterwards. Indeed, the answer seems to imply a knowledge of it to some extent; for it states only that the defendant had heard that the debt to Walker was included in the deed. Now, by a knowledge of the deed he is affected with notice of every part of its contents. How- (83) ever that may be, the defendant cannot defeat the operation of the deed of trust by suppressing his deed to Henly, whether the deed of trust be regarded as either the conveyance of the legal estate or the assignment of an equity; for, in the second place, if Henly had but an equity, the deed of trust was the first assignment of it and was for value and in writing, and it left nothing in Henly which he could assign to Coltraine but the resulting trust after the satisfaction of the debts secured in the deed. But even for that the defendant's contract was by parol and of no efficiency, by the statute of frauds; and equity follows the law in that respect. Of course, the defendant, as the purchaser of an equity, could get nothing more than his vendor had; and that would leave the deed of trust in full force. The defendant insists, also, on the statute of limitations. But that cannot avail him. If Henly's title was equitable only, by reason that his deed had not been registered, then Coltraine held the legal title in trust for him, by his own contract; and his possession, though for seven years, would not bar the *cestui que trust* or his assignee.

If Henly is to be regarded as the legal owner, notwithstanding the deed was unregistered, then the possession of Coltraine was not under color of title, and therefore would be no bar. He says, indeed, that he claims under Horney's deed to him, and that is good color. But that is only a false appearance, and not the real truth. He did not in fact enter the last time under the purchase and conveyance from Horney, but under his contract with Henly. There might be a dificulty on the plaintiff in showing that at law; but here the answer discloses the truth, and, in the view of this Court, Coltraine's possession was derived from Henly upon an executory contract for a sale and conveyance in fee; and such a possession cannot be treated as adverse, unless it be continued long enough to raise the presumption of a conveyance. But in point of fact
(84) his possession was not for seven years before the bill was filed, but wanted two months of it. It is true, the contract was with Henly in August, 1839; but Coltraine was let into possession, at that time, of the mill only, and Henly retained the exclusive possession of the houses and all the other parts of land until November following, and the present suit was brought early in September, 1846.

The answer further insists that the plaintiff might have raised his debt from the personal property conveyed in the deed, and that he ought not, after suffering Henly to dispose of it, to come on the land to his prejudice. The equity of the defendant in this respect would be sound if the plaintiff had it in his power now to obtain satisfaction out of the other effects, or if, after he knew of the defendant's purchase, supposing it to be valid, he had released the other effects. But, *prima facie,* a mortgagee has a right to look to all the property, and a purchaser of a part must see, at his peril, that the encumbrance is satisfied. He cannot repel the creditor by showing merely that if he had not been indulgent he might at one time have raised his money without interfering with the part he purchased. Of course, if enough of the property remained in the creditor's reach to pay him, he ought to resort to it; or if there were several purchasers, they ought to be liable in the inverse order of their purchases. But this is not a case of either of those kinds, as it appears upon the answer that of the horses, the few cattle, and a little furniture included in the deed, nothing is left, but all consumed or disposed of by Henly; and it is not even stated whether that was done before or after Coltraine's purchase.

The Court therefore declares that the plaintiff Walker is entitled to have the money due him and his costs raised out of the land. We suppose this declaration is all that is requisite, as the defendant will
(85) hardly allow the land to be brought to a sale for so small a sum, unless it be a mode of now completing his own title at law. But if it should be necessary to resort to a sale, then, in order to render

it effectual by securing a good title to the purchaser, it must be decreed that the defendant produce his deed to Henly, that it may be registered, or that he join in the sale and conveyance; and to that end there must, in the meanwhile, be the usual reference to ascertain the plaintiff's debts and the cost of the suit.

PER CURIAM. Decree accordingly.

Cited: Phifer v. Barnhart, 88 N. C., 338; *Brendle v. Herron, ib.,* 386; *Austin v. King,* 91 N. C., 289; *Jennings v. Reeves,* 101 N. C., 451; *Respass v. Jones,* 102 N. C., 12; *Ray v. Wilcoxon,* 107 N. C., 523; *Janney v. Blackwell,* 138 N. C., 440; *Dew v. Pyke,* 145 N. C., 305; *Brown v. Hutchinson,* 155 N. C., 208.

CHRISTOPHER MUNROE v. DUNCAN McCORMICK.

1. When one makes an entry so vague as not to identify the land, such entry does not amount to notice, and does not give any priority of right as against another individual who makes an entry, has it surveyed, and takes out a grant.
2. One who makes an entry and has it surveyed cannot afterwards shift its location to the detriment of a subsequent enterer.

APPEAL from an interlocutory decree of the Court of Equity of CUMBERLAND, at Spring Term, 1849, *Caldwell, J.*

On 4 January, 1845, the plaintiff made an entry of "640 acres of land in the county of Cumberland, on the heads of Beaver and Big Cross creeks, joining the Torrey and Murchison lands." In December, 1847, the purchase money was paid. In 1848 the survey was (86) made, and a grant issued to the plaintiff in September, 1848.

On 11 January, 1841, the defendant made an entry of "500 acres of land in the county of Cumberland, on Cross Creek, on or near the Murchison Road, joining the McRay lands."

The defendant failed to pay the purchase money, and his entry would have elapsed but for the act of 1844, which allows further time to pay the purchase money and perfect titles upon entries made prior to that time, with a proviso that it shall not affect the rights of *junior enterers.* This was ratified on 4 January, 1845, and went into operation "from and after its ratification." During 1845 the purchase money was paid, the survey was made, and a grant issued to the defendant in December, 1845.

The grant to the defendant includes about 400 acres of the land included in the grant to the plaintiff. The plaintiff cut timber upon the land covered by both grants, and the defendant brought an action for the trespass.

The plaintiff alleges, as a reason for not having his survey made sooner, that the defendant was the only county surveyor, and, although the warrant of survey was put into his hands, he delayed, under one pretext and another, to make the survey, so that the plaintiff was unable to get his land located until 1848, when one McDuffie, being appointed additional county surveyor, made the survey. This delay on the part of the defendant is alleged to have been fraudulent and with a view of gaining a priority for his claim.

The plaintiff also alleges that his right was protected by the proviso in the act of 1844, he being a *junior enterer* within the meaning of the act, as his entry was made on 4 January, 1845, and the act did not go into operation until 5 January; and that the defendant, with no-
(87) tice of his entry, located his land so as to include a part of it. He insists that as the defendant acted fraudulently and with notice, he has an equity to demand the legal title, and prays for a conveyance, and that the defendant may be enjoined from the further prosecution of his action at law.

The defendant positively denies that there was any delay on his part to make the survey for the plaintiff after the warrant was put in his hands. On the contrary, he avers that, having understood that one McDiarmid had made an entry at the head of Beaver Creek, he urged the plaintiff, more than once, to have the survey made or give him such directions as would enable him to do so. This the plaintiff neglected to do until some time in 1846, when a survey was made by the defendant and the plaintiff's entry located according to his directions, he being present, assisting in the survey and marking the lines with his own hands. This location was at the head of Beaver and Big Cross creeks, some miles above the land of the defendant; and the plaintiff then knew not only that the defendant had surveyed and taken out a grant, but also the location of the defendant's land. The defendant avers that the plats and other papers were duly returned to the office of the Secretary of State, and he is informed that, in 1848, the plaintiff, instead of taking a grant in pursuance of his survey, withdrew the papers and procured McDuffie to make a second survey, so as, knowingly, to cover the greater part of the defendant's land. The defendant denies that, at the time he made his survey and took out his grant, he had any notice, belief, or suspicion that he was interfering with the entry of the plaintiff. He does not believe that the plaintiff had any idea of vacating his land as it is by the second survey until more than a year after its first location, when he found it interfered with older grants.

The defendant avers that his entry was revived by the act of (88) 1844, on 4 January, 1845, and has priority over the entry of the plaintiff, made on the same day, but in contemplation of the law *after* the defendant's was revived, which, he is advised, was, in contemplation of law, the first moment of the day of its ratification, as the act takes effect "from and after its ratification" and not from and after "the day of its ratification."

Upon the coming in of the answer, a motion was made to dissolve the injunction which had been granted. The motion was refused, and the injunction ordered to be continued to the hearing. The defendant, by leave, appealed.

W. Winslow for plaintiff.
Strange and D. Reid for defendant.

PEARSON, J. The allegation of a fraudulent delay on the part of the defendant to make the plaintiff's survey is positively, fully, and fairly denied by the answer, which, in this stage of the proceeding, is taken to be true. A question is raised whether the plaintiff's entry was made before the defendant's was revived by the act of 1844. This involves the consideration whether fractions of days are to be estimated; whether there be not a distinction between an act taking effect from and after *its* ratification and from and after the *day* of its ratification; whether legislative proceedings do not relate to the *first moment* of the day on which they go into effect; and what would be the rights of the parties if both entries take effect at the same time.

It is unnecessary to enter into a consideration of the question of time, about which so much learning and so many nice distinctions are met with in the books; for there is a plain principle, settled by two decisions of this Court, which is fatal to the plaintiff's case. *Harris v. Ewing,* 21 N. C., 369; *Johnston v. Shelton,* 39 N. C., 85.

When one makes an entry so vague as not to identify the land, (89) such entry does not amount to notice, and does not give any priority of right as against another individual who makes an entry, has it surveyed, and takes out a grant. By a liberal construction of the law, such entries are not void as against the State. It is not material to the State what vacant land is granted; but such entries are not allowed to interfere with the rights of other citizens, and not susceptible of being notice to any one, because they have no identity. It would be taking advantage of his own wrong for one to make a younger entry, and afterwards take from another land which he had, in the meantime, entered and paid for.

When an entry is vague, it acquires no priority until it is made *certain* by a survey. The good sense of this principle will strike every one as soon as it is suggested.

Both the entries in this case are vague; they have no beginning corner, no lines are called for, and the general description will fit one piece of land as well as another on the heads of Beaver and Big Cross creeks. They are "floating" rights upon either creek, and the first survey and grant gave the title.

There is another fact which makes the principle apply even more forcibly to the plaintiff's case. He had a survey upon his entry, and located his land, in 1846. Admit that, as against the State, the plaintiff is not concluded by his election, and that the same liberal construction will allow him to shift his location to other vacant land by a second survey before he takes his grant; this cannot be tolerated as against an individual who, before the second survey, makes an entry and takes out a grant. The plaintiff's entry was too vague. He locates his land by the first survey; this is notice to others, at least until the second survey, that the surrounding land is vacant. It would be most unreason-
(90) able to allow him to shift his location, and call upon another, who had perfected his title, to make a conveyance to him.

We think his Honor erred in refusing the motion to dissolve the injunction, and ordering it to be continued until the hearing.

The injunction should have been dissolved. The plaintiff will pay the costs of this Court.

PER CURIAM. Reversed.

Cited: Fuller v. Williams, 45 N. C., 163; *Horton v. Cook,* 54 N. C., 273; *Currie v. Gibson,* 57 N. C., 26; *Ashley v. Sumner, ib.,* 123; *McDiarmid v. McMillan,* 58 N. C., 30; *Gilchrist v. Middleton,* 108 N. C., 708; *Wool v. Saunders, ib.,* 741; *Kimsey v. Munday,* 112 N. C., 831; *Grayson v. English,* 115 N. C., 363; *Carr v. Coke,* 116 N. C., 252; *Fisher v. Owen,* 144 N. C., 653; *Call v. Robinett,* 147 N. C., 618; *Lovin v. Carver,* 150 N. C., 711; *Cain v. Downing,* 161 N. C., 596; *Wallace v. Barlow,* 165 N. C., 678.

ANDREW BROWN ET AL. v. NATHANIEL CLEGG ET AL.

A court of equity will compel the discovery of a secret trust, to enforce it if lawful, or declare it void if unlawful, when the fact of its not being declared in the conveyance creating the legal estate is caused by fraud or circumvention, or is the result of accident or mistake, or the omission is by design, the trust being unlawful and the object of secrecy being to evade the policy of the law; the Court in all these cases proceeding upon the idea of preventing fraud.

CAUSE removed from the Court of Equity of CHATHAM, at Fall Term, 1848.

The bill alleges that Thomas J. Winter, in 1824, being indebted to sundry persons, executed a bill of sale for several slaves to Archelaus Carloss, the intestate of the defendant, in trust to sell and pay the said debts. In 1825 one Haroldson caused an execution to be levied upon the interest of the said Winter in the slaves. At the sale the said Carloss contrived to buy the slaves at an undervalue by repre- (91) senting that he was bidding for the benefit of the wife and children of the said Winter, and thus stifling the bidding. Winter was present and made no objection. After the sale, it being apprehended that Carloss, being a trustee, could not legally become a purchaser, it was agreed between Carloss and Winter that the officer should make a bill of sale to one Farrar, to whom Carloss assigned his bid; that Carloss and Winter should also make a bill of sale to the said Farrar, and that Farrar should then make a bill of sale to the said Carloss; all of which was accordingly done.

The plaintiffs allege that the bill of sale so made to Carloss, although upon its face absolute and for the apparent consideration of $950, was made in trust that Carloss would sell as many of the slaves as might be necessary to pay off the debts, and hold the rest of the slaves in trust for the wife of the said Winter and her children; but that this trust was not inserted in the deed, nor was any written memorandum thereof taken, because of the confidence reposed in the honesty and friendship of Carloss.

In 1827 Thomas J. Winter died, soon after which Carloss took the slaves into his possession, sold two of them for a price sufficient, or nearly so, to pay off the debts, and held the rest in his possession up to his death in 1845.

The prayer is that the plaintiffs, who are alleged to be the wife and children of the said Winter, for whom the said trust was declared, and their husbands and representatives, may be allowed to redeem by paying the balance of the encumbrances, if any, and have an account, etc. The plaintiff Nancy Brown was the wife of the said Winter. She married

the other plaintiff, Brown, soon after the death of her first husband. The plaintiff Joseph is a son of the said Winter, and was born *after* the execution of the bill of sale to Carloss. The plaintiff Martha and her sister Frances, who is the intestate of the other plaintiff, Marks,
(92) were the only children of the said Winter living when the bill of sale was executed.

The defendant, who is the administrator of Carloss, does not admit the trust, but avers that, according to his information and belief, there was no such trust; and insists that, as his intestate held possession of the slaves from 1827 to his death in 1845, claiming them as his own, the trust or equitable estate of the plaintiffs, if they ever had any, will be presumed to have been satisfied or abandoned.

H. Waddell for plaintiffs.
W. H. Haywood and Haughton for defendants.

PEARSON, J. A court of equity will compel the discovery of a secret trust, to enforce it if lawful, or declare it void if unlawful, whenever the fact of its not being declared in the conveyance creating the legal estate is caused by fraud or circumvention, or is the result of accident or mistake, or the omission is by design, the trust being unlawful and the object of secrecy being to evade the policy of the law. The Court in all these cases proceeds upon the idea of preventing fraud.

The trust alleged in this case is an expressed *verbal trust,* which the parties did not choose to set out in the deed. It is not admitted by the answer. There is no allegation that fraud or accident prevented its being set out in the deed. On the contrary, the bill states that "no written promise or other memorial of this undertaking on the part of Carloss was executed, the parties having an unbounded confidence in his honesty and friendship." So the question intended to be raised is, Can a bill of sale for *slaves be added to* by parol proof, so as to show that, although absolute upon its face, it was upon a trust, no fraud being alleged and no reason being assigned why the trust was not expressed in the deed?
(93) The question is one of much interest. We do not feel at liberty now to dispose of it, because the decision of the case does not make it necessary, and we prefer to put the decision upon another ground, especially as the proof made of the trust is very vague and uncertain, consisting mainly of the recollection of conversations held with Carloss in reference to the slaves, not agreeing as to the precise nature of the trust, and stating no facts or circumstances *dehors* the deed so as to make it probable, independent of *mere words,* that there was a trust.

As to the plaintiff Joseph Winter, the bill must be dismissed, because he was not born until after the trust was executed; and its being for

Mrs. Winter and her children, would, in the absence of any words to enlarge the meaning, be confined to the two children then *in esse*.

As to the other plaintiffs, the bill must be dismissed, because there is nothing to repel the presumption that the trust or equitable estate has been satisfied or abandoned. The intestate of the defendant held the slaves as his own for nearly twenty years, during which time there was no recognition of any right on the part of the plaintiffs. This case furnishes a strong illustration of the wise policy of the statute. It is an attempt to set up a *verbal* trust after the death of the original parties and after the lapse of twenty-one years! Mrs. Winter, now Mrs. Brown, married soon after Carloss took the slaves into possession. No reason can be assigned why she did not set up her claim. There is no saving on account of coverture in the statute, and as a husband has a right to receive satisfaction, release, or abandon an equitable estate of his wife in slaves, there is nothing to repel the presumption.

The same observation is applicable to the claim of Mrs. Marks and her sister. It may be that if the pleadings had been amended so as to make the allegation of infancy and set forth the dates of their respective marriages, there might have been something to repel (94) the presumption as to them; but there is no such allegation, and although it is quite probable that they were both infants at the time the trust was executed and when Carloss took possession, we are bound by the pleadings.

PER CURIAM. Bill dismissed with costs.

ASHLEY G. POWELL, ADMINISTRATOR, ETC., v. WILLIAM H. WATSON, ADMINISTRATOR, ETC.

Where there has been a judgment at law, a court of equity, except in a case of fraud, will not interfere in behalf of either party upon the groud of testimony being discovered since the trial which was unknown to the party at the time of the trial and which would have materially varied the result.

APPEAL from an interlocutory order made at Spring Term, 1849, of JOHNSTON Court of Equity, *Settle, J.*

The plaintiff is the administrator of John B. Turner, who had been the administrator of Thomas Rice, deceased. The defendant Watson is the administrator *de bonis non* of Thomas Rice, and the other defendants, his heirs. The defendant Watson sued the plaintiff Powell as such administrator, and recovered a judgment against him. The bill charges

that, on the trial at law, a reference was made to a commissioner to take an account of the assets of Turner in the hands of the present
(95) plaintiff, as his administrator, who made his report, and which was confirmed, and from which it appeared that the plaintiff had in his hands assets to the amount of $415.61, for which there was a verdict and judgment, which he has paid. The bill then alleges that the plaintiff's intestate, before his death, had deposited with one Hobbes, who lived about 6 miles from him, a bundle of vouchers showing payments made by him to a large amount, and which were not taken into consideration on the trial of the suit at law; and that at that time he, the plaintiff, had no knowledge of their existence, and therefore they were not laid before the commissioners. The bill prays that the defendants may be decreed to pay him "so much of said sums as he, the defendant Watson, may have assets in his hands," etc.

The defendants demurred generally.

Miller and Husted for plaintiff.
W. H. Haywood and Busbee for defendants.

NASH, J. We do not exactly see what it is the plaintiff wishes us to do for him, or in what manner he desires to be relieved. If it is that we shall grant him a decree for so much money wrongfully paid by him under the judgment at law, we cannot grant his request. It is calling upon the Court to give him a decree against the defendants for a legal demand, unascertained by a judgment at law. If the plaintiff have a legal claim, he must establish it at law before he can ask the aid of this Court. *Brown v. Long,* 36 N. C., 190. But he has no claim at law. The money paid by him was paid under the judgment of a court of justice—under compulsion of law. An action for money had and received, which is an equitable action, will not lie to recover it back, however unconscientiously retained by the defendant. The contrary was
(96) at one time ruled by *Lord Mansfield* in *Moses v. McFarland,* 2 Bur., 1009, but that case has been repeatedly overruled. *Marriott v. Haughton,* 7 Term, 268; 2 East, 469; 5 Taun., 143. In the first case *Lord Kenyon* would not grant a rule to show cause, lest it should imply a doubt as to the plaintiff's right to recover, observing, "After a recovery by process of law, there must be an end of litigation; otherwise there would be no security for any one." There the defendant had brought an action for goods sold, and for which the plaintiff had paid him and taken his receipt, but the receipt was, at the time of the trial, mislaid, and the plaintiff, not being otherwise able to prove the payment, judgment was given against him, which he paid. Afterwards the receipt was found and the application made for a rule to show cause. Neither will a court of equity interfere, and for the same reason. In *Peagram v.*

King, 9 N. C., 610, which was a bill to set aside a verdict at law, obtained by fraud and perjury, *Chief Justice Taylor,* in delivering the opinion of the Court, observes that the power of the court of equity to grant new trials "is never extended to any case where the party applying has been guilty of any *laches* and might have made use of the evidence at law." The language of the Court in *Wilson v. Leigh,* 39 N. C., 100, speaking of the trial at law, the verdict in which was sought to be set aside on the ground of subsequently discovered testimony, is: "The question being legal, the tribunal legal, and the trial regular, the result must be conclusive on the one party as well as on the other, unless there was fraud practiced by one of them on the trial, so as to prevent its being a fair trial." To the same effect is the case of *Martin v. Harding,* 38 N. C., 603. In each of these cases there was a demurrer, which was sustained and the bill dismissed. No fraud is alleged in this case. The plaintiff does not ask a new trial at law, but a decree for the money overpaid, and the same principle applies—it is in substance the same redress. (97)

The decree in the court below, overruling the demurrer, is erroneous and must be reversed and the bill dismissed with costs in this Court.

PER CURIAM. Decree accordingly.

Cited: Stockton v. Briggs, 58 N. C., 314; *Carson v. Dellinger,* 90 N. C., 230; *Moses v. Gulley,* 144 N. C., 83.

JOHN M. INGRAM, ADMINISTRATOR, v. JOHN SMITH.

1. In order to rebut the presumption, under the statute, of the abandonment of the right of redemption in a mortgagor, upon the ground of great mental distress and decay of memory, if these can have such an effect, they must be estblished beyond all doubt; for the statute is one of repose, and its provisions ought to be carried out.
2. In the case of bills for redemption of mortgages it has the usual course of the court not to require the mortgagor to pay the debt and costs by a given day, or that his bill shall stand dismissed, but, in default of payment, to order a sale of the subject, and out of the proceeds discharge the encumbrance, and then the surplus belongs to the mortgagor.

CAUSE removed from the Court of Equity of ANSON, at Spring Term, 1849.

The bill was filed in September, 1841, and prays to redeem four negroes and their increase. The negroes were conveyed to the defendant

early in 1824, and consisted of a woman, aged 27 years, and her three female children—one of the age of 6 years; another, 4; and the youngest, about 1. The consideration expressed in the deed is $711.36; and it has the following clause of redemption: "Now, if the said money, with interest, be paid to the said Smith on or before 1 November, 1825,
(98) then the above obligation to be void; otherwise, to remain in full force." The instrument was registered in July, 1839.

The bill states that the plaintiff had been a man of independent property until within a year or two before he made the contract with the defendant; that he then became embarrassed and all his property was sold under execution, except this family of negroes; that for several years about that period the plaintiff's mind and memory were seriously impaired by the ruin of his pecuniary affairs, and that, although he always recollected having had dealings with the defendant, in receiving money from him and conveying negroes to him, yet the amount of the money or the particular bargain in relation to the negroes entirely faded from his memory, so that he had no knowledge thereof, until by the registration of the instrument in 1839 he discovered that it secured to him the right of redemption. The bill further states: "That some years ago the plaintiff recovered his health of body and mind, but found himself entirely without pecuniary resources, and was unable to redeem the negroes, had he even known he had the right; but that the sum of $711.36 was far below the value of the slaves at the time, and that the defendant took the negroes into possession, and from them and their issue has received profits to the full amount of the sum and the interest on it."

The answer states that $711.36 was the full value of the negroes, and more than the defendant would have given for them if they had not been all he could get for the debt which the plaintiff owed him to that amount for supplies for his family from a country store and money advanced for him in his distresses; that in fact and truth the transaction was a sale to the defendant in satisfaction of his debt, with an agreement, offered on the part of the defendant, to resell to the plaintiff if he would pay him the same price and interest by the succeeding November; that after all his property had been sold, the plaintiff was
(99) still considerably indebted to others as well as to the defendant, and that he and his family wished to save the defendant from loss, on account of his kindness and indulgence to him, and therefore proposed to sell the family of negroes to the defendant, and that they settled and found the debts then to be $711.36, and in discharge thereof the plaintiff made an absolute sale of the slaves to the defendant, and took up all the evidences of the debts, and made him the bill of sale, which was at first drawn in an absolute form; but that, as the defendant

did not want the negroes at the price, and the plaintiff had some children and a son-in-law who were in easy circumstances, the defendant hoped they might desire, and among them be able, to repurchase the negroes for the use of the plaintiff and his wife, and, with the view of inciting them to it, the defendant proposed to insert such a provision in the bill of sale, if the plaintiff thought it worth while; and that the plaintiff said he would like such an arrangement, if it could be effected, and he would endeavor to bring it about; and that thereupon the defendant added the clause in the deed for the repayment of the purchase money; that, as the negroes would not be profitable to the defendant, and would be useful to the plaintiff's wife for domestic purposes, the defendant, at her request, left them with her until it could be ascertained whether the plaintiff could induce any of his family or friends to repurchase them; that in September following, Mrs. Ingram died, and the plaintiff broke up housekeeping, and, not being able in any manner to effect the repurchase, the plaintiff then abandoned all idea of doing so, and left the negroes on the place for the defendant, and went to live among his children and friends, and had done so up to the filing of the bill; that upon the death of Mrs. Ingram the defendant took the negroes into his actual possession as his own absolute property, and has so claimed them ever since, and either had them in his own service (100) or advanced them to his children, and that during the interval they have increased to the number of fifteen, and have yielded no profit, besides that of their increase, but have been an expense. The answer denies positively any defect of mind or memory in the plaintiff at any time, and says that he has always been a man of business and good understanding; and that ever since 1823 the plaintiff lived in the same county and neighborhood with the defendant, and knew the negroes and never set up any right to redeem them, nor pretended any claim whatever to them; and the answer thereupon insists that, whether the transaction is to be regarded as originally a conditional sale or a mortgage, the plaintiff is now entitled to no relief, by reason of his long delay and neglect.

Strange for plaintiff.
Winston and Ashe for defendant.

RUFFIN, C. J. Many witnesses have been examined, chiefly to the value of the negroes in 1823, and there is great disparity in the respective estimates. The evidence appears to the Court rather to preponderate in establishing the sum mentioned in the bill of sale to be a fair price. Taking that to be so, and finding it proved that upon the settlement made when the deed was given, all the old bonds were given up to the

plaintiff, and no new ones taken; that shortly before 1 November, 1823, the plaintiff gave up the negroes and the defendant has held them ever since, claiming them as his own and without an intimation, during the whole period, from the plaintiff of a claim to them, though residing with his children and other relatives near the defendant, and in the possession of ordinary faculties; and that, in fact, during 1823 the plaintiff was arrested by another creditor and took the oath of insolvency, and was discharged without giving in a schedule: the probability might
(101) not be deemed slight that the account is true which the answer gives the character of the transaction, as intended by the parties at the time. But the Court does not weigh that probability, as, perhaps, it could not be allowed to control the explicit terms of the writing reserving a right to pay the money and thereby avoid the conveyance. Besides, it is not necessary, for the further reason, that, admitting the intention to reserve the right to redeem, we think it clear both that it is to be presumed as a matter of law and that it is established as a matter of fact that the plaintiff abandoned his right of redemption. By the act of 1826 the presumption arose upon the lapse of thirteen years after the day of forfeiture; and here it was nearly eighteen to the filing of the bill, and the delay is insisted on in the answer. The plaintiff endeavors to rebut the presumption by the state of his mind and memory and his poverty. But he fails to establish any such defect as the former; and, clearly, his poverty has no bearing in the case, as the plaintiff does not assign that as the cause of his *laches,* but only says that it would have prevented him from redeeming if he had known he had the right. But the truth is that his poverty could have had no influence on his conduct, as he had all the time just the same means of suing as he had at last, and, indeed, might have sued *in forma pauperis;* and it is now the usual course of the court not to require the mortgagor to pay the debt and the costs by a given day or that his bill shall stand dismissed, but, in default of payment, to order a sale of the subject, and out of the proceeds discharge the encumbrance, and then the surplus belongs to the mortgagor. We need not say what effect mental distress and decay of memory, combined with poverty, would have had on the presumption, if they had been established. It may be remarked, however, that in order to have any, they must be established beyond all doubt; for the statute is
(102) one of repose, and its provisions are to be fairly carried out. Indeed, the obvious purpose of our law is to insist peremptorily on diligence in redeeming personalty, and not in point of policy for the sake of repose, but as an act of good faith towards mortgagees and those claiming under them, as it evinced by the act of 1830, which makes the failure to file a bill for the very short space of two years after the forfeiture a bar forever. There is nothing to impair the statutory pre-

sumption of abandonment, but much to sustain it as the actual truth in this case. It is not usual for a mortgagee to wish, nor the mortgagor to consent, that the former should take possession when there is an intention and expectation to redeem—especially of such a family of slaves as this, which were undoubtedly chargeable and troublesome. When, therefore, the plaintiff broke up housekeeping on the death of his wife, and, leaving the negroes for the defendant, went to live with his children, no one of whom would, or was asked by him to, advance the money, and the plaintiff contemporancously obtained a discharge as an insolvent debtor, without taking any notice of a property or interest in these negroes; and the defendant then took possession and held it quietly for eighteen years under the eye of the plaintiff, who made no question of its rightfulness; and then no security was taken for the money but the conveyance; the mind, under such circumstances, cannot fail to be strongly impressed with the belief that the price paid, if not the full value, was about it—especially when there is corresponding proof on that point, and the mortgagor had, consequently, little or no interest in redeeming, and in fact then abandoned the right. Such are our conclusions, both upon the matter of law and the facts in this case; and therefore the bill must be dismissed with costs.

PER CURIAM. Decree accordingly.

Cited: *Averett v. Ward,* 45 N. C., 195; *Hyman v. Devereux,* 63 N. C., 628; *Headen v. Womack,* 88 N. C., 470; *Long v. Clegg,* 94 N. C., 767; *Bradburn v. Roberts,* 148 N. C., 218.

(103)

ISAAC SCARBOROUGH v. WILLIAM TUNNELL ET AL.

Where a bill is filed to compel a party to deliver up an instrument in his possession, upon the ground that it is a forged instrument, the plaintiff has a right to have it produced and left in court for inspection and for the better examination of witnesses—the bill in this case, alleging the forgery, having been sworn to.

APPEAL from interlocutory orders made by the Court of Equity of EDGECOMBE, at Spring Term, 1849, *Settle, J.*

The bill was filed in November, 1848, and states that the plaintiff adopted the defendant Tunnell in tender infancy, as his child, he being a nephew of the plaintiff's wife, and they having no children of their own; and that the same defendant had resided with the plaintiff in Edgecombe or near him and on his land from 1818 to October, 1848; that in

1846 he made a will and therein gave to Tunnell a tract of land and six slaves, and to his son Isaac another tract of land and ten slaves; that in July, 1848, the defendant Tunnell shot one of the slaves of plaintiff, and, upon being reproved by the plaintiff, abused him very much and otherwise maltreated him; and that the plaintiff was thereby induced to revoke and destroy his will, which became known to Tunnell; that in September, 1848, the plaintiff was waylaid and shot by some person, whom he believed to be the defendant Tunnell; and that by reason of that belief he and Tunnell disagreed and the latter removed, in October, 1848, to the county of Greene to reside; and that very soon thereafter, as

(104) the plaintiff understood, the defendant Tunnell and the other defendant, Glasgow, who is Tunnell's brother-in-law, exhibited to sundry persons a paper-writing, purporting to be a deed executed by the plaintiff and attested by Glasgow as subscribing witness, and dated on some day in April, 1848, whereby the plaintiff conveyed the whole of his estate, real and personal, and consisting of land, slaves, and other things, to the defendant Tunnell, to his own use absolutely after the death of the plaintiff; and they alleged that the plaintiff executed the same and that Glasgow witnessed it. The plaintiff avers that he never did at any time execute a deed to the defendant Tunnell for anything, and that if the defendants have any such deed in their possession, it is a forgery, contrived by them in fraud of the plaintiff and to the prejudice and clouding of the title to his property; and he states that it will be particularly prejudicial to him if the defendants should cause the deed to be registered (as he understands they design) and then should destroy the original, whereby it might become more difficult to establish the fraud and forgery. The prayer is that the defendants may be compelled to discover and produce the said pretended deed, and that it may be declared to be forged, and decreed to be canceled, and, in the meantime, that the defendants may be enjoined from having the deed proved and registered. On the bill an injunction was ordered as prayed for.

The answer of Tunnell admits the relation in which he and the plaintiff stood up to April, 1848, as the same is stated in the bill, and that he knew the contents of the plaintiff's will as the same are set forth in the bill. It states on 6 April the plaintiff's wife died, and that he and his family were then residing in the house with the plaintiff, that they might the better nurse his sick wife and attend to the plaintiff, then about 68 years old; that between 1 and 17 April the plaintiff expressed to

(105) this defendant the desire to execute to him a deed conveying to him all his property, reserving to himself a life estate; and that he assigned, as his reasons therefore, that he wished to give him two pieces of land which the plaintiff had purchased after he had made his will, and also because he was unwilling that the negroes given in the

will to the defendant's son, should be hired out, as they would probably be, by reason of the infancy of the son, at the plaintiff's death. And both the defendants state that the defendant Glasgow, who lived in Greene, came to the plaintiff's on a visit to his sister, Mrs. Tunnell, on 16 April, and that the next morning the plaintiff procured and executed the deed referred to in the bill, and that the defendant Glasgow, at the plaintiff's request, became a subscribing witness to it, and the plaintiff delivered it to Tunnell, and remarked that it was useless to keep the will any longer, as it was of no force, and threw it into the fire.

The defendant Tunnell admits that he shot the plaintiff's slave, but says that it was upon a just cause—which he does not mention—and that the plaintiff, though excited at first, readily became satisfied with the defendant's conduct upon that occasion, and no alienation arose therefrom between them; that they continued to live as father and son until the plaintiff married a second time in September, 1848, when the defendant left the plaintiff's house and resided in another on the plaintiff's land, until in that month the plaintiff was shot by some person in his own woods. The defendant denies that he shot the plaintiff or had knowledge thereof, until he received the information of it from another person, when he promptly went to the plaintiff's assistance and carried him home and attended him there, until the plaintiff was induced by his second wife to accuse the defendant of having shot him; and that then he left the plaintiff's premises and went to Greene to live. The answer states that as soon as the plaintiff was last married his conduct towards the defendant underwent a complete change, and that he (106) went so far as to threaten to burn the house in which the defendant lived; and that, being apprehensive that he would do so and consume the deed, the defendant placed it for safe keeping in the hands of one Gardner, who lived in the neighborhood; that, becoming afterwards uneasy, lest the plaintiff might get the deed into possession and destroy it, he directed Gardner to deliver it to one Patrick Glasgow of Wayne; but that he subsequently concluded, in order more effectually to secure his title to the property, to have the deed proved and registered, and was proceeding to do so when the injunction stopped him. Both of the defendants say that, when interrogated on the subject, they exhibited the deed to several persons and declared it to be the act and deed of the plaintiff, and that they still declare it to be so; and the defendant Tunnell avers that he is ready to establish it to be so; whenever permitted by the court. The answer of Glasgow states that he annexes a copy of the deed to the answer, as a part of it; but it does not appear in the transcript.

On the coming in of the answers the defendants moved to dissolve the injunction; and at the same time the plaintiff moved that the defendants should be ordered to produce the alleged deed for the inspection of the

court, and also file it with the master for the inspection of the plaintiff, his counsel, and such witnesses as might be examined by the plaintiff to establish that it was not his deed. The court first granted the latter motion; and the defendant Tunnell, insisting that the deed was his own, and that the court could not deprive him of it, refused to file it or produce it; and therefore the court refused to dissolve the injunction, but allowed an appeal.

B. F. Moore for plaintiff.
Biggs for defendants.

(107) RUFFIN, C. J. We think both of the orders perfectly correct. This was not an attempt to deprive the defendant of his deed. That is what is to be done by the decree on the hearing if it should be found to be a forgery. But before the hearing the court often directs the production of papers, and, if necessary to the purposes of the cause, the deposit of them in court, for their security and for inspection. As to the former, no case, perhaps, is made here, as no ground is laid for supposing that the defendant will not produce the deed on the hearing, nor would it prejudice the plaintiff if he did not produce it; for the nonproduction would no doubt entitle the plaintiff to a decree declaring it a forgery, and perpetuating the injunction. But, clearly, the inspection of the instrument is indispensable to the plaintiff's preparation for the hearing, as it is impossible that, without the deed, he can give evidence as to the handwriting and various other matters tending to show that the instrument is not genuine. Of course, the order for the production of the paper is not depriving the defendant of his deed at all. The court does not put it into the hands of the plaintiff, but in those of its officer; and the court is necessarily obliged to have confidence that the officers of the court—the master, solicitor, and counsel—are to be trusted with the custody and inspection of the papers and records in every cause. Here the defendants admit they have the deed, and therefore it is subjecting them to no difficulty to require its production from them. When produced, it will be as accessible to the defendants as to the plaintiff, and both may with equal facility take proofs as to its execution. Indeed, the refusal to produce it furnishes evidence of the intention of unfairness in the management of the cause, and adds much to the suspicion excited by the case made in the bill and answer. It was no favor which the plaintiff asked; for, when the object of a suit (108) is to destroy a deed, as upon an allegation of forgery, the plaintiff has a right to have it produced and left in court for the inspection and the better examination of witnesses. *Beckford v. Wildman*, 16 Ves., 438. And although in that case it was said that the production would not be ordered upon a mere suggestion in a bill of the forgery, but that

a special ground must be made out, yet that does not affect the present question, because here the bill is a sworn one, expressly averring the special case of forgery. It has always been the course in this State to order the instrument thus contested to be brought into court for the purpose of inspection (*Cooper v. Cooper,* 17 N. C., 298); and the wonder is that, instead of merely refusing to dissolve the injunction, the court had not attached the parties upon the spot, not simply for noncompliance with the order, but for the positive refusal to do so in the face of the court.

That was, of itself, a sufficient reason for not hearing the defendants' motion to dissolve; for while in contempt they had no right to ask anything. But the answers are, upon their face, insufficient and suspicious. Besides the singular reason given or depriving the defendant's son of the benefit bestowed by the will—which could not have extended to the land devised to him— there are the extraordinary circumstances that there was no communication of the plaintiff's intention to make the deed to any one but the defendants; that while they remained friendly, from April to July, and while they lived together up to September, no communication of the existence of the instrument was made to any one as far as is alleged; and that it was only after the dissension between the parties that the deed was put into the hands of Gardner, and after the final breach and reparation, upon the mortal assault on the plaintiff laid to the defendant Tunnell, that the parties made known generally that they had such an instrument. Certainly, upon such an account of such an instrument, disposing of the plaintiff's whole estate as a gift, no court could feel any assurance that the deed was genuine, (109) although in some parts of the answer it is averred to be so.

PER CURIAM. Affirmed, with costs.

Cited: *McGibboney v. Mills,* 35 N. C., 164; *Bank v. McArthur,* 165 N. C., 375.

CASES IN EQUITY

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

MORGANTON

AUGUST TERM, 1848

WILEY v. BENJAMIN F. HAWKINS ET AL.

When the bill does not charge the facts to be within the knowledge of the defendant, he is permitted to answer as to his information and belief, and such an answer is always deemed sufficiently responsive to the bill

APPEAL from an interlocutory order of the Court of Equity of BUNCOMBE, at Fall Term, 1847, *Battle, J.*

In 1839 the plaintiff purchased from Joseph W. Hawkins a (111) tract of land belonging to him and to his brother Benjamin F. Hawkins, for whom he acted as an agent, at the price of $5,000. Of this sum, $2,000 were paid at the time, and the plaintiff, to secure the sum remaining due, executed three several bonds, each for $1,000, and payable respectively on 13 March, 1841, 1842, and 1843, and each bearing date 27 September, 1839. On the same day, and bearing even date with these bonds, Joseph W. Hawkins executed and delivered to the plaintiff his obligation under his hand and seal, in the penal sum of $10,000, to make to him, on or before 13 March, 1843, a good and sufficient conveyance of the said land, with general warranties. Joseph W. Hawkins died in the year ....., and the defendant John Hawkins was duly appointed his administrator. The plaintiff alleges that at the time he made this contract it was expressly agreed between him and the intestate, Joseph W. Hawkins, that he should not be pressed for the money until the conveyance of title was made, both for his share of the land and his brother Benjamin's, who lived in another State, and that, in violation of

NOTE.—Owing to indisposition of the Reporter, these cases were not reported at the proper time.

the contract, an action was commenced against him in 1845 upon one of the bonds, by the defendant John Hawkins, and a final judgment obtained at August Term, 1847, of the Supreme Court against him; and that at the same term another judgment was obtained against him upon another of the bonds, in the name of Benjamin F. Hawkins, to whom it had been assigned. He alleges that he always has been ready, and still is, to comply with his part of the contract, upon receiving a good and sufficient title from the defendant John Hawkins of the interest of his intestate in the said lands, the said Benjamin having conveyed his interest to him, but that the said John Hawkins, administrator of Joseph W. Hawkins, has refused to convey the interest of the said Joseph in
(112) the said land. The plaintiff further alleges that the $2,000 paid by him at the time of making the contract were for the interest of Benjamin F. Hawkins in the tract of land. The bill prays a specific performance of the contract and an injunction to restrain the collection of the money recovered until a good and sufficient title is made.

The defendant John Hawkins, administrator of Joseph W. Hawkins, alleges that he knows nothing of the contract personally, but from what he has heard, both from the intestate and the plaintiff, he does not believe that it was a part of the contract, at the time it was made, or was ever since so agreed between his intestate and the plaintiff, that the latter was not to be pressed for the purchase money until titles were executed for the land; but, on the contrary, he believes that the purchase money was to be paid before the conveyances were executed; and states, as his reason for the belief, that the bond given for the title requires the title to be made at the time the last bond for the purchase money falls due. He further alleges that the plaintiff, in conversation with him, stated that the title to the land was to be made when the money was paid, and that he never claimed the contrary to be the fact. He denies that the plaintiff ever demanded or requested a conveyance. On the contrary, he offered to make a conveyance at any time, when the plaintiff told him he did not wish the title made until the money was paid. He denies that the $2,000 paid were for the interest of the defendant Benjamin F. Hawkins, as the share of the latter in the land was much more valuable than the intestate's, and alleges that it was paid for their joint interest and was accordingly shared between them, and that two of the bonds were assigned to Benjamin and one retained by Joseph W. Hawkins, which is the one upon which judgment is recovered. The
(113) answer of Benjamin F. Hawkins is the same in every material part with that of John Hawkins.

On motion in the court below, the injunction, which had been granted, was dissolved, and the plaintiff appealed.

J. W. Woodfin for plaintiff.
N. W. Woodfin for defendants.

NASH, J. The claim of the plaintiff to the relief he seeks rests upon the allegation that at the time he made the contract it was expressly agreed between him and Joseph W. Hawkins that he was not to be pressed for that portion of the purchase money for which he has given his bond until a good and sufficient conveyance of the whole of the land was made to him; and that, in violation of this agreement, the judgment was recovered before any deed was executed and tendered by the defendants. This allegation is denied by both the answers, as fully and positively as, from the situation of the defendants, it was in their power to make it. The bill states that Benjamin F. Hawkins, one of the defendants, was not present, but was, at that time, residing in another State, and Joseph W. Hawkins, with whom the contract was made, is dead. So that neither of the defendants could possibly know anything of the alleged agreement, except by relation. The bill, therefore, does not charge the facts to be within the knowledge of either of the defendants. If it had so done, the defendants would have had to answer positively and not as to their belief. But the rules of chancery practice do not require of a defendant that which in the nature of things he cannot do. When the charge is, as here, of facts of which he has no personal knowledge, he is permitted to answer as to his information and belief, and such an answer is always deemed sufficiently responsive to the bill. This has been done by those defendants. Nor are the facts alleged in the plaintiff's bill such as sustain his charge. The three bonds given by him for the deferred payments, and the bond given by Joseph W. Hawkins to make (114) title, all bear the same date, to wit, 27 September, 1839. The last bond is payable on 13 March, 1842, and on the same day Joseph W. Hawkins binds himself to make title. Each of the contracts or covenants is independent—upon their face there is no condition whatever. It may well be asked, if such an agreement as that charged in the bill had been made by the parties, why it was not inserted in the written evidence.

In addition, it is alleged in the bill that the $2,000 paid at the time of the contract were for the interest of Benjamin F. Hawkins in the land, and the plaintiff admits that he has received a good and sufficient title from Benjamin for his share of the land. The answers both deny that the money paid was for Benjamin's interest, but avers that it was received to their joint interest and divided equally between them, and that Benjamin's interest was valued at $3,000 and Joseph's at $2,000; and, in accordance therewith, two of the bonds were assigned to Benjamin and one retained by Joseph, which, with $1,000 each had received in money, made up their respective shares of the purchase money. The plaintiff

then has actually received a conveyance for Benjamin's interest, without paying what was due to him, and the defendant John Hawkins has professed his readiness to make a conveyance for Joseph's interest whenever the plaintiff was willing to receive it.

The case is before us upon the interlocutory decree made below, dissolving the injunction. We see no error in that decree. The plaintiff must pay the costs of this Court.

PER CURIAM. Affirmed.

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(115)

EDMUND JONES v. BURWELL BLANTON.

1. A surety to a guardian bond is not discharged from his liabilities by the guardian giving a new bond with other sureties.
2. A surety who has been compelled to pay the debt of his principal must make all his cosureties parties to a bill for contribution, if they are in this State and solvent. But where one is out of the jurisdiction of the court, and others are within it, the plaintiff, by stating the fact in his bill, is at liberty to proceed against the latter alone.
3. The cosurety who is in this State will have to make contribution without regard to the share of contribution which the absent cosurety would have had to pay had he been within the reach of the process of our courts.
4. A surety to a guardian bond, when sued by the wards, is not bound to avail himself of the statute of limitations.
5. All the bonds given by a guardian are but securities for the same thing, and the sureties on each are bound to contribution, but their liabilities are in proportion to the amount of their respective bonds.

CAUSE transmitted from the Court of Equity of CLEVELAND, at Spring Term, 1848.

The bill sets out that one Benjamin Hicks, in 1821, was, by the county court of Rutherford, appointed guardian to the minor children, five in number, of Richard Blanton, deceased, and executed five several bonds, one for the benefit of each of his wards, as guardian, and each in the penalty of $600, with one Achilles Durham and the defendant as his sureties; that on 16 April, 1823, the said Hicks renewed his said guardian bonds by order of the court, and gave, in their place, one bond
(116) in the penalty of £3,500, with the conditions prescribed by law. To this bond Benjamin D. Durham, Achilles Durham, and the plaintiff were sureties. The bill then sets forth that, in 1842, a bill was filed in the court of equity of Rutherford County against the sureties to the bond of 1823, in favor of the children of Richard Blanton and those

who represented them or claimed their interest in the estate of the said Richard Blanton, and that a final decree was obtained at the December Term, 1845, of the Supreme Court, against the defendants in that suit, for $3,081.04, with interest on $1,666.03 from 1 January, 1846, together with the costs of the suit; which sum, amounting in the whole to $3,233, was paid and discharged by the plaintiff under an execution issued against him and the other sureties. The bill further charges that Benjamin Hicks removed from this State before the institution of the above named suit, and died intestate and insolvent; that before the obtaining of the above decree Achilles Durham, one of the defendants, became hopelessly insolvent and continues so, and that the said Benjamin D. Durham long since removed from this State to parts unknown, and continues, if alive, to reside abroad. The bill then charges that the defendant is a cosurety with the plaintiff in the faithful discharge, by the said Benjamin Hicks, of his duties as guardian, and that he is the only one from whom the plaintiff can receive any contribution; that the plaintiff, after paying off and discharging the decree of the Supreme Court, notified the defendant of the fact, and demanded of him his part or portion of it, which he refused to pay. It then prays an account, etc.

The defendant admits that he executed the five several bonds (117) first set forth in the plaintiff's bill. He alleges that, having become uneasy at his situation, and with a view to become discharged from further liability for Hicks, he applied to him to give other security, which he accordingly did at April Sessions, 1823, of Rutherford County Court; that upon the records of the same court is the following entry: "April Sessions, 1823. The court took a new bond of Benjamin Hicks guardian of the heirs of Richard Blanton, deceased, in the sum of £3,500, with Edmund Jones, Benjamin D. Durham, and Achilles Durham for sureties. Done at the request of Burwell Blanton, former surety." He further alleges that this proceeding was had by him with a view to being discharged from his liability for Hicks' guardianship, and that, at that time, Hicks was amply able to discharge all his liabilities as such guardian, and that he has since become insolvent; that Benjamin D. Durham has removed to and still resides in the State of Mississippi, and is a man of wealth, and well able to pay his share of the said decree. He further alleges that, at the time the heirs of Burwell Blanton instituted their said suit against the plaintiff, he was protected by the statute limiting the time within which wards shall bring their suits against sureties to guardian bonds, as all or some of them had arrived at the age of 21 years more than three years before. The defendant admits the decree set forth in the plaintiff's bill, and its payment by the plaintiff.

Replication was taken to the answer.

(118) *Guion and Alexander for plaintiff.*
L. E. Thompson for defendants.

NASH, J. The defendant's objection to making contribution is not put on the ground of his not being a party to the bond of 1823, upon which the judgment against the plaintiff was obtained, but upon the three following grounds: *First,* that he was discharged from all liability on the bonds, to which he was a party, by the judgment of the county court of Rutherford, when they took the bond of 1823; *secondly,* that, as Benjamin D. Durham was one of the obligors in the bond of 1823, with the plaintiff, and is in good circumstances, and amply able to pay his share, it was the duty of the plaintiff to follow him to the State of Mississippi, where he lived, and sue him there; *thirdly,* that more than three years had elapsed after the wards of Hicks, or some of them, had arrived at the age of 21 years, before they instituted their suit against the plaintiff, and he was therefore protected by the act of the General Assembly, Rev. St., ch. 65, sec. 7, and that he had no right to file this bill.

We do not think that any of these objections can avail the defendant. As to the first, if such discharge by the judgment of the county court of Rutherford does exist, it must be a matter of record; and, without deciding whether the county court could or could not so discharge the defendant, it is sufficient to say the defendant has produced no
(119) evidence to support the allegation. The defendant was not discharged by taking the bond of 1823, but his liability continued. If it did not relieve him to the extent he expected and wished, yet it certainly did relieve him to the extent of binding the sureties to the new bond to contribute to any loss he might thereafter sustain by reason of his liability; and it has, eventually, thrown upon the plaintiff, one of the sureties to it, the first brunt of the battle. *Governor v. Gowan,* 25 N. C., 342.

As to the second objection. If Benjamin D. Durham had remained in this State and was solvent, it would have been necessary for the plaintiff to have made him a party, that the court, in its final decree, might adjust the loss between all the parties. *Butler v. Durham,* 38 N. C., 589. But when one of several parties is out of the jurisdiction of the court, and others are within it, the plaintiff, by stating the fact in his bill, is at liberty to proceed against the latter alone. This is the ordinary practice in the court of chancery. *Spivey v. Jenkins,* 36 N. C., 126. And the act of 1807, Rev. St., ch. 113, sec. 2, expressly authorizes one surety to sue another without making the principal a party, when he is insolvent and out of the State, and the equity of the act applies to this case. It was not necessary, then for the plaintiff to pursue Benjamin Durham

into the State of Mississippi. That burden will fall upon the defendant, if he wishes to lessen the liability which by the decree in this case will rest upon him. Nor was it necessary to make the administrator of Hicks a party. Hicks was insolvent and the administrator has left the State.

As to the third objection. If the wards of Hicks, as is alleged, had reached 21 more than three years before they commenced their suit against the present plaintiff, he might, if he had so chosen, protected himself under the act limiting the time within which actions must be brought against the sureties to guardian bonds. Rev. St., ch. 65, sec. 7. But he did not so choose. A recovery has been had against him upon a just claim, and he now seeks to make the defendant bear (120) an equal share of that just demand. It is right and proper that the law should fix a time beyond which the sureties to a guardian bond shall not be held liable to the claims of the wards; and the law has fixed the period at three years after their arrival at full age. The claim here is not that of the ward, but of a joint surety. There was no obligation on the plaintiff, either in law or in equity, to plead that statute or rely upon the protection it gave him. In *Leigh v. Smith,* 38 N. C., 468, and *Williams v. Maitland,* 36 N. C., 92, the Court decided that an executor may or may not, at his option, plead the statute of limitations; nor can a legatee compel him to do it, though, by his neglect, or refusal, a liability is thrown on the latter from which the plea would have protected him. The plaintiff Jones was not compelled to plead the statute upon which the defendant relies. *Johnson v. Taylor,* 8 N. C., 271, was correctly decided, but that was an action *by the wards.*

The guardian bonds to which the defendant was a surety amounted to $3,000, and that on which the plaintiff was surety amounted to $7,000. All the bonds given by a guardian are but securities for the same thing, and the sureties upon each are bound to contribute; but where the several bonds differ in amount, the liability of the sureties is not equal, but in proportion to the penalties of the different bonds. In this case the sum for which the defendant Blanton is liable, when compared to that which the plaintiff ought to pay of the sum decreed against him, is as $3,000 is to $7,000, and so it must be declared. *Jones v. Hayes,* 38 N. C., 502.

PER CURIAM. Decree accordingly.

Cited: Hughes v. Blount, 81 N. C., 207; *Craven v. Freeman,* 82 N. C., 364; *Bright v. Lennon,* 83 N. C., 189; *Dudley v. Bland, ib.,* 224; *Pickens v. Miller, ib.,* 547; *Hallyburton v. Carson,* 100 N. C., 109.

(121)

WILLIAM BUCHANNAN ET AL. v. SAMUEL FITZGERALD.

1. A payment of money into the public treasury for an entry of land, without the certificate required from the Secretary of State by the act, Rev. Stat. ch. 42, sec. 22, is to be regarded as a merely voluntary and unauthorized act, and not as a payment on the entry, so as to entitle the party to a grant.

2. The proviso in the act of 1842, ch. 35, saving the rights of junior entries "for which the purchase money may have been paid," is to be construed as not preferring a lapsed entry before a junior entry, subsisting at the passing of the act, on which the purchase money was afterwards duly paid and a grant obtained in due time.

APPEAL from an interlocutory order, made by *Settle, J.*, in the Court of Equity for HAYWOOD, at Fall Term, 1847, dissolving the injunction which had been granted in the cause.

John Buchannan, the late father of the plaintiffs, on 2 May, 1836, entered 96 acres of land in Haywood County, and took out a warrant, on which he had the land surveyed on 2 September, 1837. On 5 December, 1838, he paid the purchase money into the public treasury, as the bill charges; but, as the surveyor had not returned the warrant and survey, he could not then get a grant. Upon inquiry, he ascertained that the surveyor had mislaid the warrant and survey, and he insisted that he should look for it and return it, so that he (Buchannan) might get a grant. On 13 September, 1841, the defendant Fitzgerald entered 100 acres of land, and obtained a grant therefor on 11 January, 1843,
(122) including the greater part of the land entered and surveyed for Buchannan.

The bill was filed in September, 1846, and states that at the time the defendant made the entry he had full knowledge that Buchannan had made the older entry and paid the purchase money to the State and intended taking out a grant as soon as the surveyor could find the warrant and survey or make a new one. It further states that afterwards those papers were found and returned to the Secretary's office, and a grant obtained 1 July, 1844, under which the grantee entered and held the land until his death, and then that it descended to the plaintiffs, who are his children and heirs at law; and that the defendant brought an action of ejectment against them and has recovered judgment therein. The prayer is that the defendant may be declared a trustee for the plaintiffs and be decreed to convey the land to them, and in the meanwhile for an injunction.

The answer denies that the defendant had any knowledge of the entry, survey, or payment of the purchase money by Buchannan, as charged in the bill, until some considerable time after the defendant had obtained

his grant. It states that, in fact, Buchannan had abandoned the entry under which he now claims, and made a second entry to the same land on 10 November, 1838, on which, however, he took no further steps; and it insists that both of those entries had lapsed when the defendant made his entry on 13 September, 1841, and, therefore, that he had a perfect right to enter the land and obtain a grant. Upon the coming in of the answer, the defendant moved for the dissolution of the common injunction which had been granted on the bill, and the motion was allowed, with costs, but the plaintiffs by leave of the court appealed.

N. W. Woodfin for plaintiffs.
Francis for defendant.

RUFFIN, C. J. The court is of opinion that the injunction was (123) properly dissolved. It is not correct to say that the purchase money on Buchannan's entry was paid into the treasury; for it could only be lawfully received upon the certificate of the Secretary of State setting forth the number and date of the entry and the quantity of acres found by the surveyor to be vacant, as the same may appear to exist by the returns made to him from the surveyor, or entry taker, or from the entry taker's warrant or the plats of survey. Rev. St., ch. 42, sec. 22. Nothing of that kind is alleged here, and, indeed, it appears by an indorsement of the Secretary of State on the Treasurer's receipt, which is annexed to the bill as an exhibit, that there was no warrant or survey returned to his office. The payment into the treasury, therefore, must be regarded as a merely voluntary and unauthorized act, and not as a payment on the entry so as to entitle the party to a grant on it. Consequently the entry had lapsed and the land became subject to entry by another person, under sections 10 and 11 of the entry law. But if it were otherwise, and the money could be deemed a payment for the land, there is nothing in the case to affect the defendant with notice of it, and he positively denies ever having heard of the entry of 2 May, 1836, until nearly a year after he had obtained his own grant; and, certainly, without notice of it, the defendant might innocently and justly enter the land and lay out his money for it, after a lapse of upwards of five years from the date of the entry, and nearly three from that of the alleged payment of the money into the treasury, and therefore is entitled in consequence to hold it to his own use.

If the acts extending the time for perfecting titles to lands before entered be urged for the plaintiffs, the answer is that they all contain savings in general terms, that nothing in them shall affect the rights of junior entries, except that of 1842, ch. 35, which, taken literally, qualifies the proviso by restricting it to a subsequent entry, "for which the purchase money may have been paid"; and in *Bryson* (124)

v. Dobson, 38 N. C., 138, on the maxim that the Legislature never intends to confer a favor on one citizen which causes loss and injury to another, it was held that those words were to be construed as not preferring a lapsed entry of 1836 before a junior entry subsisting at the passing of the act, on which the purchase money was afterwards duly paid and a grant obtained in due time. In every point of view, therefore, according to the answer, the equity of the bill is completely removed. There is no error in the decree. The plaintiff must pay the costs in this Court.

PER CURIAM. Affirmed.

Cited: Horton v. Cook, 54 N. C., 273; *Gilchrist v. Middleton,* 108 N. C., 717, 718.

MARY JANE SUTTLES ET AL. V. MARTHA HAY ET AL.

Neither weakness of mind nor old age is, of itself, a sufficient ground to invalidate an instrument. To have that effect, there must be some fraud in the transaction, either expressly proved or inferred from the circumstances.

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

This bill was filed in the court of equity of Rutherford by Mary Jane Suttles and Sarah Ann Suttles, infants, by their next friend, (125) George Suttles, against Martha Hay and George Hay, *alias* George Wesson, and stated that George Hay, the elder, died in 1840, leaving the plaintiffs, in right of their mother, Sarah Suttles, deceased, and George Hay, the younger, his only heirs at law and next of kin; that George Hay, senior, was about 90 years of age at the time of his death, and was at that time, and had been for many years before, of a very weak mind, incapable of transacting business and easy to be imposed upon; that his son George Hay, junior, lived with him, and, some years before his death, brought the defendant, Martha to his house, and lived with her in adultery until she bore a son, the defendant George Hay, *alias* George Wesson, and married her; that the said George Hay, junior, and the defendant Martha obtained and exercised great influence over the said George Hay, senior, by means of which they for several years endeavored to procure from him a conveyance to the said George, junior, of a tract of land which he then owned, of the value of about $2,500, and that, at last, by threatening to institute vexatious suits against him and by divers other artifices, false suggestions, and undue

influence, they procured the said George Hay, senior, to execute a deed, bearing date 8 August, 1838, to his son, the said George, junior, for the tract of land aforesaid, upon the pretended consideration that the said George, junior, was to support his father during his life. The bill charges that the said deed was procured by fraud and undue influence practiced upon an old man of very imbecile mind, and was therefore void. The bill then states that the said George Hay, junior, after the death of his father, took possession of the said tract of land and claimed it as his own, and on 23 November, 1840, duly made and published his last will in writing, and therein devised the said tract of land to his wife, the defendant Martha, for life, with the remainder in fee to her son, the defendant George Hay, *alias* Wesson, and soon (126) thereafter died; that the said Martha thereupon took possession of the said land and claimed it under the said devise. The prayer of the bill is that the deed for the said tract of land should be delivered up and canceled, and that the plaintiffs should be let into possession of the said land as tenants in common with the defendants. The answer of Martha Hay admits all the material allegations of the bill, excepting those relating to fraud and undue influence exercised over George Hay, senior, by her and her husband, and to the manner in which the deed to her husband was executed by his father. With regard to these, it denies expressly that defendant Martha or her husband, George Hay, junior, acquired any influence over the said George Hay, senior, except what resulted naturally from their kind and dutiful attention to him, and denies also that the said deed was produced by the means alleged in the bill. On the contrary, it avers, that the said deed was executed by the said George, senior, freely and fairly, to carry out a long settled purpose of conveying the said land to his son George, who was his favorite child, as was manifested by his having willed to his son the same tract of land in 1834; that the said George, senior, was at the time in his proper mind and free from any undue influence whatever, and that, in consideration of said conveyance, the said George, junior, executed to his father an instrument by which he bound himself to support his father during his life, and that he had faithfully performed the obligation. The answer of George Hay, *alias* George Wesson, who is an infant, is merely formal. Replications were put in to the answers, proofs were taken on both sides, and the cause was set up for hearing, and transmitted by consent to this Court.

Baxter for plaintiffs.
Gaither for defendants.

BATTLE, J. We have carefully examined the testimony in this (127) case, and it entirely satisfies us that George Hay, senior, though,

from his advanced age and other causes, a man of weak mind, had at the time when he executed the deed which has given rise to this contract, sufficient mental capacity for that purpose. Indeed, the contrary is rather insinuated than asserted in the bill, and the main ground upon which the plaintiffs rely is that the deed was obtained by means of undue influence fraudulently exercised by George Hay, junior, and his wife, over the grantor. The specific charge is that it was obtained "by threats to institute vexatious suits against him and by divers other artifices, false suggestions, and undue influence." It is well settled that neither weakness of mind nor old age is, in the absence of fraud, a sufficient ground to invalidate an instrument. *Smith v. Beatty,* 37 N. C., 456. And although it is said in the same case "that excessive old age, with weakness of mind, may be a ground for setting aside a conveyance obtained under such circumstances," yet it is manifest that, to have this effect, there must be some fraud in the transaction, expressly proved or inferred from the circumstances. It is incumbent, then, upon the plaintiffs to prove their charge, that the deed was procured from a grantor by the fraudulent exercise of undue influence over him by the grantee and his wife. Have they done so? We think they have not. There is no testimony at all that George Hay, junior, or his wife, at or about the time when the deed was executed, threatened the grantor with suits of any kind, or used any artifice, or made any false suggestions, to procure its execution. Two of the plaintiffs' witnesses, to wit, David Miller and Isaac D. McClure, testified to declarations of the grantee tending to show the exercise of undue influence by him over his father at
(128) other times. The witness Miller states that George Hay, junior, told him that he could make his father do anything he wished in relation to the disposal of his property, and he would have it done; but the witness does not mention on what occasion or at what time this was said. Isaac D. McClure testifies that he wrote a will for the grantor in 1834, in which he gave the land in question to his son George, and $100 to the plaintiffs, and that a few days afterwards George, the son, said that he compelled or almost compelled his father to will him the land; that he told his father that he had worked on the plantation twelve or thirteen years after he had come of age, for which he would charge $100 a year, and would sue him for it and break him up if he did not will him the land. If this testimony had related to the execution of the deed, and were not weakened by other circumstances, it would have much weight with us; but such is not the case. It relates to a will made four years before the execution of the deed. The witness who states it is a subscribing witness to the deed, as he was to the will, and in his deposition as taken by the plaintiffs not a word is said about the deed, and we only learn that he was a witness to it from seeing his name subscribed

to it, and from his examination, taken subsequently by the defendants. In his latter deposition he tells us that the old man brought the deed to him, acknowledged it, and asked him to witness it, which he did; and that he at the same time witnessed an obligation from the grantee to his father; he testified, further, that the old man was entirely capable of making a will when he wrote the one for him in 1834. Archibald Tollar, another witness for the plaintiffs, testifies that some time before 1834 he wrote a will for the old man, in which he gave $50 to each of the plaintiffs and the residue of his property to his son George, and that he, the witness, destroyed it after he heard that the testator had made another. Under these circumstances we cannot give much effect (129) to the declaration of the son, made to one witness at a time not specified, and to another four years before the deed was executed, and in relation to a will of almost precisely the same import with the one previously made and then in existence. The testimony of the subscribing and other witnesses, taken by the defendants, does not much vary the case, except in showing that George Hay and his wife lived with his father many years, working upon his farm, and supported him, principally by their labor, until his death, and that he had a dislike to George Suttles, the father of the plaintiffs, saying on one occasion, after the deed was executed, that he thought he had it fixed so that George Suttles could never get another shilling out of it. Upon a consideration of the whole case, we think that the plaintiffs have altogether failed to establish their allegations that the deed in question was procured from the grantor by the fraudulent exercise of undue influence over him by the grantee and his wife. The inadequacy of price, relied upon by the counsel for the plaintiffs, can have no application to the case, because the plaintiffs do not claim as creditors or purchasers, and because the transaction between the parties to the deed was not a purchase, but was substantially, and so intended to be, a gift from a father to a son, for whom he was under a moral obligation to provide.

PER CURIAM. Bill dismissed.

Cited: Graham v. Little, 56 N. C., 163; *Hartley v. Estes,* 62 N. C., 169; *Mobley v. Griffin,* 104 N. C., 117; *Bond v. Mfg. Co.,* 140 N. C., 383.

(130)

HUGH KIRKPATRICK v. SAMUEL W. ROGERS ET AL.

1. A testatrix, by her last will, devised as follows: "Item 2d. I will and bequeath to my nephew H. K. my negroes M. and N., and also to him my Glass plantation, the proceeds of which are to go to the support of M. and N. during their lives, and, at their death, it is to become said H. K.'s for his trouble in taking care of said negroes." *Held*, that the devise was of a present interest to H. K. in the Glass plantation, and that the provision that the proceeds of the land should be applied to the maintenance of those old negroes was only a discharge of the duty which the law would have imposed on her estate.

2. She also, in the 6th clause, devised as follows: "I will that my negroes not otherwise mentioned in this will be valued by three disinterested men at one-fifth less than would be considered the rating price of such negroes, and the negroes have the liberty of choosing their masters, and if the persons chosen should not be willing to take them at the valuation, that the negroes have the liberty of choosing until they get one, and Lucy's family is not to be separated, nor the negroes to be taken out of the county. The fund of this valuation is to remain in the hands of my executors, and by them kept on interest, to be annually divided between the negroes so valued, for their own use. As each one of these negroes, so valued, arrives at the age of 45, they are to receive from my executors what would be their equal share of the principal; if any of the negroes die, their share is to be given to those living, etc. *Held*, that the direction in the first part of this clause is void for uncertainty.

3. She also, in clause 8, devised as follows: "I will that all the balance of my property not herein disposed of be sold by my executors and, after my debts are paid, the proceeds of the sale be divided into three divisions: one-third to go to the use of the Associated Reformed Church at Sardis in Mecklenburg County, North Carolina; one-third to be equally divided between my brothers' and sisters' children; the remaining third of the proceeds of the sale to be held by my negroes, A. J. and L., to be subject to the same regulations as I have laid down in a former clause relative to the proceeds of the valuation of the said negroes, and to be used in the same way." *Held*, (1) that the legacy to the Associated Reformed Church at Sardis was good, that congregation having
(131) appointed trustees according to law. *Held*, (2) that the property attempted to be given to the slaves under this and the 6th clause passes under the residuary clause, and the slaves themselves mentioned in this and the 6th clause go to the next of kin.

4. *Held*, (3) that the legitimate children of the brothers and sisters of the testatrix take under this clause, *per capita*, but one of them, being illegitimate, takes nothing—*children* being in law considered, *prima facie*, to mean *legitimate children*, unless it plainly appear from the will that illegitimate children were intended to be included in a bequest.

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

Annie Boyce, by her last will and testament, devised as follows:

"Item the 2d. I will and bequeath to my nephew, Hugh Kirkpatrick, my negroes, Mose and Nelly, and also to him my Glass plantation, the proceeds of which are to go to the support of Mose and Nelly during their lives, and at their death it is to become said Hugh Kirkpatrick's, for his trouble in taking care of said negroes. I also allow the said Mose a horse called Buck, and a cow and calf, also a plow and harness to work the Glass plantation, and to Mose and Nelly one year's provisions to be paid by my executors, and to Nelly all the beds she claims in Iredell as her own, and all the kitchen furniture she has there.

"6th. I will that my negroes, not otherwise mentioned in this will, be valued by three disinterested men at one-fifth less than would be considered the rating price of such negroes, and the negroes have the liberty of choosing their masters, and if the persons chosen should not be willing to take them at valuation, that the negroes have the liberty of choosing until they get one; and Lucy's family is not to be separated, nor the negroes taken out of the county. The funds of this valuation are to remain in the hands of my executors, and by them kept on interest, to be annually divided between the negroes so valued, for their own use. As each one of the negroes, so valued, arrives at the age of (132) 45, they are to receive from my executors what would be their equal share of the principal; if any of the negroes die, their share is to be given to those living. Also I will to my boys Anderson and Jo one bed each, with complete clothing and plain bedstead. All the balance of my beds and furniture, except what may herein be disposed of, I will to my negro girl Lucy and her children.

"8th. I will that all the balance of my property, not herein disposed of, be sold by my executors, and, after my debts are paid, the proceeds of the sale to be divided into three divisions: one-third to go to the use of the Associated Reformed Church at Sardis, in Mecklenburg County, North Carolina; one-third to be equally divided between my brothers' and sisters' children; the remaining third of the proceeds of the sale to be held by my executors for my negroes Anderson and Jo, Lucy, and her children, and to be subject to the same regulations as I have laid down in a foregoing clause relative to the proceeds of the valuation of said negroes, and to be used in the same way."

To this will the plaintiff is executor.

The bill states that doubts have arisen as to the true construction of the clauses of the will which are set out, and prays the advice of the court upon them—whether under the 2d clause the property, real and personal, passes to him, the plaintiff, or is void and sinks into the residuum; whether the provision in the 6th clause is void, and whether under the 8th clause the legacy to the negroes, if void, passes to the

next of kin, and whether the legacy to the Associated Reformed Church at Sardis takes the same course. The bill then states that the deceased had several brothers and two sisters, one of whom had several children, and the other one illegitimate child named Dearmond, who has died since the death of the testatrix, and whose administrator is a party de-
(133) fendant, and prays the instruction of the court whether Dearmond is to be considered a sister's child so as to be taken under the will. It further states that there is in Mecklenburg a church known as the Associated Reformed Church, at Sardis, and that the defendants Ely Griffith, Samuel Boyce, James Wallace, and Jesse Erwin are its regularly appointed trustees, and that the other defendants are the heirs at law, next of kin, and residuary legatees of the testatrix.

The facts set forth in the bill are admitted in the answers—and they all, except that of the trustees of the Associated Reformed Church at Sardis, allege the bequests contained in the 2d and 6th clauses and the latter part of the 8th clause are void and inoperative; and the next of kin insist that the portion of the 8th clause which gives a third of the proceeds of the sale therein directed to the church at Sardis is likewise void, because the church is not incorporated, and that all these bequests fall into the residuum. The trustees contend that the bequest to the religious association is not void, as it is capable of taking, and they are its trustees regularly appointed.

Osborne and Wilson for plaintiff.
Thompson and Avery for defendants.

NASH, J. We are of the opinion that the bequest contained in the 2d item is not void, but that, under it, the plaintiff takes the Glass plantation as a present devise in fee, charged with the maintenance of the two old negroes, Mose and Nelly, who are also given to him, and that the provision, "the proceeds of which are to go to their support," if not void, is merely directory. By the laws of this State, provision is made whereby owners of slaves are compelled to furnish every slave who has become superannuated and unable to work, with the usual allow-
(134) ance of clothing, food, and lodging. Rev. Stat., ch. 89, sec. 19. They are not permitted to cast them off in their old age, when no longer able to work. The benevolent testatrix in this case was, therefore, not only in the performance of a high moral duty in providing for the future maintenance of these two old and, no doubt, faithful slaves, but she is doing what the law would have compelled her estate to perform.

As to clause 6, we are of opinion that the bequests in it are void, and that a trust resulted which under clause 8 either passes as therein directed or to the next of kin. The first part of the clause is void for uncertainty. It directs that the slaves, after the valuation therein pro-

vided, shall choose their masters; and if those whom they shall choose do not take them, that they may exercise the same privilege again without limit of time. And they are not confined to any particular persons, but have the whole country to select from. If their choice had been limited to the relations of the testatrix or to a certain number of designated persons, as it was a bequest intended for the benefit of such persons, it would have been supported; but it is too indefinite and uncertain. The bequest in the latter part of clause 6 is void because of the incapacity of slaves to take. It was certainly not the intention of the testatrix to free her slaves, for she expressly provided for their having masters by directing a sale of them, and as slaves they are incapable of taking anything devised to them for their maintenance. *Cunningham v. Cunningham.* 1 N. C., 519.

Under clause 8 is embraced all the property of the deceased not previously mentioned in the will. The words are "all the balance of my property not herein disposed of." Now, the slaves are not disposed of in the preceding part of the will and it is therefore contended they are embraced in this clause, and pass into the residuum created by it. The proceeds of the sale are directed to be divided into three (135) parts: one-third is given to the Associated Reform Church at Sardis, in Mecklenberg County; one-third to her brothers' and sisters' children, and one-third to be given in substance to the slaves. It cannot, therefore, be that they were intended to pass under this clause—they cannot be given to themselves. It is true that whenever a bequest fails from any cause to take effect, and there be a general residuary clause, the property so attempted to be given will pass into the residuum, but any testamentary disposition of property must have a sensible and reasonable construction put upon it. Every portion, then, of the property of the testatrix which could form a portion of that fund is to be embraced in it, as the property given to the different slaves in the preceding part of the will, and which they could take, together with the property not previously mentioned. As to the slaves, the testatrix died intestate, and they pass to the next of kin. The next of kin contend that as the Associated Reformed Church is not incorporated they could not hold property, and the bequest to them is void. The Legislature has provided a mode by which religious societies may hold property without an incorporation. Rev. Stat., ch. 99, sec. 93. The members of this society have availed themselves of the act, and their trustees are parties to this suit, and claim the share bequeathed to them. The bequest is a valid one, and so it is the bequest of one-third to her brothers' and sisters' children, who take it *per capita.* The gift is to the children, and they all stand in the same degree of relationship to the testatrix. 1 Roper on Leg., 126. The parents were all dead at the making of the will. John Dearmond is not

entitled to any portion of this legacy. He was the illegitimate child of Jane Kirkpatrick, one of the sisters. The word child or children being in law considered, *prima facie,* to mean legitimate children. If, (136) therefore, a bequest be to the child of the testator, or to the child of another person, or to one or more of them, and nothing appears from the will sufficient to show that illegitimate children were intended to be included under the word children, that class of children will be excluded. 1 Roper on Leg., 79; *Williamson v. Adam,* 1 Ves. and R., 465; *Thompson v. McDonald,* 22 N. C., 463. There is nothing in this will to show that the testatrix, in using the word children, intended to embrace illegitimate children. Her language is "my brothers' and sisters' children." If she had had but one sister, who had one child, and brothers, who had children, the language would have been the same.

The bequests to Mose and Nelly and the other negroes are all void, and, except the money from the valuation, the whole of such property is included in the direction for the sale in clause 8.

To conclude: The Glass plantation passes under clause 2 to the plaintiffs. Secondly, the slaves are undisposed of by the will, and as to them, the testatrix has died intestate. So, also, as to the one-third of the proceeds of the sale directed in clause 6, both the slaves and that third go to the next of kin, except as hereinafter stated.

Thirdly. Under clause 6 is embraced all the property belonging to the testatrix both real and personal, except the slaves and the Glass plantation, and including the personal property attempted to be given to the slaves, all of which is to be sold, and of the proceeds, one-third goes to the brothers' and sisters' children, excluding John Dearmond, and one-third to the trustees of the Associated Reformed Church in Mecklenburg County, at Sardis.

As to the one-third of this fund given to the slaves, it passes to the next of kin, except that portion of it arising from the sale of the land, and that will go to the heir at law of the testatrix, as so much land.

PER CURIAM. Decree accordingly.

Cited: Hudson v. Pierce, 43 N. C., 128; *Lea v. Brown,* 56 N. C., 150; *Allison v. Allison, ib.,* 237; *Howell v. Tyler,* 91 N. C., 211; *Sullivan v. Parker,* 113 N. C., 305.

(137)

WILLIAM T. LEMMOND ET AL. v. RICHARD PEOPLES ET AL.

When slaves are conveyed by a deed, absolute on its face, but with a secret confidence that the donee should hold them in a qualified state of bondage, that is, that the donees were to consult the benefit of the negroes and not their own emolument, this trust is illegal, and there is a resulting trust to the donor.

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

On 26 February, 1844, William Query conveyed to the defendants a negro woman named Linny, and her child, Mary, about 6 years old. The consideration expressed in the deed was $600. Soon afterwards he also conveyed to them a piece of land, containing 12 acres, for the consideration, as expressed, of $36. Both deeds are absolute on their face and contain warranties.

In September, 1846, Query died intestate and the plaintiffs administered on his estate, and in November, 1847, filed this bill. It charges that their intestate had not capacity to make a contract, and that the conveyance were unduly obtained without consideration. But the allegations in respect to incapacity and imposition are denied in the answer and not established by the evidence.

The bill, however, further charges that the purpose of the par- (138) ties was to effect the emancipation of the negroes and give them a home on the land, and that the conveyances were upon secret trust of that kind, or to some such effect, and insists that such a trust is illegal, and that a trust resulted to the donor, and prays for a discovery and a conveyance of the slaves and their increase, and an account. In their answer the defendants admit that the deeds were made without any valuable consideration; but they state that they were unsolicited by them, and were accepted at the earnest request of the intestate. They then give this history of the transaction: That the woman was a mulatto, and had been brought up by the intestate and was regarded by him with great affection; that for several years a free negro named McAlpin lived with her at the intestate's as her husband, and it was the wish of the intestate that they should so continue to live; and he, therefore, permitted McAlpin to build a house on his land and raise crops, and the woman there lived with him—which was the place subsequently conveyed to the defendants. The defendants deny that it was any part of the object of the bill of sale that Linny and her children should be liberated, or sent to a free State, and say that it was designed by the deceased that the property should be vested in them absolutely and without condition. They further state that the real purpose of the deceased was to provide

for the protection, comfort, and happiness of the woman Linny and her children; that he believed that, at his death, she and her family would fall into the hands of his relatives and would be separated, without regard to his objects aforesaid; and that he accordingly placed the title of the land and negroes in the hands of the defendants, that the land might be a home for McAlpin, and that, by him or otherwise, it might be so arranged that the woman might live there with McAlpin;
(139) that the defendants, accordingly, during the life of the intestate, permitted the man to occupy the land, and, for a small consideration, hired his wife to him, which arrangements continued until a short time before the bill was filed, when, in order to prevent the plaintiffs from getting them, the defendants took her and her children, including two born after the deed, into their own possession. The defendants further say that they design faithfully to carry out the arrangement made by the intestate, and to exercise over the woman such control as is necessary to her proper conduct and maintenance; that they claim the property in the slaves, to be appropriated in any manner they think proper, and that no part of the wishes of the donor extended to the children; and, finally, that they were selected by the intestate as the objects of his kindness because he had confidence in their integrity and disposition to act fairly and justly by the woman Linny.

Avery Wilson and Alexander for plaintiffs.
Osborne and Bynum for defendants.

RUFFIN, C. J. There is but little difficulty, we think, in understanding that, although there was not a trust to procure actual and open emancipation, the conveyance of the negroes was made upon a secret trust and confidence that the defendants hold them in what has been called a qualified state of bondage—that is, that the donees, as expressed in *Huckaby v. Jones,* 9 N. C., 120, were to consult the benefit of the negroes and not their own emolument. Such a trust, when ascertained, must be pronounced illegal, as has been frequently decided: and as it cannot be executed as intended and is unlawful, it follows that, of necessity, there is a trust for the original owner, and those who succeed him; for if a trust of any kind be intended, the donee of the legal title
(140) cannot, in conscience, hold the negro as property for himself, but must execute it for some one, and, as there is no one else who can claim, it must be for the donor. It is so under the mortmain acts; and the provisions of our law, as judicially construed, respecting conveyances for emancipation or *quasi* emancipation here, bear strong resemblance to those acts. *Stevens v. Ely,* 16 N. C., 493; *Thompson v. Newlin,* 38 N. C., 338. Every country has the right to protect itself from a population dangerous to its morality and peace; and hence the policy

of the law of this State prevents the emancipation of slaves with a view to their continuing here (*Thompson v. Newlin, ut supra; Cox v. Williams,* 26 N. C., 15); and when the purpose is that the emancipated slaves shall remain here, they cannot be carried away, because it is contrary to the trust, and the doctrine of *cy pres* does not exist with us; and therefore the trust results. *Haywood v. Craven,* 4 N. C., 360; *McCauley v. Wilson,* 16 N. C., 270; *Bridgers v. Pleasants,* 39 N. C., 26.

The cases upon this subject show that this must be deemed a disposition upon the unlawful trust mentioned. In *Huckaby v. Jones* the bequest was to four persons or the survivors, "to be their lawful property, for them to keep or dispose of as they shall judge most for the glory of God and the good of said slaves." In *Stevens v. Ely* there was a trust "to permit the negroes to live together on his land and to be industriously employed and continue to exercise a controlling power over their moral condition and furnish them with the necessaries and comforts of life." And in *Sorry v. Bright,* 21 N. C., 113, there was an absolute bequest of the slaves, followed by a request that the donee would "admit said negroes to have the result of their own labor, but ever to be under his care and protection." In each of these cases a trust for the negroes was inferred and held void; and therefore it was declared that a trust resulted to the representatives of the donor. In the last of them the trust for the slaves was inferred, because, as was said, the (141) bounty appeared to be intended for the slaves and not for the nominal donee, who was made the legal owner, not that he should be master, but that they might have a protector; an observation that applies equally to the present case, which is almost literally the same with the other, according to "the real purpose" of the donor, as it is set forth in the answer. The answer, indeed, is not as candid as would have been creditable to the defendant. In some parts of it the defendants endeavor to cast some obscurity over the transaction, and mystify the case, by insisting on the legal property under the conveyance, and affecting to consider it as the beneficial ownership bestowed on them "as objects of the intestate's kindness." Yet, upon the whole answer, from the nature of the transaction, it is very evident that the conveyances were not made to the defendants to their own use, but to the secret use of the slaves themselves. It is true, "the property" was to be in the defendants, that is, apparently and literally speaking. It is also true that the negroes were not to be carried to another State, as the purpose was that the family (husband, wife, and children) were to live here on the land, which the donor also conveyed to the defendants. And it may likewise be true that emancipation here was not desired, or, rather, expected, as the parties knew that could not be effected. But still that would not come up to the claim of the property, absolute and unconditional, in the

sense in which the defendants wish it to be understood, and as it must be understood in order to exclude the right of the plaintiffs, namely, as importing a benefit and bounty from the intestate to the defendants in *jure propria;* for the answer further tells us that the defendants became thus the objects of the donor's kindness, because he believed they would act fairly and justly towards the negroes. How, then, and why were the defendants to have this absolute property? The answer again
(142) tells us, is was so as "to provide for the protection, comfort, and happiness of the woman and her children," and that was to be effected, not by exacting moderate labor from them as humane masters, but by the defendants placing them, upon a colorable contract "for a small consideration." or otherwise, with the free negro on the land, no control being exercised over them by the defendants but such as might be necessary for their proper conduct and maintenance. There could scarcely be a plainer case of *quasi* emancipation in violation and fraud of the law; for the family is only required to maintain themselves, and the authority to be exercised over the children is that, not of owners, but of parents. The answer in the latter part of it says, indeed "no part of the wishes of the donor extended to the children," and we confess that we do not know how that is to be understood, consistently with that integrity professed by the defendants and with the previous statements of the answer; for where the children are first mentioned they are explicitly put on the same footing with the mother, as objects of the provision; it being for the protection, comfort, and happiness of the "woman and her children"; and in another place it is stated that the donor meant to prevent the separation of "the family" after his death. Besides, the motive of the donor, arising out of the regard for and relation to the mother, as the latter is intimated in the answer, must have extended to the issue. One is, therefore, at a loss how to understand the meaning of that passage respecting different intentions as to the woman and her children. If the different parts of an answer be directly contradictory, it would seem proper to take it most strongly against the defendants. But, willing to reconcile the answer to itself, is possible, it has occurred to us, in conjecturing the meaning, that it was probably intended to say only that the intestate did not declare any express trust as to any further issue of the woman. If, however, that conjecture be well founded,
(143) it cannot affect the case; for the *status* of the issue depends on that of the mother. *Partus sequitur ventrem.*

The plaintiffs are therefore entitled to the relief sought, in respect both to the mother and the children, and to such profits, if any, as might have been made from the death of the intestate, with just deductions; and the parties will take the usual orders for the proper inquiries. The defendants must be held thus accountable and also to be liable for costs,

on account of their concurrence in contriving to defraud the law and policy of the country by accepting a conveyance upon an illegal trust, kept secret because it was known to be illegal, and because they have endeavored unconscientiously to defeat the plaintiffs' right of recovery by attempting to set up an unfounded claim for their own benefit.

PER CURIAM. Decree accordingly.

Cited: Creswell v. Emberson, post, 154; *Green v. Lane,* 43 N. C., 79; *s. c.,* 45 N. C., 114; *Campbell v. Smith,* 54 N. C., 156; *Grimes v. Hoyt,* 55 N. C., 274.

JOHN WITHERSPOON ET AL. v. ABNER CARMICHAEL.

A bill founded upon an allegation of fraud must not merely insinuate the fraud, but must charge it in positive and direct terms; otherwise the plaintiff will not be permitted to prove it, and, of course, can have no relief.

APPEAL from an interlocutory order of the Court of Equity of WILKES, at Spring Term, 1848, *Caldwell, J.*

The bill was filed by John Witherspoon and William P. Witherspoon against Abner Carmichael, and set forth, in substance, that James W. Dula and certain other infants, by their guardian, Nelson A. (144) Strange, and other complainants of full age, filed their bill of complaint against the present plaintiff, William P. Witherspoon, in the court of equity for Wilkes County, and obtained a decree against him at April Term, 1839, for $3,544.84, upon which executions issued from time to time, which went into the hands of the defendant, who was then sheriff of Wilkes County; that the plaintiff William made many payments on the said executions during the years 1840, 1841, and 1845, making in the whole the sum of $3,823.15, for which he had taken receipts from the said defendant as sheriff; that besides these sums, the plaintiff William paid to the defendant, in the summer of 1841, the sum of $393.16 in the following manner, to wit: the said plaintiff was indebted to the Bank of the State at Raleigh in the sum of $1,015 principal, which, with interest and the costs of collecting the same, amounted to $1,084.38, and that, for the purpose of paying the same, as well as the residue unpaid of the decree aforesaid, he had a note discounted at the branch of the Bank of Cape Fear at Salisbury for $1,500, all of the proceeds of which, except the sum of $10, went into the hands of the defendant, who paid off therewith the debt due the Bank of the State, and the

cost thereof, and, by express agreement, was to apply the remainder of the proceeds of the said note to the payment of the decree aforesaid; but the defendant had not done so, and had in no way accounted for the same; that the plaintiff William had taken a receipt from the defendant for the money paid on the bank debt, but had neglected to take one for the residue of the money received by the defendant from the bank at Salisbury, and the same remained in the hands of the defendant entirely unaccounted for; and that, besides this, the defendant had collected for the plaintiff William, on a judgment against one Thomas E.
(145) Laws, the sum of about $60, which he had also failed to account for. The bill further charged that the defendant, in order to satisfy the residue which, he alleges, was unpaid on the decree aforesaid, levied the execution which he had in his hands, in 1845, on several slaves of the plaintiff William, and sold two of them for $683, the said plaintiff contending at the time that the said decree had been fully paid off; that the defendant was about to sell others of the said slaves, to prevent which the plaintiff William entered into a written contract with the defendant, by which it was agreed "that Col. Anderson Mitchell should examine the papers in the case *N. A. Strange, guardian, v. W. P. Witherspoon,* the judgment, execution, and receipts, and ascertain what balance, if any, there is yet unpaid, principal or interest, or costs," and if any should be found unpaid, the said plaintiff agreed to pay it without delay; and if the decree should be ascertained to have been overpaid, then the defendant agreed to refund the overplus, both parties mutually agreeing to abide by the award of the said Mitchell. The bill then charged that the said Mitchell examined the papers in the case referred to him, and decided that there remained due on the said decree the sum of $361.45, and rendered his award accordingly; that in making this award, the said arbitrator refused to take into considertaion any payment for which the plaintiff William had no written receipts, founding his refusal upon the exact terms of the written agreement, which, the bill alleged, had been artfully drawn by a son-in-law of the defendant; whereas the bill charged that at the time when the said agreement was entered into it was expressly mentioned and understood by the parties that the money received by the defendant from the bank at Salisbury was to be taken into the account, and the bill alleged that the said matter was brought distinctly to the notice of the said arbitrator,
(146) but he refused to allow it, whether because he was of opinion that he was precluded from doing so by the express terms of the written agreement or that the plaintiff William might have his remedy upon the official bond of the defendant as sheriff, for the year when the money was received by him; but the bill alleged that the plaintiff William could have no remedy at law on the said sheriff's bond for 1840, because he

was one of the sureties for that year, and that the said arbitrator was mistaken in both the points decided by him. The bill charged, further, that the defendant instituted a suit against the plaintiff John on the said award, in the Superior Court of Wilkes County, and at Fall Term, 1846, recovered a judgment against him for $125, for which he was about to take out execution. The bill then charged that the defendant was entirely insolvent, and that, if he were permitted to enforce the collection of the said judgment from the plaintiff William it would be an entire loss to the latter, because the execution in the defendant's hands on the decree aforesaid had been overpaid to the amount of $700 and more. The bill prayed for an injunction to restrain the collection of the judgment against the plaintiff John, and that the defendant might be compelled to account for and repay to the plaintiff William the amount which had been overpaid towards the decree aforesaid.

The injunction was granted as prayed, and the defendant filed an answer to the bill, wherein he admitted that the wards of Nelson A. Strange and others had obtained a decree against the plaintiff William, upon which execution had issued from time to time, and come to the hands of the defendant as sheriff of Wilkes County, and that the plaintiff William had made many payments thereon, for which the defendant had given him receipts, as stated in the bill. The answer also admits that the defendant received the proceeds of the note of the plaintiff William, discounted by the branch of the Bank of Cape Fear at Salisbury, and that he paid therewith the debt due from the said (147) plaintiff to the Bank of the State at Raleigh, and that for the amount so applied he had given the said plaintiff a receipt. It also admitted the collection by the defendant of the judgment in favor of the plaintiff William against Laws, but it denied that the sums remaining of the money received of the bank at Salisbury, after paying the debt due the bank at Raleigh, and the amount collected on the judgment against the said Laws, have ever been received by the defendant upon any understanding or agreement with the plaintiff William that it should be applied towards the payment of the executions of the aforesaid decree. On the contrary, it is averred that those sums of money had been appropriated for the use of the plaintiff William and had been fully accounted for to him. The answer, after much prolixity and circumlocution, admitted that the defendant could not then state how the whole of the said sums had been applied to the use of the plaintiff William, but it specified the payment to him of $130.75, for which the defendant had his written receipt, which expressed to be for a part of the money received from the bank at Salisbury, and the defendant had also taken a note given by the plaintiff William to Council and Bower for $100 as cash. The reasons assigned in the answer why the defendant

could not account for the residue of the said sum of money were that he had various other executions against the plaintiff William besides those above specified, and in consequence thereof had had many dealings with him in the receipt and payment of money, and that a considerable length of time had elapsed since the money from the bank at Salisbury had come to his hands. The answer then admitted that the defendant and plaintiff John entered into the written agreement for referring the matters of difference between the defendant and the plaintiff William
(148) to the arbitration of Col. Anderson Mitchell, and that he had made an award thereon, as stated in the bill, but it denied expressly that the said agreement was artfully drawn up to prevent the said arbitrator from taking into consideration any payment made by the said William, for which he had no written receipt. On the contrary, it is averred that the said agreement was written by the defendant's son-in-law, at the request of both parties, was drawn according to their instructions, and was fully understood by them, and that by the said agreement the said arbitrator was not prevented from passing upon payments of any kind, whether written or otherwise, made by the said William, on the executions aforesaid, and that, in fact, the said arbitrator did not consider of the payments alleged to have been made out of the moneys received by the defendant from the bank at Salisbury, and from the judgment against Laws, and rejected them, not because the plaintiff William had no written receipts for them, but because he was satisfied that they had been otherwise accounted for to the said plaintiff. The answer admitted that the defendant had obtained judgment at law against the plaintiff John, and insisted that the submission to arbitration made by the defendant and the plaintiff John was fair, and the award thereon legal and proper, and that it was final and conclusive between the parties to it, and that the plaintiff ought not to be permitted to allege anything against it. Upon the filing of the answer, a motion to dissolve the injunction was made by the defendant and sustained by the court, and the plaintiffs prayed for and were allowed an appeal to the Supreme Court.

No counsel for plaintiffs.
Craige for defendant.

(149) BATTLE, J. The motion to dissolve the injunction in this case was properly granted, and that for two very sufficient reasons. The first is that all the material allegations upon which the plaintiffs found their claims for relief are denied by the defendant; and the second is that, taking the allegations of the bill to be true, they are not sufficient to entitle the plaintiffs to the relief which they seek. The facts stated in the bill are, in substance, that the plaintiff William was entitled to cer-

tain credits for payments which the defendant, as sheriff of Wilkes County, had in his hands against him; that the defendant refused to allow these credits, and that, to settle the dificulty which existed in relation thereto between the said plaintiff and the defendant, the plaintiff John and the defendant entered into a written agreement to submit the matter in dispute to the arbitration of a gentleman selected by them, and to abide by his award. This agreement, the plaintiff alleged, was artfully written by a son-in-law of the defendant, so as to preclude the arbitrator from taking into consideration and allowing some of the payments made by the plaintiff William, because he had no written receipts for them, and that the arbitrator had in fact rejected them on that account.

The answer of the defendant, though containing much irrelevant matter, and consisting much more of argument than of clear and distinct statements, denies positively all these allegations, and, for this reason alone, the injunction would be dissolved. But, besides this, there is another objection to it, apparent upon the face of the bill. The payments for which the plaintiffs insist that the plaintiff William was entitled to a credit on the executions in the hands of the defendant was a matter solely between the said William and the defendant. The bill does not state that the plaintiff John was surety to the debt for which the decree was obtained against William. It only says that the plaintiff John was the father and surety of the plaintiff William, without stating for what debt or in what manner he was surety. He was not then, for all that appears, interested in the state of the accounts between his (150) son and the defendant, and, having voluntarily entered into the agreement for the submission to arbitration of the subject of dispute between his son and the defendant, and an award having been made thereon, he cannot have relief except by impeaching the award for fraud or mistake in the agreement for the submission or in the award itself. But there is nothing stated in the bill to raise those objections. The only allegation is that the agreement was written by a son-in-law of the defendant, so as to prevent the arbitrator from considering and allowing any other payments made by the plaintiff William than those for which he had written receipts, contrary to the express understanding between the plaintiff John and the defendant; but it is not said that the defendant procured the instrument to be so written, or that the parties gave the writer instructions which he either perverted or mistook. The utmost effect which can be given to the statement in the bill, that the agreement was artfully written by a son-in-law of the defendant, is that it insinuates a fraud, which cannot be taken as a direct and positive charge; and without such a charge the plaintiffs will not be permitted to prove the fraud, and, of course, can have no relief on account of it. Story Eq. P., ch. 2, sec. 28, and ch. 5, sec. 255. The order made in the court below, dis-

solving the injunction, is affirmed, but the answer of the defendant contains so many immaterial and irrelevant statements which, so far from being responsive to the bill or necessary to his defense, tend only to show that he was grossly and criminally negligent of his official duty as sheriff, that we cannot give him costs.

PER CURIAM. Affirmed.

Cited: McLane v. Manning, 60 N. C., 612; *Harshaw v. McCombs,* 63 N. C., 77; *Suttle v. Doggett,* 87 N. C., 205.

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(151)

DAVID CRESWELL ET AL v. WILLIAM EMBERSON.

A. bequeathed a slave to his wife for her life, and after her death to be emancipated. *Held*, that though the provision for the emancipation of the slave was void, yet the slave did not belong absolutely to the wife, but, after her death, went to the next of kin, or passed by the residuary clause, if there was one.

CAUSE removed form the Court of Equity of IREDELL, at Spring Term, 1848.

In 1831 Adam Moore made his will, in which he gave to his wife, Hannah Moore, the whole of his property, after the payment of his debts, during her natural life, except such part as she might choose not to retain, and he directed such part to be sold by his executors, and the proceeds to be put out at interest until her death, and then to be divided. He then gave to her one-third of the proceeds of the sale, and the whole of the increase of the estate, except the negroes. He further directs that, after the death of his wife, his boy, George Washington, shall be emancipated. The defendant Emberson was appointed one of the executors. Mrs. Moore died, and by her last will appointed the plaintiffs her executors, and the bill is filed for an account, and, among other things, charges that the testatrix, by her will, gave to the plaintiff Creswell the boy Washington, to be emancipated as soon as the laws will permit; that the defendant, after the death of Mrs. Moore, sold the boy Washington, as the property of his testator, and that during the life of the testatrix, Mrs. Moore, he hired out for several years, a valuable negro boy, and
(152) received a large sum therefor, and claimed the money as belonging to the estate of Adam Moore.

The answer of the executors of A. Moore admits the contents of their testator's will to be, as set out in the bill, the sale of Washington and the hiring out of Stephen, and that the amount of his hire is in their hands.

They aver, as to Stephen, that, apprehending that the perishable property and the other property directed to be sold would not pay the debts, they obtained an order from the county court to sell Stephen, but as the deficiency was not large, and the negro was willed to Mrs. Moore for her life, at her request, instead of selling him, they hired him out for the purpose of paying the debts.

No more of the pleadings are set out than are necessary to bring in view the question submitted to this Court at this time.

The bill was filed at September Term, 1841, and the answer at Spring Term, 1843. Upon a hearing, a decree for an account was made, and at the same term, by an order of court, the case was referred to a commissioner. The order of reference was as follows: "On motion of the plaintiff's counsel, it was ordered that this cause be referred to J. P. Caldwell, to take an account and report to the next court of and concerning the assets of Adam Moore, deceased, etc., the amount of that portion of it belonging to the late Hannah Moore, and that he report the facts in relation to the bequest and sale of the slave Washington, etc." At Spring Term, 1848, the commissioner made his report, and, among other things, reported: (1) That the negro boy Washington belonged to the plaintiff Creswell, and he, now assenting to the sale, is entitled to recover the amount he sold for, with interest, as set forth in the report.

2. That as the hire of Stephen, I decide that the plaintiffs, as the executors of Hannah Moore have a right to recover the same, with interest, as stated. (153)

3. Of the growing crop of corn and hay, I decide they properly belong to the estate of Hannah Moore, and that the plaintiffs had a right to recover the same.

To this report the defendants filed the following exceptions:

1st. That the commissioner has adjudged the title of the slave Washington to be in the plaintiff Creswell, and has accordingly charged for the said plaintiff the value of the slave against the defendant, whereas the title to the said slave was in the next of kin of Adam Moore, and the plaintiffs are not of the next of kin.

2d. That the commissioner has charged the defendants with the hire of the boy Stephen, and adjudged the value thereof to the plaintiffs, when the same constitutes no charge against the estate of Adam Moore, and should form no part of this account, the plaintiffs' remedy being wholly a legal one, if any, against the defendants individually.

3d. That the defendants are charged in the said account with the sum of $288 for certain corn and hay belonging to the plaintiffs, as executors of Hannah Moore, and which they should have taken care of, but for which the defendants, as executors of Adam Moore, are not liable to account in this suit, the plaintiffs having a clear remedy at law.

The 4th, 5th, and 6th exceptions were abandoned, as not being supported by testimony.

Avery, Alexander, and Bynum for plaintiffs.
Osborne, Guion, and Gaither for defendants.

NASH, J. The first exception is sustained. The plaintiff claimed the negro Washington under the will of Mrs. Moore. She had but a life estate. In making her will she doubtless thought, and the commissioner has acted under a similar impression, that as the negro Washington was given to her for life, and the subsequent disposition was void, she took an absolute estate in him under the will of her husband, Adam Moore.

It is true that the direction given for his emancipation was void,
(154) as being contrary to law, but Mrs. Moore's interest in him was not thereby enlarged. By the express provisions made for her, she has an estate but for life. With her death that interest ceased—she had nothing to leave to another. Washington, therefore, upon her death, passed either to the next of kin of Adam Moore or sunk into the residuum, if there was one. This has been repeatedly declared by the Court. The latest case on the subject (and we hope it will be the last) is that of *Lemmond v. Peoples, ante,* 137. The slave Washington, therefore, or his value, is in the hands of the defendant Emberson, as of the estate of Adam Moore.

The second exception is overruled. It appears that Stephen was one of the negroes left to the widow during her life, and to her also the testator gave, after the payment of his debts, the whole increase of the estate except the negroes. The defendant Emberson admits that he did hire out Stephen for the purpose of paying debts; that, with that view, he obtained an order from the county court to sell Stephen, but at the request of Mrs. Moore as the balance of the debts to be paid was small, he, instead of selling, hired him out. It turned out afterwards that the hire of Stephen was not required to pay the debts, and the money is in his hands. The consent of the executor to a legacy is necessary. He is not obliged to part with the property until the debts of the testator are discharged, and it appears that the defendant did not assent to the legacy as to Stephen, but neither Stephen nor his hire became necessary, and the widow was entitled under the will to both. The hire of Stephen is in the hands of the defendant Emberson, for the use of the plaintiffs, representatives of Mrs. Moore. The third exception is overruled. The exception is that the hay and corn, for which the sum of $288 is allowed by the commissioner, belong to the plaintiffs as executors of Hannah

Moore, but for which the estate of Adam Moore is not liable to
(155) account in this suit, the plaintiffs having a clear remedy at law,

The question attempted to be raised is not open. It was disposed of by the decree made on the hearing for an account. The other exceptions are overruled, there being no evidence to support them. The report of Commissioner Caldwell is in all things confirmed, except as to the slave Washington.

PER CURIAM. Decree accordingly.

Cited: Hudson v. Pierce, 43 N. C., 128.

JOHN PHIFER ET AL. V. MARTIN PHIFER ET AL.

1. A testator devised as follows, after providing for the payment of his debts: "I will and bequeath the residue of my estate of every kind and description to my dearly beloved wife, to manage the same as she may think most advisable for her own support and for the support and education of her children, as long as she remains a widow, and, should she again intermarry, it is my will that my property should be divided between her and her children, agreeable to the laws of North Carolina. 3d. And should she not intermarry until my children become of lawful age, I hereby invest her with full and ample authority to divide my property among them, as she may deem most expedient."
2. *Held,* that the widow, remaining unmarried until her death, had no right to dispose of this property at her discretion by will, but that in such an event she had a life estate, and the property after her death was to be divided among the children of the testator as it would be divided if he had died intestate.

CAUSE removed from the Court of Equity of CABARRUS, at Spring Term, 1847.

John Phifer, late of the county of Cabarrus died on 18 Octo- (156) ber, 1845, having previously, on 21 November, 1818, made and published his last will and testament, duly executed to pass both real and personal estate, in which were contained the following clauses, to wit: "I desire that all my just debts be as speedily paid as the circumstances of my estate will render convenient. 2d. I will and bequeath the residue of my estate, of every kind and description, to my dearly beloved wife, to manage the same as she may think most advisable, for her own support and for the support and education of our children, as long as she remains a widow, and, should she again intermarry, it is my will that my property should be divided between her and my children, agreeable to the laws of the State of North Carolina. 3d. And should she not in-

termarry until my children become of lawful age, I hereby invest her with full and ample authority to divide my property among them as she may deem most expedient."

Some time in 1840 the testator added a codicil to his will, which does not appear, however, to have been executed in the manner required by law to pass real estate. The testator left surviving him his wife, Esther Phifer, and seven children, to wit: Martin Phifer, John F. Phifer, Caleb Phifer, George L. Phifer, Elizabeth, the wife of E. R. Gibson, Sarah Ann, the wife of Robert W. Allison, all of full age, and Mary B. Phifer, a minor under 21 years of age. He also left a grandson, John Phifer Young, the only child of a daughter named Louisa, who had intermarried with Robert S. Young, and died a few months before her father. Esther Phifer, the widow of John Phifer, and who was the wife whom he mentions in his will, remained unmarried until her death, which occurred in March, 1846. Previously thereto she had made and published a last will and testament, duly executed to pass real and personal estate, wherein, after reciting that she had been empowered by
(157) the will of her late husband to divide his property among his children, she proceeded to give to each of the children, by name, certain specified parts of the property, both real and personal. These portions were not of equal value, but valued from $6,000, the smallest, to $15,000, the largest estimated share. She also gave to her grandson, John Phifer Young, six negro slaves estimated to be worth about $2,000. Among the property given in her will was a tract of land devised to her son George L. Phifer, worth about $7,500, which her husband purchased after the publication of his will.

Upon the probate of the will of John Phifer, his sons, John Phifer and Caleb Phifer, took out letters of administration thereon, with the will annexed, and they also took out letters testamentary upon the will of their mother, and, meeting with difficulties in carrying the provisions of said will into effect, they filed this bill, to which all persons interested were made parties, to get advice of the court upon the following questions:

Whether Esther Phifer, the widow, had any power, under the will of her husband, to dispose of and divide any of his property among their children by her last will and testament. (2) And if she had, whether she had the further power to bequeath the slaves, mentioned in her will, to John Phifer Young, their grandson, and whether the executors ought to deliver the said slaves to him. (3) Whether, if the said John Phifer Young is one of the persons among whom the widow was directed to divide the property of her husband, he is bound by the allotment made in her will, or is entitled to demand from the executors a larger portion

of the said property. (4) Whether the said devise by the said widow of the tract of land, purchased by her husband after the making of his will, to her son George, vested the said land in him.

Thompson and Coleman for plaintiffs.
Avery and Wilson for defendants.

BATTLE, J. The answer which we feel bound to give to the (158) first inquiry renders the consideration of the other questions presented in the bill unnecessary. We are of the opinion that the will of John Phifer did not confer upon his widow the power to divide his estate among their children by her last will and testament, much less to divide it among them in unequal portions. The will of the testator was made in 1818, about twenty-seven years before his death, and although the ages of his children are not otherwise stated in the pleadings, than that all of them, except one, were of full age when the bill was filed in the Fall of 1846, yet we may fairly infer that when the will was made all of them who were then born were under age, and most probably infants of very tender years. In that condition of his family he gives to his wife, after the payment of his debts, the whole residue of his estate, real and personal, so long as she might remain a widow. He gives it to her, however, not absolutely for herself and for her own sole use and support, but also for the support and education of his children. While she should remain his widow, the entire confidence which he expressed in her prudence and discretion induced him to confer upon her the exclusive management of the property for those necessary and important purposes. But should she again intermarry, then her situation would be so essentially changed by the new relations which she would contract that he thought it no longer proper to intrust her with the property which he designed for their children. He therefore directs a division of the whole estate between her and the children according to the law of the State. So far there is no difficulty in ascertaining his intentions, for they are clearly expressed and seem reasonable and proper. Then comes the third clause, which, at first view, appears somewhat obscure, but the obscurity vanishes when we consider his intentions respecting his family, previously expressed in the second clause, and (159) apply them to another state of things which he foresaw might possibly occur. His widow might not marry again at all, or, at least, might not do so until after the education of some or perhaps of all of their children might be completed, and they shall have arrived at the proper age to marry and settle, or otherwise engage in the active duties of life. Should such be the case, they would need a portion of that property which had been intrusted to their mother for their benefit. To provide

for such exigencies, he gives to her the power to divide the property among them as she might deem most expedient, and this power she might execute from time to time, as the occasion for its exercise might occur. (Sug. on Pow., 278; 1 Law Lib., 341.) He thought, too, that she would know best what kind of property would be most suitable for each one of the children, as he or she might arrive at lawful age, and such kind he leaves it to her discretion to give, keeping in view, however, that equality in the shares of the children indicated in the second clause of his will. Without the power to make such allotments, the children would either be unprovided for or would take and hold what their mother might put in their possession, as hers, and not as their own, which was certainly contrary to the intention of the testator. From this exposition of the testator's intention, as declared in the third clause of his will, it is manifest that the power given to the widow was to be executed by a deed of other instrument, *inter vivos,* and not by her will. Indeed, in the execution of the power no reference is made to her death, but to her marriage after the children or some of them should have arrived at lawful age. A power given generally may, it is true, be executed either by deed or will, unless the particular mode of execution is prescribed. Sug. on Pow., 207; 1 Law Lib., 250. But the mode of execution, when the power is given by will, depends on the intention
(160) of the testator, and that is to be ascertained upon a fair construction of the will, like any other intention, when the terms are not express. Sug. on Pow., 97; 1 Law Lib., 117. Our opinion being that the power given in the will of the testator to his widow has not been executed, the result is that the effect of his will has been to give all the estate therein effectually divised or bequeathed to his widow for her life, with the remainder to all the children; and as she is now dead, the estate must be equally divided between all the living children, and John Phifer Young, the only heir at law of Mrs. Louisa Young, another child, who died after the making of her father's will, but before his death, John Phifer Young takes the share to which his mother, if living, would have been entitled under the act of 1816, 1 Rev. Stat., ch. 122, sec. 15. The real estate purchased by the testator after the making of the will, whether devised therein or not, by force of the act of 1844, must be divided in the same manner.

PER CURIAM. Declared accordingly.

Cited: Thompson v. Power Co., 154 N. C., 19.

(161)

ALEXANDER RANKIN ET AL. v. ANDREW HOYLE ET AL.

A testator bequeathed certain slaves to his wife for life, with power at her death to dispose of them as she might think proper, among her children. One of the children died in the lifetime of the testator, leaving children. *Held*, that the wife had no right, under this power, to appoint any of the slaves to the said last mentioned children.

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

This bill was filed by Alexander Rankin and wife, Elizabeth Ann Rhinehart, Alexander Moore, and Robinson Moore against Andrew Hoyle, as the executor of Elizabeth Moore, deceased, and as the administrator with the will annexed of Alexander Moore, senior, deceased, and against Elizabeth R. Moore and the other children of James Moore, deceased; and its purpose was to obtain a judicial construction of the wills of said Alexander and Elizabeth Moore, deceased, and for the distribution of the property accordingly. The case made by the bill and answer is this: Alexander Moore by his will gave to his wife, Elizabeth, considerable property, real and personal, including several slaves, during her life, and at her death to be disposed of as she might think proper among her children. Elizabeth Moore, the widow, by her will gave a certain number of slaves, so bequeathed to her, to the children of her deceased son, James Moore. Alexander Moore died in November, 1837, having survived his son James Moore, who died in the preceding September, and Elizabeth Moore died in 1839. The will of Alexander Moore was made and published in June, 1834, and that of his widow in December, 1838. The plaintiff Elizabeth, wife of the (162) plaintiff Alexander Rankin, and the other plaintiffs, are the only children of Elizabeth Moore who were living at the death of their mother. The defendants, other than the executor, are the children of James Moore, deceased, and grandchildren of the said Elizabeth. The defendant Hoyle, as the executor of said Elizabeth and administrator with the will annexed of the said Alexander Moore, deceased, took possession of the negroes bequeathed by the said Elizabeth to his codefendants, and sold some of them, and holds the proceeds of the sale, together with the slaves not sold, subject to the direction of the court. The plaintiffs contend that their mother, Elizabeth Moore, had no authority, by virtue of the power given to her in the will of her husband, to bequeath the slaves to her grandchildren, and that, consequently, the said slaves or their proceeds in the hands of the executor belong to them. On the other hand, the defendants, the children of James Moore, deceased, insist that, under the provisions of the act of 1816, and by virtue

of the power given in their grandfather's will to their grandmother, she might bequeath to them whatever she might have given to their father, had he been living at her death.

Avery, Bynum, and Alexander for plaintiffs.
Guion for defendants.

BATTLE, J, The question presented for our consideration has not hitherto, so far as we are aware, been decided or even discussed in our courts. The counsel for the defendants admits that, prior to 1816, a power to appoint to or among children did not authorize an appointment among grandchildren. Sug. on Pow., ch. 9, sec. 5, p. 501 (2 Law. Lib., 253) But he contends that the act of 1816 (1 Rev. Stat., ch. 122, sec. 15) makes an alteration of the law in this respect, not expressly, (163) but by necessary construction of its provisions. These provisions are, that when any person shall bequeath or devise any of his or her estate to his or her child or children, and such child or children shall have died in the lifetime of such testator or testatrix, in every such case the said legacy, devise, or bequest shall take effect and vest a title to the property or share of estate described and mentioned in the same in the issue of such child or children, if any, in the same manner and to the same extent as it would have vested in such child or children had she or they been in full life at the death of the testator or testatrix and taking effect of such will. Applying the act to this case, the counsel insists that the power given by Alexander Moore in his will to his widow to dispose of the slaves in question, at her death, among her children, had, upon its execution, the same effect as a bequest of them in the will of the testator, to his son James, which, as he died before the testator, would go to his children. In support of this proposition the counsel relies upon the well established doctrine that the appointee under a power takes from the instrument which creates the power, and not from that which executes it. Sug. on Pow., 331 (2 Law Lib., 22). Unfortunately for the argument, the power of appointment in this case is not to be executed in favor of the testator's children, but the children of his wife. The words of the will are, "to be disposed of as she may think proper among her children." These words may embrace children of the testator's wife by a former or subsequent husband—children who may not be his. If a power, then, which is given by a will have the same effect when executed as a bequest in the will, the act of 1816 cannot apply to this case, because the will does not authorize, by its terms, the execution of the power in favor of the person whose legacy would necessarily be saved from lapse by the operation of the act. But a more decisive answer to the argument is, that (164) when the testator's will took effect by his death, his son James

Moore was not one of the objects of the power, he having died before his father. He was not then one of her children among whom she was authorized to appoint, and no case could be made to which the act of 1816 could apply. And his children also were excluded, because the power of appointment was confined to the wife's *children.* Whether if James Moore had survived his father, and the power given by the father's will had been to appoint among his (the testator's) children, it could have been executed in favor of the children of James after his death, or whether the act of 1816 applies to any case where the bequest is not directly to the child, but only to be carried into effect through the medium of a power of appointment among the children of the testator, it is unnecessary for us to decide. In the case presented to us we hold that the power was not well executed in favor of the grandchildren of the testatrix, Elizabeth Moore, and that consequently the plaintiffs are entitled to a decree for such of the slaves bequeathed by the will of the said Elizabeth to the defendants as are now in the hands of the executor, and for an account of the proceeds of such as he had sold.

PER CURIAM. Decree accordingly.

Cited: Williamson v. Jordan, 45 N. C., 48.

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(165)

LEANDER E. BRITTAIN v. JOHN McLAIN.

Where a vendee gave a bond for the purchase money of a tract of land, and the vendor at the same time gave a bond to make a valid title when the money was paid: *Held,* that these were current acts, and that if the vendor attempted to collect the money on the bond for the price of the land, without making or tendering a valid title, the vendee was entitled to an injunction, and if a valid conveyance of title was not filed in the court, after the bill of injunction granted, the injunction should be continued to the hearing.

APPEAL from an interlocutory order of the Court of Equity of HENDERSON, at Spring Term, 1848, dissolving an injunction theretofore granted, *Battle, J.*

The bill charges that in 1845 the plaintiff purchased from the defendant a tract of land in Henderson County, at the price of $395, and, to secure the purchase money, executed his bond to the defendant, with William Brittain his surety, payable on 1 January, 1847, and at the same time the defendant executed to him a bond to make a conveyance of the land when the purchase money was paid. It charges that at the time of sale, which was made by public auction, the defendant represented the land as the property of John McLain, deceased, of Georgia,

who had made a will, appointing himself executor thereof, and giving him full power and authority to sell the said land; that he took possession of the said land and proceeded to improve it but in a short time was informed that the defendant had no power to make a valid
(166) conveyance, and, upon application to the defendant, was informed that a caveat against the probate of the will had been entered in the court of the proper county in Georgia, where the said John McLain lived and died, and where it was still pending. The plaintiff alleges that he has recently been informed, and charges the fact so to be, that the defendant never brought the will of John McLain to this State, but merely a copy, which he caused to be entered on the records of Henderson County, and procured letters testamentary to be issued thereon to him in this State as one of the executors thereof, and by said paper it appears to have been proven before three justices of the peace, out of court of Rabun County, in the State of Georgia. The bill further charges that the defendant had no power, under the present state of the paper-writing, to make a valid conveyance of the land; that the defendant has never made any conveyance of the land or tendered one to him, but without so doing has sued him on his bond and recovered judgment against him, and is about to take execution thereon; and, if he collects it, he fears it will be to him an entire loss, and prays that the contract may be rescinded and an injunction issued to restrain the defendant from collecting the money on his judgment.

The defendant answers that John McLain, of Rabun County, in the State of Georgia, died in the year....., having made his last will and testament, duly executed to pass real estate in the State of Georgia; that he and one John Martin were appointed executors, and power is given to them, or either of them, to sell and convey the land in question; that, in conformity with the laws of Georgia, the said will was proved before three justices of the county of Rabun, and duly recorded in the court of ordinary in said county. He admits executing a bond for a conveyance, as stated in the plaintiff's bill, and that he has not made a deed for the land, but is willing to do so whenever called on; that he has
(167) obtained a judgment against the plaintiff on his bond, and that he is able to make good to him any injury he may sustain in consequence of his not obtaining title. He avers that no *caveat* has ever been entered in the probate of the will in Georgia, and denies he ever so told the plaintiff. The defendant further alleges that Alexander Martin, his coexecutor, took out letters testamentary in the State of Georgia, and he procured from him a good and sufficient deed of conveyance to the plaintiff of the said land, which he now has and is willing to bring into this court and deliver to the complainant, whenever thereto required.

BRITTAIN *v.* MCLAIN.

N. W. Woodfin for plaintiff.
Baxter for defendant.

NASH, J. Upon the coming in of the answer in this case the injunction theretofore granted is dissolved. From the pleadings in the case it appears that the defendant, representing himself as the executor of the will of John McLain, of Georgia, and claiming to have full power, as such, under the will, sold to the plaintiff a tract of land lying in Henderson County in this State. The plaintiff executed to the defendant his note or bond for the purchase money payable 1 January, 1847. This bond bore date in March, 1845. At the same time the defendant executed his bond to make title to the plaintiff when the purchase money was paid. The defendant, without executing or handing to the plaintiff any deed for the land, sued him upon his bond and has obtained a judgment on it, nor has he even brought into court any deed from himself or from his coexecutor, Martin, to the complainant. We think his Honor erred in dissolving the injunction. The acts to be performed by these parties were concurrent acts, to be performed at one and the same time. The plaintiff bound himself to pay the money due upon his bond on 1 January, 1847, and the defendant bound himself, at the same (168) time, to make the conveyance of the land. Whichever of the parties, in such a case, takes the initiative becomes the actor. A court of equity will not compel a purchaser to take a doubtful title. He has a right to have the title brought into court, and a reference to the clerk, if he so chooses, to examine and report upon it. This the defendant has not done, and we do not consider him entitled to force the purchase money from the plaintiff and to throw him upon the uncertain security of his bond to make a conveyance. He is not compellable, in equity, to part with his money until the vendor has conveyed or offered to convey the land. This defendant has not yet done. We do not consider the other objections raised by the answer as properly before us. The only question referred to is the propriety of the dissolution of the injunction. We think there was error in dissolving the injunction, and that it ought to be retained to the hearing.

PER CURIAM. Reversed with costs.

(169)

JOEL VANNOY v. WILLIAM MARTIN ET AL.

A. Purchased the land of B. at a sale under an execution he had against B., and at the sale declared he was buying in the land only as a security for other debts which were to be ascertained on a settlement with B., and thereby prevented B.'s friends from advancing the money to satisfy the execution. Afterwards the land was sold as the property of A. under an execution against him: *Held*, first, that the act making void parol contracts for the sale of land (Rev. Stat., ch. 50 sec. 8) did not bar B. from his remedy. *Held*, secondly, that the purchasers under the executions against A. held but the title he had, subject to all the equities against it, whether they had notice of such equities or not.

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

This bill was filed in the court of equity for Wilkes County, by Joseph Vannoy against William H. Martin, Samuel P. Smith, and Joseph W. Hackett, and stated that the plaintiff was the owner of a tract of land lying adjacent to the town of Wilkesboro, which he leased in 1839 to one Thomas D. Kelly for a term of five years; that the defendant Martin, in 1841, recovered a judgment in the Superior Court of law for Wilkes against the plaintiff for about $860, and had an execution issued thereon and levied upon the said tract of land, and had it advertised for sale; that the plaintiff at that time resided in the county of Cherokee, at the distance of 200 miles from the place of sale, and that his lessee,

(170) the said Kelly, went to the defendant Martin and told him that, as he believed the plaintiff was ignorant of the intended sale, and the land was valuable, being worth about $2,500, he would either buy it himself for the plaintiff or raise the money and pay off the debt for himself, when the defendant Martin told him that the would bid off the land himself, but would not keep it; that he had an unsettled account against the plaintiff and would hold it only as a security for whatever sum might be found to be due to him upon a settlement with the plaintiff. The bill stated further that the said land was sold in August, 1841, when the defendant Martin became the purchaser at the price of $810, and that the said Martin, after his purchase, several times acknowledged that he had the land only as security, and that the plaintiff had a right to redeem it; that the plaintiff and the defendant Martin afterwards came to a settlement of their accounts, when it was found that the balance due from the plaintiff to Martin was about $700, and that Martin offered to reconvey the said land upon being paid that sum; that the plaintiff was unable at the time to pay the said balance, but, not long afterwards, he procured $300 and handed it to one William W. Peden to pay the defendant, which was accordingly done on 25 December, 1842, and the

said defendant gave a receipt therefor, expressing that the money was received towards the redemption of the said Vannoy's land; that the plaintiff subsequently paid on the same account the sum of $90 and was entitled to a credit for $76 more, received by Martin for him and not accounted for in their settlement. The bill then stated that the said defendants Smith and Hackett obtained a judgment against the defendant Martin and had an execution levied upon the said land as the property of the said Martin, and had it sold, when they became the purchasers at the price of about $1,000. The bill charged that the said defendants Smith and Hackett had, at the time when the (171) judgment was obtained against Martin, and when they had the land levied on and sold, full knowledge that the plaintiff had the right to redeem it, and that he had already paid near $400 towards such redemption. The bill prayed that the plaintiff might be permitted to redeem the land upon paying to the defendants Smith and Hackett whatever balance might be found to be due from him to the defendant Martin, upon their accounting for the rents and profits. The defendants all answered the bill. The answer of the defendant Martin denied that he had purchased the land upon any understanding or agreement whatever to hold it only as security, subject to the plaintiff's right to redeem it. On the contrary, it asserted that his purchase was absolute for himself, but that, afterwards, he had agreed to resell the land to the plaintiff at the price of $1,000, provided the money was paid by a certain agreed time, and that the plaintiff had failed to comply with the terms. He admitted the receipt of the sums of money stated in the bill, but said they were paid in part of the price for a repurchase, and not a redemption of the land. The answer claimed the benefit of the act of 1819 (Rev. Stat., ch. 50, sec. 8), making void all parol contracts for the sale of land. The answer of Smith and Hackett denied the plaintiff's right of redemption, and insisted that they had purchased without any notice of such right, and relied also upon the act of 1819. Replications were put in to the answers, proofs were taken, and the cause was set down for hearing and transmitted to this Court.

Craige for plaintiff.
Guion for defendants.

BATTLE, J. The facts of the case are left in very little doubt (172) by the testimony. The depositions of Thomas D. Kelly and William P. Waugh, the letter from the defendant Martin to the plaintiff, written 23 August, 1842, and the receipt given by the said defendant to the plaintiff's agent, Peden, on 25 December in the same year, expressed to be towards the redemption of the land, satisfy us that the defendant Martin purchased the said land under the execution in his favor, not

absolutely for himself, but to hold the same merely as a security for his judgment, and for whatever other sum might be found to be due to him upon a settlement subsequently to be had with the plaintiff. We are satisfied, further, that he made representation to that effect at the time of sale which prevented the plaintiff's lessee, Kelly, or some other friend at his instance, from stopping the sale by paying off the amount due on the executions, or buying in the land for the plaintiff, and enabled the defendant Martin to purchase it at an undervalue. In either case it would be a gross fraud upon the plaintiff if the said defendant were permitted to set up an absolute title to the land, which it is the duty of a court of equity to prevent, and, in the way of preventing which, the act making void parol contracts for the sale of land does not stand. *Turner v. King,* 37 N. C., 132. The plaintiff, then, would be entitled as against the defendant Martin to redeem the land upon paying him whatever might be found to be due upon a general account. That being so, the plaintiff has the same right of redemption against the other defendants, Smith and Hackett, because they were purchasers at the sale under an execution against the defendant Martin. They purchased the land subject to all the equities against him, whether they had any knowledge of such equities or not. *Freeman v. Hill,* 21 N. C., 389; *Polk v. Gallant,* 22 N. C., 395; *Rutherford v. Green,* 37 N. C., 121. The plaintiff is, therefore, entitled to a decree for the redemption of the tract of
(173) land mentioned in the pleadings upon paying to the defendants Smith and Hackett whatever sum may be found to be owing from him to the defendant Martin, with interest thereon, deducting therefrom whatever amount the said Martin and the other defendants have received from the rents and profits of the said land, and to ascertain these rents and profits, as well as the sum due and owing from the plaintiff to the defendant Martin, there must be a reference to the clerk of this Court.

PER CURIAM. Decree accordingly.

Cited: Barnes v. Brown, 71 N. C., 511; *Hicks v. Skinner, ib.,* 541; *Mulholland v. York,* 82 N. C., 514; *Cobb v. Edwards,* 117 N. C., 252; *Avery v. Stewart,* 136 N. C., 439; *Harrell v. Hagan,* 150 N. C., 244.

FRANCES McCORKLE v. ELISHA SHERILL ET AL.

1. A testator devised the whole of his negroes to be divided as follows: one-seventh to C, one-seventh to B., one-seventh to S., one-seventh to E., one-seventh to R., one-seventh to M., and one-seventh to G. R., one of the legatees, who was a niece of the testator, died in his lifetime. By the 9th clause of the will the testator devised as follows: "My land and stock of all kinds, etc., to be sold at public sale, all my just debts to be paid out of the proceeds of the sale." He then gives out of the proceeds of the sale $50 to A., B., and C., each. The will then proceeds: "If any left afterwards from the proceeds of the sale, to be equally divided among all my devisees."

2. *Held, first,* that the share of the negroes bequeathed to R. lapsed by her death in the lifetime of the testator and did not go to her children whom she left surviving her.

3. *Held,* secondly, that the word "devisees," in the residuary clause, meant legatees.

4. *Held,* thirdly, that the legatees, as such, take no part of the lapsed legacy, but as to it and the other property not mentioned in the will, the testator died intestate.

5. *Held,* fourthly, that the undisposed personal property of the testator, as well the lapsed legacy as the money on hand, notes, accounts, etc., constitute the primary fund for paying the debts, and what money may remain after such purpose is answered is to be distributed among the next of kin of the testator.

6. *Held,* fifthly, that the portion of the lapsed legacy which arose from the sale of the land does not go to the next of kin, but to the heirs at law.

Cause removed from the Court of Equity of Catawba, at (174) Spring Term, 1848.

Matthew McCorkle died in 1844, and by his will, duly made and proved, directed the whole of his negroes to be valued and not sold, and to be divided as follows: one-seventh to Charles Beaty, one-seventh to Betsey Selina Little, the wife of George Little; one-seventh to Sarah W. Sherrill, wife of Theophilus Sherrill; one-seventh to Elizabeth B. Sherrill, wife of Elisha Sherrill; one-seventh part to Rebecca W. Milligan; one-seventh part to Martha Milligan, and one-seventh part to Gilbert A. Milligan. The above legacies are contained in the first eight clauses of the will. Clause 9 is as follows: "9. My land and stock of all kinds, household and kitchen furniture and farming tools, and all my corn, wheat, oats, and fodder, to be sold at public sale; all my just debts to be paid out of the proceeds of the sale." By clause 10 the testator directs that "After my just debts and funeral expenses are paid, if there be anything left from the proceeds of the property that is to be sold, I

will that Caroline Loftin, Thomas Loftin, Frank Loftin, and Selina Loftin get $50 each." Clause 11 is as follows: "I give and bequeath to Jane Rebecca Robinson $50 out of the proceeds of the property to be sold. If any left afterwards from the proceeds of the sale, to be equally divided among all my devisees." The bill alleges that, over and above the property mentioned in the will, the testator died seized and possessed of a large estate, both real and personal, and that Betsey Selina
(175) Little died before the testator, whereby the legacy to her lapsed and fell into the general estate. It further alleges that the plaintiff, together with the defendants Charles Beaty, Rebecca Milligan, Martha Milligan, are the next of kin and representatives, as such, of the testator, and entitled each to one-eleventh part of the whole of the personal property, and the money arising from the sale of the land directed to be sold, after paying all the debts of the testator, and also the legacy of Betsey Selina Little, and that more than ten years had elapsed since administration with the will annexed had been granted to the defendant Elisha Sherrill. The bill charges that as to the lapsed legacy, and all the property not mentioned in the will, the testator died intestate, and that it passes under the law to his next of kin.

The answers admit the facts set forth in the bill, as to the death of Matthew McCorkle, the making of his will, etc., but deny that the testator died intestate as to any portion of his estate. They admit the death of Betsey Selina Little before that of the testator, and that she was the niece of the testator, but aver that she left seven children, who are next of kin, and entitled to one-seventh part of the sales of the negroes directed to be sold by the first clause of the will, and the legacy to their mother did not lapse, but that, if it did, it passed under the residuary clause contained in the 11th item of the will, to the legatees in the will, under the word devisees. The bill prays an account, etc., and the cause is set for hearing on the bill and answers.

McCorkle and Guion for plaintiff.
Wheeler for defendants.

(176) NASH, J. It is required of the Court to put a construction upon the will of Matthew McCorkle, and thereby ascertain whether the testator died intestate as to any part of his property, and what property passed under the residuary provision of clause 11 of the will, and to whom. By the first clause of the will the whole of the negroes of the deceased are directed to be valued and divided into seven parts, and one-seventh part is given to Betsey Selina Little, who died before the testator, leaving seven children. One question submitted to us is, what effect the death of the legatee, before the testator, has upon the gift. There can be no doubt upon it. The legacy lapsed, and if there be in

the will a general residuary clause, it sinks into and passes under it. If there be no such residuary clause, it is undisposed of by the will. The testator dies intestate as to it. It passes to the next of kin. The case is not governed by sec. 15, ch. 122, Rev. Stat. That is confined to a bequest to the children or the child of the testator. Betsey Selina Little was his niece. The whole question as to the lapse of the legacy was decided in *Johnson v. Johnson,* 38 N. C., 426; *Hester v. Hester,* 37 N. C., 330. The children, then, of Betsey Selina Little take nothing under the will of Matthew McCorkle, or as next of kin. It is argued, in behalf of the legatees, that under the residuary provision of clause 11 of the will the one-seventh part of the negroes left to Betsey Selina Little passed to them under the term "devisees." The next of kin contend that the word as used is insensible, and passes nothing. We agree with the counsel for the plaintiff, that the word *"devisees"* in clause 11 is to read *legatees.* The word *devise* is properly applied to gifts of real property by will, but may be extended to embrace personal property to execute the intention of the testator. The leading rule in the construction of wills is to carry into execution the intention of the maker. He has a right to make such a disposition of his property as he pleases, provided it is not for a purpose forbidden by the law. In arriving at this intention, the whole will must be taken together, and one part may be used to explain another, without regard to their respective positions. In the will (177) we are considering there are no devises of land, either preceding or following section 11. By section 9 he directs that his land, together with some of his personal property, shall be sold for the payment of debts. This is not a devise of the land to any one, but a power given to the executor or his personal representative to sell. It is manifest, therefore, by the term, "all my devisees," the testator must have meant his legatees—his donees. The word legacy properly means a disposition by will of personal property; yet, to carry out the intention of the testator as gathered from the will, it may be rendered devise, and legatee, devisee. *Williams v. McComb,* 38 N. C., 455; *Tucker v. Tucker,* 40 N. C., 84; *Hardacre v. Nash,* 5 Term, 716.

We are clearly of opinion that the word *"devisees"* means *"legatees,"* as used by the testator McCorkle, and that the bequest is not void for uncertainty. But we do not agree that, under the residuary provision of clause 11, the lapsed legacy of Betsey Selina Little passed to the other legatees. It is not a general, but a special, residuary clause, and nothing was intended to pass under it but the residue of the money arising from the sale of the property directed to be sold after the payment of the debts. The words are precise and unequivocal as to this question: "If any left afterwards *from the proceeds of the sale,* to be equally divided," etc. Now, nothing is directed to be sold but the property mentioned in

clause 9. It cannot, then, embrace the lapsed legacy. *Bradley v. Jones,* 37 N. C., 248; *Dickens v. Cotton,* 22 N. C., 272. On the part of the next of kin it is contended that, under the residuary clause, nothing passed to the legatees but that portion of the money raised by the sale of the property, set apart in clause 9, which remained after the payment of the debts, and that as to all the other property owned by Matthew McCorkle, he died intestate, and it goes to the next of kin. It is not (178) necessary to cite authorities to show that, as to the property owned by a testator at the time of his death, or the making of his will and not disposed of by it, he dies intestate, and the personalty is to be distributed among the next of kin. It is alleged in the bill and admitted in the answer that the testator had other property besides his negroes, and property enumerated in clause 9. No part of his omitted property passed by the will, and there is an intestacy as to it. It did not pass under clause 11; its terms excluded it. The language used by Mary Jones in her will is very similar to that used here. *Bradley v. Jones,* 37 N. C., 245. The words are, "all the balance of my estate that is not given to be sold," and it was contended by the residuary legatees that the money on hand was embraced in it. The Court ruled to the contrary, and say: "We think the testatrix could not have meant that her specie and bank notes should be exposed to sale." The case before us is a much stronger one. The testator has told us what property should be sold, and what residue he meant. Another question arises, as to the proper fund for the payment of the debts and pecuniary legacies of the testator. Notwithstanding the directions given by the testator, as to the payment of his debts, contained in clause 9, under the circumstances of this case the personal property unbequeathed is the fund first to be looked to, and the debts are to be paid out of it as far as it will go. In the administration of assets, the personal property is the fund first liable, and is therefore often called the "natural fund." And when there is a will, that portion of the personal estate which is not especially bequeathed or by plain implication exempted is first applied. 1 Mad. Ch., 473. Now, it is true that, in clause 9 the testator does direct that his land and other property there named shall be sold and out of the proceeds of the sale his debts shall be paid. This, however, is but a charge on the property so (179) directed to be sold. There is nothing in the will exempting the undisposed surplus from the burthen. Nor is there anything in the clause fixing it absolutely upon the fund pointed out in it. And unless there be either an exemption of the residue or the charge be fixed by plain words or as plain implication, on other property exclusively, the legal and natural order of paying the debts and pecuniary legacies is not to be departed from. *White v. Green,* 36 N. C., 49.

We are of opinion, then, that the legacies of the negroes in the will of Matthew McCorkle to Betsey Selina Little lapsed in consequence of her death before the testator, and nothing passed under it to her children. (2) That the legatees, as such, take no portion of the said lapsed legacy, but, as to it and the other property of the testator not mentioned in the will, Matthew McCorkle died intestate. (3) That in the residuary provision of clause 11 of the will the legatees are meant under the term devisees, but that they, as legatees, do not take any portion of the money on hand, or other personal property not disposed of in the will. (4) That the undisposed personal property of Matthew McCorkle, as well the lapsed legacy as the money on hand, notes and accounts, etc., constitute the primary fund for paying the debts, and what money may remain after such purpose is answered is to be distributed among the next of kin of the testator. (5) It appears from the will that a portion of the property directed to be sold was land, and we have declared that Betsey Selina Little, to whom, under the name of devisee, a portion of the proceeds are given, having died, her portion lapsed. But that portion of the proceeds of the land does not go to the testator's next of kin, but to his heirs at law.

Per Curiam. Decree accordingly.

Cited: Lane v. Bennett, 56 N. C., 394.

CASES IN EQUITY

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

MORGANTON

AUGUST TERM, 1849

BENJAMIN LOGAN, BY HIS GUARDIAN, v. SQUIRE SIMMONS.

The creditor of a nonresident debtor who is brought in by publication cannot have a decree for the satisfaction of his claim out of debt due by persons in this State to such nonresident debtor.

CAUSE transmitted from the Court of Equity of CLEVELAND, at Spring Term, 1849.

In October, 1845, the defendant Squire Simmons, then of Rutherford County, sold and conveyed to the defendant Bedford a tract of land situate in Rutherford, at the price of $950, of which he paid down the sum of $400, partly in cash and partly in the notes of other (181) persons. For the residue he gave his bonds, by the direction of Simmons, to his sons William and Joseph Simmons. The notes were transferred by Bedford without indorsement; and Squire Simmons delivered them also to his two sons, who placed them in the hands of the defendants Davis and Hauser for collection, and soon afterwards Simmons and his sons removed to Georgia, carrying all their property with them, and having nothing in this State except the above mentioned debts. The bill was filed in July, 1846, and states that at the time of the sale and the removal of Simmons a suit was pending in the court of equity, which the plaintiff had brought against Squire Simmons to recover, among other things, a large sum of money for the profits made by Simmons from certain slaves belonging to the plaintiff, wherein an interlocutory decree had been made for an account; and that the said sale

was made with the intent to defeat the plaintiff of the benefit of the recovery he might and was expected to make in that suit, and that Bedford knew of such intent; and that the bonds were made payable and the notes transferred to the sons voluntarily, in order more effectually to carry out the fraudulent intent. The bill further states that, upon taking the account, a sum was found to be due thereon to the plaintiff of $2,000, and that a decree was made therefor in June, 1846, and a *fieri facias* was sued out thereon, directed to the sheriff of Rutherford, who returned *nulla bona*. The prayer of the bill is that Bedford, Davis, and Hauser may be enjoined from paying the debts they owe as aforesaid to either Squire, William, or Joseph Simmons, and that they may be compelled to pay the same to the plaintiff, towards the satisfaction of the sum due on the decree.

(182) The defendants Bedford, Davis, and Hauser put in several answers, in which they state that they have no knowledge of the alleged decree. They set forth the sums due from them respectively, and submit to pay them to the plaintiff, if the court should think they can safely do so and make a decree to that effect. Bedford denies any intent on his part, or any knowledge of an intent on the part of Simmons, to defraud the plaintiff in making the sale of the land and taking the bonds for the purchase money payable to his sons; and he says that he gave his bonds payable to the sons of the vendor because it was immaterial to him to whom he paid the money, and he was requested to do so by those parties. After publication, the bill was taken *pro confesso* as to the three Simmons. The plaintiff put in a replication to the answers, but he took no proofs. By orders in the cause, Bedford, Davis, and Hauser paid at different times several sums into court, in order to stop interest against them should they be held liable in the cause, and the master, under the direction of the court, put the money out on interest.

Guion for plaintiff.
Baxter for defendants.

RUFFIN, C. J. The cause has been brought to a hearing by the plaintiff, without any evidence to establish his case. He has not even shown his decree and execution, much less a fradulent purpose in any of the defendants to defeat him of his demand. Indeed, if he had shown those facts, *Yarborough v. Arrington,* 40 N. C., 291 is in point, that he could have had no relief. The bill does not seek satisfaction out of the land upon a declaration that Bedford's purchase was fraudulent; but, on the contrary, it affirms the sale, and prays payment out of the debts created for the purchase money, upon the ground that the securities are held by the sons of Simmons in trust for the father, or at all events as volunteers.

If the land were fraudulently sold, it would be liable at law to (183) execution or attachment. It is, therefore, simply a case in which a creditor is unable to reach the effects of his nonresident debtor by an attachment at law, and files a bill to attach those effects in equity. Such a jurisdiction is unknown to the courts of equity. It is conferred on them by statute in some of the states; but there is no such statute in this State, nor any precedent of the exercise of such a jurisdiction. The Court was therefore obliged to hold in the case cited, for the reasons there given, that such a bill will not lie. Consequently, there must be an order that the sums paid in by Bedford, Davis, and Hauser respectively be returned to them and the interest thereon accrued, or that the securities held for the money be transferred to them; and the bill must be dismissed with costs.

PER CURIAM. Decree accordingly.

LEANDER S. GASH v. RICHARD LEDBETTER ET AL.

After there has been a judgment at law, at the instance of some tenants in common, for an actual partition of land, the other tenants or any of them may have an injunction against the judgment, upon the allegation that the land cannot be actually divided without injury to the owners, and the injunction will be continued until the hearing, that the court may decide, *upon the proofs*, whether an actual partition or sale of the premises will be most for the interest of the parties.

APPEAL from an interlocutory order of the Court of Equity of HENDERSON, at Spring Term, 1849, dissolving an injunction theretofore granted; *Bailey, J.*

Isaac Ledbetter died intestate in 1836, seized in fee of three (184) tracts of land in Henderson County, one of which contained 883 acres, another 202 acres, and the third 175 acres. The first tract is represented in the bill to have 500 acres suited for cultivation, of which 200 acres are good, productive bottom, and to have been assessed in 1847 as of value of $2,900; the second to have 100 acres fit for cultivation, and to have been assessed at $200, and the third to be nearly all fit for cultivation, and assessed at $300. The intestate left fifteen children, to whom the land descended, who were then nearly all infants, and of whom six are still infants. From those who came of age, the plaintiff purchased shares which amounted to one-sixth part of the whole, and the defendant Richard Ledbetter in like manner became entitled to another sixth part. In the Spring of 1848, Richard Ledbetter and the other heirs (who, including the infants, were entitled to ten-fifteenths of the land) filed a petition in the Superior Court of Law against Gash for

partition of three tracts, which he opposed on the ground that actual partition could not be made without injury to him and the infant proprietors, and that he intended to apply to the court of equity for a sale for the purpose of partition. But the court decreed partition specifically, and then Gash filed the present bill against Richard Ledbetter and the other tenants in common, in which the lands are described, and it is alleged that from the quantity cleared and fit for cultivation, and the deficiency and situation of the timber, and the number of shares, actual partition cannot be made without greatly impairing the value of the shares, and that the land can be sold upon a reasonable credit at a fair price; and the prayer is that it may be ascertained whether the interest of the owners would not be profited by a sale of the land, and, if it should be so found, that a sale may be had under a decree of the court, and that in the meantime the defendants be enjoined from proceeding fur-
(185) ther under the judgment for partition in the suit at law. The injunction was granted as prayed.

The answer states that the defendants prefer an actual partition, as land is increasing in value in Henderson County, and each of the defendants wishes to retain his or her shares in the inheritance derived from their father, and that, in their opinion, the partition may be made so as to assign to the several parties entitled shares of the land specifically, of values equal to their shares in the value of all of the lands descended; and therefore the defendants insist that a sale ought not to be ordered, and that they have the right to proceed to a partition under the judgment at law.

On the coming in of the answer the defendants moved to dissolve the injunction, which was allowed, with costs; and the plaintiff appealed.

N. W. Woodfin for plaintiff.
Baxter for defendants.

RUFFIN, C. J. As the statutes confer on the courts of law the same jurisdiction to make actual partition which was possessed by the court of equity originally, a bill would not be entertained which sought merely to transfer a partition cause from a court of law to this Court. But, besides the jurisdiction to decree specific partition, the court of equity has, by the act of 1812, an authority, at the instance of any party interested, to order a sale of the property for division, if the court shall find that actual partition cannot be made without injury to some of the parties. That jurisdiction is exclusive in the court of equity, and it necessarily gives rise to a power in that court to restrain some of the parties from applying to a court of law for actual partition, to which at
(186) law they have an absolute right. For while one of the parties

has the right to ask in either court for actual partition, the other has an equal right to ask the court of equity for a partition by a sale and division of the proceeds; and whether the case be a proper one for a sale, within the purview of the statute, must, in the nature of things, be determined before a decree ought to be made for the partition in one way or the other, since, by making actual partition, the court would be precluded from subsequently ordering a sale, however clear it might appear upon the hearing that there ought to be one. That would be the course were a bill filed here in the first instance for partition, either actual or by sale, as the court should deem best. The same result must follow upon the bill before us. As there was already a proceeding at law for actual partition, the plaintiff does not ask a partition of that kind in this suit; he being content, if such a partition is to be made at all, that it should be adjudged by the court of law and made in the mode prescribed in the statute. But he says he is entitled to a relief by a sale of the premises which the court of law cannot administer to him, and the court of equity alone can; and the sole object of the bill is to obtain that relief. It prays nothing else; and, unless the Court should give him that decree, his bill must be dismissed. The object of the suit, therefore, is to assert a pure equity, and one which is not denied, but arises out of the statute in every case where real estate is to be divided. Whether this particular case be, in its circumstances, fit for a sale to be decreed must depend upon the allegations of the bill and the proofs on the hearing. It is the question in the cause, and cannot, at least as a general rule, be decided upon motions to continue or dissolve an injunction. We will not say it cannot appear so clear on the pleadings and exhibits that there cannot ultimately be a decree for a sale as to lay it down positivity that in no instance whatever ought the court to allow the parties to go on at law before the hearing of the cause in equity. (187) But if there be such an instance, it is only when it is manifest upon the record that the court will feel obliged, in the progress of the cause, to deny the prayer for a sale. In the present case the facts are such as to render it, to say the least, not improbable that the plaintiff may, upon the proofs, entitle himself to the decree he asks; and, certainly, it would be premature, upon the answer alone, to allow the defendant to have actual partition, and thus incidentally defeat this suit altogether, although upon the hearing the plaintiff may be able to establish a complete case. Each party has an undoubted right to sever the common property, and the only question is as to the mode of doing it. That which the plaintiff prefers, he can entitle himself to only by showing at the hearing that he would suffer injury without it, while it would do no injustice to the others, and if he should not succeed in obtaining it, the other must follow, of course. The defendants are there-

fore in no event to be injured, and the utmost inconvenience to them is that of the short delay which may occur in a cause of this sort when all the parties are desirous of getting their respective shares in severalty in the one way or the other. That inconvenience is not comparable to the mischief that may arise to the plaintiff by having the land laid off by a judgment at law into fifteen worthless strips presently, which he would in vain seek to remedy, however clearly he might subsequently show that it ought not to have been done. He came here in apt time to avoid that, and we hold that it was erroneous to expose him to the risk of that irremediable injury until it be definitely determined whether or not he is entitled to the equitable relief of a sale, which can only be when the cause is heard. Wherefore the decree must be reversed and the motion to dissolve the injunction overruled. The defendants, except the infants, must pay the costs of this suit.

PER CURIAM. Reversed.

(188)

RANSOM EGERTON ET AL. v. JOHN H. ALLEY ET AL.

It is a principle in equity that when land is sold by a clerk and master under a decree of a court of equity, and the legal title is retained until the purchase money is paid, if the principal becomes insolvent before so doing, the sureties have an immediate equity, either before paying the money or after, to subject the land.

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

The case made by the bill and answers is as follows: In 1836 the defendants James Miller and his wife, Frances, James Foster and his wife, Martha, and Susan Booker, were tenants in common of a tract of land lying in the county of Rutherford, and, in the same year, procured a decree of the court of equity directing its sale. Under this decree the land was sold by the clerk and master, and the defendant John H. Alley became the purchaser at the price of $1,107, and to secure the payment gave his bond with the plaintiff Ransom Egerton and James Erwin, the intestate of John W. Erwin, the other plaintiff, his sureties. Alley made several payments, but failing to discharge the bond, an action was brought upon it against him and his sureties, and judgment having been obtained, the whole amount remaining due was collected out of the sureties by an execution, Alley being entirely destitute of property. This judgment was obtained at January Term, 1847, of Rutherford Superior Court. In July, 1842, John H. Alley, being largely (189) indebted, conveyed or attempted to convey the land so pur-

chased by him to John W. Hampton and Samuel S. Hampton, in trust to secure the debts mentioned in the deed, and on 14 September, 1846, they conveyed the land, by deed, to the defendant John S. Jackson. The legal title to the land is still in the tenants in common, the clerk and master never having made any conveyance to Alley or to any other person. The plaintiffs pray that the land may be resold and the money paid by them be repaid, with interest from the time they paid it.

B. S. Gaither for plaintiff.
W. P. Bynum, G. W. Baxter, and J. McD. Carson for defendants.

NASH, J. The equity of the plaintiffs is a very plain one, and they are entitled to the relief they seek. The question presented by the case is indeed not an open one. *Green v. Crockett,* 37 N. C., 390, and *Polk v. Gallant, ib.,* 395, entirely cover the ground occupied by this. In each of these cases a sale had been made by a clerk and master, under a decree of their respective courts, and title retained until the purchase money should be paid, and in each the plaintiffs were the sureties of the purchasers on their purchase bonds. The bills were filed against the purchasers and their assignees. In the first case the sureties had paid the purchase money, and in the other they were liable to pay it, the principals being insolvent. In each the bill was filed to subject the land to a resale to indemnify the sureties, and in each case the relief sought was granted. The principle established by those cases, and which fully governs this, is that when land is sold by a clerk and master under a recree of a court of equity, and the legal title is retained until the purchase money is paid, if the principal becomes insolvent before so doing, the sureties have an immediate equity, either before paying the money or after, to subject the land, because that has then (190) become the only fund to which they can apply, and in truth the only debtor, as between it and the surety. There is here no assignee, from the purchaser, Alley, contesting the right of the plaintiffs to the substitution they seek. Jackson, the purchaser from the alleged trustees of Alley, admits their right to relief, and, if their right were contested, we have seen above that his purchase would not avail him against the plaintiffs. It must be referred to the master to inquire what is due for principal and interest of the debt, which the plaintiffs have paid as stated in the pleadings, and it must be declared that the land mentioned in the pleadings is liable for the sum that may thereupon be found due, and for the costs of this suit; and if the defendant Alley should not pay such principal, interest, and costs within some reasonable time, it must be ordered that the clerk and master of Rutherford County sell the

land, and out of the proceeds pay in the first place the principal money and interest due on said debt, and in the next place the costs, if sufficient therefor.

PER CURIAM. Decree acordingly.

Cited: *Freeman v. Mebane,* 55 N. C., 47; *Pettillo, ex parte,* 80 N. C., 52; *Mast v. Raper,* 81 N. C., 334; *Stenhouse v. Davis,* 82 N. C., 434; *Dawkins v. Dawkins,* 93 N. C., 291.

JOHN CRAIGE v. WILLIAM CRAIGE.

It is a rule in equity that relief must be granted according to the allegations of the bill and the proofs. The latter must not only show that the plaintiff is entitled to some relief, but that he is entitled to it upon the grounds on which he has placed his claim.

(191) CAUSE removed from the Court of Equity of BUNCOMBE, at Spring Term, 1849.

The bill charges that the intestate, James Craige, and the defendant were brothers, and lived together for thirty years, neither of them having ever married, and that they were partners and held all their property in common, both real and personal, and traded upon it as partners, to the year 1846, when James died, and the plaintiff was duly appointed his administrator. Among other property so held in partnership, the bill alleges, was a sum of money amounting to $600, a negro woman named Sue, purchased of Samuel W. Davidson at the price of $300, a boy named Joe, purchased of A. B. Chunn for the sum of $475, and which were paid out of the joint funds, and that there were five head of horses and much other property. The bill prays an account, etc.

The answer admits that the defendant and his brother James lived together and cultivated together, but avers that each held his own property in severalty, and denies expressly that there was any partnership between them, either in working the land or in buying and selling any property. The answer denies that the negroes Sue and Joe were

(192) purchased for the defendant and the deceased, or paid for out of the joint funds, but alleges that they were purchased by the defendant for his own use and paid for out of his own separate funds; that Sue was purchased on a credit, and that he gave his individual note for the purchase money, and that the intestate attested both the bill of sale and the note. The answer further admits that the defendant

and his brother James, the intestate, held certain tracts of land and a still as tenants in common, and that there has been no division, and, at the death of James, there were on the plantation five horses and twenty-two head of cattle, and avers that they were not held jointly nor as copartners, but that the stud and the gray horse mentioned in the bill belonged to the intestate, and nine of the cattle and the rest of the horses and stock to the defendant.

N. W. Woodfin for plaintiff.
Gaither for defendants.

NASH, J. It is a rule in equity that relief, when granted, must be according to the allegations of the bill and the proofs. The latter must not only show that the plaintiff is entitled to some relief, but that he is entitled to it upon the grounds on which he has placed his claim. Thus, when the plaintiff alleges in his bill that a transaction between him and the defendant was a loan and mortgage, and seeks a foreclosure, he cannot at the hearing ask relief upon the ground that the transaction was a conditional sale. *McBrayer v. Roberts,* 17 N. C., 75. In this case the plaintiff asked the aid of the court upon the ground of a partnership between his intestate and the defendant. The answer denies that there was any copartnership between them. It is admitted there never was any express agreement between the brothers for a copartnership, but the plaintiff relies upon the transaction between them to (193) prove it. We think he has failed in his proofs, and that all he has shown is that the brothers were tenants in common in a portion of the property. The partners lived together in peace and harmony, working the same land with their respective horses, and sustaining themselves and their respective stock out of the joint funds. But it is evident from the proofs that much of the property was held by them severally. The negro Sue was purchased by the defendant for his own use and benefit, as he alleges, and his allegation is sustained by the facts, that the bill of sale is taken in his name, and is attested by James, and the note given for the purchase money is also attested by him. The bill of sale for Joe is taken in the name of the defendant, and his allegation that he purchased him for himself, and paid for the negro out of his own funds, is not disproved by any witness whatever, and the witnesses in each case testify that their contract was with the defendant alone. It is in evidence that the parties kept their money in separate depositories, and each under his own control, and, since the death of James, the plaintiff, his administrator, took into his possession, as assets of the estate, the stallion and the gray horse and the still, and sold them as the property of his intestate. The declarations of the parties, as proved, establish

nothing more than a tenancy in common of a portion of the property. The plaintiff has failed to sustain, by his proofs, the allegations of his bill, and it must be

PER CURIAM. Dismissed with costs.

Cited: *Grant v. Burgwyn,* 88 N. C., 100.

JOHN C. MELTON v. SAMUEL W. DAVIDSON.

A. made a contract for the purchase of a tract of land, gave his bond for the purchase money, on which he made some payments, and took a bond for the conveyance of the title whenever the infant to whom it belonged became of age; and a judgment having been recovered against O. for the balance of the purchase money, execution was levied on his interest in the land, and B. became the purchaser at the sale under this levy. *Held,* that B. acquired no title of any sort to the land, as there was no trust subject to execution, the trust being a mixed and not a pure trust.

(194) CAUSE removed from the Court of Equity of BUNCOMBE, at Spring Term, 1849.

Isabella Hamby, one of the defendants, being entitled to a dower in a tract of 50 acres of land, in consideration of $112.50, executed a bond to William Melton by which she bound herself to convey her interest and to procure her two infant children, who owned the land subject to her dower, to convey their estate to the said Melton, so as to vest in him the fee simple, as soon as they arrived at full age, provided the purchase money was paid.

In 1840 William Melton, having paid a part of the purchase money, assigned his interest in the contract to the plaintiff, who undertook to pay the balance. In 1843 Isabella, having obtained judgment against William Melton for the balance of the purchase money, the execution was levied upon said Melton's interest in the land. The land was sold by the sheriff and the defendant Davidson became the purchaser. Davidson afterwards procured the said Isabella and Jane Hamby, one of the children, who had arrived at full age, to execute to him a deed for the land. The other child, Nancy, had moved from the State many (195) years ago, and was supposed to be dead intestate and without children.

The bill alleges that Davidson, at the time of the sheriff's sale, and at the time he took the conveyance from the said Isabella and Jane, had notice of the sheriff's right.

The prayer is for a conveyance and for an account of the profits since Davidson had been in possession. The defendant William Melton admits the allegations of the bill. The defendants Isabella and Jane Hamby also admit the allegations of the bill, and Jane Hamby avers that she is willing to ratify the contract made by her mother, and believing that Davidson, by his purchase at the sheriff's sale, had acquired the title, she joined with her mother in the deed to Davidson, upon his executing a bond to save them harmless.

The defendant Davidson does not admit that he had notice of the sheriff's right at the time of the sheriff's sale or at the time he took the deed from Isabella and Jane Hamby; but he avers that if William Melton had assigned his interest in the contract to the plaintiff, who is his son, it was done to defraud his creditors. He also avers that, to get possession, he was under the necessity of bringing an action of ejectment against William Hamby, and insists that if the plaintiff is allowed to redeem by paying the balance of the purchase money, he should be required to pay the costs of the action of ejectment, as William Hamby is insolvent.

Gaither for plaintiff.
Baxter for defendants.

PEARSON, J. The defendant Davidson acquired nothing by his (196) purchase at the sheriff's sale, for William Melton had no interest subject to execution; he had paid only a part of the purchase money and had a mixed trust and not a pure trust, such as could be sold, nor can his interest be considered as an equity of redemption in any sense of the term. If it could be, an equity of redemption cannot be sold for the mortgage debt. *Camp v. Cox,* 21 N. C., 52. It is true that Davidson did acquire the legal title by the deed from Isabella and Jane Hamby, but he took the deed with full notice of the right of the plaintiff, and in fact gave a bond of indemnity against that right, in order to get the deed. He therefore took the legal title subject to the plaintiff's equity, and the plaintiff must have a decree for a conveyance of the land upon payment of the balance of the purchase money, with interest. The plaintiff is also entitled to the profits while the land has been in the possession of the defendant Davidson, as to which there must be a reference. The costs of the judgment at law for the balance of the purchase money, also the costs of this suit, must be paid by the plaintiff. The tender of the balance of the purchase money is not so alleged in the bill and sustained by the proofs as to relieve the plaintiff from the general rule that the fund to be redeemed must pay the costs.

The plaintiff is not liable for the costs incurred in the action of ejectment against William Melton by the defendant Davidson. Davidson had the legal title, but he knew that the equitable title was in the plaintiff.

PER CURIAM. Decreed accordingly.

(197)

WILLIAM COSTIN ET AL. V. WILLIAM BAXTER, SR.

Where an "account settled" is relied on, by way of plea or answer to a bill for an account, it is conclusive, unless the plaintiff can allege and prove some fraud or mistake. And the allegation of such fraud or mistake must state the particular facts of the fraud or mistake.

CAUSE removed from the Court of Equity of BUNCOMBE, at Spring Term, 1849.

By the will of William Baxter, Mrs. Costin and W. G. M. Baxter, his only surviving children, were entitled to his estate. W. G. M. Baxter died intestate. The plaintiff William Costin is his administrator, and Mrs. Costin is entitled to his estate. The bill is filed against the defendant, who is the executor of William Baxter, for an account. So far as Costin and wife are concerned, he alleges that in March, 1842, he and the plaintiff Costin made a settlement; that Costin after a full and fair investigation of his accounts, in which he was assisted by an attorney at law, became satisfied that, of the amount which had come to the hands of the defendant, the share to which he was entitled in right of his wife was $756.60, which sum was paid to him, and for which he executed a receipt in full, under his seal, for his wife's share of that portion of the estate which had come to the hands of the defendant as executor. So far as the plaintiff, as administrator, is concerned, the defendant admits that at the time of the settlement he retained in his hands the share of W. G. M. Baxter; that afterwards the said Baxter died intestate, and the plaintiff demanded the amount (198) of his estate, and received, in 1836, the sum of $770.66 on account of his estate, but, expressing some dissatisfaction, gave a receipt with this reservation: "The above receipt is not to preclude me from recovering any further sum that I may be entitled to in right of said W. G. M. Baxter." The plaintiffs, by an amended bill, insist that the settlement and acquittance of 1842 should not conclude them, for the acquittance was executed and the settlement made "upon a total misapprehension of the facts of the case, acquired from the defendant, and through utter ignorance of their rights." The defendant in his answer to the amended bill sets out in detail all the facts upon which his right to retain certain sums is grounded, and also the facts connected

with the slaves Kate and Alin, and avers that the plaintiff Costin, at the time of the settlement and when he received the balance and executed the acquittance, had full and correct knowledge of all the facts.

Guion and Gaither for plaintiffs.
N. W. Woodfin and Baxter for defendant.

PEARSON, J. The plaintiff, as administrator, having reserved the right to recover any further amount that might be due, and having refused, in that capacity, to acquiesce in the settled account, is entitled to an account of the whole estate. But the plaintiff Costin, having, in right of his wife, made a settlement, executed an acquittance, and re-received the balance in 1842 as to all amounts received by the defendant at that time, is concluded, and can only have a reference to ascertain what sums, if any, have since come to the hand of the defendant, or what sums the defendant ought since that time to have collected, with which he was not charged in the settlement of 1842.

When an "account settled" is relied on, by way of plea or (199) answer to a bill for an account, it is conclusive, unless the plaintiff can allege and prove some fraud or mistake; for, otherwise, he has already had that which he asks by his bill, having made a settlement and thereby perhaps induced the other party to destroy or surrender his vouchers. "It would be most mischievous to allow the *settled account* to be set aside, unless from urgent reasons." *Mebane v. Mebane,* 36 N. C., 403; 1 Story Eq., 590. In this case the plaintiffs allege no particular fraud or mistake, but, in sweeping generalities, "total misapprehension of the facts, acquired from the defendant, and utter ignorance of their rights." This renders the bill partly defective for the want of proper allegations, and it is equally defective as to the proof of any fraud or mistake.

PER CURIAM. Decree accordingly.

Cited: *R. R. v. Morrison,* 82 N. C., 143; *Grant v. Bell,* 87 N. C., 44; *Garrett v. Love,* 89 N. C., 208; *Grant v. Hughes,* 96 N. C., 191; *Jones v. Wooten,* 137 N. C., 423.

N. P. LACKAY v. JOHN N. CURTIS ET AL.

1. Where a suit abated by the death of the defendant, and an execution issued against the plaintiff for all the costs, at the instance of the heirs of the deceased, the execution was void, and a note given by the plaintiff for the purpose of discharging it, being without consideration, the plaintiff has a right in equity to be relieved against it.
2. A note being passed without indorsement, and therefore there being no legal title in the person to whom it was transferred, he is subject to the same equity as the payee, without regard to the question of notice.
3. An officer who merely proceeds to collect an execution put into his hands as an officer ought not to be made a party to a bill of injunction, and if he is so, the bill will be dismissed as to him with costs.

APPEAL from an interlocutory order, made at Spring Term, 1849, of McDOWELL Court of Equity, *Bailey, J.*, disallowing a motion to dissolve an injunction theretofore granted.

(200) The bill charged that the plaintiff Lackay had a suit in assumpsit pending in the county court of McDowell County against one G. W. Bradley; that the said suit abated by the death of the said Bradley, and that execution was issued by the clerk of the said court against the plaintiff Lackay for the whole amount of the costs of the said suit, being about $67, of which the plaintiff Lackay was, in law, only liable for about $12 or $13, that being the amount of costs incurred by him; that there being no administration on the estate of the said G. W. Bradley, the execution was issued in the name of "the heirs of the said Bradley"; that the execution was returnable to November Term, 1846, and was directed to the defendant John N. Curtis, who was the sheriff of the said county; that the said sheriff levied on the plaintiff Lackay's property for the amount of the said execution, and advertised it for sale; that on the day of sale the plaintiff Lackay was induced by the representations and persuasions of the said John N. Curtis to pay him $25 in cash, in part of the said execution and also in discharge of claims which the sheriff had against him, to the amount of $6 or $7, and also to execute to him, in discharge of the balance of the said execution, his note with surety; that the plaintiff Lackay thereupon paid the said sum of $25 to the said Curtis for the purposes as above stated, and also gave him his note with the other plaintiff, Mary Duncan, as his surety, according to the requisitions of the said Curtis; that the said Curtis afterwards, among other things, transferred to the defendants Conley and Brown the said note, but without any indorsement to convey to them the legal title; that a warrant was issued on the said note against the plaintiffs and judgment obtained thereon for the whole amount and interest in June, 1848; that an execution issued thereon, directed to the

defendant James McNeeley, a constable of the said county, who (201) had now the execution and was about to collect it. The bill then prayed an injunction and process against the said Curtis, Conley, Brown, and McNeeley, and for relief, etc.

The defendants, in their answers, admitted all the material allegations in the plaintiff's bill, so far as the motion to dissolve the injunction was concerned.

Upon the coming in of the answers, a motion was made to dissolve the injunction, which was refused by the court, and the defendants, by leave of the court, appealed.

Avery for plaintiffs.
Edney for defendants.

PEARSON, J. The execution in favor of "the heirs of G. W. Bradley" against Lackay was void, and the note executed by the plaintiff to the defendant Curtis was therefore without consideration, and they have an equity to prevent its collection and to have it surrendered.

The note was transferred to the defendants Conley and Brown without indorsement. The legal title did not pass to them, and they hold it subject to the same equity that Curtis did, without regard to the question of notice.

The plaintiffs must have a decree for the surrender of the note and costs. As to the cash paid Curtis, the plaintiffs have their remedy at law, and the court cannot take jurisdiction.

The bill must be dismissed, with costs as to the other defendant, McNeeley. He was acting as constable—a minister of the law—and had no interest whatever in the controversy, and it was wrong to put him to the expense of filing an answer. *Edney v. King,* 39 N. C., 474.

PER CURIAM. Ordered accordingly.

Cited: Emmons v. McKesson, 58 N. C., 95; *McLane v. Manning,* 60 N. C., 611; *Stout v. McNeill,* 98 N. C., 3.

(202)

K. J. McCRAW v. JOHN EDWARDS ET AL.

When a party avers that a certain bond was given to him in South Carolina as a *donatio mortis causa,* he must show that his right accrues under some special law of South Carolina; otherwise, the gift comes within the provision of the common or canon law, and there must be an express or implied delivery, and the title to be dependent upon the death of the donor.

CAUSE removed from the Court of Equity of RUTHERFORD, at Spring Term, 1849.

The defendants John Edwards and George Edwards gave a bond to one James McCarthy for $100, in 1843, and in 1845 McCarthy died intestate in South Carolina, where he then resided. The bill states that, a few days before his death and in his last illness McCarthy gave the bond, by way of *donatio mortis causa,* to one John Baber, with whom he resided, and that Baber afterwards disposed of the bond, and that, for a valuable consideration, it came to the plaintiff, without any recourse on his assignors. Afterwards the defendant John Edwards took administration of McCarthy's effects in this State, and the present bill was filed to obtain payment of the bond.

The answer denies any knowledge or information of the alleged donation to Baber, but submits to pay the money to the plaintiff if he should establish the gift, after discharging certain debts which the intestate, McCarthy, owed. A witness for the plaintiff states that in McCarthy's last illness, and five or ten days before his death, he was called on by McCarthy to witness a power of attorney from him to John Baber, and also a verbal gift from McCarthy to Baber of all his effects, after

(203) payment of his debts. The plaintiff also examined Baber himself, who states that McCarthy gave him "all his notes, bonds, and accounts, and all his land, during his last illness, and requested him to pay all his debts; and that the bond of Edwards was in his (the witness's) possession at the time McCarthy died, and was among the notes and accounts McCarthy gave him."

Baxter for plaintiff.
Guion for defendant.

RUFFIN, C. J. The bill does not state that the transaction between McCarthy and Baber derived any peculiar efficacy from the law of South Carolina; and, in the absence of such an allegation, we must assume that it did not, and are at liberty to suppose that the validity of the gift depends upon the same rules of the canon or common law which all the States of English origin received from the mother country. By that

law the alleged gift is clearly ineffectual, for the want of the delivery of the bond, express or implied. 1 Rop. Leg., 12. The transaction did not purport to be a present conditional gift, dependent upon the death or recovery of the donor; but it seems to have been rather a disposition, after the death of the donor, for the payment of debts and also for a bounty, in the nature of a nuncupative will, and, consequently, it cannot be executed in this Court until the fact and validity of such a disposition have been established by the judgment of a court of probate.

PER CURIAM. Bill dismissed with costs.

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(204)

JOHN E. PATTON v. ANTHONY BENCINI ET AL.

When creditors who claim under a deed of trust for the payment of debts are in a posterior class, they need not make as parties to their bill those who have the prior encumbrance, but they must make as parties all who are in their own class.

APPEAL from the Court of Equity of BUNCOMBE, Spring Term, 1849, *Bailey, J.*

In November, 1843, the defendant Anthony Bencini conveyed to the defendants Adams and McLean several parcels of real estate, slaves, and other personal effects, upon trust to sell and pay his debts. The deed recites that Bencini was indebted to D. A. Davis in the sum of $1,175, on a note, to which the said Joel McLean, Peter Adams, John A. Gilmer, and J. P. Mabry were sureties, to Robert G. Lindsay in the sum of $278.25 by bond, to which the said Adams was surety, and to John E. Patton, the plaintiff, in the sum of $250, or thereabouts, by account, which the said Adams had guaranteed in writing. It also recites divers other debts for certain sums mentioned, for which Adams was bound as surety, and three other specified debts to several persons by name, viz., T. R. Tate, J. and R. Sloan, J. A. Mebane, and divers others upon notes or bonds, for which no one is stated to be bound as surety. And, after the conveying clause and the trust to sell, the deed declares the trusts as to the proceeds as follows: "and out of the money thus (205) raised to pay first the debts herein specified, sureties, indorsers, and guarantors; next the debt of Thomas R. Tate and J. & R. Sloan, J. A. Mebane (and sundry others enumerated); thirdly, if there should be any balance, to pay the same on the several debts of the said Bencini, not secured by any other mortgage or deed of trust, including in this class a debt to Dr. Garland, Thomas Gatewood," and upwards of twenty others named.

The bill was filed in March, 1849, and states that on 5 July, 1843, Bencini was indebted to the plaintiff in the sum of $300 upon an unsettled account, and that the defendant Adams guaranteed in writing "the payment to the said John E. Patton of whatever amount might be found due upon a final settlement with Bencini, which settlement is to be made in August next." No payment nor settlement was made of the plaintiff's demand, and the object of the bill is to obtain an account of the trust property and satisfaction of the plaintiff's debts thereout. A copy of the deed is annexed to the bill and referred to therein as Exhibit B. The bill is filed against Anthony Bencini, Joel McLean, and Peter Adams, against whom by name process of subpœna was prayed, issued and served. The bill, at the close of it, adds: "and that all the creditors mentioned in Exhibit B may be made parties and served with process, that they may protect such interest as they may have in the premises." But process was issued to no one but the three persons just named, nor did any other person appear in the cause.

Bencini answered, and the defendants McLean and Adams demurred, and assigned for causes of demurrer that D. A. Davis, John A. Gilmer, J. P. Mabry, Robert G. Lindsay, Tate, Mebane, etc., the creditors named in the deed, were not and neither of them was made party. The demurrer was overruled and Adams and McLean were allowed an appeal.

(206) *N. W. Woodfin for plaintiff.*
Gaither for defendants.

RUFFIN, C. J. Although as against third persons, who deny the title both of the trustees and *cestui que trust,* the latter need not be a party, but it is generally sufficient that the trustee alone should be before the court, either as plaintiff or defendant, inasmuch as he represents the *cestui que trust,* yet when several persons are *cestuis que trustent* or have specified charges on a trust fund, under the deed, and a suit is brought to ask the execution of the trusts, and claim an account and distribution of the fund, it is ordinarily proper the plaintiff should bring in all persons entitled equally with or before himself, or should show that it is not necessary because they had been satisfied, or that he could not because they were out of the jurisdiction, or other like excuse. The reasons arising out of the rule of the court of equity to prevent the multiplicity of suits and to secure persons bound to account by requiring all persons in interest to be parties in order definitely to bind them by the decree, apply as forcibly to this case as to any other. Jeremy Eq. Pl., 176. It is not indeed necessary, for example, in this case, to embarrass the suit by the number of parties or the increase of expense, by making parties of those persons who can claim under the provisions of

the deed only after the plaintiff shall have been satisfied, for they have no direct interest in the account which he seeks, or, at least, as against him and those who are provided for with or before him. The trustee is charged with the duty of seeing that no unjust recovery is effected by the plaintiff, as to the prior encumbrancer, and therefore such posterior encumbrancer is bound by a decree fairly obtained against the trustee. The case is precisely analogous to a bill by specific legatees, who need not make the residuary legatees parties, but may recover against the executor by himself, in which case, unless there be collusion, (207) the residuary legatee is concluded. In this case, therefore, the second and third class of creditors, Tate, Mebane, Garland, and the others, would be unnecessary parties, and if the plaintiff had brought them in, he would have been liable to them for costs. The causes of demurrer, in respect to those persons, severally, are therefore insufficient. But as no reason is stated in the bill for not doing so, it was indispensable that the plaintiff should have brought in all those who are secured in the same class with himself, just as in a bill, by one residuary legatee or next of kin, he must make the others parties. The inquiry is, then, Who are thus secured? and, next, whether all of them are made parties. Now, not only are the creditors designated in the deed entitled to satisfaction of their debts, but also those liable for any of the debts as sureties, indorsers, or guarantors are expressly provided for, and therefore are proper parties, as Gilmer, Mabry, and others. It may well be questioned whether any persons are made technically parties defendant except the three who are mentioned in the bill by name. That is the regular and proper method of making a defendant. Perhaps a bill might be sustained against persons named in a schedule annexed to the bill and referred to in it, as though they were mentioned by name in the bill; but we cannot undertake to say it would, and we are inclined to require pleaders to adhere to the usual form of mentioning in the body of the bill each person by name whom the plaintiff means to make a defendant. But, without deciding upon that point, we think this bill does not make the proper parties, because it does not refer to a schedule, purporting to set forth the names of the defendants, as such, but refers to an annexed exhibit of a deed and prays for process against the creditors therein mentioned. Now, supposing that such a general description (208) of defendants might, in any case, suffice, it will not do here, because other persons, namely, "the sureties, indorsers, or guarantors," upon any of these debts, are as necessary parties as the creditors themselves; and it is plain that they do not even come within the terms of description used in the bill of the creditors mentioned in the exhibit "B," and that the master could not have issued a subpœna for them. Therefore, without deciding at present the more general question, it is

sufficient to say that Gilmer and Mabry, for example, ought to be parties, and that they are not; and consequently that the want of them was good cause of demurrer. The plaintiff might, probably, have been allowed, in a court of equity, to amend on paying the costs of the demurrer, as that is often done. But as he would not move it, but contested the sufficiency of the demurrer, and compelled the other side to bring the cause here on appeal, this Court can say nothing less than that the decree must be reversed with costs in this Court. The demurrer must be sustained and the bill dismissed as against McLean and Adams, with costs.

PER CURIAM. Reversed with costs.

Cited: Tomlinson v. Claywell, 57 N. C., 320; *Murphy v. Jackson,* 58 N. C., 14.

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(209)

JAMES LOVE ET AL. v. THOMAS CAMP.

1. Where a party covenants to convey a title to a tract of land, he cannot resist a claim by the vendee for specific performance by showing that a part of the title is in others, that he has in vain endeavored to procure a conveyance from them, and that therefore he is unable to complete the title, and, especially, where he was cognizant of his want of title.
2. What might be the effect of a knowledge on the part of the covenantee, at the time the contract was made, that the covenantor had not the title, and whether a court of equity would in such a case decree a specific performance or leave the party to his action at law for damages, *quere.*

CAUSE removed from the Court of Equity of CLEVELAND, at Fall Term, 1849.

The bill in this case alleged, in substance, that about forty years ago one Daniel Camp died intestate, seized and posessed of a certain tract of land (particularly described in the bill) and leaving as his heirs at law the defendant Thomas Camp and five others (naming them); that the defendant Thomas Camp, prior to 1840, purchased from his coheirs their several and respective shares in the said tract of land, and thus became the sole owner thereof in fee simple; that in 1840 he contracted with the plaintiff Love for the sale thereof; that the said plaintiff agreed to purchase from the said defendant the entire fee simple in the said land at the price of $80, which was then the full value of the land; that in the same year the said plaintiff paid to the defendant the full amount of the purchase money, and took from him a bond, con-

(210) ditioned to make a title for the whole of the said land in fee

simple; that afterwards, to wit, in the winter of 1840 and 1841, the county of Cleveland was established and the county-seat was located at a town called Shelby, near which the said land was situate; that by this means the land became enhanced in value; that the said plaintiff Love sold his interest in the said land to the other plaintiff, Howesby, for a valuable consideration, which has been paid; that afterwards and after the location of the said town of Shelby, the defendant became dissatisfied with his contract, and refused, upon application of the plaintiff, to convey as he had contracted, declaring that he would forfeit his bond; and the bill prays for a specific performance of the contract.

The answer admits the death of Daniel Camp, and that his heirs were as set forth in the bill. It also admits the contract mentioned in the bill, and that the purchase money was paid to him by the plaintiff Love. It avers that the plaintiff Love knew at the time of the contract that the defendant owned only one-sixth, being his share in the land, and a life estate in another sixth, and that the defendant was to make title to the said land whenever he could procure a conveyance from the other heirs. It denies that the defendant ever purchased the titles of the other heirs, but it states that, after reasonable exertions on his part, since the time of the contract, he has been unable to procure from the other heirs their titles. It admits that Howesby has bought the interests of Love, and that a title has been demanded of the defendant, which he declined, on account of his inability, as above stated.

Replication was made to the answer, some depositions of little importance were taken, and the cause, being set for hearing, was transmitted to the Supreme Court.

Guion for plaintiffs. (211)
Lander for Defendant.

PEARSON, J. We think the plaintiffs are entitled to a specific performance of the contract. The defendant says he owns one-sixth part in fee and a life estate in one other sixth part, and this he is willing to convey; but he says he does not own the other shares, and, "after reasonable exertion since he made the contract, has been unable to procure the title of the other tenants in common, who are unwilling to sell," and he is therefore unable to comply with his contract. The question is, Under these circumstances, will a court of equity decree a specific performance, or decline to interfere and leave the plaintiffs to their remedy at law? One who, for a valuable consideration, enters into an agreement, is bound in conscience to perform it. A court of law can only give damages for a breach. This remedy is in many cases inadequate. A court of equity will do full justice, and, addressing itself to the conscience of the party, will require a specific performance of the agreement. This

jurisdiction forms one of the great heads of equity, and in the opinion of *Lord Hardwicke,* "the most useful one." *Pern v. Lord Baltimore,* 1 Ves., 446. Nothing should prevent the exercise of this most useful and well established jurisdiction but the strongest and most controlling considerations. If a husband agrees to procure his wife to join with him in a conveyance of her land, and the wife refuses to do so, it seems by the modern cases that a court of equity will not decree a specific performance. 1 Madd. Ch., 311; Sugden on Vendors, 151. There are cases in which the husband has been confined to the Fleet prison until the wife agreed to join in the conveyance; and in one case the husband, after being confined for many years, was discharged, it appearing that (212) the wife could not be induced to make the conveyance. 5 Ves., 548, and 8 Ves., 848. These cases show with what reluctance courts of equity stand by and permit a party to deprive another of the benefit of his contract. But it has recently been held that the court will not interfere, upon two considerations. The vendee knew at the time of the contract that the husband did not own the land and might not be able to perform his agreement; he, therefore, has no right to complain if he is left to his remedy at law, upon its appearing that after a *bona fide* effort the husband is not able to procure the wife's consent. And, in the second place, because, if the husband be decreed to perform, he will compel the wife, who is under his power, to convey; and the wife ought not to be exposed to this compulsion on the part of her husband. It may be (but upon this we give no opinion) that where the vendee knows that the vendor has not the title, and takes a bond or covenant that a third person will be procured to make a conveyance, equity will not decree a specific performance, if it appears that the vendor has made proper exertions to procure the conveyance from such third person, because the first consideration above referred to applies with full force. As if a father, seized as tenant by the curtesy, sells in fee simple, and covenants that he will procure conveyances from his children when they come of age. If they refuse, after proper efforts on the part of the father, equity may decline to decree a specific performance and leave the vendee to his remedy at law, this being a state of things which he might have expected and as to which he took the chances. This result would seem to follow from the reason of the thing; but in respect to that we give no opinion upon it. No case makes such an exception to the general jurisdiction to decree specific performance, and it is only adverted to for the purpose of illustrating the next proposition, upon which this cause turns. *Oliver v. Dix,* 21 N. C., 158. If the vendee does *not know* that the (213) vendor has not the title, there is then no reason why he should not be decreed to perform his agreement; and if he is put to great inconvenience and expense to enable him to obey the decree, it will be

the consequence of his own act, and he will not be allowed to offer such an excuse for not doing justice. When a vendee seeks to rescind a contract because of a defect of title in the vendor, the latter is allowed time to complete his title until the hearing. *Clanton v. Burgess,* 17 N. C., 13. As a defect of the title will not excuse a vendee, provided it can be made good, upon ground of mutuality it should not excuse a vendor. As the vendee cannot discharge himself should the land depreciate in value, so the vendor should not be allowed to discharge himself if the value is enhanced. In this case it does not appear that the plaintiff Love knew that the defendant did not have title. The bill avers that the defendant did have title, or did have full authority from his cotenants to sell. The defendant denies that he had title to the whole, and insists that the plaintiff had notice of his want of title; but he offers no proof of the fact, and his covenant is to convey or cause to be conveyed the whole in fee, and he admits that he has received the price of the whole. As to the averment that he had authority from his cotenants to sell, the defendant is entirely silent, leaving the inference that he either had such authority or was guilty of a fraud in receiving the price of the whole. But if it be conceded, for the sake of argument, that this Court will not make a decree requiring a party to do that which it is clearly out of his power to do, as it may amount to perpetual imprisonment, there is in this case no sufficient allegation and no proof whatever to raise the question. The defendant avers generally that, after reasonable exertion (and what amounts to it, he chooses to decide for himself), he is unable to procure the cotenants to convey.

A conscientious man would not consider this a sufficient apology (214) for the breach of an agreement creating no legal obligation, when offered as a reason why a court of justice should not compel the performance of a legal obligation. It is mere mockery. The defendant should have set out what he had done—what price he had offered to pay —so that *the court* might judge whether his exertions had been "reasonable," especially as the averment in the bill that the value of the land had been greatly enhanced since the contract by the location of the town of Shelby on adjoining land creates, against him, the strongest suspicion, and impeaches his motives by the suggestion that, if he has title, he refuses to perform his agreement for the sake of gain—or, if the title is outstanding, he is unwilling to offer his cotenants what is now a fair price. A man of proper feelings would be unwilling to avail himself of the gain, and would be willing to submit to much loss rather than violate his solemn agreement. A court of equity acts upon the conscience, and enforces a specific performance, and will require this unconscionable gain to be given up, or this loss to be incurred, if it be necessary to enable him to do that which he has undertaken to do, and for which he

has received the full consideration. There must be a decree for a conveyance to the plaintiff Howesby, who is the assignee of the other plaintiff, Love, and the defendant must pay the costs.

PER CURIAM. Decree accordingly.

Cited: Carland v. Jones, 45 N. C., 239; *Love v. Carland,* 55 N. C., 505; *Swepson v. Johnston,* 84 N. C., 454; *Wellborn v. Sechrist,* 88 N. C., 291; *Hughes v. McNider,* 90 N. C., 253; *Bank v. Loughran,* 122 N. C., 671.

JOHN IRWIN ET AL. V. JOHN B. S. HARRIS ET AL.

1. Where a recovery in ejectment has been effected by a combination between the purchaser at a sheriff's sale and trustees who have the legal title, by which the latter are induced to commit a breach of trust: *Held,* that the *cestuis que trustent* are entitled to an injunction, to be continued to the hearing, to prevent the plaintiff in ejectment from taking possession of the land.
2. A court of equity will under no circumstances permit a trustee to secure a debt of his own, not secured by the trust, by forming a combination with one claiming adversely to those whose interests he has undertaken to protect.
3. It is the policy of the law to favor purchasers at sheriffs' sales as against debtors in the executions whose debts have been paid by the purchasers, but not as against third persons.

APPEAL from an interlocutory order, made at Fall Term, 1847, of MECKLENBURG Court of Equity, *Pearson, J.*

This bill was filed by Joseph H. Wilson, James P. Henderson, John Irwin, and William W. Elms against Henry Heathern, James Magnus, George W. Langstaff, John Penman, John B. S. Harris, Henry Blundell, Henry W. Olcott, Daniel Alexander, William H. Harris, and John W. Morrison. The bill set forth that in 1835 an association called the Anglo-American Gold Mining Association was formed by certain persons, most of whom resided out of this State, together with the defendant Penman, a citizen of this State, the object of which was to purchase and work gold mines in North Carolina; that of this association the defendants Heathern, Blundell, and Langstaff were members, besides other persons to the plaintiffs unknown; that the said Penman, in 1835,
(216) acting for the said association, purchased, among other property, a tract of land lying in Union County known as the Washington Mine, and a smaller tract adjacent to it; that the said Penman, by deed

of bargain and sale dated in March, 1836, conveyed the said lands to the defendants John B. S. Harris, Olcott, and Alexander in trust for the said association, empowering and directing the said trustees to convey to such person or persons as any three of the directors of the said association should designate. The bill further states that the association commenced it operations in 1835 or 1836, worked their mines extensively, and contracted large debts on the faith of the property, of which they were in the possession; that in 1837 they were largely indebted, and, among others, to the plaintiffs Irwin and Elms in the amount of $14,000 or $15,000; that for the purpose of securing the payment of this indebtedness a deed of bargain and sale for the land above mentioned was regularly executed by the defendants Magnus, Heathern, and Blundell, three of the directors of the said association, to the plaintiffs Wilson and Henderson, as trustees, for the purpose of selling the same and discharging the debts enumerated in the deed, and authorizing and requiring the defendants J. B. S. Harris, Olcott, and Alexander, trustees as aforesaid, to convey the said estate to the plaintiffs Wilson and Henderson, trustees as aforesaid, according to the provisions of the deed made by Penman to the first trustees; that the said plaintiffs Wilson and Henderson took possession of the said Washington Mine and sold the same to the plaintiffs Irwin and Elms, and executed to them a deed therefor. The bill further sets forth that the defendants Alexander, Olcott, and J. B. S. Harris, trustees in the deed from Penman, instead of discharging their trust by making title to the said land to the plaintiffs Wilson and Henderson, have refused to do so, although they had notice of the claim of the said plaintiffs, and were often (217) requested to make the conveyance; but that, on the contrary, the defendant J. B. S. Harris, designing to defeat the just claims of the said plaintiffs to the land aforesaid, coöperated with the defendants Morrison and Harris, authorizing them to make use of his name in an action of ejectment to recover the possession of the said land. The bill further states that the plaintiffs Wilson and Alexander delivered the possession of the said land to the plaintiffs Irwin and Elms, after their purchase, and it has been held by them ever since. The bill further states that, in pursuance of the combination above mentioned, the said J. B. S. Harris, with the defendants Morrison and W. A. Harris, instituted in 1840, in the Superior Court of Mecklenburg County, an action of ejectment against the defendant John Irwin, in which they claimed title under two counts, one on the demise of W. A. Harris and Morrison, and one in the name of Olcott, J. B. S. Harris, and Daniel Alexander, the trustees above named; that at Fall Term, 1846, of Mecklenburg Superior Court the said W. A. Harris and Morrison obtained a verdict and judgment, and on appeal the judgment was affirmed in the Supreme Court, and

that the said W. A. Harris and Morrison now threaten to sue out a writ of possession on the said judgment; that the claim of title set up by W. A. Harris and Morrison is through Penman, and subsequent to his conveyance to Olcott, Alexander, and B. S. Harris, and also to the conveyance to the plaintiffs Irwin and Elms by Wilson and Henderson. And the bill then prays for an injunction to restrain the issuing of a writ of possession on the said judgment in ejectment, for a conveyance of a legal title, and for general relief.

The injunction prayed for was granted. At the return term some of the defendants answered.

W. A. Harris and J. M. Morrison answered that they admit (218) the action of ejectment instituted by them for the recovery for the land, and that the declared on two counts, one on the demise of themselves and one on the demise of J. B. S. Harris, Olcott, and Alexander. They say that the plaintiff Irwin caused himself to be made defendant in the place of the tenant in possession; that on the trial no evidence was offered of any title in the said J. B. S. Harris, Olcott, and Alexander, and the recovery was effected on their own demise. They state that at February Term, 1838, of Mecklenburg Superior Court of Law they recovered a judgment against the said Penman for about $500; that on this judgment they issued a *fi. fa.*, which was levied on the land above mentioned, and at the sale by the sheriff these defendants became the purchasers and received a deed from the sheriff. They admit the suing out of the writ of possession on their judgment in ejectment. These defendants then say that, inasmuch as they are purchasers at a sheriff's sale, they have a right to be placed in possession under their said recovery, whatever may be the claim of title on the part of the complainants. These defendants further state that no copy of the exhibits mentioned in the plaintiff's bill was annenxed to the copy of the bill served on them, and they do not admit the allegations of the bill as to them to be true.

The defendant J. B. S. Harris filed a separate answer. He admits that his name was used by his express consent, in the action of ejectment before mentioned, as one of the lessors of the plaintiff. He states that the deed of trust executed by the said Penman to this defendant, Olcott, and Alexander was made at the instance of the defendant Olcott and others, at a time that the association before referred to was largely indebted to this defendant, and, he believes, also to Alexander and Olcott, and this defendant believes that one great object of the said trust was to prevent Penman from squandering the said property, and thereby to enable said trustees to secure the debts due by the said association. This defendant further avers that the said association is (219) still indebted to him, as executor of his father and in his own

right, to the amount of $40,000 or $50,000, and is also indebted to Alexander and Olcott in an amount not known to this defendant; and that it was for the purpose of securing the large debt due to him from the association that he permitted his name to be used in the action of ejectment above referred to; and he insists that if a recovery had been effected on the demise of himself and his cotrustees, they would have been entitled, both in law and equity, to have taken possession of the said land and to have held the same as a fund for the satisfaction of their debts; and he insists that if the legal title to the said land is still in him and his cotrustees, then they will, in equity, be entitled to hold said land as a fund applicable to the payment of their debts. The defendant avers that no copy of the exhibits referred to in the plaintiff's bill was attached to the copy of the bill served on him, and does not admit such exhibits. He insists that, even if a request had been made to him to part with his legal title, which he denies, he had a right to require the payment of his debt before he parted with such title.

Judgment *pro confesso* by due course of the court was taken against the other defendants.

Upon the coming in of the answers a motion was made to dissolve the injunction, which was refused, and, by leave of the court, the defendants appealed.

Osborne, J. H. Wilson, Bynum, and Iredell for plaintiffs.
Boyden for defendants.

PEARSON, J. The injunction ought to have been continued until the hearing.

The land in dispute was conveyed to one Penman in 1835. Penman in 1836 conveyed to J. B. S. Harris, Olcott and Alexander, three of the defendants, in trust for the Anglo-American Gold Mining (220) Association and such persons as the said association should appoint. In 1837 Henry Blundell, Henry Heathern, and James Magnus, three of the directors of the said association, conveyed to Wilson and Henderson, two of the plaintiffs, in trust to sell for the payment of debts, and, in pursuance of the deed, directed the said trustees to hold in trust for the said Wilson and Henderson. Afterwards the said Wilson and Henderson conveyed to Irwin and Elms, two of the plaintiffs, who took possession by their tenants.

In 1838 Morrison and William A. Harris, two of the defendants, caused the land to be sold by the sheriff under an execution in their favor against Penman, became the purchasers, and took a deed from the sheriff.

In 1840 an action of ejectment was instituted against the tenant of Irwin and Elms. The declaration contained one count on the demise of

Morrison and W. A. Harris, and a second count on the demise of J. B. S. Harris, Olcott, and Alexander, and a recovery was made upon the first count.

The prayer is for the conveyance of the legal title by the defendants J. B. S. Harris, Olcott, and Alexander, and that the defendants W. A. Harris and Morrison be enjoined from suing out a writ of possession.

The equity of the bill, so far as it relates to the injunction, is that the recovery in the action of ejectment upon the demise of W. A. Harris and Morrison was effected by a combination between J. B. S. Harris, Olcott, and Alexander, who are trustees for the plaintiffs, and W. A. Harris and Morrison, who claim adversely to them under the sheriff's deed, by which combination an undue advantage was gained; for although the defendant in that action could have defeated a recovery upon the demise of W. A. Harris and Morrison, who claimed under a
(221) sheriff's sale in 1838, by showing that he had conveyed to the trustees in 1835, yet as there were two demises, this would necessarily have enabled the plaintiff to recover on the second demise, and thust the present plaintiffs were, in that action, exposed to a cross-fire. This is a plain equity, confessed by the defendants.

J. B. S. Harris, the only one of the trustees who has answered, admits that he and Alexander consented that their names should be used as lessors in the action of ejectment, which was also to contain a count in the name of W. A. Harris and Morrison, and says his reason for doing so was for the purpose of securing a large debt which the association owed him when he consented to accept the deed of trust, and which is still unpaid; and he insists that, had a recovery been effected on the demise in his name and that of his cotrustees, he would have been entitled, in law and equity, to hold the land to secure the debt. He does not allege that the debt was mentioned in or secured by the deed of trust, but admits that the legal title was received by him and his cosureties in trust to hold for the association and for such persons as the directors of the said association might direct or appoint. It is a strange idea of equity for a trustee, because the legal title has been confided to him, to assert a trust in favor of himself. Equity will under no circumstances permit a trustee to attempt to secure a debt of his own, not secured by the trust, by forming a combination with one claiming adversely to those whose interest he has undertaken to protect, because it is a palpable breach of trust and a direct violation of the confidence reposed in him.

The other two defendants, William A. Harris and Morrison, admit that they united with the trustees in bringing the action of ejectment, but they insist that as the recovery was effected upon the title which they set up as purchasers at a sheriff's sale, and not upon the demise of

the trustees, they ought to be allowed to take possession, especially (222) as it is the policy of courts, both of law and equity, to favor purchasers at sheriff's sales.

It is the policy of the law to favor purchasers at sheriff's sales as against debtors in the executions whose debts have been paid by the purchasers, but not as against third persons, particularly where these have the equitable estate and the purchasers have effected a recovery at law by an iniquitous combination with the trustees, whose duty required them to give protection, instead of taking sides with their adversaries.

If these defendants had impeached the deed made by Penman to the trustees, upon the ground of an intent to defraud his creditors, it might probably have avoided them, at least upon the hearing, as the recovery would then have been effected upon the strength of their own title as purchasers, and not by force of the combination; but there is no allegation of the kind, and the bill avers that Penman purchased as the agent and with the funds of the association, the *cestuis que trustent.* That they were the equitable owners before the conveyance by Penman to the trustees is not denied or called in question.

The objection that copies of the exhibits referred to in the bill were not annexed to the copies served is not available on the motion now before us. It would have been a good reason for refusing to answer, but the exhibits are sent up with the transcript. The deeds are duly proven and registered, and the motion was heard in the court below upon the bill, answers, and *exhibits filed.*

The third position taken by the defendants W. A. Harris and Morrison, that they should be allowed to take possession because there is no allegation that the mine will be endangered, or that they are not fully able to pay the rents and profits of the land and all the gold they may take from the mine, is also untenable. These allegations are not necessary against parties who have no title (for, in 1838, Penman had no interest in the land, either legal or equitable), and who effected (223) their recovery at law by inducing trustees to commit a breach of trust and to form a combination against their *cestuis que trustent.* The interlocutory decree was right.

PER CURIAM. Affirmed.

PETER GREEN v. JAMES PHILLIPS.

In injunction cases, where the answer does not confess the equity set up in the bill, and is not evasive, but contains a fair response to all the allegations, the injunction will be dissolved as a matter of course.

APPEAL from an interlocutory order made in the Court of Equity of RUTHERFORD, at Fall Term, 1848, *Manly, J.*

The bill alleged that in March, 1844, the plaintiff executed to the defendant and Jacob Phillips a mortgage for some slaves to secure the payment of a debt of $1,900 which he owed them; that the plaintiff at one time made a payment of $400 to the said Jacob, and at another time the said Jacob received two negroes at the price of $750, and at another time there was a small payment of $5; that he afterwards paid to the said Jacob $750, on 9 September, 1844, for which he took his receipt, which receipt is filed as an exhibit. The bill further alleges that, (224) after the death of the said Jacob Phillips, when the defendant demanded the slaves, the plaintiff informed him that the mortgage debt was nearly, if not quite, paid off, and offered to pay any balance that might be due, if there had been a mistake as to interest upon a rough calculation; but that the defendant, insisting that there was a large amount due, demanded the slaves, and, upon the plaintiff's refusing to deliver them, brought an action of trover and recovered damages to the amount of $2,000. The prayer is for an injunction against an execution upon the judgment at law, and that the plaintiff may be permitted to redeem the mortgage upon paying the balance, if any, of the mortgage debt, and that he may have a reconveyance of the slaves.

The defendant, in his answer, admits all the payments except the alleged payment of $750 on 9 September, 1844, and he avers that he does not believe that such payment ever was made, and he believes that the whole balance of the debt, with interest, is justly due, after deducting the admitted payments. He says he does not believe that the signature of Jacob Phillips, who was his father, to the alleged receipt is genuine, but believes it to be a forgery, or else that the receipt was given for the price of the two negroes, $750, and has been since altered in its date, and he assigns as his reason for so believing, besides the difference in the handwriting, that his father told him on the day he was killed that there was due upon the debt a balance of about $745 and interest. He further states that, soon after his father's death, he called upon the plaintiff for payment, and the plaintiff did not allege that he had paid the whole, or nearly the whole, of the debt, and said nothing about the alleged receipt, but offered to pay the balance of $745, with interest, if the defendant would take two notes.

A motion to dissolve the injunction was refused and the injunc- (225)
tion ordered to stand till the hearing. From this order the defendant, by leave of the court, appealed.

Guion and N. W. Woodfin for plaintiff.
Baxter for defendant.

PEARSON, J. The answer does not confess the equity set up in the bill. It is not evasive, but is a fair response to all the allegations. This is sufficient to dissolve the injunction as to the amount of the disputed payment. We do not express any opinion as to the disputed facts, as the case may be retained and brought to a final hearing.

The interlocutory decree should be reversed and a decree entered making the injunction perpetual as to all damages recovered at law except an amount equal to the balance claimed by the defendant to be still due upon the mortgage debt, and dissolving the injunction as to such balance; and there must be a decree against the plaintiff for the costs in this Court.

PER CURIAM. Decree accordingly.

CLAUDIUS B. WHEELER v. NATHAN B. TAYLOR ET AL.

A court of equity never interferes in behalf of a mere legal demand until the creditor has tried the legal remedies and found them ineffectual.

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

It appears upon the bill that the defendant Nathan B. Taylor (226)
was indebted in two several bonds or notes to one John Murphy, amounting in the whole to $7,000, and that the plaintiff and one Nathan Chaffin, who is dead, were his sureties. Judgments were obtained and executions issued, and the plaintiff alleges he has paid $5,000 upon them, the balance being paid by the estate of Chaffin, and that he has commenced his action at law against the defendant N. B. Taylor to recover the money so paid by him, which is still pending. The bill alleges that Nathan B. Taylor has fraudulently assigned over to the defendant Moses B. Taylor all his property of every kind, and that the plaintiff is fearful he will sell the same and collect the debt due to the assignor, and that both of them will remove beyond the jurisdiction of the court, so that, if he recover a judgment against N. B. Taylor, there will be no property subject to an execution, and he will be unable to procure satisfaction of what is due to him. The prayer of the bill is that Moses B. Taylor may

be decreed a trustee for the said N. B. Taylor, and may be decreed to hold the property and debts so conveyed subject to the payment of such sum as the plaintiffs *shall recover at law* against the said N. B. Taylor, and be enjoined, etc., and that the other defendants be enjoined from paying to N. B. Taylor what they owe the former.

Boyden, W. J. Alexander, and H. C. Jones for plaintiff.
Osborne and Craige for defendants.

NASH, J. It is apparent upon the face of the bill that it cannot be sustained; that in this stage of the plaintiff's controversy with N. B. Taylor he has no right to ask the aid of this Court. His allegation is that he has paid money for and on account of the defendant, as (227) his surety to John Murphy. If this be so, he has a clear legal remedy, which a court of common law is fully competent to enforce, and it is only after he has established his claim by the judgment of such court that he can claim the aid of this, either to make his execution at law effectual or to give him a decree in the nature of an execution. A court of equity never interferes in behalf of a mere legal demand until the creditor has tried the legal remedies and found them ineffectual. *Rambaut v. Mayfield,* 8 N. C., 85. The creditor must reduce his debt to judgment, and, in general, take out execution, that it may appear by demanding property of the defendant and the return of *nulla bona* that satisfaction cannot be had at law. In this case the plaintiff states that he has sued N. B. Taylor at law for this debt, and consequently, in the shape of bail, has his debt assured to him. The application is not to call in the aid of the court to secure property the title to which is in a state of controversy at law, but to compel the defendant to give security for the payment of what may be found due to the plaintiff, in addition to that which he has already given at law. The recognition by this Court of the principle assumed in the bill would convert it into a court of common-law jurisdiction in every case where a debtor may be in failing circumstances or the plaintiff may have fears, just or not, that he will make way with his property.

The bill must be dismissed with costs, including a solicitor's fee for N. B. Taylor and the administrator, Benjamin Taylor.

PER CURIAM. Bill dismissed with costs.

Cited: Carr v. Fearington, 63 N. C., 562; *Bank v. Harris,* 84 N. C., 209; *Hackney v. Arrington,* 99 N. C., 115.

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ABSALOM SHERRILL v. ANDREW H. SHUFORD.

A trustee is entitled to commissions as compensation for his labor in managing the trust committed to him, though no provision be made for it in the deed of trust.

THIS case came before the Court upon exceptions to the report of the clerk to whom it had been referred at the last term. It is necessary to state only the ninth exception, as the others related entirely to matters of fact. The ninth exception was that the clerk had allowed 2½ per cent as commissions to the trustee, when there was no provision in the deed of trust that the trustee should receive any compensation for his services.

Boyd and Guion for plaintiff.
Alexander, Craige, and Iredell for defendant.

NASH, J. The ninth exception is overruled, because we think a trustee is entitled to commissions as compensation for his labor in managing the trust committed to him, though no provision be made for it in the deed.

PER CURIAM. This exception overruled.

Cited: *Cannon v. McCape,* 114 N. C., 582; *Ivie v. Blum,* 159 N. C., 123.

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ROBERT D. ALEXANDER, EXECUTOR, ETC., v. JOSEPH N. ALEXANDER ET AL.

A testator after making other devises and bequests, directed as follows: "It is my will that my land and negroes and *all the residue of my property, both real and personal,* not heretofore expressly willed, *be put to sale* at such credit as my executors may think proper; out of the *proceeds of which sale* it is my will that all my just debts be paid, and the *balance* or residue of said money arising from such sale, after paying my just debts as aforesaid, I allow, and it is my will, shall be equally divided among A., B., C.," etc. *Held,* that bonds and notes due to the testator were not included in this clause, as not being the ordinary subjects of sale, and there being no general residuary clause, the amount of them went to the next of kin, as undisposed of.

CAUSE removed from the Court of Equity of MECKLENBURG, at November Term, 1847.

In 1841 William Alexander, of Mecklenburg County, made his will, duly executed to pass real and personal property. The 5th clause is as follows: "It is my will that my land and negroes and *all the residue of my property, both real and personal,* not heretofore expressly willed, *be put to sale,* at such credit as my executors may think proper; out of the *proceeds of which sale* it is my will that all my just debts be paid, and the *balance* or *residue* of said money arising from such sale, after paying my just debts as aforesaid, I allow, and it is my will, shall be equally divided between my three daughters, towit, Sarah, Isabelle, and Abigail, and as my sons, Joseph, John, William, Robert, and James, have heretofore been provided for, as well as my daughters Jane,
(230) Elizabeth, Rebecca, and Margaret, I have left them nothing in this my last will and testament." At the time of the testator's death, besides lands and negroes, stock and other personal property, he had a number of promissory notes on various persons, amounting in the whole to $2,800. The bill is filed by the executor to procure the opinion of the Court as to the proper construction of the above devise. The defendants are the children, or such as represent them, and next of kin of the testator. The defendants Sarah Alexander, Calvin S. Wise, administrator of his wife, Isabelle Alexander, and James Alexander, administrator of his wife, Abigail Alexander, by their answer claim the proceeds of the notes as being included in the 6th item of the will, and passing under it, and the other defendants in the answer claim that, as to the notes, the testator died intestate, and the proceeds of them must be divided among the next of kin of William B. Alexander as in a case of intestacy.

Osborne and J. H. Wilson for plaintiffs.
Boyden, Alexander and Bynum for defendants.

NASH, J. The question submitted to us depends upon the proper construction of clause 6. The intention of the testator is always to be carried out when it can be gathered from the will itself, but it must not rest in supposition or surmises. The testator must not only have a particular intent, but must express that intent in apt words, in words sufficient to show it. The terms "all the residue of my property, both real and personal, not herein expressly willed," etc., would very clearly embrace not only the notes in question, but also such money as he had in possession at the time of his death, and if the testator had devised the property itself to the three legatees mentioned in that clause, no question could be made as to their right under the will to it. But he has not so done, but gives to them the proceeds of the property. He directs that
(231) the property embraced in that clause should be "put to *sale* at

such *credit* as my executors may think proper." What property is embraced in this clause? Certainly not notes or money, but such property as was usually the subject of sale.

This construction is made evident by the direction to sell on a credit. If the notes were so sold, they would produce but notes or bonds, or evidences of debt. In *Fraser v. Alexander,* 17 N. C., 348, the will commenced, "As to what worldly substance it has pleased God to bless me with, I dispose of in the following manner," etc. There it was manifestly the intention of the testator not to die intestate as to any of his property, yet the Court decided that he had not disposed of the whole. In the opinion delivered by the Chief Justice it is declared that the term "all my property" could not embrace money or bonds, if the testator had left any, because the property thereby given is to be sold at public sale, which is altogether inapplicable to money, whether due or in hand. That case was followed by that of *Bradley v. Jones,* 37 N. C., 248, where the question we are now considering came directly before the Court. The words of the will there were "all the balance of my estate that is not given to be sold, and the money arising from the sale," etc. At the time of the death of the testatrix she had in her possession specie and bank notes. The Court decided that she could not have meant the latter, but only such property as was usually the subject of sale. It is said, however, in behalf of the three legatees mentioned in that clause, that it is evident that the testator did not intend to die intestate as to any of his property; that he intended to dispose of the whole. This may be so, and very likely was, but, in seeking for his intention, we must not pass by the language he has used. If we do, we shall make the will, and not expound it. The intention of the testator in this case, for that purpose, is not expressed as clearly and as strongly as in *Bradley v. Jones.* (232) There, then, could be no doubt of such intention, and yet the Court decided he died intestate as to a large and valuable portion of his estate mentioned in the will.

We are of opinion that the notes on hand at the death of the testator did not pass under the 6th clause of the will, they not being mentioned in it specifically, and there being no general residuary clause which would embrace them; therefore they must be distributed as in a case of intestacy.

PER CURIAM. Decree accordingly.

Cited: Allsbrook v. Reid, 89 N. C., 154; *Harkness v. Harkey,* 91 N. C., 199; *Holton v. Jones,* 133 N. C., 406; *McCallum v. McCallum,* 167 N. C., 311.

Dist.: Hogan v. Hogan, 63 N. C., 225.

HENRY A. TROUTMAN v. JACOB TROUTMAN ET AL.

A bill in equity for the reconveyance of a tract of land for which the plaintiff alleges the defendant had by fraud obtained from him a deed of trust may be brought either in the county in which the land lies or in that in which either of the parties resides.

APPEAL from an interlocutory order of the Court of Equity for CABARRUS, at Fall Term, 1848, *Moore, J.*

The case was this: The defendant Canoy brought an action of ejectment against the plaintiff in the Superior Court of law of Cabarrus for a tract of land lying in that county, and recovered judgment therein.

The plaintiff then filed this bill in the court of equity for Cabar-
(233) rus, in which he states himself to be of that county, and one of the defendants to be of Rowan, and the other defendant, Canoy, to be of Iredell. The bill states that a deed of trust for the land in question was fraudulently obtained from the plaintiff by the defendant Troutman, to secure a certain debt not justly due, and, by fraudulent contrivance between the two defendants, the land had been unduly and unfairly sold and conveyed by the defendant Troutman to the defendant Canoy, and it prays that the conveyance may be declared fraudulent, and the defendant Canoy be decreed to reconvey the premises to the plaintiff, and that both of the defendants may come to an account with the plaintiff.

The defendant Troutman answered; but Canoy put in a plea to the jurisdiction, that, at the filing of the bill, the plaintiff and the defendants did not, nor did either of them, reside in Cabarrus County, but that the plaintiff and the defendant Troutman resided in Rowan County, and the defendant Canoy resided in Iredell County. The plea was set down for argument and overruled. Canoy, by leave, appealed.

Craige, Thompson, and Alexander for plaintiff.
Osborne for defendant.

RUFFIN, C. J. The statutes provide in which particular Superior Courts of law or county courts actions shall be brought, but there is no such provision in respect to the courts of equity. The act of 1782 gave to the court of equity in each district "all the powers and authority within the same that the court of chancery, which was formerly held under the colonial government, used and exercised, and that are properly incident to such a court," and the act of 1806 transferred the same jurisdiction to the courts of equity, thereby established in each county. Ac-
cording to the terms of the grant, taken literally, each court would
(234) seem to have jurisdiction over all persons, wherever resident,

upon whom process was served, and without regard to the situation of the thing which might be the subject of litigation, inasmuch as there was but one colonial court and its jurisdiction was coextensive with the province. But the Court is not aware that the provision has been received in that broad signification in reference to the territorial jurisdiction of the respective counties, but only as to the nature of the rights cognizable in equity and the redress to be afforded in those courts. It has never been understood that where the parties live and the land, for example, lies in a particular county, a person could institute a suit in the court of a county situate in another extremity of the State, and there has been no instance of the kind, we believe. On the other hand, without the point having been brought before the courts, as far as we are aware, it has seemed to be generally considered that the several courts of equity would, as between themselves, follow, in the main, the rule of the statute dividing the jurisdiction between the several Superior Courts of law, at least as far as the residence of one of the parties in a particular county confers jurisdiction on the court of that county. We are not informed that, unless in a case of land, a bill has ever been filed in a county in which neither of the parties resided, nor that it has ever been doubted that a bill may be filed in a county in which any one of the parties resides. Then, if equity is to follow the law upon this head, it would apepar that a bill touching the realty must be local, as actions of ejectment and trespass *quare clausum fregit* are. That is certainly not true, however, to the full extent; for, while an action of ejectment for each parcel of land in the county where it lies is authorized, one bill will lie for land in many counties, or even for a conveyance or partition of land situate in another government, as the jurisdiction is primarily *in personam*. Because the jurisdiction is of that character, it is (235) contended, in support of the plea, that the subject being land cannot affect this question. It must be yielded that the court of a county cannot decree in respect of land merely because it is within it, and without process to the person. Still, in regulating the jurisdiction of the several courts of equity, as between themselves, when there is no legislative mandate, it is very proper those courts should, in cases in which the parties are personally brought in, have regard to the conveniences of the suitors and witnesses and the saving of expense, and entertain a suit respecting land because of it being situated within the county; since most frequently the evidence of identity, of fraud in the conveyance, of the profits and improvements, is to be drawn from the neighborhood of the land. Therefore, as the statute is silent on the subject, and the courts of equity are under the necessity of adjusting their jurisdiction between themselves, it seems to be, in itself, a reasonable ground for entertaining a bill that it is brought in respect to land lying in the

county in which the suit is instituted. It is in conformity, also, with the rule prescribed by the statutes for partition, either in the courts of law or equity. We do not mean to say that the bill in all cases must be filed where the land lies, for no doubt it may be filed where any or either of the parties may reside. But we think it ought also to be allowable that suit may be brought in the county in which the land lies. There is no error in the interlocutory decree appealed from.

PER CURIAM. Affirmed.

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ELIZABETH WILSON v. EDWARD WILSON.

The husband is a necessary party to a bill filed by a wife to recover slaves alleged by her to have been conveyed to a trustee for her separate use.

CAUSE removed from the Court of Equity of YANCEY, at Spring Term, 1849.

On 15 September, 1842, Thomas Shepherd conveyed to Edward Wilson three slaves "in trust for Elizabeth Wilson, the mother of the said Edward," and also the sister of the said Thomas and the wife of George Wilson. The bill was filed in February, 1843, by Elizabeth Wilson against Edward Wilson and George A. Greenwood and Joseph Wilson. It states that the plaintiff's husband, George Wilson, had abandoned her several years before and was then living apart from her and in a different county; and that with a view to provide a comfortable support for her, the slaves were conveyed by her brother Thomas to her son Edward, in trust for her, and that Edward accepted the conveyance and the slaves upon that trust, as expressed in the deed. The bill then charges that Edward, the trustee, refused to let the plaintiff enjoy the slaves, and had improperly and without consideration conveyed some of them to the two other defendants, and kept one for his own use. The prayer is that the trust may be declared to be to the separate use of the plaintiff, and that all the slaves may be decreed to be conveyed to some fit person upon that trust, and that the defendants may respectively account to

(237) the plaintiff for the profits.

The answer of the several defendants set up contracts with the plaintiff and her husband under which they respectively claim the slaves as their own, discharged of any trust; and the parties proceeded to proofs upon the matters in issue.

N. W. Woodfin for plaintiff.
Avery for defendants.

RUFFIN, C. J. It is not necessary to make any observation as to the nature of the trust created by the bill of sale, nor upon any other part of the merits alleged or established in the pleadings and proofs, as there is a radical defect in constituting the cause which is fatal to the bill. It is that the husband of the plaintiff is not a party to the suit. It is perfectly settled that a married woman cannot, by herself, institute a suit against any person. Where her interest is not separate from or adverse to the marital rights of the husband, he is a necessary party with her. She has not capacity to institute and carry on a suit for herself in any case; and it is not allowed to any third person officiously to assume the office of suing for a married woman, which properly and legally belongs to the husband. When, indeed, the husband and wife have adverse claims, she is, from necessity, allowed to litigate the right with him. But even then she cannot, for want of capacity to conduct it, institute a suit for herself, but it must be done for her by some fit and responsible person, as her next friend. Mit. Plead., 28. Indeed, in the present case it is plain that the interest of the husband is directly involved in the question whether the trust can be construed to be for the separate use of the wife or is only a general trust for her, and so subject to his disposition. For that reason he would be an indispensable party, in order to protect his interest and also to protect the defendants from an accountability to him hereafter. But upon the general ground before mentioned the husband must be a party, either with his (238) wife or as a defendant.

PER CURIAM. Bill dismissed with costs, to be paid by the surety in the prosecution bond.

ALFRED GOODSON v. AARON GOODSON.

A guardian is not bound to have the money ready to pay his ward when he comes of age, but the ward is bound to take a bond in discharge of the guardian, which the latter properly took and has not made his own by fraud or *laches*. Such a bond in truth belongs to the ward, just as much as a specific chattel.

CAUSE removed from the Court of Equity of LINCOLN, at Spring Term, 1849.

The bill in this case was filed in September, 1847, for the purpose of setting aside a release obtained by the defendant from the plaintiff, and for an account against the defendant as the plaintiff's late guardian,

and payment of the sum which may be found due. The facts are that the plaintiff was entitled to the sum of $544.15 as his distributive share of the estate of his intestate father, due in July, 1840; and that the defendant, as the plaintiff's guardian, received from the father's administrator, on 1 January, 1841, a bond for that sum, made by Robert H. Burton and Henry Fullenwider, and payable to the defendant, as
(239) guardian, one day after date. The interest from July, 1840, to January, 1841, was paid to the defendant in cash, and the bond was taken by the administrators from the obligors, who were debtors to the estate, by a previous arrangement between the administrators and the defendant, who applied to them to pay him the plaintiff's distributive share in a good bond, payable to him as guardian, rather than in money. At that time both Fullenwider and Burton were in possesion of large estates and were considered by every one perfectly safe. In January, 1842, Burton offered to pay the debt to the defendant in the presence of the plaintiff, who was then within a month or two of full age; but the plaintiff requested the other parties to let the money remain at interest as it was, and they did so. Burton at the same time stated that if further security was desired, he would renew the bond and get one Hoke to become his surety, but he died the latter end of February following, without anything further having been done. On 18 March, 1842, four days after the plaintiff came of age, the defendant went to the plaintiff's house to settle with him. The plaintiff declined at first, in consequence of his being unwell at the time, but the defendant urged him to settle, and the plaintiff finally consented to do so. The defendant then paid him in money all that was due him, except the amount of the above mentioned bond, and proposed to transfer that to the plaintiff for the balance. The plaintiff objected to taking it, saying that he did not like to receive a dead man's bond. But the defendant, as alleged in the bill and established by the proofs, said that if he would take the bond Hoke, who had become the executor of Burton, would become bound for it as surety; and, thereupon, the plaintiff received the money and bond without indorsement, and executed to the defendant an acquittance therefor and a general release of all demands. It turned out that Burton
(240) and Fullenwider were insolvent at the time, and that Hoke, when requested by the plaintiff and defendant, refused to become bound for the debt. The plaintiff then brought an action at law upon the bond, but has never been able to get anything, as Fullenwider has no property and Burton's assets have been tied up by a suit by some of the creditors in a court of equity for their administration. The bill charges that, in fact, both Burton and Fullenwider were insolvent in 1841, and that it was the duty of the defendant to have collected the money and especially

to have received it when offered by Burton in 1842, and that the bond was also void by reason of an usurious agreement of the defendant with Fullenwider for indulgence, and it insists that the defendant was liable to make good the bond to the plaintiff, and that the acquittance and release were unduly obtained.

The answer states that the defendant considered himself obliged by law to have the plaintiff's estate ready for him in money when he should come of age, and, in conformity to what he thought his duty, that he would have collected the money from Burton, as he might in January, 1842, if the plaintiff had not interposed and requested him not to do so. The defendant states that the administrators of the plaintiff's father selected Burton and Fullenwider as the best out of debtors to the estate to the amounts of upwards of $5,000, and that no men were considered as less likely to become insolvent or involved than those; and, indeed, that no suspicion of their solvency was entertained until the sale of Burton's property by his executor in the latter part of April, 1842; but that, on the contrary, their estates were so ample, and their industry and prudence were deemed so exemplary as to establish a credit on which they could have borrowed almost any sum of money that any business in that part of the country could have required, and that the defendant believed the debt perfectly good up to that sale. The defendant, therefore, avers that he acted to the best of his judg- (241) ment for the interests of his ward in receiving the said bond for his distributive share, and in letting it remain uncollected in accordance with both the interest and the wishes of the plaintiff; and denies that he intended to take, or did take, any advantage whatever of the plaintiff in transferring the bond to him as part of his estate and obtaining the release. He denies positively any agreement at any time for the payment of usurious interest on the bond, or any premium for indulgence thereon; and avers that his sole motive for becoming guardian was to serve the plaintiff, and that he did so without a view to his own advantage, and did not even charge any commissions.

The answer is fully sustained by proofs as to the property and reputed solvency and wealth of the obligors, and of Mr. Burton in particular, until the death of that person and the sale of his effects in April, 1842; and there is no evidence in support of the charge of an usurious agreement.

Landers and Boyden for plaintiff.
Guion, Thompson and Craige for defendant.

RUFFIN, C. J. From the circumstances under which the settlement was made with the plaintiff just after he came of age, and when he was sick, and without advice, and was reluctant, on those accounts, to enter

into it, the release could not stand in the plaintiff's way if any undue advantage had been gained therein by the guardian. But it seems to the Court that putting aside the settlement and release, the plaintiff is not entitled to any relief upon the other facts, as the money was, we think, honestly and properly invested by the defendant, and, therefore, the plaintiff had a right to claim the bond as property, and so, like-
(242) wise, the defendant had a right to insist that the plaintiff should take it as his property. Possibly, if there were no statute upon the subject, it might be deemed *laches* in a guardian to let money lie on the personal responsibility of the debtors. We should, indeed, rather conclude otherwise, in the state of our country, where there are so few opportunities of investment in public securities and for small sums on mortgages on real estate. But the act of 1762 puts the matter at rest by making it the duty of a guardian to lend the surplus money of the ward upon bond with good security, with interest payable annually or compounded. As the guardian is a trustee merely, he is entitled to all the protection of trustees which arises from obedience to the law in good faith. Therefore, the ward is bound to take a bond in discharge of the guardian, which the latter properly took and has not made his own by fraud or *laches*. The Court has said that such bonds, in truth, belong to the ward, and that, although they are negotiable, one who takes them from the guardian with notice must account for them to the ward. *Powell v. Jones,* 36 N. C., 337; *Exum v. Bowden,* 39 N. C., 281. It follows that, in equity, the guardian is entitled to transfer the bonds to the ward in satisfaction, and is not bound to pay the ward, in money, as the defendant seems, by mistake, to have supposed. Indeed, the statute expressly provides that the guardian may assign any uncollected bonds to the ward, and that such assignment shall be a discharge *pro tanto*. And it is clear that the assignment is one that will enable the ward to collect the money by suit in his own name, and not to charge the guardian as indorser; for the same section provides that the guardian shall be liable for the money only when the borrowers and the sureties are likely to become insolvent, and the guardian shall not use all lawful means to enforce payment. The Court therefore holds that in this case no imposition was practiced on the plaintiff, inducing him to discharge his
(243) guardian upon receiving the bond in question, for the guardian acted *bona fide* and rightly in taking the bond and in not collecting the money, since the debtors were deemed perfectly good up to the time when he parted from the bond, and were so deemd, not only by him, but by the plaintiff and the whole community, without a single exception, as far as appears. It is purely a question of loss between two innocent persons; and surely the guardian, who would not be allowed to

make a profit for himself, and acted on behalf and for the benefit of the plaintiff, ought not to bear the loss; but it must rest with the plaintiff as the equitable owner of the bond.

PER CURIAM. The bill dismissed with costs.

Cited: *Williamson v. Williams,* 59 N. C., 65.

ELIZABETH BRADSHAW ET AL. v. SIMPSON ET AL.

1. An administrator has a right to sell the notes of his intestate, and the mere fact of selling is no breach of trust.
2. But if a purchaser takes notes from an administrator, belonging to his intestate's estate, in satisfaction of the administrator's individual debt, or otherwise, he has actual notice of a dishonest intention and purpose on the part of the administrator to misapply the funds, the purchaser is liable to the persons entitled in equity to the notes.

THE bill of the complainants sets forth that they are the next of kin of one Jonas Bradshaw, who died intestate in February, 1840; that administration on his estate was afterwards granted to the defendant Fullenwider and to John Bradshaw; that in April, 1840, (244) they made a sale of the estate, and among other things of four negroes, one to Dr. Hunter for $890, one to Thomas Shuford for $890, one to Ephriam Brevard for $600, and one to Franklin Rhinehart for $314; that these respective purchasers gave their notes severally with surety to the said administrators, payable six months after the said first day of April, each for the amount of which he was bound; that the defendant Fullenwider, as administrator, took the said bonds into his possession and shortly afterwards sold them at a discount to the defendant Samuel P. Simpson, for the purpose of paying his individual debts; that the said Samuel well knew and had full notice that the said notes belonged to the estate of the said Jonas Bradshaw, and that the proceeds of the sale were to be applied to the individual use of the said Fullenwider; that soon thereafter the said Samuel transferred the said bonds to the defendant Jacob Ramsour, and that the said Ramsour was fully apprised how and in what manner the said defendant Simpson had traded for the said bonds, and knew well that they belonged to the estate of the said Jonas, and, before his purchase from Simpson, knew also that the proceeds of the sale to Simpson went to the individual use of the said Fullenwider. The bill also states that the said Fullenwider is utterly insolvent. The bill further states that the coadministrator, John Brad-

shaw, who is one of the plaintiffs, never countenanced nor assented to the said transactions, and it prayed that the said bonds should be delivered up to the plaintiffs or that the defendants should pay them the amount thereof and interest. An amended bill further stated that besides these negroes, the estate of the said Jonas, after paying all the debts, was worth a large amount of money, most of which came to the hands of defendant Fullenwider, and had never been accounted
(245) for, and some of the distributees had received the full amount of their shares and others had received nothing.

Samuel P. Simpson and Jacob Ramsour in a joint and several answer admit the administration on the estate of Jonas Bradshaw by Fullenwider and John Bradshaw, and that the bonds stated in the bill were taken on the sale of the negroes belonging to the said estate and were made payable to the said administrators; and Samuel P. Simpson for himself says that he purchased the bond of Franklin Rhinehart from the defendant Fullenwider at a discount of 15 per cent or thereabouts and paid for it in cash; as to the other bonds, he hath no knowledge how, when, or where he obtained them from Fullenwider, nor does he recollect that they were received from Fullenwider for a debt to him from Fullenwider individually, nor does he recollect what he paid for them. These defendants both admit that the bonds of Hunter, Brevard, and Shuford were transferred from Simpson to the other defendant, Ramsour, and aver that no discount was taken on this transfer, and that it was for a valuable consideration. They admit that the bonds have been collected. They further say that at the time the said transfers were made they fully believed that Fullenwider had a perfect right to dispose of the said bonds, and that, by receiving them, they incurred no responsibility to the next of kin of the said Jonas Bradshaw. They further allege that Fullenwider has secured, by a deed of trust, the payment of all he may owe to the estate of the said Bradshaw. They deny all fraud, etc., and pray to be dismissed, etc.

Replication was filed to the answers, proofs taken, and the cause, being set for hearing, was transmitted to this Court.

Bynum, Avery, and Landers for plaintiffs.
Guion for defendants.

(246) PEARSON, J. An administrator has the right to sell the notes of his intestate. The purchaser is under no legal obligation to see to the application of the purchase money. But although the exigencies of estates sometimes make it expedient to sell notes, it is rarely ever the case, and such dealings are looked upon with suspicion, and when permitted to stand it is not because courts are satisfied that the parties have acted honestly, but because their dishonesty cannot be proven. As

an administrator has the right of property, and, of course, the right to sell, the mere fact of selling is no breach of trust, and a purchaser cannot be liable without actual notice that the administrator intended to use the funds for his own purpose. The case of most frequent occurrence is when the purchaser receives the funds in satisfaction of an individual debt of the administrator, so as not merely to have notice, but to be a participator in the guilt. This latter circumstance, however, is not necessary. It is sufficient if the purchaser has actual notice of a dishonest intent and purpose to misapply the funds. *Tyrrell v. Morris,* 21 N. C., 559; *Gray v. Armistead, ante,* 74. The defendant Simpson swears that he purchased the note of Rhinehart, and paid for it in cash, deducting 15 per cent. There is no proof that he had actual notice of a particular dishonest intent on the part of the administrator, and, although the fact that an administrator proposes to sell a *good sale note* at a discount of 15 per cent will most usually put honest dealers upon inquiry, this constructive notice is not sufficient. In this a purchaser from an administrator stands on higher ground than a purchaser from a trustee, who has no right to sell, and when the mere fact of selling is a breach of trust. For these reasons the plaintiff cannot have relief as to the amount of the note of Rhinehart. Simpson does not allege that he is a purchaser of the other three notes, but merely makes the general assertion that he is unable to recollect how, when, or (247) where he got them from Fullenwider. As he does not allege himself to be a purchaser, he must be looked upon as a volunteer, holding in trust for the person entitled, and the plaintiffs are entitled to a decree against him for the amount of those three notes and interest, with costs. There is no proof of the allegation that John Bradshaw, one of the plaintiffs, who is a coadministrator with Fullenwider, was privy and consented to the misapplication of the funds, nor is there any suggestion that the sum realized from the deed of trust made by Fullenwider reduced the amount of his defalcation, so that it does not exceed the amount of the notes for which Simpson is liable. If the amount has been reduced below the amount of the notes and interest, Simpson can have the benefit of that fact upon taking the account. But there is proof that some of the distributees have received from John Bradshaw, the coadministrator, a part or the whole of their shares of the estate. This is no ground of defense for Simpson, for the plaintiff John Bradshaw has an equity to be substituted and receive the amounts so paid by him; but it may render it necessary for the plaintiffs to have an account among themselves, so as to ascertain the sums they are respectively entitled to, out of the amount decreed against Simpson. In the meantime the fund must be paid into the master's office, and an execution will issue therefor in the name of John Bradshaw. The defendant Ramsour

is not fixed with notice; he swears he purchased the notes from Simpson for a full and fair consideration, after Simpson obtained them from Fullenwider. The bill must be dismissed as to him, with costs. The defendant Fullenwider is admitted to be insolvent. He is primarily liable and either party may hereafter move for a decree against him.

PER CURIAM. Decreed accordingly.

Cited: *Wooten v. R. R.*, 128 N. C., 124.

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MOSES TREXLER AND WIFE v. PAUL MILLER.

1. A court of equity has no right to fill up a blank in a will, or to restore a bequest which it is alleged was originally in the will, but was fraudulently obliterated by the executor or some other person before the probate. The court of equity must take the will as it is certified from the court of probate.
2. A testator devised the land on which he lived and another tract to his wife in fee, and one-sixth part of his unwilled negroes, the whole to be equally divided between her and five of his six children, and "also two beds, her bureau (etc.), the wagon and gear, and the" [here there was a blank] "ten head of hogs" (etc.), "which shall belong to her as her own property." He then devises property to his two sons, to his two grandsons, and two daughters. He then devises, by distinct clauses, several tracts of land, and all other property not willed "to be sold" and the money to be divided as hereinafter directed. And afterwards comes the following disposition: "It is my further will that after all my just debts be paid, and the money willed, the balance to be divided among all heirs." By codicil he subsequently provides that "If my wife should be pregnant and delivered of a child, that child shall have a negro named Creecy, and further shall be heir with my children in the division and distribution of my estate." *Held*, that the widow was not entitled to any part of the proceeds of the property directed to be sold, but that the testator intended by the word "heirs" only his children and grandchildren.

CAUSE removed from the Court of Equity of ROWAN, at Fall Term, 1848.

George Miller made his will in July, 1848, and thereby devised the land on which he lived, and another tract, to his wife in fee, and one-sixth part of his unwilled negroes, the whole to be equally divided between her and five of his six children, and also "two beds, her bureau, the house clock, six chairs, the cupboard and all that is in it, and all the kitchen furniture, two horses (her choice), four head of cattle (her choice,) the wagon and gear, and the....., ten
(249) head of hogs, 200 pounds of bacon, 200 bushels of corn, 50 bushels

of wheat one sack of salt, and one table, which shall belong to her as her own property." He then gives to two of his sons a tract of land, and to two grandsons, the sons of a deceased son, $250 each "for their land," and to his daughter Sophia a negro girl named Emmeline, and to his daughter Polly a legacy in money instead of negroes, as she did not wish to have negroes. He then, by distinct clause, devises several tracts of land and other property, not willed, "to be sold" and the money to be divided as hereafter directed. And afterwards comes the following disposition: "It is my further will that after all my just debts be paid, and the money willed, the balance be divided among all my heirs." By a codicil of 28 September, 1845, the testator provides that "if my wife should be pregnant and delivered of a child, that child shall have a negro named Creecy, and further shall be heir with my children in the division and distribution of my estate." After the death of the testator the will was proved in November, 1845, by the defendant Paul Miller in the form and with the blank as above set forth, the said Paul being one of the sons of the testator; and he delivered to the widow her share of the negroes and the specific articles bequeathed to her, as above mentioned, and took her acquittance in full for the property bequeathed to her in her late husband's will.

The present bill is filed by the widow and her after-taken husband, against the executor and the other children of the testator, and states that the blank now appearing in the will was originally filled with the words "carriage and harness," and that the executor or some other person fraudulently obliterated these words and procured the probate of the will without them, of which the widow had no notice when she gave the acquittance; and, in consequence of her ignorance thereof, she was induced to purchase the carriage and harness at the execu- (250) tor's sale at the price of $135. The bill also states that the testator left considerable sums due to him on bonds and notes, and that the produce of the lands and other things directed to be sold amounted to a considerable sum. And it prays that it may be declared that the words "carriage and harness" originally formed part of the will, and that they were fraudulently obliterated by the defendant Paul and others, or one of them, and that the plaintiffs are thereby entitled to the carriage and harness under the will, as if it had been duly proved with those words in it; and, further, that the executor should come to a general account of the estate and pay the widow an equal share with the children of the residue.

Craige for plaintiffs.
Boyden for defendants.

RUFFIN, C. J. The bill cannot be sustained in either aspect of it. As to the alleged alteration in the will, the court of equity has no jurisdiction, but it belongs exclusively to the court of probate, which latter court alone has power to determine the question, what is a will of personalty and which is the will of the testator, and, consequently, to authenticate it to all other courts. The seal of the court of probate is, therefore, evidence that the paper, in the terms certified, is the testament of the deceased, and no suggestion can be heard that any part has been added to of left out of the instrument. Bac. Ab. Executors, E, 1. The province of the court of equity extends only to the construction of the will as it is sent from the court of probate.

Upon the construction of this will there seems no doubt. Upon the original will, by itself, the intention would appear to have been to give the residue to the children and grandchildren, under the descrip-
(251) tion of "all heirs"; for the provision for the wife was so much more ample in land, a full share of the negroes, and in other specific articles, that it could hardly be supposed the testator intended, under those terms, to let her into the residue equally with the children, for whom he made a much less specific or pecuniary provision in the previous part of the will. But whatever doubt there might be, if there were nothing but the original will to guide, the point is rendered plain by the codicil, in which, while making provisions for a posthumous child, should there be one, he gives it a particular negro, and then says, "that child shall be heir with my children in the division and distribution of my estate," which clearly refers to the residuary clause and shows that he used the term "heirs" there as descriptive of his children and their issue, all of whom he had mentioned in the previous clauses of the will. Had it been the testator's meaning that his wife should take a part of the residue, he would have mentioned her again in the codicil as one with whom the after-born child should be *heir,* as well as with the children. As he did not, the inference is that, as mentioned in the codicil, the children were to take the residue, and that, if another should be born, such child should come in with the "children."

PER CURIAM. Bill dismissed with costs.

(252)

GEORGE ALLEN v. PENIL GILBREATH.

1. A. made an entry so vague in its description that no one could tell what land it covered. Afterwards B. made an entry definite in its description. A., having full notice of this entry, causes a survey to be made of his entry by which he includes the land entered by B., but to do so he is obliged to run 2 miles in length, and but a few yards in width, and passing over several granted lands, and upon such survey obtains a grant before B. obtains his. *Held*, that under these circumstances O. is to be looked upon in the same light as a junior enterer, with notice of a prior entry of B., and that B.'s title is preferable, and he has a right to a decree compelling A. to make him a conveyance and for profits, etc.
2. Before B. discovered that the land he entered, including a rock quarry, was vacant, he had agreed to purchase part of a tract of land which A. claimed from C. and which was supposed to include the rock quarry, but in the agreement the rock quarry was reserved to A. *Held*, that this formed no reason in equity why B. should not enter the rock quarry when he found it to be vacant.

CAUSE removed from the Court of Equity of HENDERSON, at Spring Term, 1849.

On 17 January, 1838, the plaintiff made an entry of the vacant land "lying on the north side of Clear Creek in Buncombe County, adjoining the lands of Edmonson, the said George Allen, and Edward Shipman, and running so as to include the rock quarry," and afterwards had a survey and obtained a grant for 19 acres, including the quarry, dated 20 December, 1838. On 19 November, 1838, the defendant obtained a grant for 95 acres and 79 poles, purporting to be issued on an entry made 7 January, 1831, and surveyed on 10 November, 1838, which includes the land granted as above to the plaintiff. The bill states that, a few days after the plaintiff made his entry, he informed (253) the defendant that he had made it and that it included the quarry, and that the defendant had full knowledge that the plaintiff had caused his survey to be made and it included the rock quarry, which was a notorious place well known to the defendant and the people of the neighborhood generally. The bill further states that, before that time, the defendant had claimed the said rock quarry under a conveyance made to him of a tract of land by one Edward Shipman, which was supposed to include it; and the plaintiff discovered that the same was not within the lines of the land granted to Shipman and by him sold to the defendant, and then he made his entry, and communicated it to the defendant, as before mentioned; and that thereupon, and with a view to defeat the plaintiff of his entry, and after the plaintiff's survey, the defendant had an entry, which he had made in 1831 for 150 acres, of which the beginning corner was in the mountains at the distance of 2 miles from the

quarry, and which was vague in its terms, so surveyed as to include the quarry and the other land granted to the plaintiff; and that, in order to do so, the defendant was obliged to pass directly through four tracts of granted land and to make his tract 180 poles in length, while for nearly the whole length it is only a few yards wide. The bill charges that, in truth, the defendant had no intention, at the time he made his entry, to include therein any of the land granted to the plaintiff, or any of the intermediate granted land, and that when he found the conveyance from Shipman did not cover the quarry, he had it surveyed in the form he did, for the sole purpose of defeating the plaintiff's special entry and survey. The bill further states that the defendant had brought an action of trespass against the plaintiff for taking stone from the quarry, and had recovered therein. The prayer is that the defendant may be
(254) declared a trustee for the plaintiff as to so much of the land as was entered by and granted to the plaintiff, and be decreed to convey the same to him, and to repay the damages and costs recovered from the plaintiff, and to come to an account for profits otherwise made by him.

The answer states that on 25 October, 1831, Shipman conveyed to the defendant a tract of land containing 265 acres, by metes and bounds, which the parties believed covered the quarry, which is the subject of dispute; and that on 22 November, 1834, the defendant contracted to sell the same land to the plaintiff (reserving the quarry) at the price of $400, in annual installments of $100, and to convey the same in fee upon the payment of the purchase money, of which the last installment fell due 25 December, 1839, and that they entered into written articles to that effect, in which the defendant obliged himself to convey the said land by the description specified in the deed of Shipman to him, expressly, however, "excepting and reserving to himself and his heirs and assigns 10 acres out of said land, lying on the southwest part of said tract, including the rock quarry in the center of a square, with the right of way through said land to pass to and from the said quarry." The deed from Shipman and the articles with the plaintiff are exhibited, and agree with the statements of their contents in the answer. The answer admits that the plaintiff informed the defendant, in February, 1838, that the plaintiff had ascertained by a survey that the Shipman deed did not include the quarry, and that he had entered it; and it states that the defendant did not know whether it was in fact vacant or included in the Shipman tract, and that he determined, with the intention of protecting his own rights and out of abundant caution, to guard against a fraud on himself by the plaintiff in defeating his claim to the quarry, thus agreed to be reserved, to have the quarry included in a survey and grant upon an entry he had made in 1831, which might be made to extend to

it, as it called for the waters of Clear Creek and the lines of Ship- (255)
man; and that accordingly he did so. The answer states that, when he made his entry of 1831, the defendant "had no correct idea of the lines of the many tracts of land lying or supposed to lie adjoining or nearly so, or of the other tracts in the vicinity; and, of course, that he could not have intended it to cover any particular quantity or parcel." And the defendant insists that the plaintiff cannot call in question the right of the State to grant her land in any form, or of the defendant to make his survey upon the elder entry, made in good faith, so as to take in any and all small pieces of vacant land that might be found between the lines of the other tracts. The answer further states that, after both grants were issued, that is to say, on 1 July, 1839, the plaintiff accepted a deed from the defendant for the land sold to him, describing it according to the lines and corners in Shipman's deed, and expressly excepting and reserving the 10 acres including the rock quarry in the same terms in which that reservation was made in the articles; and so it appears by the deed, which is filed as an exhibit. And the answer insists it was a fraud on the part of the plaintiff to make an entry of the land which it had been thus agreed between the parties should belong to the defendant; and that, by reason thereof, the plaintiff ought not to have the assistance of the court.

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

RUFFIN, C. J. So far as the rights of the parties depend merely upon their entries and grants, and without reference to any contract or other equity between them, the plaintiff seems to be clearly entitled to the relief he seeks. The defendant has not filed a copy of his entry, and from the omission and the inferences from the answer it (256) must be understood to be a vague one, not specifying the land entered by the defendant or that granted to him. Indeed, it is clear the defendant did not intend to embrace the disputed land in his entry; for, upon being informed that the plaintiff had entered the quarry, he said to a witness that the entry should do him no good, as he had an entry on the mountain which he could run down so as to include the quarry; and, upon being reminded that there was granted land between his entry and the quarry, he replied that made no difference, as he could pay the State for granted land, if he chose, without hurting his title to that which was vacant. Moreover, the contract between those parties shows that the defendant could have had no motive to include in his entry the rock quarry, as he then thought it his under his purchase from Simpson; it is established by proofs that the defendant claimed the quarry under that purchase, and not under an entry of his own, down to the time in

1838 when he was informed that the plaintiff had discovered it was vacant and entered it. The case, then, is that the plaintiff entered the land without any knowledge of the defendant's entry, and without the defendant's having an entry in fact which did cover it specifically, or which was designed by him to cover it; and that, with full knowledge of the special entry of the plaintiff, he perverted a previous vague entry of his own, by having it, contrary to his original intention, so run as to include the land entered by the plaintiff, with the express view to defeat him; and that the plaintiff went on afterwards in due time to survey his entry, pay the purchase money, and get a grant, without even a knowledge on his part, as far as appears, that the defendant had made any such entry or survey or obtained a grant, until after the grant to the plaintiff had issued. Clearly upon these facts the plaintiff would be entitled to a conveyance from the defendant; for, by reason of the vagueness of his entry, the defendant stands in the same situation as a
(257) junior enterer, with notice of the prior entry of the plaintiff, and the right of the plaintiff is the preferable one. *Plemmons v. Fore,* 17 N. C., 312; *Johnston v. Shelton,* 39 N. C., 85.

But the defendant insists that he had a right thus to intercept the plaintiff, because the plaintiff knew the defendant claimed the quarry, and in the contract between them that and 10 acres of land were reserved to the defendant, so as to make it a fraud in the plaintiff to get the land by entering it himself. But whether it be a fraud or not depends upon the obligations imposed on the plaintiff by the contract, and no equity is perceived to have been raised by it to restrain the plaintiff of the liberty, in common with other citizens, of entering this land. The reservation of it in the articles makes it evident that the parties thought it was included in the conveyance to the defendant. But, in fact, it was not, and was vacant, and so was the subject of entry by any one. A person of a delicate sense of propriety, situated as the plaintiff was, might not have thought himself at liberty to make an entry, but have rather thought it a duty of kindness and honor to advise the defendant that the land was vacant, so as to let him have the opportunity of entering it. But a similar obligation rests upon every man who finds out that a person is living on or improving vacant land under a belief that it is his own. Yet such land is subject to entry by any one, as well as by the occupant, and the court cannot restrain the right, notwithstanding the hardships, unless there be something peculiar in the relation of the parties, binding in conscience on the one to take care of the interest of the other. There does not seem to be anything here to establish a fiduciary relation between the parties. It was, indeed, their contract that the plaintiff should not have the quarry under his purchase from the defendant, but it was no part of it that the plaintiff should assure to

the defendant his supposed title to the land reserved or thought (258) to be reserved, or that the plaintiff should not purchase it from any other person to whom it might belong. If the plaintiff had not purchased from the State, any one else might; and the plaintiff, by his contract with the defendant, neither acquired access to any peculiar means of information nor obliged himself to refrain from availing himself of any he might first gain as to the title of the land, which was alike open to the defendant and to all the world. Therefore, there is no ground for saying that the plaintiff took an undue advantage of the defendant, which might not be said with equal truth of any one who should have entered the land with a knowledge that the defendant claimed it, and, though mistaken, believed it to be his own. It cannot be declared, therefore, that the defendant's fraud in endeavoring to defeat the plaintiff of his entry was justified or excused by its necessity in order to counteract a fraud projected by the plaintiff against the defendant; and the plaintiff must have the decree he asks for, a conveyance and account. The plaintiff is not only entitled to receive back the sum he paid for damages in the action at law, but also the costs adjudged to Gilreath, the plaintiff in that action. The present plaintiff's own costs at law, if any, he must submit to lose, as he had no legal defense, and it was his folly not to apply at once for relief in equity. *Keaton v. Cobb,* 16 N. C., 439.

PER CURIAM. Decreed accordingly.

Cited: Gilchrist v. Middleton, 108 N. C., 708; *Kinney v. Munday,* 112 N. C., 831.

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(259)

JOAN KROUS v. JOHN LONG.

1. There is now no statute prescribing the time within which grants must be issued, where the entry money has been paid.
2. A person, therefore, who pays the entry money may take out his grant when he chooses, subject to this risk, that if another person enters the same land without notice of the prior entry, and first obtains his grant, this shall be preferred.

CAUSE transmitted from the Court of Equity of ASHE, at Spring Term, 1849.

On 18 March, 1834, the plaintiff made an entry of 100 acres of land, beginning at a forked black oak, a corner of the land of Adam Krous, deceased, the southwest corner, on the Long tract of Cane Camp Creek, etc. In September, 1841, the plaintiff obtained a duplicate warrant of survey, upon which the land was surveyed and a grant issued in November, 1841.

On 5 April, 1837, an entry of 100 acres of land, beginning on the line of Joseph Alexander, was made by the defendant John Long, through his agent, James Maxwell, the testator of the other defendants. Under this entry a survey was made by the said Maxwell, who was a deputy surveyor, so as to include all the land which is contained in the plaintiff's grant, except 10 acres, and a grant issued therefor to the defendant Long in 1838, who brought an action of ejectment against the plaintiff and effected a recovery in October, 1845. These facts were admitted in the pleadings.

(260) The bill charges that in November, 1834, the plaintiff filed a certified copy of this entry in the office of the Secretary of State, and paid the purchase money, $5, to the Treasurer of the State, and obtained a certificate of the same from the proper officer; that in November, 1836, having had his entry surveyed, he inclosed the necessary papers to the Secretary of State by letter, and made application for a grant, but the grant did not issue, owing, as he supposes, to the miscarriage of his letter.

The bill also charges that the defendants John Long and James Maxwell, the testators of the other defendants, at the time the plaintiff made his entry had full notice that the land was covered by the entry of the plaintiff and that the purchase money had been paid within the time required by law.

The prayer is for a conveyance and an injunction against suing out a writ of possession, etc.

The defendant John Long denies that he had notice of the plaintiff's entry or of the payment of the purchase money, and insists that the entry of the plaintiff had lapsed or been abandoned at the time his entry was made. He admits that James Maxwell acted as his agent, as he did not reside in this State, in making the entry and survey and in taking out his grant; but he says he does not believe that the said Maxwell had notice of the plaintiff's entry; and, if he had notice of the entry, he does not believe he had notice of the payment of the purchase money, but believes that the said Maxwell made the entry for him under the belief that the entry of the plaintiff had collapsed.

The other defendants, who are the executors of the said Maxwell, to whom his real estate was devised, deny any personal knowledge and disclaim any title; they deny that their testator used the name of the other defendant and made this entry for his own benefit or acted otherwise than as agent.

(261) *H. C. Jones for plaintiff.*
Clarke and Boyden for defendants.

PEARSON, J. The allegation made in the bill, that Maxwell made the entry for his own benefit, is not sufficiently proven in opposition to the answers. We are satisfied from the proofs that Maxwell had notice of the entry, and the location of the plaintiff's entry, at the time he made the entry for the defendant Long. Notice to the agent is notice to the principal, so that the defendant Long had notice. We are also satisfied from the exhibits and the deposition of Mr. Hill, the Secretary of State, that the plaintiff did pay the purchase money within the time required by law, so that his entry did not lapse. This being the case, it is immaterial whether the defendant had notice of the payment of the purchase money or not. In making an entry and taking out a grant for land which he knew had been before entered by the plaintiff, he acted at his peril, and has no right to hold land to which another is entitled because he may have persuaded himself that the entry had lapsed by the nonpayment of the purchase money, as it turns out that he was mistaken. It is no excuse for one who takes the legal title to land for which he knows another has contracted, to say that he believed the conditions of the contract had not been complied with, and that the right was forforfeited, if it turns out not to be as he hoped it was.

So if one knows that another has made an entry, he has no right to take it for granted that the entry has lapsed. He should inform himself, for he is put on inquiry, and if it turns out that, in fact, the entry had not lapsed, he cannot be allowed to hold the land. It was his folly to be too hasty in seeking an advantage from a supposed state of facts, and to act in the dark. He reckoned without his host. It was insisted in the argument for the defendant that, although the plaintiff had paid the purchase money within the time required by the law, yet as he (262) did not take out a grant and perfect his title until November, 1841, which was more than two years from the date of his entry, the grant is inoperative, unless he can bring it within the provisions of some of the statutes extending the time for perfecting title, and that if this case falls within any of those statutes, his grant must give way, under the proviso, to the defendant, who had in the meantime obtained his grant. The argument assumes that the law requires a grant to be taken out within two years, from the date of the entry, notwithstanding the purchase money has been paid within the time required by law. In this the counsel are mistaken. If the purchase money be paid in due time, there is no law fixing upon any particular time within which the grant must be obtained. The enterer is looked upon as a purchaser who has paid the price and may call for a title when he chooses, with this restriction only, that if his entry be vague it cannot amount to notice, and even when it is so specific or has been made so by a survey, that he can allege notice, still, if he is unable to prove it, and any other person makes

an entry *without notice,* he loses his right. Subject to this risk, he may call for a grant when he chooses, as the law now stands.

Laws 1796, ch. 445, sec. 13, required *grants* to be *taken out,* as well as surveys to be made, within two years after the date of the entry, although the purchase money had been paid in due time. Laws 1804, ch. 651, *ib.,* repeals so much of the act of 1796 as required grants to be taken out, but surveys were still required to be made within two years from the date of the entry, and there are acts regularly extending the time for making surveys, and some of the acts extend the time for taking out grants, without any necessity for it, unless in cases where the purchase money had not been paid in due time. Laws 1836, ch. 42, Rev.
(263) Stat., "Entries and Grants," has no provision requiring either that the surveys should be made or that grants should be obtained within any limited time, provided the purchase money is paid within the time required; and thus the act of 1796 is repealed; but persons who have made entries and paid the purchase money, by neglecting to perfect title, take the chance of losing the entries and their money, if any other persons enter upon the land whom they cannot prove to have had notice, or if the entry be so vague and uncertain as not to be capable of being identified, in which case it cannot be made the subject of notice. *Harris v. Ewing,* 21 N. C., 369.

There are since the act of 1836 statutes from time to time extending time for perfecting title. They are only necessary when purchase money has not been paid within time required by law, although in some the provision is general, probably because the fact that the act of 1796 has been repealed by the act of 1836 in this particular was not adverted to.

The plaintiff is entitled to a decree for a conveyance from the defendant John Long of so much of the land as is covered by his grant, with costs; and as the injunction heretofore granted has, by an interlocutory order, been heretofore dissolved, if the defendant has taken possession, the plaintiff is entitled to have the possession given up to him and an account of the profits and of the costs at law paid by the plaintiff to the defendant. As to the plaintiff's own costs at law, he is not entitled to a decree, because he ought not to have resisted the recovery, as he did not have the legal title. As to the other two defendants, the bill must be dismissed without costs. The allegation that their testator acted otherwise than as an agent, although not fully sustained, so as to entitle the plaintiff to a decree against them, is still so supported as to show that the plaintiff had a reasonable ground for making them parties and to call for their title.

PER CURIAM. Decree accordingly.

Cited: Gilchrist v. Middleton, 108 N. C., 716, 717.

(264)

HOUSTON ET AL. v. SMITH.

Where a party has had a trial at law on a case exclusively within the jurisdiction of a court of law, a court of equity will not interfere with the judgment, except for some new matter not known to the party while the court of law had the case in its power, and then not for matter to repel the charge by opposing proofs, but such as destroy his adversary's proof.

APPEAL from the Court of Equity of LINCOLN.

In 1827 the plaintiff Houston sold to the defendant a negro girl, 17 years of age, for the price of $350, for and during the life of the defendant, who at the same time executed a penal bond in the sum of $350, with the condition that the negro girl and her issue should be returned to the said Houston at her death, and if the defendant or her assignees should remove the negroes out of the county the said Houston should take immediate possession, as though the defendant was dead.

In 1844 the defendant executed a bill of sale to one Grier for the said girl and her five children, for the life of the defendant, under which Grier took possession and carried the slaves to South Carolina, whereupon the plaintiffs Samuel and James Davis, agents of the said Houston, seized the negroes, alleging that the life estate was forfeited, brought them back to this State, and afterwards sent them to the plaintiff Houston in the State of Mississippi. The defendant thereupon brought an action of trover against the said Samuel and James Davis, and, at Fall Term, 1847, recovered judgment at law for the sum of $1,120, the value of her life estate. On the trial of the action at law the (265) defendants in that action resisted a recovery on the ground that the defendant (then plaintiff) had forfeited her life estate by having sent the negroes out of the State, and to prove that fact, called the said Grier as a witness. Upon his examination Grier denied that he had any knowledge that the negroes had been sent out of the State by the defendant, and stated that he had no communication with her, except by the intervention of one Cunningham, her nephew, who was the subscribing witness to the bill of sale purporting to be made by the defendant to the said Grier, and who delivered to him the bill of sale and the negroes; but Grier knew nothing of his own knowledge as to the act or assent of the defendant. Grier stated that he and Cunningham carried the negroes to South Carolina, where they were seized and taken into possession by the plaintiffs Samuel and James Davis. He could not prove the mark of the defendant to the bill of sale to himself, exhibited in court. The judge who tried the case at law instructed the jury that there was no evidence that the negroes had been sent out of the State by the present defendants, and the jury found a verdict in favor of the

present defendants; damages, $1,150. A new trial was moved for by the defendants (who are now plaintiffs) on the ground of surprise as to the testimony of Grier, and also as to misdirection as to the law. The judge allowed the defendants (now plaintiffs), upon the motion for a new trial, to have the said Cunningham subpœnaed, and he was examined. He stated that he was a witness to the bill of sale by the defendant to Grier, and delivered the bill of sale and the negroes to him, but that Grier was not present when the bill of sale was executed. The motion for a new trial on the ground of surprise was refused. The bill charges that, shortly after the trial, the plaintiffs in this suit discovered that the defendant had executed the bill of sale for said negroes to the
(266) said Grier for the purpose of his taking them out of the State, and that those facts were suppressed and kept secret by a combination between the defendant and Cunningham (her nephew) and the said Grier. The prayer is that the defendant be perpetually enjoined from collecting the sum recovered by her at law.

The defendant admits that she executed the bill of sale to Grier, but avers that she did so because she was apprehensive that the plaintiffs would seek some opportunity to get possession of the negroes and run them out of the State, as the plaintiff Houston had done on a former occasion. She denies any assent, expectation, or belief on her part, when she made the bill of sale to Grier for her life estate, that he would take the negroes out of the State. She denies that there was any combination between her and Grier to suppress and keep secret the fact that she had made the bill of sale. On the contrary, she avers that the plaintiffs knew of the bill of sale, that it was exhibited on the trial at law, and that the said Grier did not have any personal knowledge of its execution, and, as the subscribing witness Cunningham had not been summoned by the plaintiffs (although they knew he was the subscribing witness), the presiding judge before deciding the question for a new trial allowed him to have the said Cunningham subpœnaed. He was fully examined, and, although he proved the execution of the bill of sale, he also proved that Grier had a personal knowledge of the fact that it was made without consideration, that the defendant made it under an apprehension that the plaintiffs would deprive her of the negroes, and that they would be more secure if held by Grier, and that it was surrendered to her before the negroes were taken from the State by the plaintiffs.

(267) *Bynum, Boyden, Alexander, and Thompson for plaintiffs.*
Osborne, Wilson, and Avery for defendant.

PEARSON, J. We are at some loss to know upon what ground of equity the plaintiffs put their case. If it be upon the ground that they have not had a fair trial at law, they have not prayed for a new trail,

but merely pray for a perpetual injunction, as if the matter was there to stop. They do not allege the discovery of any evidence, since the adjournment of the court which gives them in equity a right to ask for a new trial at law, but merely allege that, *after the trial,* they discovered that a bill of sale had been executed by the defendant for the purposes aforesaid.

All this matter was brought to the attention of the judge who tried the case, and, after full deliberation and consideration of all the new matter brought forward by the plaintiffs, he refused to give a new trial, and, being competent to decide, his adjudication must be final. In this point of view the bill cannot be supported, if an appeal to this Court for a new trial had been proper, since the court of law was entirely competent to grant it. *Fentress v. Robbins,* 4 N. C., 610. For although the bill says the alleged combination to suppress and keep secret the fact that the bill of sale was executed and that the purpose of its execution was to enable Grier to run the negroes out of the State was not discovered until after the trial, it does not allege that those facts were not discovered until after the *expiration of the term,* so that the judge at law had no power to act on the case in that point of view, but, on the contrary, the answer shows that the question was presented to the judge, that he gave a day for the production of the witness Cunningham, and refused upon a consideration of all the facts to grant a new trial. This Court is not authorized to say whether his decision was right or wrong. This Court cannot review the decision of a court of law upon a question addressed to its discretion, from which there is no ap- (268) peal, for the same reason that they cannot review a question of law from which there is an appeal. It is only for some new matter, not known to the party whilst the court of law had the case in its power, that this Court has ever interfered, and then not for matter to repel the charge, by opposing proof, but such as destroys his proof. *Peagram v. King,* 9 N. C., 297. Although there is an allegation that Grier did not swear truly, it is not alleged how it can be shown that he swore falsely. The answer supports him in this. He was not present when the bill of sale was executed, and of course did not know, *of his own knowledge,* whether the defendant had executed the bill of sale or not, and the answer positively denies that there was any combination between the defendant and Grier to suppress the fact. It is true, the defendant, on the trial at law, refused to admit the execution of the bill of sale. She was under no legal obligation to admit it, and there is no allegation that the plaintiffs were surprised in consequence of her having agreed to admit it and then refusing; but even this was a matter for the consideration of the judge on the motion for a new trial.

It is suggested that, as the plaintiffs could not have made a defense at law, upon the proof of all their allegations, inasmush as the forteiture of the life estate was not annexed to the title of the slaves, but was inserted by way of condition to a penal bond, that this Court will give relief on the ground that the plaintiff had no defense at law, and the defendant is availing herself of a legal advantage.

The bill was not framed with this aspect, and therefore the question is not fairly presented; but suppose it was, this Court will never aid to enforce a condition by which a vested estate is to be defeated or a forfeiture incurred, but will only grant relief by requiring the party to pay damages and restraining a further breach. If the party provides (269) for himself a legal condition, annexed to the estate, whereby to defeat it at law, a court of equity will nevertheless relieve against a forfeiture or a breach of the condition by decreeing that the bond shall be satisfied or the condition saved by the payment of the damage. Even this relief against conditions by which estates are defeated can only be given when the conveyance is made to secure a debt by way of mortgage, but it never has been known that, where the party has failed to secure himself by a *condition annexed to the estate,* so that it may be avoided at law, equity will lend its aid to enforce a condition and defeat an estate for which a valuable consideration was paid. Equity gives redress for the damage really sustained, and will not enforce pains, penalties, forfeitures, or conditions, and will in most cases restrain the party from enforcing them.

In this case the plaintiffs, if any injury has been sustained, have, by the penal bond of $350, as full redress as they stipulated, for the price of $350 for a life estate in a negro girl of 17 years of age was exorbitant. There is no error in the interlocutory order in the court below.

PER CURIAM. Affirmed.

Cited: Stockton v. Briggs, 58 N. C., 314; *Carson v. Dellinger,* 90 N. C., 230; *Simmons v. Mann,* 92 N. C., 17.

DAVID MILLER v. JOHN HOYLE ET AL.

Where a bond which is secured by a deed of trust is assigned, the assignee shall have the benefit of such security.

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

The plaintiff and Philip H. Bennick were partners in a small (270) retail store, under the management of Bennick. In 1842 the concern became very much indebted, and, in February, 1843, there were executions in the hands of the sheriff and constables to the amount of $2,519. Of that amount Bennick paid $775, with the money of the firm; and he was unable then to raise any more. As the effects of the firm were all in the hands of Bennick, the plaintiff refused to advance the money for the residue of the debts unless Bennick would secure him for so doing, and he insisted that the sheriff should levy the executions on the goods in the store or on the separate property of Bennick to raise the balance. To prevent that extremity, Bennick proposed that Miller should pay the residue of the executions, and that he would, by way of security or indemnity therefor, assign to him a bond, which he, Bennick, then held on John Hoyle for $1,600, and which was secured by a deed of trust for four slaves made by Hoyle to John Holleman; and on 17 February, 1843, upon an agreement to that effect, Miller paid to the officers the sum of $1,353.41 for the debts and costs, and at the same time took from Bennick an assignment of Hoyle's bond. On 31 July, 1843, Miller and Bennick came to a final settlement of their partnership on the following terms: Bennick was to pay to Miller the sums advanced by him as capital, with interest from the dates of the several advances, and to keep all the effects and pay all the debts of the firm as his awn and if he had been the sole owner from the beginning; and accordingly Bennick, after deducting Miller's indebtedness to the firm on that day, gave his bonds to Miller for $1,327 for the advances of Miller as capital, and at the same time the bond of Hoyle was retained by Miller in satisfaction of the sums paid him upon the executions as before mentioned. The bond of Hoyle to Bennick bears date 1 January, 1840, and is for $1,600, payable one day after date and indorsed to the plaintiff, 17 February, 1843. The deed of (271) trust bears date 21 January, 1842, and recites that Hoyle was then indebted to Bennick in the sum of $1,600 on the bond above described, and, for the security of the debt, conveyed four slaves, named, to Holleman in trust that if Hoyle should fail to pay the said debt on or before 1 April, 1843, the trustee should sell the negroes to the highest bidder on a credit of twelve months, taking bond with good sureties for

the purchase money, and out of the same, when collected, should pay the reasonable expenses of executing the trusts, and then discharge the money due on the bond, with interest. The bill was filed in January, 1845, against Hoyle, Bennick, Holleman, and Catherine Hinkle, and charges that all the defendants, knowing that the debt had been assigned to the plaintiff, and intending to defraud him of the whole or some part of it, combined to make a pretended sale of the negroes, on 1 April, 1843, to the defendant Catherine, the mother-in-law of Bennick and sister of Hoyle, for the inadequate price of $1,000, and that Holleman took from her a bond therefor with insufficient surety and refused to transfer that to the plaintiff or pay any part of the price upon his debt; and the bill charges the purchase by Catherine Hinkle was merely colorable and was in fact made by her as the agent of, or in trust for Hoyle himself, who has since kept the negroes as before, and that there was no intention that the price should be paid, but the sole purpose of the sale was to baffle the plaintiff in pursuing his remedy for the money thus due him. The bill further charges that the defendants are all in embarrassed circumstances and not able to make good the value of the slaves, if they should be carried out of the jurisdiction. The prayer is that the deed of trust may be declared to have been a security to the plaintiff for the debt and interest; that the defendants Hinkle and Holleman may be compelled to pay the price of the negroes and

(272) interest thereon, or that the sale by the trustee may be declared fraudulent and void, and the negroes be resold, under the direction of the court, for the satisfaction of the plaintiff's demand; and that the negroes may be taken and held in custody for the safe keeping, unless the defendant or one of them should give security that they should be forthcoming to answer the decree.

There was an order made on the bill for seizing the negroes by the sheriff, and that the defendant Hoyle gave the required bond.

The defendant Bennick admits the assignment of the debt to the plaintiff, but alleges it was only a security for what might be found due to the plaintiff upon a settlement of their copartnership; and he alleges that nothing is due to the plaintiff on that score, and that no settlement has ever yet been made, though he, this defendant, has repeatedly urged the plaintiff to make one.

The defendant Hoyle denies that he owed the sum mentioned in the bond, or any other sum of money to Bennick, and avers that Bennick, before he indorsed the bond to the plaintiff, had expressly promised to surrender it to this defendant in satisfaction of a bond of the same amount which Bennick had given to him, and which he then held. The answer states that the bond was not given when it bears date, but that it was in January 1842, about the time the deed of trust bears date.

and that it was given under the following circumstances and agreement: This defendant was then much indebted, and, besides, one Solomon Hoyle was suing him for an unjust debt, for which he feared a recovery would be made; and he consulted with Bennick as to the best course for him to pursue, and by him he was advised to sell all his other property, except the negroes, for the purpose of paying his just debts, and he did so. That as to the negroes, Bennick advised him that the best way to protect them against the unjust demand of Solomon Hoyle (273) would be for him, the defendant Hyle, to give Bennick a bond for a sum equal to the estimated value of the negroes, and execute a deed of trust for the negroes to secure the payment of the bond; and, in order to assure this defendant against loss thereby, that Bennick should give his bond for the same sum to him, Hoyle, which might be used as a set-off in case any unforeseen event should make it necessary. That accordingly, Hoyle then gave Bennick the bond in question, dated back as of 1 January, 1840, and Bennick then gave Hoyle his bond for $1,600, dated back as of 1 February, 1840, and Hoyle also executed the deed of trust, which bears its proper date. The answer admits that, after the plaintiff got the bond, the defendant prevailed on Holleman to sell the negroes, and that the defendant, having no other resource, procured Catharine Hinkle to purchase them for him, and that nothing was paid thereon, but that the purchase was rescinded by consent of those two persons and Holleman. The answer then states that the plaintiff, at the time he took the bond, knew that this defendant did not owe Bennick anything, because he held the said bond of Bennick; and it insists that, at all events, as the plaintiff took the bond from Bennick after it was due upon its face, the bond of Bennick, held by Hoyle, is a good set-off at law, and therefore in this Court also against it, and prays the benefit thereof.

The answer of Holleman and Hinkle admit the fraud in making the sale of the negroes under the deed of trust from the former to the latter, and that it has been rescinded; and they submit to another sale, if decreed, or to whatever may be deemed right.

Avery and Craige for plaintiff.
Bynum, Alexander, and Williamson for defendants.

RUFFIN, C. J. The plaintiff's equity is fully admitted by the (274) answers, except as to the fact that the bond indorsed to him is his absolutely. Bennick denies that in his answer and says it is only a security, and that he owes the plaintiff nothing. If it were true that the plaintiff holds the bond as security only, the defendant Hoyle would be entitled, upon the admissions of Bennick's answer, to a set-off as to

any surplus of the bond after satisfy the plaintiff's demand against Bennick, and it would be necessary to direct an inquiry to ascertain the sum due to the plaintiff upon the whole partnership dealings, including his advances of capital at first, as well as those made for the discharge of the debts at the time the bond was indorsed. But it is established by a witness who was present that in July, 1843, Bennick and the plaintiff settled all the dealings in a way which made the debts paid by the plaintiff in February preceding the debts of Bennick alone, and that upon that settlement there was over and above the amount of Hoyle's bond, a balance due the plaintiff of $1,327, for which Bennick then gave the plaintiff his bond; and in that statement the witness is sustained by the declarations of Bennick to others, that he and the plaintiff had settled, and by the receipts and bonds which passed at that time between those two persons and which they have filed. It must be declared, therefore, that the plaintiff is the *bona fide* assignee of the bond in question for value, and that he holds it as his own. The Court had some hesitation at first upon the question whether the assignment of the bond gave the assignees the benefit also of the security of the deed of trust. It seemed perfectly just that it should do so, as the incident ought to follow the principal. It would do so between the personal and real representatives of a mortgagee in fee, and in case of an assignment of a bond with a surety and a mortgage as a further security, it is clear the assignee of the bond would, upon the principle of substitution, be entitled to the benefit of the mortgage. So likewise it would
(275) seem it should be where there is no surety, because the assignee of the debts would seem to stand in the shoes of the assignor to every purpose, not only as being liable to all equities against him, but as being entitled to all his remedies and securities, unless agreed to the contrary. And, upon investigation, so it is found to have been decided in several cases. *Foster v. Fox,* 4 W. & Serg., 92; *Wheeler v. Wheeler,* 9 Cowan, 34. It would follow, however, upon the same principle, that the plaintiff would in this Court be liable to any just demand of the debtor against the assignor, attached to the debt assigned; and, according to the doctrine as settled in this State, a set-off is of that character when a note or bond overdue is assigned. We should, however doubt extremely whether the defendant could, upon that principal avail himself of this set-off against the plaintiff, unless he could bring home to him precise knowledge, at the time he took the bond, of the subsistence of the bond of Bennick held by the defendant; for it is a case of flagrant fraud, contrived for the express purpose of deceiving the world, and put into such a shape as of purpose to mislead others upon this point, and, at the same, time intended to enable the deceivers to take advantage of their fraud; for although the debt, according to the face

of the bond, had been due more than three years, yet, according to the terms of the deed of trust, it was not due and would not be for six weeks after the assignment; and there can be but little suspicion that the bond given by Bennick to Hoyle, as alleged, was known to the plaintiff or any one else but the parties to it, since the very purpose of it, as now stated, required that it should be kept from the world, let the fraudulent nature of the debt to Bennick and of the deed of trust should be discovered and thus avoid that deed. It is, under the circumstances, much the same as if Hoyle, knowing that the plaintiff was about paying his money on the bond, had encouraged him to do so, or had at least stood by without saying anything, when he saw that the plaintiff was led by the deed of trust to believe that the parties did not consider the money as (276) having fallen due, but that the debts still subsisted. It is not, however, necesary to declare the law upon that point, inasmuch as this defendant has not taken the requisite proof to establish the debt he relies on as a set-off. He has exhibited the bond purporting to be that of Bennick to himself for $1,600, dated 1 February, 1840, and due on day after date. But it is not attested, and the defendant Hoyle has not even proved the handwriting of the alleged obligor, much less taken evidence to establish the existence of the bond prior to the transfer of the debt to the plaintiff. Such proof would be indispensable in such a case, since from the conduct of these parties, as admitted by themselves, it might well be presumed that the pretended bond would be fabricated after this controversy arose, and that they have failed to prove its prior subsistence, only because they could not. This party, indeed, upon the defect of the proof in this respect being pointed out at the hearing, pressed the court to open the case for further proof. But that could not be thought of for a moment, since such indulgences are given only in furtherance of right. It would be a disgrace to the administration of justice if an extraordinary favor were granted to enable a party to supply a defect in so iniquitous a defense. The court, therefore, refused the application; and it must now be declared that the defendant Hoyle has failed to establish that the other defendant, Bennick, gave to him the bond for $1,600, as alleged in his answer; and as it is admitted in all the answers that the sale hitherto made under the deed of trust was all a sham, it must be decided that the defendants Hoyle and Holleman produce the negroes to the clerk of this Court to be sold, and that they, or as many of them as may be necessary, be sold by the clerk, after the usual notice, to the highest bidder for ready money, so as to pay to the plaintiff the sum due upon the said bond given by the defendant (277) Hoyle, and as the defendants do not allege any payment, the sum due thereon is found to be $1,600, with interest at the rate of 6 per cent from 1 January, 1840, until payment; and it will be ordered that Holle-

man join with the clerk in conveying the slaves to the purchaser or purchasers. Of course, the defendants must pay all the costs.

In the course of the cause Joseph Barringer filed a petition in it, stating that on 16 August, 1844, the defendant Hoyle conveyed to him two of the slaves included in the deed of trust, named Ann and Jane, by way of mortgage to indemnify him against loss as the surety of Hoyle in a bond for $206, before that time given to one Henry Rhodes, and praying that they might be discharged from the sequestration in order that he might sell them to raise the money for the discharge of the debt, agreeably to a power contained in the mortgage. An inquiry was directed as to the petitioner's right, and the master reported that the debt was a just one.

The Court can give no relief upon the petition, as against the plaintiff, whose encumbrance is prior and preferable; and all that can be done for the petitioner is to direct that the negroes which are not mortgaged to Barringer shall be first sold for the satisfaction of the plaintiff, so that if he should be paid before all the negroes are sold, Barringer may take those or that one of the two mortgaged to him which may remain after paying the plaintiff.

PER CURIAM. Decreed accordingly.

Cited: *Cannady v. Roberts, post,* 429; *Winberry v. Koonce,* 83 N. C., 355; *Watson v. Dobbin,* 89 N. C., 109.

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(278)

CHARLES McDOWELL ET AL. V. A. H. SIMMS ET AL.

Although the secret employment of a by-bidder at an auction sale may be a fraud upon the vendee, yet the latter must aver in his bill and show that he abandoned the contract as soon as he discovered such fraud.

APPEAL from an interlocutory order made at Spring Term, 1849, of RUTHERFORD Court of Equity, *Bailey, J.*

The bill states that a certain tract of land, lying in the county of Rutherford and particularly described in the bill, belonged in fee to the defendants as tenants in common; that the said land was offered at public sale to the highest bidder, by the defendants, on 20 May, 1845, when the plaintiffs were the lastest and highest bidders and became the purchasers at the price of $2,008, for which the plaintiffs gave their bonds, according to the terms of the sale, one due in twelve months for $1,004 and another at two years for the same amount; that on each of these bonds suit was brought in Rutherford Superior Court of Law, and, on

the first, judgment was rendered against the plaintiffs at Fall term of the said court in 1847, and that the suit on the other bond is still pending, and the defendants threaten to take out execution on the said judgment and to prosecute the other suit to judgment and force the collection of it also by execution. The bill further states that when they gave the said bonds they received a bond from the defendants to make a title to the said land, but that as yet no deed of conveyance has been actually made. The bill further sets forth that the said tract of land is worth but little, probably not more than $400 or $500, for agri- (279) cultural purposes or indeed for any purpose, unless gold mines could be found on its surface or in its bosom; that when it was advertised to be sold as above set forth, it was advertised, not as a farm, but as a valuable gold mine, and it was so represented repeatedly by the said heirs, and one Thomas Jefferson and others, who, as the plaintiffs understood and believe, were procured by them to do so with a view to puff the property and cheat the purchaser, both before and on the day of sale; that one of the defendants often urged one of the plaintiffs to attend the sale, and assured him it was worth $10,000, but that he was not able to purchase it, or else he would do so at any price, and assured the said plaintiff that a large proportion of the lowgrounds, many acres, would yield two or more pennyweights of gold to the hand per day. The bill further states that, on the day of sale, when the plaintiffs purchased the said land, the said heirs or some of them and the said Thomas Jefferson, agent for others, were present and employed divers persons to puff the said lands as containing a valuable deposit gold mine, and also among others one Preston Long, who was the son-in-law of one of the defendants, resided in the immediate neighborhood of the land, professed to be well acquainted with the land, as no doubt he was, and who represented it as being very valuable for the purpose of mining for gold. The bill further charges that the said Preston Long was secretly employed by the defendants or their agents in conducting the sale, and with the knowledge and consent of the defendants, not only to puff the said land, but also as a by-bidder to run the land up greatly beyond its value; that the said Long did accordingly bid and run the land up, and these plaintiffs were the more induced to bid on account of Long's connection with the family and well-known acquaintance with the land. The bill further states that the plaintiffs were (280) entirely unacquainted with the land, and were induced to purchase solely from the false representations of the defendants and their agents, and from the bidding of the said Long. The bill further states that the land is utterly worthless for mining, and that, after employing hands for several months, the plaintiffs have been unable to find gold enough to defray the expense, and that they have requested the defend-

ants to rescind the contract, which they have refused to do. The prayer is that the contract may be rescinded, and in the meantime for an injunction.

The answer admits that Long was employed as a by-bidder, but avers that it was done solely for the purpose of preventing a sacrifice of the land, and not with any fraudulent intent, and it denies that the defendants made any false or fraudulent representations about the value of the land, either on the day of sale or at any other time.

Upon the coming in of the answer, the injunction which had been granted was dissolved, and the plaintiffs, by leave, appealed.

N. W. Woodfin and Iredell for plaintiffs.
Avery and Guion for defendants.

PEARSON, J. We concur in opinion with the judge below, and think, upon the answers, which are to be taken as true in this stage of the proceedings, the injunction ought to have been dissolved. The general allegation of fraud by a false representation of the value of the land as a gold mine, and by a combination among the defendants by such representations to defraud the plaintiff, is positively denied by the answers, fairly and without evasion. It was the ordinary case of a vendor's praising the property offered for sale. "A splendid article, a valuable gold mine, worth not less than $10,000," are words used by vendors or persons offering to sell, and understood by purchasers or persons wishing to buy to be unmeaning, and pass for what they are worth.

(281) The specific fraud alleged is that one Long, at the instance of the defendants, who offered the land for sale, bid for the land and ran it up to the price of $1,950, with an understanding between him and the defendants that if the lands fell upon his hands at the bid, it should be no sale, but the title was to be with the defendants; whereas the terms of the sale were that the land should be sold to the highest and best bidder, and no right was reserved or notice given that Long was bidding for the vendors. Whether his by-bidding vitiates the sale, so as to give the plaintiffs an equity, upon that ground alone, to repudiate the contract, is a question about which the authorities do not agree. *Lord Mansfield,* in *Bexwell v. Christie,* Cowper, 355, and *Lord Kenyon,* in *Howard v. Costel,* 6 Term, 642 held that such by-bidding does vitiate the sale, and that the purchaser is at liberty, without more saying, to refuse to abide by his contract or purchase. On the other hand, *Lord Roslyn* and *Sir William Grant* have each questioned the soundness of the doctrine. *Coudley v. Parsons,* 3 Vesey, 625; *Smith v. Clark,* 12 Vesey, 477. They hold that by-bidding, when it is not done for the purpose of inflating, but merely to prevent the sacrifice of the property, fur-

nishes no ground, of itself, to vitiate a sale. We are inclined to the opinion of *Lords Mansfield* and *Kenyon*. If persons wish to reserve a right to buy in unless the property sells for more than a given sum, good faith requires that bidders should have notice, and a secret bidding with this view would seem to be a fraud, where the terms of sale are to the highest and best bidder, and it is impossible, as *Lord Roslyn* and *Sir William Grant* attempted to do, to run a dividing line so as to say when this by-bidding is intended for puffing and when merely to prevent property being sold at a sacrifice. In the nature of things, any by-bid tends to inflate the price, more or less, except it be announced to be a bid for the owners of the land. We are not called upon in this (282) case to decide the question definitely; for, be it either way, it is certain that a purchaser who wishes to avail himself of such an objection must do so as soon as the fact comes to his knowledge, and cannot go on to test the mine, so that, if it turns out not to be rich, he falls back upon the objection that there was a by-bidder. There must be good faith on both sides, and the purchaser, as soon as he discovers that there has been by-bidding, must make his election. The bill does not allege when the plaintiffs discovered that Long was a by-bidder. It may be that he knew it at the time of the sale, or soon afterwards, before they gave their bonds. At all events, there is no allegation that they did not know it before they went on to explore and test the mine fully, and their wish to repudiate the contract, as the case is now presented to us, would seem to be because, upon examination, there was not as much gold to be found as they hoped for, and not because, by reason of the by-bidding of Long, they had been surprised and induced to give more than they otherwise would. This pretext of a by-bidding has now the appearance of being set up as a ground for getting clear of a bargain which may be a bad one, whereas if the gold mine had proved to be valuable it never would have been heard of.

There is no error in the interlocutory order appealed from.

PER CURIAM. Affirmed.

Cited: *Tomlinson v. Savage, post,* 437; *Alexander v. Utley,* 42 N. C., 245; *McDowell v. Simms, ib.,* 50; *s. c.,* 45 N. C., 134; *Francis v. Love,* 56 N. C., 323; *Whitfield v. Hill,* 58 N. C., 321; *Knight v. Houghtalling,* 85 N. C., 31; *Caldwell v. Stirewalt,* 100 N. C., 206; *Davis v. Keen,* 142 N. C., 504.

(283)

THOMAS D. KELLY v. E. AND L. BRYAN.

Where a deed is absolute on its face, it cannot be converted into a mortgage or security for a debt merely by evidence of the declarations of the parties or the unaided memory of witnesses. There must be proof of facts and circumstances *dehors* the deed, incompatible with the idea of an absolute purchase and leaving no doubt on the mind. There must be an allegation that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue advantage.

CAUSE removed from the Court of Equity of RUTHERFORD, at Spring Term, 1849.

The bill seeks an account of property conveyed in 1842 by the plaintiff to the defendants, in trust to pay certain enumerated debts.

The defendants aver that, in 1845, all the matters connected with the trust were referred to arbitrators, who, after full investigation, fairly stated the account, and made an award, in pursuance of which all the property undisposed of, for the purpose of the trust, was surrendered to the plaintiff, except four slaves, which were retained by the defendant E. Bryan for the purpose of being sold to pay the balance found in his favor. These slaves have since been sold. It is, therefore, insisted that the award is conclusive as to all matters up to the time it was made; and the defendants submit to account for the price of the slaves retained.

Guion and Avery for plaintiff.
Gaither for defendants.

(284) PEARSON, J. The plaintiff does not set out any specific mistake or error in the award, but attempts to impeach it on the ground of unfairness on the part of the arbitrators. There is no proof to sustain this allegation. And on the further ground that the same persons selected to act called in one Mr. McIntire, who acted and signed the award with them. The plaintiff consented that McIntire should be called in and should act with the four originally chosen. His signing the award with them can in no point of view vitiate it. The Court, therefore, declares its opinion to be that the award is *conclusive* as to all matters connected with the trust up to the time it was made. There will be a reference for an account as to the four slaves retained, in which the defendant E. Bryan will be credited with the amount found to be due him, with interest, after deducting the amount found to be due by the defendant L. Bryan, and charged with the price for which the four slaves have or ought to have been sold, and such hires as may have been received and such profits as may have been made by their labor since the award, subject to a proper allowance for clothing, etc.

In the second place, the bill charges that in 1840 the plaintiff conveyed two slaves, Ember and Charles, to one Puryear and Poindexter to indemnify them as his sureties to a debt of $900; that the bill of sale, although absolute on its face, was executed with the understanding that the plaintiff might redeem by paying $900; that in the Fall of 1841 Puryear and Poindexter conveyed the slaves to the defendants, who paid the $900 and took the conveyance, at the request of the plaintiff, with the same understanding as to his right of redemption. Charles has been in the possession of the defendants ever since. Ember was also kept by them until 1846, when an arrangement was made by which Alfred was substituted for Ember, and Alfred has since been in their possession. The plaintiff insists that the defendants have received (285) large sums for the hires and profits of these slaves, and that he has a right to an account and to redeem Charles and Alfred. The defendants deny that they paid the $900 and took the conveyance at the request of the plaintiff, or that he was to have a right to redeem. They aver that they paid the money and took the conveyance at the request of their sister, who is the wife of the plaintiff, as they were fearful that, being a thriftless man, addicted to hard drink, he would waste his substance and leave her in a destitute condition, and they intended to allow her to redeem the negroes and have the title secured to her sole and separate use. They have had possession of Charles ever since; they allowed their sister to keep Ember and retain his wages in the blacksmith shop, for the support of herself and family, from the time of their purchase in 1841 until 1846, when Alfred was substituted for Ember, who was sold for $500, which was applied to the plaintiff's debts; since which time they have also had possession of Alfred, and had no expectation that their sister would be able to redeem. They aver that their intention to allow their sister to redeem was as a favor and not as a right, and at no time did they ever admit a right in the plaintiff to redeem or hold any obligation upon him to refund the $900. They insist that it is iniquitous in him now to attempt to set up a right to redeem and call for an account, since, during the whole time, the risk had been theirs if one or both the negroes had died.

Mr. Puryear, whose deposition has been taken, states that when he and Poindexter took the bill of sale there was no understanding that the plaintiff was to have a right to redeem. But, afterwards, as the price was considered low, and they understood that the plaintiff's wife wished to be allowed to pay the $900 and have the negroes conveyed to some friend for her use, they concluded to allow either the plaintiff or his wife to redeem, and informed the plaintiff of this intention, and further informed him that they only desired to be indemnified, but did not like the matter to stand in that condition. The witness says (286)

he and, as he supposes, Poindexter were under the impression that they were acting in pursuance of some arrangement of the kind when they conveyed to the defendants.

Another witness says that, about the time the conveyance was executed, he heard the defendant and Larkin Bryan say that he and his mother were taking the conveyance to give "the plaintiff and his wife" or "the plaintiff and his family" a chance to redeem.

Another witness says he was present, and his understanding was that the defendants were acting for the benefit of their sister, and that there was no idea entertained by any of the parties that the defendants were acting in the matter for the benefit of the plaintiff, or that he was to have a right of redemption.

It is a rule of the common law that parol testimony shall not be admitted to add to, vary, or explain written instruments; for the very sound reason that written memorials are surer and beter evidence than the slippery memory of witnesses.

Courts of equity have made some exceptions to this rule for the purpose of *preventing fraud,* but the jurisdiction is exercised sparingly and, many think, with very doubtful policy.

In equity plaintiffs are allowed, by making the proper preliminary allegations, as that a certain clause was intended to be inserted in a written instrument, but was omitted by the ignorance or mistake of the draftsman, or by some fraud or circumvention of the opposite party, or some oppression or advantage taken of the plaintiff's necessities, or when an unlawful trust was designedly omitted to evade the law, to call for a discovery on the oath of the defendant. If the fact is confessed, the plaintiff can have relief. If it be denied, although it was for a (287) long time questioned, it is now settled that, provided the matter can be established, not merely by the declarations of the parties or the unaided memory of witnesses, but by facts and circumstances *dehors* the instrument such as are more tangible and less liable to be mistaken than mere words, equity will give relief by considering the clause thus shown to have been omitted, as if it had been set out in the instrument. *Streator v. Jones,* 10 N. C., 423.

The facts and circumstances *dehors* relied upon in that case were gross inadequacy of price; the possession being retained by the plaintiff and the payment of interest; and there was the preliminary allegation of oppression to account for the clause of redemption not being inserted. The plaintiff was a man hard pressed for money, and was forced to consent to the omission of the clause, the matter being cut short by the defendant saying, "Here, take the money you want, and trust to my word." Many other cases fully settle this to be law, that, "provided it appear to have been the real intent of the party to have the clause in-

serted and the instrument was put in the form of an absolute deed by ignorance, mistake, fraud, or undue advantage," equity will treat the instrument as if the clause was inserted. *McDonald v. McLeod,* 36 N. C., 221.

In *Franklin v. Roberts,* 37 N. C., 560, this further restriction is added: "When the answer denies the right of redemption, the proofs must be clear, consistent, and cogent, composed of circumstances incompatible with the idea of an absolute purchase and leaving no doubt on the mind."

The cases all show by what narrow limits the exception to the general rule of evidence is circumscribed. It is allowed to protect against fraud; but it leads to perjury, and is a weak protection against fraud; for a man who will commit a fraud most usually will swear falsely rather than *"confess it"* and give up his expected gain. Hence (288) it is rigidly required that there should be an allegation that the clause was intended to be inserted, but was omitted from some of the causes above stated, otherwise there would be encouragement given to secret trusts, and the door to let in perjury would be opened wide without any necessity on the ground of preventing fraud.

The above cases are referred to for the purpose of showing how entirely short, in *every particular,* the present case falls of the limits fixed to the admitted exceptions to the general rule:

1. The right of redemption is not confessed, but is positively denied without evasion.

2. There is no allegation that the alleged right to redeem was intended to be inserted in the deed from Puryear and Poindexter to the defendants, or any reason suggested why it should not have been inserted, if, in truth, there was any such understanding.

3. There is no allegation of surprise, mistake, fraud, or oppression; in fact, there could have been no oppression, for the plaintiff was not the debtor of the defendants and they paid the same price that he had agreed to take from his vendees, which does not appear to have been inadequate; for one of the slaves, the best blacksmith, was sold for $500.

4. There are no circumstances *dehors* the deed inconsistent with the idea of its being absolute. The price as above stated was not inadequate. The defendants did not claim or take any evidence of debt from the plaintiff for the $900.

The possession was not retained by the plaintiff, as if it had been a mortgage. One of the slaves was taken into possession by the defendants immediately; the other was allowed to remain in the possession of the defendant's sister, who was the plaintiff's wife, for some four years, when Alfred, who was exchanged for him, was taken into possession by

(289) the defendants; and the possession of one of the slaves by the defendant's sister is not inconsistent with an absolute purchase for the purpose of rendering aid to her.

5. When the matters connected with the trust fund were referred to arbitration, no claim of a right to redeem and call for an account was set up as to these negroes.

6. The parol proof of declarations by which the plaintiff seeks to set up a right to redeem is vague and unmeaning; no two witnesses agree in their recollection, thus giving a striking proof of the wisdom of the rule of the common law, and the necessity of restricting the exception to the rule by very narrow limits.

We therefore declare our opinion to be that the plaintiff is not entitled to redeem the slaves.

PER CURIAM. Decreed accordingly.

Cited: *Sowell v. Barrett*, 45 N. C., 54; *Brown v. Carson, ib.*, 275; *Clement v. Clement*, 54 N. C., 185; *McKethan v. Murchison*, 73 N. C., 434; *Shields v. Whitaker*, 82 N. C., 521; *Link v. Link*, 90 N. C., 238; *Watkins v. Williams*, 123 N. C., 175; *Porter v. White*, 128 N. C., 43; *Frazier v. Frazier*, 129 N. C., 30; *Avery v. Stewart*, 136 N. C., 432; *Taylor v. Wahab*, 154 N. C., 224; *Sandlin v. Kearney, ib.*, 605; *Culbreth v. Hall*, 159 N. C., 591.

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(290)

RULE ADOPTED BY THE SUPREME COURT AT MORGANTON, AUGUST TERM, 1849.

ORDERED by the Court, That whenever a judgment at law is obtained by the plaintiff, it shall be at the option of the plaintiff's counsel, without a special motion to the court, to have his execution for debt or damages returnable to the Superior Court of law of the county from which the record was transmitted to this Court.

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

DECEMBER TERM, 1849

WILLIS A. ROYSTER v. LITTLEBERRY CHANDLER.

In this case a motion was made to remand the cause because it had been set for a hearing and ordered to be transferred to the Supreme Court at a special term of the court below: *Held*, that the order of the court below was right, and the motion to remand, on the ground that the court below had no right to make such an order, was refused.

CAUSE removed from the Court of Equity of GRANVILLE, at Special Term in June, 1849.

W. H. Haywood, Gilliam, and Lanier for plaintiff.
Graham, J. H. Bryan, and T. B. Venable for defendants.

RUFFIN, C. J. A motion has been made to remand this cause (292) upon the ground that it was improvidently removed. The facts are that, at the regular term on the first Monday of September last, the case was continued on replication to the answer and an order for commission, and that a special term of the court was then appointed for a day prior to the present term of this Court, and at the special term the cause was set down for hearing and ordered to be sent here.

As the purpose of the special term is to expedite the administration of justice, the court, at a term of that kind, ought to possess all the powers necessary to that end, and, therefore, to be considered as possessing all which could be exercised at the stated terms, except as far as they may be withheld by the acts either expressly or implicitly. Acts 1844, ch. 10, requires all causes on the civil docket to be tried at the special terms, but directs that no process shall be made returnable thereto

except such as may be requisite to obtain the attendance of witnesses. That excludes the cognizance of criminal cases and suits in equity, and the bringing in of a party either originally or for the purpose of reviving. But in other respects it would seem that all the functions belonging to the court are to be exercised at a special term, which is substantially an additional term, or one in anticipation of the regular term, and nothing more or less. Laws 1848, ch. 29, extends the powers and duties of the court at special terms to causes in equity. It requires that those remaining undecided at the preceding term shall be decided—meaning, of course, such as stood ready for decision and were not decided for want of time. And it furthermore requires that such orders, rules, and decrees shall be made in all such suits as may be proper, according to the course in equity proceedings. Then, although parties cannot be brought in at a special term, it seems clear that in all
(293) causes already constituted (except criminal cases) both the purpose and words of the statutes merely substitute a special for a regular term, both on the law and equity side of the court. It was objected to this construction that one of the parties might at the time have sued out commissions returnable to the next regular term, and that it would be incongruous in the act to allow those orders to be made at the intermediate special term. If that had been the state of the facts, and one of the parties had not prepared his case to be set down, on objection the court might, and doubtless would, have refused to make the orders at that time. But there was no objection on that ground, nor indeed on any other. The question, therefore, is solely as to the power of the court, at a special term, to take cognizance of a cause which was not before set for hearing; and upon that, for the reasons stated, we conceive the authority is full.

PER CURIAM. Motion denied.

Cited: *White v. Butcher,* 97 N. C., 10.

BYTHAN B. ALLEN v. JOHN B. ALLEN ET AL.

1. In this State a wife has no right to have a provision made for her out of a distributive share accruing to her during her coverture.
2. And the husband is not at liberty to make a voluntary disposition of such distributive share, even in trust for his wife, so as to prevent it from being liable to the claims of his creditors.

CAUSE transferred from the Court of Equity of JOHNSTON, at
(294) Spring Term, 1849.

Henry W. Stevens was entitled to real and personal estates, and died intestate on 14 February, 1847, leaving no issue, but several heirs at law and next of kin, of whom a sister, Amanda, then the wife of John B. Allen, was one. On 22d of the same month the husband, for the nominal consideration of $1, conveyed and assigned to Jacob A. Stevens all his estate and interest in the land descended to his wife from her deceased brother, and also the distributive share of the personal estate of the intestate to which his wife and he in her right were entitled, upon trust to hold the same to the sole and separate use of the wife during her life, and at her death to convey the same to such persons and for such purposes as she might by will appoint. John B. Allen had no other visible property, but was insolvent at the time, and the plaintiff was his creditor by a judgment rendered in 1846, on which an execution was returned *nulla bona*. The bill was filed in March, 1847, against John B. Allen and his wife, the trustee and the administrator of the intestate, and charges that the deed was executed voluntarily and for the purpose of securing those interests to the wife in fraud of the plaintiff and other creditors of the husband; and it prays that it may be so declared, and that satisfaction of the plaintiff's judgment out of the distributive share may be decreed. The administrator submits to account for the estate as soon as it can be got in, and to pay the distributive share in question as he may be directed by the court. The other defendants did not answer, and the bill was taken *pro confesso* as to them.

H. W. Miller and Husted for plaintiff.
G. W. Haywood for defendants.

RUFFIN, C. J. The particular point which arises here has not (295) been presented to the Court before. But upon the principle of *Bryan v. Bryan,* 16 N. C., 47, and of *Lassiter v. Dawson,* 17 N. C., 383, it must be held for the plaintiff. Those cases establish that in this State a married woman has no equity against an insolvent husband, or his creditors, for a provision out of her legacy, distributive share, or other equitable property. It was there known and submitted to be clearly settled otherwise in England, and also in several parts of this country; and it is now believed that the doctrine of the courts of equity in nearly all the States accords with that in England. Such a concurrence of opinion among those who administer the system of equity which, even to its details, is generally adopted in this State, is well calculated to make it somewhat surprising that in this respect our decisions should establish an exception; for unless one adverts to the peculiar state of our law touching the provisions for widows, it may well seem singular that a wife's claim for a settlement out of her own property should not be

deemed as equitable here as it is elsewhere. If the present members of the Court entertained, indeed, opinions on that qustion different from those of their predecessors, they would, nevertheless, feel bound to adhere to what was thus distinctly decided twice with unanimity and has been regarded as at rest for about twenty years. But, in truth, there were reasons, we think, quite sufficient for not adopting here the notion of the supposed equity of the wife. The rule had its origin in the maxim that he who seeks equity must do equity—assuming it to be equitable, when a husband asked the assistance of a court of equity to get in his wife's property, to refuse it to him unless he had made out of his estate, or would make out of hers, an adequate settlement on her. The reasons for that course of the chancellor undoubtedly were, that by the law of that country and its fixed habits a wife had no adequate security for a livelihood but by a settlement made by the husband of his own accord (296) or under the direction of the court; for a woman has no absolute right in England to a share of her husband's personal estate; but he may dispose of the whole of it before his death or by his will. It was also an incontestable fact that by the introduction of uses and trusts and the habits of putting the titles of nearly all of the lands in England in trustees, dower in that country was not a source of livelihood which could be at all relied on. The husband defeated it by conveying his estates, just before marriage, in trust for himself and making subsequent purchases in the name of a trustee. Then, as a woman might be left destitute of any personal provision, if the husband chose, however large his wealth, and also as the permanent provision intended for her by the common law out of his land was, by the devices of the husband, practically lost, and as by the course of descents the males are preferred, and therefore women are not apt to have land of their own, there arose the clearest case imaginable for the interposition of either the legislature or the chancellor in aid of the wife's claim for protection against destitution. It happened that the Parliament left the matter to the courts; and from that necessity of creating some substitute for he legal provision to which the wife was once entitled, and habitually enjoyed, sprang the adjudications on which the system now prevailing was built. But if in the middle of the eighteenth century Parliament had taken up the subject from its foundation, and enacted new and indefeasible provisions for the wife, out of the legal and equitable estates of her husband, one is apt to conclude that it would not have required restraining words in the statute to induce the chancellor to desist from further intercepting the exercise of the legal marital rights of the husband over any part of his wife's fortune. Such modern enactments must be received by courts as the authentic exposition of what is deemed by the Legislature fit to be established as the rights of the husband and the wife in the state of

society now existing, and respected accordingly. Now that was (297) precisely the condition of things in this State. Our Legislature did not leave it to the courts to adjust the rights of husband and wife in the points in which they had lost the equilibrium which originally existed at common law. On the contrary, the Assembly at an early period began a course of legislation on this subject which indicated an intention to frame a new system of our own, and has resulted in establishing a system whereby such legal provisions are secured to married women as seemed to the Legislature to be suitable to the state of our country and the habits of our people. By it a woman is dowable of one-third of all inheritances of which the husband dies seized, and also of trusts, equities of redemption, and other equitable estates of inheritance; and all conveyances by the husband with the intent to defeat dower are avoided; and dower, or devise in lieu of it, is exempt from the debts of the husband. Of the personal estate she is entitled to one year's provision for herself and family, and absolutely to one-third of the surplus, if the husband left not more than two children, and, if more, to a child's part. And if the husband make a will, and do not therein make provisions for the wife equal to those specified, she may signify her dissent, and shall then have those provisions made good out of the other parts of the estate. Moreover, a summary remedy is given for the recovery both of the dower and distributive share. It is obvious that the Legislature has departed entirely from the common law and from the previous course of equity in respect to provisions for married women, and hath established a code of our own—in many respects, indeed, much preferable for the wife. It secures to the wife indefensible interests in all parts of her husband's estate, and exposes her to destitution in the single case only of the husband himself becoming destitute. Against that, provision might be made by settlement, which, however, has hitherto been unusual and is not (298) yet common with us. But if there be no settlement, the presumption is that, in respect to fortune, as in other things affecting their happiness, they intend by marriage to embark in one bottom, and to sink or swim together. The Legislature plainly considered that the wife's interests were sufficiently secured, and those of the issue best promoted, by placing her rights upon the footing that the husband should do as well for his wife as he did for himself and his children, and that if he provided a livelihood for himself and his issue, he should also for her. But suppose the Court to conceive that the code was imperfect in some respects and did not do ample justice to the wife, could we then assume authority to supply those supposed defects in legislation by continuing to her those equitable rights against her husband's legal power of disposition of her *choses* in action or equitable property which had been

conferred on her when and because she was substantially without any legal rights in any part of the husband's property unless by antenupital contract? It is thought not. For the fact that the Legislature hath thus superseded the provisions for her previously existing, and secured to her others more valuable, would seem to be almost conclusive that it was the purpose to simplify and fix definitely, as legal rights, all the claims which the wife should have out of the husband's estate, or set up in restraint of the powers which the common law gave him over any part of hers. However much the court of equity might be justified in interfering, on behalf of the wife, to supply defects in the ancient legal system which had gradually grown or been developed through a long course of time, it is hardly justifiable in any conceivable case in a court to take such liberties with legislation so recent as to make it impossible to suppose the lawmakers did or would not think it adequate to all the (299) exigencies of society now existing. More especially was the court obliged to take that view of the matter in 1826, as the construction and effect given to our statutes had been universally acquiesced in up to that time, and the supposed equity of the wife was then first suggested with us. Until that period it was the common experience that husbands and wives alike relied on their legal rights, and each, though claiming no more, claimed them; so that the husband had universally dealt with his wife's equitable property as his own, whenever it was capable of being reduced into possession during the coverture. The conclusion of the Court, then, is that *Bryan v. Bryan,* 16 N. C., 47, was good law, and that a wife has no such equity as was there denied to her. That point being settled, it would seem to follow that the husband has such an interest in the distributive share accruing to the wife, and that it is substantially so much his property as to render a voluntary assignment of it by him, when insolvent, a fraud upon his creditors. It would be so if the assignment were to a stranger without value. It must be as much so when the assignment is to the wife after marriage, or to a trustee for her. She does not claim under her original right. That was extinguished by the husband's assignment, and she claims exclusively under the assignment; and the question is, whether it is valid against his creditors. The husband's interest, it is true, is not so vested in him finally as to make the distributive share his to all purposes. It cannot be attached for his debts, nor can he sue for it in his own name, nor transmit it to his representative; but, if not got in o rdisposed of by him during the coverture, it will survive to the wife or her representative. It is not supposed a court of equity would decree payment of the husband's debt out of the wife's distributive share, if it be left by the husband outstanding and not affected by any dealing of his, because that would in effect be to compel him to assign it either in whole or in

part, and would, to that extent, interfere with the contingent (300) right of survivorship which the law leaves in the wife and of which there is no ground for equity to deprive her. It may be said, then, that the creditors have no such right to satisfaction attaching itself to this property as entitles them to complain of any disposition the husband may make of it. But it seems otherwise to the Court. This interest would clearly pass to the assignees in bankruptcy. That is settled in England, subject, indeed, to the wife's equity, of which we have before spoken, which exist there, but not here. So he could not be discharged as an insolvent debtor under our law without including this interest in his schedule; for, although the act speaks of the estate, goods and effects of the debtor, yet it is a part of the oath that the schedule contains all securities and contracts "whereby any benefit or advantage may accrue to him," and it cannot be supposed that one may be lawfully discharged as an insolvent today with the power of selling or reducing to his possession, tomorow, his wife's distributive share to his own use. There is no middle ground, and it must be, therefore, that the insolvent husband may be kept in prison under a *ca. sa.* until he appropriates his wife's choses to the satisfaction of his creditors, or that the wife is entitled to have them secured to her absolutely as against him—since he cannot keep them for himself, even contingently. Having held that the wife is not thus entitled, the other part of the alternative must be enforced. If, indeed, the creditor will not proceed by that mode to obtain an appropriation of this interest during the life of the husband or before he disposes of it effectually to some one else, it is his own lookout. If the husband will not make the assignment, but rather lie in jail, there is no help for the creditor against the surviving wife. But the creditor has a right to be satisfied out of the fund wherever the husband by any act makes it his own. If he gets in the demand in money or specific property, the creditor can look to it for satisfaction. So (301) if he sell it, the price is subject in the same manner. It is, therefore, fraudulent in him, as against his creditors, to convey it voluntarily, since he thereby extinguishes his wife's right as the next of kin, and his voluntary assignee ought not to hold in preference to the creditors. Then, as our law denies an equity in the wife to a provision out of this demand, the assignment in trust for her is purely voluntary, as much so as if it were to a stranger without a price. All the cases in which settlements of such interests on the wife and children have been upheld distinctly place their validity on the equity of the wife as a subsisting independent interest, amounting to a valuable consideration for the disposition in her favor. In *Gassett v. Grout,* 4 Metcalf, 486, after holding that a debt from a late guardian to the wife could not be attached by a

creditor of the husband before alteration, the Court held, further, that an assignment of it to a trustee for the wife was not fraudulent against the husband's creditors, expressly upon the ground that equity would not appropriate the debt to the creditors of the husband without making a provision for her. *Wickes v. Clarke,* 8 Paige, 160, is precisely that now before the Court. A husband assigned to trustees, for the benefit of his wife and children, real and personal property which accrued to the wife upon the death of a collateral relation, while the husband was insolvent. The assignment was declared valid, because it was not impeached as exceeding in value a reasonable provision, if the husband could make such a settlement of that property, and because by the law of New York the court of equity would hold him bound to make it at the instance of the wife. It was laid down as the rule that the same circumstances which would induce the court to compel a settlement by the husband will uphold one already made to the extent that would be required if one should be directed to be made under the decree of the court. Of
(302) course, it is implied that it would be upheld to no greater extent.

In *Wheeler v. Caryl,* Amb., 121, *Lord Hardwicke* stated the same principle thus: That if the husband come here for aid, the court would decree an adequate settlement on the wife, and support it as a good settlement for valuable consideration; and therefore if the husband does that which the court would have decreed, it is not to be deemed unreasonable, but held a good settlement against creditors. It is plain, then, that it is the existence or nonexistence of a right in the wife to have a provision secured to her which gives to the settlement of her distributive share on her by the husband the character of being for value or not. Accordingly, in *Wickes v. Clarke* the decree was affirmed on appeal in respect of the personal property, because the wife had in equity a right to have it settled on her; but it was reversed as to the real estate, because she had no right to have the husband's interest, as tenant by the curtesy initiate, settled on her as against his creditors. Indeed, in England it is the rule to pay the fund of the wife to the husband without any settlement, when the parties are not the subjects of that country, but of some other, the law of which entitles the husband to receive it absolutely. *Campbell v. French,* 3 Ves., 321.

Then, as a wife has in this State no right to a provision out of the personalty more than the realty, the whole conveyance here was voluntary; and it must be declared that the plaintiff, who was a creditor at the time of the assignment, is entitled to satisfaction of his debt and costs at law and in this Court out of the personal fund in the hands of the administrator or trustee—the bill not praying any relief in respect of the land.

PER CURIAM. Decreed accordingly.

Cited: *Barnes v. Pearson, post,* 483; *Moye v. May,* 43 N. C., 135; *Arrington v. Yarborough,* 54 N. C., 81; *McKinnon v. McDonald,* 57 N. C., 6; *McLean v. McPhaul,* 59 N. C., 16; *Wilkins v. Finch,* 62 N. C., 357.

(303)

WILLIAM NORTHCOT v. WILLIAM CASPER.

Where one tennant in common has long been in the reception of the profits of the estate held in common, he is bound to account with his cotenant for all his shares of the profits received, no matter at what time received, unless these is evidence of an ouster, or unless such cotenant makes a demand and there is a refusal. In these latter cases the statute of limitations begins to run from the time such ouster or such demand and refusal.

CAUSE removed from the Court of Equity of BERTIE, at Fall Term, 1849.

Daniel Wynns died in 1813, leaving a will by which he bequeathed to his daughter Peggy a negro boy. She afterwards married one Northcot, who was the father of the plaintiff, and who died intestate soon after plaintiff's birth. One William Wynns administered upon his estate, and delivered the negro boy to the mother of the plaintiff. She soon afterwards married the defendant Casper, and took her child to live with her. Casper also took the negro boy, and has had him in possession ever since, and has received the profits of his hire and labor. He was also at the expense of raising the plaintiff from his early infancy. The plaintiff arrived at full age in 1841, and filed this bill in March, 1846, alleging that, as the only child of his father, he is entitled to two-thirds of the negro boy; that the executor of his grandfather assented to the legacy and the negro boy was taken into possession by his father, and after his death was, by his administrator, delivered to his (304) mother, to be held by her and the plaintiff as tenants in common; and that the defendant Casper, since his marriage, has held the negro as a tenant in common with the plaintiff, and has received all the profits. The prayer is for a sale of the negro for partition and for an account of the profits.

The defendant denies that the father of the plaintiff reduced the negro into possession and that his administrator delivered the negro to the mother of the plaintiff as tenant in common, and alleges that the negro belonged to his wife, and upon his marriage became his property in severalty. He also insists that if the plaintiff be entitled to two-thirds of the negro and the profits of his hire and labor, a reasonable allowance

should be made for the trouble and expense of raising the plaintiff, and he relies upon the statute of limitations in bar of an account for the profits, except for the three years next before the bill was filed.

Bragg for plaintiff.
No counsel for defendant.

PEARSON, J. The proof is entirely satisfactory that the executor of Daniel Wynns did assent to the legacy, that the father of the plaintiff did reduce the negro into possession, and that his administrator delivered the negro to his widow (who is now the wife of the defendant) for herself and her infant child. The defendant, by his marriage, succeeded to the rights of his wife and held as tenant in common with the plaintiff. The plaintiff is therefore entitled to have the negro sold for partition and is entitled to an account of the profits.

Whether the statute of limitations is a bar to the account, except for the last three years next before the filing of the bill, is a question of more difficulty.

(305) The nonage of the plaintiff accounts for the long delay and rebuts any inference from the length of time and the staleness of the demand. It is not a replication to the statute of limitations, as the suit was not brought within three years after full age. It is argued that when the jurisdiction is concurrent, as in matters of account, and not exclusive, as in trusts, a court of equity is as much bound by the statute of limitation as a court of law.

The question is, As the relation of tenancy in common had not ceased, and there was no demand, does this privity or confidential relation prevent the statute from running before the bill was filed? or are tenants in common always in an adversary position, so as to set the statute in motion from the beginning, and keep it running all of the time, and thus cut off any item the instant three years pass, and compel a settlement or a suit every three years as long as the relation continues?

If the first proposition be true, the plaintiff is entitled to recover for the whole time. If it be false, and the second proposition be true, the defendant is protected, except for the three years next before the bill was filed.

We think from principle and the reason of the thing that the first proposition is true. The statute of Anne, where one tenant in common receives all of the profits, makes him the bailiff of his cotenant, and gives the action of account against him, *as bailiff,* for what he receives over his share. Before this statute, although account lay between coparceners, it did not between joint tenants and tenants in common, unless there was an express agreement that one should act as the bailiff of

the other, and account when required to do so. The effect of the statute was to create such an obligation to account as bailiff, in the absence of any express agreement, from the mere relation of privity of the cotenants. It will hardly be contended by any that when there is an express agreement that one shall act as bailiff and account when (306) required so to do (say for ten years or during the time the tenancy in common continues), that *the statute of limitations begins to run as soon as the bailiff begins to act;* and yet if it does not begin to run at the first insant, there can be no reason why it should begin at any other time, or at one time rather than another, until the relation of principal and bailiff ceases, or an account is called for and the right is denied. If there be two copartners, the statute does not run into a dissolution, for one is the agent of the other, and there is a mutual confidence. So as to all other agencies, and a bailiff is an agent *to act,* receive and account, as a receiver is an agent to receive and account, and until the relation ceases or an account is called for and refused, there is no cause of complaint or right of action for the statute to act on. The statute begins to run when a cause of action accrues, and a cause of action cannot accrue until one withholds what the other demands or is presumed to demand, and in agency a demand is not presumed until the relation ceases. The "clipping process," or the cutting off item by item with "the scythe of time," only applies to cases where wrongs are committed time after time, as in the case of one who wrongfully takes possession of the land of another and is considered to commit trespasses day after day; or where rights are created time after time, and a performance is withheld without any confidential relation to justify it; as if one delivers an article to be paid for presently, and afterwards, time after time, delivers other articles to be paid for in the same way, the price of each article being presently due, the seller is presumed to demand it, like any other debt, and the neglect to pay it is "withholding a right," so as to put the statute in motion as to each article at its delivery; but if the price is not to be paid until it is required by the seller, there is no withholding until a demand; so if an account is not to be rendered until a confidential relation is determned or it is required, for the like reason, there is no withholding of a right until such time as the relation ceases or an (307) account is called for and denied.

As to bailiffs, constituted by agreement of the parties, the law is clear and cannot be questioned. Does the same rule apply to bailiffs made such by the statute? No reason can be assigned for making a difference; and no such distinction is mentioned in any of the books. In fact, the statute enacts that the tenant who receives the profits shall account as *bailiff for what he receives over* his share, thus showing the intent to be that he shall account in the same way as a bailiff by agreement, ex-

cept that the latter is to account for what, by due diligence, he might have received as well as what he does receive; whereas the statute is careful to restrict the liability to "what *is* received over his share." This is the only difference, and it has no bearing on the statute of limitations; with this difference, the declaration is the same against both. Mills, 208.

So, upon the reason of the thing, the statute of limitations does not commence running in the case of tenants in common until the relation is determined by partition, or there is a demand to be let into possession and an actual ouster, or a demand for an account and the right is denied. There cannot well be such an adversary position as to make the statute run in reference to the right to an account of the profits when it does not also run in reference to the right of possession, which can only be when there is an *ouster,* really made or presumed from lapse of time.

It remains to inquire how the question stands upon authority; and here we are met at the threshold with *Wagstaff v. Smith,* 17 N. C., 264; *s. c.,* 39 N. C., 1. In December, 1832, an account of the profits received by a tenant in common during the whole time is ordered, the
(308) Court holding that the statute of limitations did not commence running until partition. *Chief Justice Henderson* thought the matter so plain upon general reasoning as not to call for any authority. The question came up on a petition to rehear, after the death of that able and profound jurist, and it was decided in December, 1833, that the statute commenced running from the time the relation commenced, and so the account was cut off, except for a few months prior to the partition, as the suit was not brought until near three years after partition.

Our duty is to decide between the two conflicting decisions. It is seen that the reason of the thing is in favor of the first division. And the second can only be sustained by weight of authority; and yet but a single case is cited, and that as not being in point, but as furnishing an inference from the manner of pleading, which is a legitimate mode of ascertaining the law, and has the high sanction of *Lord Coke.*

Judge Gaston delivered the opinion. He assumes that the receipt of the profits by one imposes upon him an immediate accountability to the other for his share, and infers from the wording of the statute of Anne that a cause of action may arise while the common holding continues. This may be conceded. He then argues: "The declaration in *Godfrey v. Saunders,* 3 Wilson, 74, after setting forth the receipts of the rents, issues, and profits, and the obligation to account, avers as a breach a failure to account, although often required so to do." Now, it is a settled principle in pleading that when a cause of action does not arise until a special

demand, the general allegation, "often required so to do," will not (309) answer; hence the cause of action did arise and the statute commenced running before a demand.

Upon examination, *Godfrey v. Saunders* does not answer the purpose for which it was cited. The declaration sets forth that the defendant was the bailiff of the plaintiff from 1 June, 1754, *until* 1 *May,* 1775, and as bailiff had received a large quantity of coral beads to be merchandised and made profit of, and to render an account thereof to the plaintiff when afterwards required thereto; yet he did not render the account, although "often required so to do." The action was brought eighteen years after 1 May, 1755, at which time the agency ceased. There was obviously no occasion for a demand. The statute had been running from May, 1755. The defendant relied on it as one of his pleas, and it would have been a bar but for the replication that the dealing was between merchant and merchant. It is, then, only an authority to show that when the agency is at an end, *"sæpius requisitus"* will answer. It also shows that the statute begins to run from the determination of the agency. It is apparent from its irrelevancy and from the words "rents, issues, and profits," which are not contained in the declaration, that the able and very learned judge had not examined the case with the pains he was in the habit of bestowing upon every subject. In 3 Chitty Pleading, 1297, a precedent is found which is more in point. The declaration sets out that the plaintiff and defendant were tenants in common from ...day of....., A. D. ....., from thence for a long space of time, to wit, *hitherto* (that is, up to the time of the action), during all of which time defendant received, etc., as bailiff, to account for what he received more than his share, etc., and although afterwards, to wit, or, etc., at, etc., (*venue*) required to account, refused, etc. Here is a special demand which was traversable. But the conclusion which is drawn does not follow, admitting that in such a case the general allegation of *"sæpius requisitus"* is proper; for the issuing of the writ is in many cases a sufficient demand, although the cause of action is not complete until the writ issues, and the statute does not run until a demand. A precedent of this kind is found in 1 Wentworth Pleading, 83. The declara- (310) tion alleges a tenancy in common from 1 January, 1864, and continally until the day of exhibiting the bill, and avers a breach by failing to account, "although often requested so to do." This shows that the bringing of suit was a sufficient demand, if the defendant submits to account, and pleads that he was always ready. The fact of there being no special demand would not affect the action; if he denies his liability, a special demand would have been useless. So in a case of a promise to

pay on demand. A writ may issue, and is held to be a sufficient demand, although in such case the statute does not run until a demand. This is referred to in the conclusion of the decision under discussion, and such is the settled law.

There are two exceptions to this "settled principle in pleading."

The form of pleading the statute is much relied on in support of the main argument. The form in the case from Wilson is: "There was not any open and current account between the plaintiff and defendant at any time within six years before the issuing of the original writ." This conflicts with the argument. No reference is made to the case from which the form quoted is taken. It is in substance that no profits had been received at any time within six years before the writ issued. If that form had been used in the case under discussion, the plea would not have been true, for profits had been received within three years. In the case before us the defendant has continued in receipt of the profits up to the present time. The perception thereof ought to have saved the whole account, because it showed that the connection had not ceased more than three years before the suit was commenced. In *Green v. Caldcleugh,* 18 N. C., 320, although it is held that the last item in an *open* account does not save the whole, yet it is distinctly admitted that such would be the case where there are *mutual current* accounts, because of the con-

(311) fidence reposed. The next support to the argument is drawn from the practice in equity of not carrying the account of rents and profits farther back than six (three) years. That practice is confined to "ejectment cases," as they are called, where the possession is *adverse.* But the court, having taken jurisdiction upon some peculiar ground, gives complete relief by decreeing an account of mesne profits, and the analogy is taken from the statute as to actions of trespass *quare clausum fregit,* and not as to the action of account. There is no case of a decree for partition and an account of profits in which it is intimated that the time is limited to six (three) years before the filing of the bill. The next support is drawn from the idea that the exception as to accounts between merchant and merchant would have been necessary if in all cases of confidential dealing the statute did not run until the connection had ceased, or a demand. The case in Wilson is an instance, among many, where the exception (taking the law to be that the statute does not run until the connection ceases) was found by the plaintiff not to have been *unnecessary,* and it served his turn as a replication to the statute. *Sherman v. Sherman,* 2 Ver., 296, is another instance. *Buchanan v. Parker,* 27 N. C., 597, is in point to show that where confidence is reposed in one as agent, the statute does not run until a demand,

and in *Welford v. Liddall,* 2 Ves., Sr., 400, it is taken for granted that the statute cannot be pleaded until the dealings are over or the connection dissolved.

The last argument in support is the inconvenience from the loss of vouchers. Courts of equity avoid the supposed inconvenience by refusing to take jurisdiction of stale demands, giving to length of time, not the effect of a positive bar, but of a presumption of satisfaction, unless it is accounted for. The case of *Sherman,* before cited, is an instance.

After a careful examination, we have not been able to find a single other case in which the statute has been pleaded or held to (312) be a bar to an account for the profits received by a tenant in common during the time of the common holding. The nearest approximation to it is a *dictum* ascribed to *Lord Hardwicke* in *Prince v. Heyden,* 1 Atk., 493. That was a bill by the administrator of one of the lessees of a term of years, against the surviving lessee, for a share of the profits since the death of his intestate, a period of *nineteen* years. The statute of limitations was not pleaded, and the only question was whether the lessees took as tenants in common or as joint tenants, in which case the defendant would be entitled by survivorship. It was held to be a case of tenancy in common, and an account for the profits during the whole time was decreed.

The reporter makes his lordship say: "It has been *insisted on for the defendant,* he ought to account only from the time of the bill filed. Now, in the case of joint tenants or parceners, there is a mutual trust between them, and they are accountable to each other without regard to time. It is otherwise in the case of tenants in common, and this is an adversary possession maintained by the defendant against the plaintiff ever since the death of his intestate." His lordship concludes: "I am of opinion the defendant must account for rents and profits from the death of the intestate. The nature of the estate does not admit of an adversary possession in regard to the privity that is between tenants in common." It is probable the reporter does injustice to his lordship by ascribing to him what he intended merely to recite as having been insisted on for the defendant. But at all events, the first remarks were uncalled for, and out of the case, as the statute was not pleaded. They are inconsistent with the concluding remarks, and they are self-contradictory. The statute of Anne gives the action of accounts to joint tenants as well as to tenants in common; and if joint tenants are liable to account for (313) the whole time the tenancy continues, such must also be the law as to tenants in common. The statute puts them on a footing with joint tenants, and there is a privity or mutual confidence, by reason of which the statute makes one the baififf of the other so long as the relation continues.

Upon principle and the uniform current of authority, the decision in *Wagstaff v. Smith, supra,* 1833 (which we have felt it to be our duty to examine with some degree of particularity), cannot be sustained.

It must be declared to be the opinion of this Court that the plaintiff is entitled to an account of the profits received by the defendant from the labor or hire of the slave during all the time he had him in possession. A reasonable allowance will be made for the trouble and expense of the defendant in raising the plaintiff, subject to a deduction for the services of the plaintiff, if he rendered any, during his minority, by working for the defendant. There must be a reference.

NASH, J. The executor of Daniel Wynns proves that, at the time of his death, the legatee was a small girl, and continued to live with her mother, to whom he delivered the negroes Hannah and Bryant, as the property of her daughter Peggy. Under the will, therefore, and the assent of the executor, the absolute title to Bryant vested in Peggy Wynns, and upon her intermarriage with William Northcot, in him. The boy passed into the possession of the latter, and remained so to the time of his death. No creditors of William Northcot are contesting the right of the plaintiff, and more than two years have elapsed since his death. Casper, the defendant, took possession upon his intermarriage with the mother of the plaintiff; and the latter did not come of age until January, 1842. The plaintiff and his mother were tenants in (314) common of the boy Bryant; the former entitled under the act of '48, ch. 204, sec. 8, to two-thirds of his value and the latter to one-third. Upon the marriage of the defendant with the widow, he succeeded to her rights in Bryant, and no more, and became tenant in common of him with the plaintiff. The defendant, however, insists that the long time he has been in possession—upwards of twenty years—will bar the plaintiff's recovery. It is true that long exclusive possession by one tenant in common of a slave becomes evidence of a title to such sole possession, of an actual *ouster;* and this presumption is made for the purpose of quieting men's titles. But it cannot arise when the party claiming is under an inability to sue. In *Thomas v. Garvin,* 15 N. C., 223, it was decided that in the case of realty the presumption did not arise, where the plaintiff was a *feme covert,* until twenty years peaceable possession after her discoverture. Here the plaintiff was under the disability of infancy up to January, 1841; and therefore the presumption could not arise. The defendant further insists that more than three years have passed since the plaintiff came of age and before the filing of the bill, and he is therefore barred. It has been repeatedly decided that the statute of 1715 applies to actions at law and not to suits in equity; yet it is the duty of equity to obey the legislative will as much as a court of law.

When, therefore, a plaintiff seeks relief from a court of equity in a matter cognizable at law, the statute is a bar. *Bell v. Beeman,* 7 N. C., 139. The plaintiff's claim is one of which a court of law has jurisdiction in an action of account. By the act of 1715, actions of accounts rendered must be brought within three years next after the cause of action accrued. So far as the defense rests upon this point, it is important to ascertain when the cause of action did accrue. The action did not lie at common law, by one tenant in common against another (Coke Lit., 200), but was first given by the statute of 4 Anne, ch. 16, sec. 27, to recover against his cotenant as bailiff. The statute of James makes six (315) years, and the act of 1715 three; but none of those acts tell us when the cause of action arises, and we are left to general principles to assist us. The statute of Anne makes the tenant in common responsible to his cotenant as a bailiff, not for the whole of what he has received in rents and profits, but only for so much as he has received over and above his own share. As tenant in common he has been guilty of no wrong in receiving the whole; he had a right to do so. His *tort* consists in not accounting with his cotenant—not in neglecting or omitting, but in refusing. A bailiff is but an agent, and in an action against an agent for not accounting, a request to account and pay over must be stated in the declaration. 1 Cr. Pl., 363; *Toppam v. Braddick,* 1 Taunt., 576. To the same effect are the precedents in 1 Ch. Pl., 1207; the request is laid specially, and is as follows: "And although the said defendant during the time aforesaid, at, etc., aforesaid, received more than her just share and proportion of the rents, issues, and profits of the said tenements with the appurtenances and the said plaintiff's share thereof, that is to say, etc.; yet the said defendant, although she was afterwards, towit, on etc., at, etc., aforesaid, requested by the said plaintiffs so to do," etc. This is a material averment, and must, of course, be proved, for it is a condition precedent to the plaintiff's right of recovery. Until the demand and refusal the defendant is not in fault; the refusal puts him in the wrong and entitles to an action. No demand was made to put the statute in motion. I am aware that when *Wagstaff v. Smith* was, a second time, before this Court at December Term, 1833, 39 N. C., 1, his Honor, *Judge Gaston,* in delivering the opinion of the Court, stated that a demand was not necessary to enable the tenant to recover from his cotenant his portion of the rents and profits; that although the receipt of the profits is no ouster, it imposes upon the receiver an imme- (316) diate accountability, and that the wording of the statute is decisive that the action lies while the relation of a common holding exists. Of the latter part of this proposition, I think there can be no doubt; but I do not agree that no demand is necessary. This proposition is founded by him on *Godfrey v. Saunders,* 3 Wil., 74. In that case the declaration

says the demand, with *licet sæpius requisitus*. And it is an established principle, says his Honor, when a demand is so laid, it is not traversable. This is true; and it is not a little remarkable that it should have escaped his acute mind that the action was between a merchant and his bailiff or factor, which is within the exception to the proviso in the act. The second plea of the defendant was, "That the account doth not concern trade and merchandise." Upon which issue was taken and by the jury found in favor of the plaintiff. That case was within the exception in the statute, and the act did not apply to it. The case *then* before the Court, and the present one, are within the enactment of the statute; and the precedent from 2 Ch. Pl. relates to actions between tenants in common under the statute of 4 Anne. When, therefore, one tenant in common receives all the profits, that part which is over and above what he is entitled to is received by him as bailiff of his cotenant, and for which he is bound to account at any time during the existence of his cotenancy. But to entitle the cotenant to his action of account, a demand must be made; otherwise, the action cannot be maintained until the destruction of the cotenancy; and the statute begins to run only from the one period or the other. In this case the joint tenancy still continues and no demand has been made. I am of opinion that the plaintiff is entitled to the relief he seeks; that the negro Bryant ought to be sold and that the plaintiff must receive two-thirds of his value; and the defendant is bound to account for the hires and profits received by him in the
(317) same proportion since he has had possession. There ought to be a reference to the master to ascertain the hires of Bryant since he has been in the possession of the defendant, and, if the latter requires it, of the cost of clothing and boarding the plaintiff until he arrived at the age of 21, and the value of his services to the defendant for the same period.

RUFFIN, C. J. As I was of the Court at each time the case of *Wagstaff v. Smith* was before it, 16 N. C., 264, and 39 N. C., 2, perhaps it is proper I should say that I believe the opinion held by the other judges in the present case is law. At this distance of time I cannot remember my impressions then with sufficient distinctness to authorize me to state them positively. I believe I concurred in the opinion delivered by *Chief Justice Henderson*, and I cannot recollect that I dissented from that of *Judge Gaston*. But, however that may have been, I am satisfied upon fuller consideration that the first opinion was right. If there be an express understanding by one to manage an estate for another for an indefinite period, a right to an account arises between them from time to time; but the statute does not operate to bar an account for any part of the time while the relation of principal and bailiff subsists between

them, that is, while the agency in the management of the estate is kept up. While the relation continues, there is a privity between the parties, and there is nothing to set the statute of limitations in operation. It is only when the agent abandons his agency and management, or the employer demands an account, that the relation is determined and the statute is set in motion. Now, when the statute gives the action of account to a tenant in common against his companion, as bailiff, for what he may receive more than his share of the profits, it necessarily supposes an express undertaking of the agency, since that is necessary, in fact or in legal intendment, to constitute a bailiff; and (318) there is no difference in the one case from the other as to the application of the statute of limitations. It is upon that principle I conclude that the statute does not affect these parties, since the defendant is deemed in law to have by express contract assumed to receive for the plaintiff his share of the profits to his use as long as the defendant should receive them at all; and, consequently, while he remains in possession and takes the profits, the office of bailiff continues, and there is nothing adverse between them.

PER CURIAM. Decree for the plaintiff.

Cited: *Gaskill v. King,* 34 N. C., 222; *Blount v. Robeson,* 56 N. C., 79; *Weisman v. Smith,* 59 N. C., 131; *Gatlin v. Walton,* 60 N. C., 360; *Hauser v. Sain,* 74 N. C., 557; *Jolly v. Bryan,* 86 N. C., 460; *Patterson v. Lilly,* 90 N. C., 88.

CALVIN GRAVES v. GEORGE WILLIAMSON.

A bequest to legatees of all the debts they owed the testator does not include a bond due and payable to the testator as guardian to an infant, notwithstanding, upon a final settlement of the guardian accounts, the infant was found indebted to the guardian in a larger amount than the bond in question.

CAUSE removed from the Court of Equity of CASWELL, at Fall Term, 1849.

The facts of the case appear in the opinion delivered in this Court.

Norwood for plaintiff.
Kerr for defendant.

NASH, J. Azariah Graves made his last will and testament (319) 28 January, 1837, and died in April of the same year. Clause 8 of the will contained the following bequest: "All those above named

legatees (referring to his brothers and sisters, who were mentioned in the preceding part of the same clause) which may be owing me by notes, bonds, and open accounts, at my death, it shall be given up to them; that is, of they are willing to give up such notes, bonds, and accounts, if any they have upon me, and not charge them against my estate." The testator was the guardian of Algernon Yancey, and at the time the will was made, and at the time of his death, held in his hands two bonds or notes executed by his brother William Graves, and made payable to him as such guardian, and had no other notes or bonds or accounts against his brother William. After the death of the testator those two bonds came into the possession of his administrator the defendant, who commenced an action upon them against the present plaintiff as the representative of William Graves. The bill is filed to have them delivered up to the plaintiff and for an injunction. It alleges that, after the making of the will, Azariah Graves and his ward, Yancey, had a settlement, in which the latter fell considerably in debt to the former, whereby these bonds or notes became the property of the guardian, and as such were retained by him. This is not admitted by the answer, nor is it sustained by any proof. The answer, on the contrary, alleges that after the death of Azariah Graves a settlement was had between the defendant as his representative and Algernon Yancey, when it was found that the ward was indebted to the estate of his late guardian to the amount of $700, which he has since paid, and that the action enjoined was brought afterwards. The answer further alleges that, after the death of William Graves, the plaintiff made a payment on these bonds of $80, and promised to
(320) pay the balance. Neither of these allegations is sustained by the proof taken in the cause. As to the latter, the bill states that the plaintiff did make the payment of $80, but at the time he was ignorant of the bequest. The statement is evidence of the fact of the payment. If the plaintiff had laid before the court any evidence of the settlement as alleged in the bill, he would have been entitled to the relief he seeks. The subsequent retention of the notes by the guardian would have been evidence, and very strong evidence, that in the settlement they had been accounted for, and thereby made his property. But the case must be considered without any reference to such a state of facts. By the terms of the bequest we are not at liberty to say the testator intended to give the notes or bonds in question. If the bequest had been to William Graves individually, there would have been much plausibility in the argument that he meant these bonds, and considered them as his own property. But William Graves is only one of a number of brothers embraced in the clause; upon some of them the testator might have held bonds or notes; upon others, none. When, therefore, the devisee comes and says "These bonds or notes are given to me," he must bring forward

proof to satisfy the court, not only that the testator so meant, but that he had legally made them his own property. The court can make no such intendment. The testator speaks of the debts he gives away as debts due to him as his property. These instruments did not belong to him, but his ward. It is impossible, as the case appears before us, to give to the bequest the application asked for by the plaintiff, without making the testator guilty of a breach of official duty—a thing of which he was incapable. A guardian cannot lawfully transfer to another, either by gift or sale, for the satisfaction of his own debt, a bond made payable to him as guardian; if he does, the assignee holds it in trust for the ward, and must account for the principal and interest. *Lockhart v. Phillips*, 36 N. C., 312; *Fox v. Alexander, ib.*, 340. At the time (321) of the death of Azariah Graves, no settlement had taken place between him and his ward: *de non apparentibus et non existentibus, eadem est lex.* The bonds and notes in controversy belonged to Algernon Yancey. The testator did not mean to give away such as he held in right of another—in which, at the time, he had no beneficial interest. He meant to give only such as were really his own property.

PER CURIAM. Bill dismissed with costs.

CONRAD CRUMP ET AL. V. WILLIAM BLACK.

1. Where A., in right of his wife, was entitled to a distributive share of a personal estate, and, in consideration of an assignment thereof, procured a conveyance to be made to his wife of certain lands by B., and the deed was never registered; and afterwards A. persuaded his wife to let this deed be surrendered and procured a conveyance of the same land to be made to himself, and then sold the land to C., who was a *bona fide* purchaser for a valuable consideration and without notice: *Held*, that the heirs of the wife, after her death, had no equitable claim for this land against C.
2. Where both parties are equally entitled to consideration, equity does not aid either, but leaves the matter to depend upon the legal title.
3. Where a *bona fide* purchaser for a valuable consideration, without notice, has acquired the legal title, a court of equity will not interfere to deprive him of his legal advantage.
4. The only cases in which the court of equity will interfere to set up an incomplete legal title are those against volunteers.

CAUSE removed from the Court of Equity of MECKLENBURG, at Spring Term, 1846.

In 1834 Henry Crump, being entitled, in right of his wife, to a distributive share of her father's estate, contracted with one (322)

Medlin for the land described in the bill, to be paid for by an assignment of the distributive share, and Medlin, by his direction, executed a deed in fee simple to the wife, under which he and his wife lived upon the land several years. The deed was not registered; and Crump, by much importunity, prevailed upon her to hand back the deed to Medlin, who was to destroy it and execute another to Crump, which was accordingly done. Crump's object was to sell the land, and this was known to his wife, who yielded to his importunity because, in her own language, "she could not live with him unless she did it." Crump, soon afterwards, sold the land to the defendant for $225, which was paid. Crump made a deed to the defendant, which was duly registered. It does not appear that $225 was less than the value of the land. The defendant expressly denies notice of the deed to Mrs. Crump, and there is no proof to fix him with it. Crump and his wife are dead. The plaintiffs are the heirs of Mrs. Crump. The prayer is for a conveyance from the defendant.

Alexander and J. H. Bryan for plaintiffs.
No counsel for defendant.

PEARSON, J. The plaintiffs are not entitled to the relief asked for, because the defendant is a *bona fide* purchaser for valuable consideration, without notice. When both parties are equally entitled to consideration, equity does not aid either, but leaves the matter to depend upon the legal title.

The mother of the plaintiffs knew that the object of her husband in procuring the legal title was to enable him to sell the land, and they apply to this Court with but little grace to lend its aid to the
(323) consummation of a fraud upon the purchaser. It is true, married women cannot part with their land unless consent be given in the form prescribed by law; and a purchaser who has not obtained the legal title cannot come into equity for assistance upon the ground that he has been induced to pay his money by a fraudulent combination between the husband and his wife. But when the purchaser gets the legal title, and the wife or her heirs are obliged to come into equity, it is a different question, and he will not be required to give it up unless he had notice of the wife's rights.

It was urged that, as the distributive share belonged to the wife, she was the meritorious cause of the consideration paid for the land, and ought not to be prejudiced by the destruction of the deed, as it was done not only against her consent, as implied by law (she having no capacity to consent except in a prescribed form), but against her express wish, until she yielded to importunity. The argument would have much force against a volunteer, but cannot avail against the defendant. The dis-

tributive share belonged to the husband by his act of assignment; so the wife paid nothing, and we are asked, in favor of her heirs, to make a purchaser give up a valid legal title. There is no principle upon which it can be done. Possibly, if the plaintiffs were acting upon the defensive, this Court would not interfere against them. But they have not the legal title; have paid nothing, and are asking aid against one who has paid the full value without notice. *Tolar v. Tolar,* 16 N. C., 457; *Tate v. Tate,* 21 N. C., 22; and *Tyson v. Harrington, post,* 329, were cases against volunteers.

It was further urged that as the deed was executed and the ceremony of registration alone was wanting to confer a legal title, which it was not in the wife's power to have done, she had something more than a mere equity, an incomplete legal title, and therefore stands upon higher ground than the ordinary case of one who seeks to set up an (324) equitable title. Be that as it may, no one has superior claims to the consideration of a court of equity than a purchaser without notice; and there is no case in which the court has interfered to deprive such a purchaser of a legal advantage. This principle is carried out in all the cases. If the power of appointment be defectively executed, and the appointee is a younger child or wife, aid will be given as against the heir at law, but not against a purchaser. In 1 Ch. Cas., 170, a sale was made of copyhold land. But there was no surrender. Afterwards the vendor devised the land to his wife and daughter, and a surrender was duly made to the use of the will, upon the death of the vendor. The vendee, who had an incomplete legal title, filed his bill against the wife and daughter, praying for a conveyance. It appearing that the husband had agreed before the marriage to settle the land upon the wife, she was considered as a purchaser, and the court refused to deprive her of the legal advantage which she had under the devise and surrender. But relief was given against the daughter, who was a volunteer.

PER CURIAM. Bill dismissed with costs.

Cited: *Wilson v. Land Co.,* 77 N. C., 456; *Brendle v. Herron,* 88 N. C., 387.

Dist.: *Tyson v. Harrington, post,* 331.

(325)

ROBERT LOVE ET AL. *v.* JOHN C. LOVE.

Where legatees under a will bring suit in equity against the executor for their respeective legacies, and upon an account taken, in which the executor is charged with all he had received or ought to have received, a decree is rendered against the executor in favor of each legatee for the share due to him, a legatee who had given his bond to the executor for purchases made by him at the sale of the testator's effects can have no relief against a suit upon that bond, subsequently brought. He should have had it deducted from the amount ascertained to be due to him in the original decree.

CAUSE removed from the Court of Equity of CASWELL, at Fall Term, 1849.

John Love died in 1844, having made his will, of which the defendant is the executor, and therein made the following bequests, with others:

"It is my will that my negroes Lem, Sam, Dinah, Salem, and Rufus be sold and divided between four of my children, Robert, Sarah, Mary, and Elizabeth; and that all my stock of horses, half my cows, wagon, sheep, and hogs be sold, and my debts paid out of the money, and the balance be divided among my said four children, Robert, Sarah, Mary, and Elizabeth."

The defendant sold the slaves and other property above mentioned, and, after the payment of the debts, there will be a surplus of $1,948.42, applicable to the legacies, deducting, however, the charges of administration. At the sale the plaintiff Robert made purchase to the amount of $409.78, for which he gave a bond, with the other plaintiff, Samuel Love, as his surety, payable to the executor in January, 1845. In July, 1847, the defendant instituted a suit at law against the plaintiffs on their bond; and in August following this bill was filed. It charges

(326) that, after the payment of all the testator's debts and charges on the estate, there is a large surplus to be divided among the four legatees above mentioned, of which one-fourth part belongs to the plaintiff Robert; and that such fourth will exceed the sum due on the said bond given by him; and that it was the duty of the executor to render to the plaintiff an account of the fund, and apply his fourth part to the satisfaction of the bond; but, instead of so doing, the defendant brought the suit on the bond without having accounted, and without even asking for a settlement or payment of the bond. The prayer thereupon is for a perpetual injunction, and general relief.

The answer states that the defendant did not object and would not have objected to come to a friendly settlement with the plaintiff in the premises, and to deduct from the plaintiff's bond the share of the estate to which the plaintiff was entitled under the will. But it states further

that the plaintiff made no application of the kind; and, on the contrary, that the plaintiff and the three other legatees instituted a suit in the court of equity for an account and distribution of the whole estate in his hands, and that the defendant submitted to an account therein, and that the same was ordered by the court, and was taken in the master's office and reported to the court; and that in the account the defendant was charged with the whole proceeds of the sales as being in his hands in cash, and one-fourth thereof allotted to the plaintiff as his legacy, without allowing any deduction for, or taking any notice of, the sum due from the plaintiff on his bond for purchases at the sales; and that the master's report had been confirmed. The answer then states that the defendant, finding that the plaintiff was in that suit thus endeavoring to charge him with the whole of his legacy and to obtain a decree for the payment thereof in cash, was advised to protect himself from loss under such a decree for money, by having his demand against the (327) plaintiff ripened into a judgment by or before the time the decree could probably be pronounced; and, with that view, and that alone, the suit at law was brought after the confirmation of the report.

There was a motion to dissolve the injunction on the coming in of the answer, which was refused. The cause was then set for hearing, and transferred to this Court.

Norwood for plaintiff.
E. G. Reade and Kerr for defendant.

RUFFIN, C. J. The bill must be dismissed. Supposing the case made on its face sufficient to sustain it, the reasons given in the answer why the defendant brought suit on the bond and ought to have judgment on it must strike any mind as fully sufficient. There is no suggestion that the defendant is in failing circumstances, whereby the plaintiff will be in danger of losing his legacy if the money due for his purchases be taken out of his hands. The only foundation for the bill is that it will be inconvenient to the plaintiff to pay his debt, instead of having it and the legacy extinguished *pro tanto* by deducting the less from the greater. Certainly that would be in itself very right. But it seems plainly to be the plaintiff's fault that it was not done in taking the account in the other cause, in which the accounts in the whole estate were ordered. At least, it was as much the fault of the plaintiff as of the defendant. He had therefore no right to complain that the defendant should endeavor to meet his decree by a judgment in due time. But the was, in truth, no necessity for the present bill, for, upon a petition in the first cause, the same relief could have been had without this additional expense; or, in a proper case, even after the judgment and decree, an order might have been obtained in either court that the parties should mu- (328)

tually acknowledged satisfaction either in whole or in part, according to the justice of the case. The bill in itself is, indeed, radically defective. It simply prays an injunction upon the ground that the plaintiff does not owe the whole debt by reason of some counter equitable demand. But it does not ask any steps to be taken for ascertaining that demand. It does not pray for an account; and well it might not, as this plaintiff by himself could not demand it, and a plea of the pendency of the former suit by all the legatees for general account would have barred it. Such a bill will not lie, for the injunction in such a case is but incidental to the general relief which a plaintiff seeks, and to which he entitles himself by the facts stated in the bill. Here an injunction merely is asked for; and if granted, it would stand without the court being able to determine how long or for how much it ought to be kept up.

The matter will probably be adjusted between the parties, as the defendant in his answer professes to have been always willing to allow a deduction of the sum admitted by him to be due to the plaintiff. But, if it should be otherwise, the plaintiff can probably obtain the requisite order in the other cause. At all events, the present bill cannot be maintained without allowing all controveries to be split up and made the subjects of as many suits in equity as there are items in dispute, and granting injunctions upon isolated parts of a case without the opportunity of determining the general merits.

PER CURIAM. Bill dismissed with costs.

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(329)

MARGARET TYSON v. ELIAS B. HARRINGTON ET AL.

1. Where a deed has been executed and delivered, and the donor, without the consent of the donee, obtained possession of it before it is registered, and suppresses it, the donee is entitled to call upon the donor for a conveyance of the legal estate.
2. When a case is made out between defendants by evidence arising from the pleadings and proofs between the plaintiff and the defendants, one defendant may insist that he shall not be obliged to institute another suit against his codefendant for a matter that may then be adjusted between them.
3. The widow of a man to whom a deed for land had been delivered, but from whom it had been abstracted before its registration, has a right to her dower in such land, the husband having an incomplete *legal title;* but to receive her dower she must apply to a court of equity.
4. A freeholder cannot now be disseized of his seizin but by a dispossession *aided by the act of law*, which takes away his right of entry. Therefore a disseizin, in this State, can only be a dispossession and a continued adverse possession for seven years under color of title.

TYSON *v.* HARRINGTON.

CAUSE removed from the Court of Equity of MOORE, at Spring Term, 1849.

The plaintiff is the widow of one Thomas Tyson. They were married in 1834, and the infant defendant, Elizabeth Tyson, is their only child. He died intestate in 1835. About the time of their marriage, Josiah Tyson, his father, purchased the tract of land described in the bill, containing 124 acres, from one McKinzie, and had the deed made to his son, who took possesion and lived upon the land with his wife for some time, and then left the State, enlisted in the army, and died in 1835. After he left, the plaintiff continued to live upon the land until (330) some time in 1834, when the defendant Harrington took possession and has held it ever since. The deed to Thomas Tyson was not registered, and, after he left the State, his father contrived to get it from the plaintiff and destroyed it, and then procured McKinzie to execute a deed to him, which is duly registered; and in 1834 he executed a deed for the land to the defendant Harrington, his son-in-law, who thereupon took possession against the will of the plaintiff. The bill alleges that the defendant Harrington took the conveyance from Josiah Tyson without consideration and with notice of the rights of Thomas Tyson and those claiming under him. It recites that in 18.. the plaintiff filed a bill against Josiah Tyson and the infant defendant, and upon the hearing it was decreed that the said Josiah Tyson convey to the infant defendant as heir of Thomas Tyson, and that dower be assigned to the plaintiff, his widow (the case is reported 37 N. C., 137), and the plaintiff avers that at the time she filed her bill against the said Tyson she had no notice of the conveyance to the defendant Harrington, but believed he had taken possession as a tenant at will of said Josiah. The prayer is that the defendant Harrington convey to the infant defendant, Elizabeth, and that the plaintiff's dower be assigned.

The defendant Harrington alleges that he is a purchaser for valuable consideration, without notice, and that the conveyance was made to him before the plaintiff filed her bill against Josiah Tyson. The infant defendant submits her rights to the protection of the court.

Winston and Strange for plaintiff.
Person and Iredell for defendants.

PEARSON, J. The conveyance to the defendant was made be- (331) fore the plaintiff filed her bill against Tyson. He is, therefore, not concluded with the decree in that case nor affected by it in any manner, except so far as it may be an authority upon the questions of law decided, like any other cause.

There is no proof that the defendant paid a valuable consideration for the land, and it is known that at the time he took the conveyance he had full notice of the rights of Thomas Tyson. Upon the authority of *Tolar v. Tolar,* 16 N. C., 456; *Morris v. Ford,* 21 N. C., 23, and *Tyson v. Tyson,* 37 N. C., 137, the heir of Thomas Tyson is entitled to a conveyance of the legal estate. This case differs from *Crump v. Black, ante,* 321; for here there was a conveyance without value and with notice. There, the conveyance was for value and without notice.

Tyson v. Tyson is also an authority to show that a decree may be entered in this case in favor of the infant defendant against her codefendant. It is there held that, although courts of equity do not ordinarily decree between codefendants, this case falls within an established exception; for where a case is made out between defendants by evidence arising from the pleadings and proofs between the plaintiffs and the defendants, one defendant may insist that he shall not be obliged to institute another suit against his codefendants for a matter that may then be adjusted between them. We think, therefore, there must be a decree that the defendant Harrington, by proper deed to be approved of by the master, convey the land in fee to the infant defendant, with covenants of warranty against himself and all claiming under him.

It does not, however, necessarily follow that because the heir is entitled to the land, the widow is entitled to her dower; and it is insisted
(332) that the plaintiff is not entitled to dower in this case, because her husband had not such an estate as was subject to dower, either at law or in equity, his deed not being registered, and because the husband was not seized at the time of his death, as he was disseized the year before by the entry of the defendant Harrington under the deed of Josiah Tyson. *Tyson v. Tyson* turned mainly upon the question of fact whether the conveyance of McKenzie had ever been delivered to Thomas Tyson, so as to become a deed; and after deciding that question in the plaintiff's favor, the Court adopted the conclusion that she was entitled to dower almost as a matter of course, and derived her right from the act of 1828, which gives dower in equitable estates. We concur in the conclusion, but we are inclined to the opinion that the right was not a mere equitable one, depending upon the act of 1828, and that the widow of a man who died without having his title deeds registered was entitled to dower because the husband had an incomplete *legal title.* If the deed was afterwards registered, the dower was assignable at law. If it was destroyed, equity gave relief, not upon the idea of a mere equitable estate, but upon the ground that in that court the party was entitled to have the benefit of the legal title which had been lost by spoliation, under the maxim, "That will be considered as dower which ought to have been dower, so as to prevent one from taking advantage of his own wrong."

The widow, however, in case of spoliation, as well as the heir, was obliged to apply to a court of equity, and could not proceed at law. *Thomas v. Thomas,* 32 N. C., 124. In *Morris v. Ford,* 17 N. C., 418, *Judge Gaston,* who delivered the opinion in *Tyson v. Tyson, supra,* says: "The interest of one who has an unregistered deed was liable to be sold under execution before the act of 1812, which subjected equitable estates. He has not a mere equity in the land, but an equity and an incomplete legal title. If he dies before registration, his wife is entitled to dower as of a *legal* estate." This shows that, although that learned judge in *Tyson v. Tyson* derived the right from the act of 1828, he did not (333) intend to exclude the other ground, but considered the right, either upon one ground or the other, beyond question. The want of registration, therefore, is no bar to the plaintiff's right of dower; and the remaining question is, Was the husband seized at the time of his death? This point was not made in *Tyson v. Tyson,* and is now to be considered for the first time. It depends upon the entry and dispossession made by the defendant Harrington. If that had the effect of putting the *seizin* in him, then Thomas Tyson was not seized at the time of his death. But if it did not operate as a disseizin, then Thomas Tyson died seized. The question is reduced to this: One having color of title enters and dispossesses the owner; is that a disseizin?

Disseizin is an ouster of the freehold, and is where one enters and turns out the tenant and *usurps his place and feodal relation,* which can only be done by the concurrence and consent of the feodal lord. The latter circumstance distinguishes a disseizin from a dispossession. Bl. Com., Coke Lit.; *Taylor v. Horde,* 1 Bur., 60, where *Lord Mansfield* says: "Disseizin is a complicated fact, and differs from dispossessing. The freeholder by disseizin differs from a possessor by wrong. A disseizin is where the possessor is *clothed* with the solemnities of the *feodal tenure.*" After a full examination of the question, he says: "Except the special case of fines and proclamations, I cannot think of a case where the true owner, *whose entry is not taken away,* may not elect to be deemed as not having been disseized. The case is also reported in 2 Smith's Leading Cases, 342. The tenant could not, against his will, be disseized by the *mere* act of a wrongdoer, as long as he had the right of entry; but if he saw proper, he might elect to consider himself disseized for the sake of a remedy given against disseizors. All the cases of disseizin since *Taylor v. Horde,* and for many years before, (334) probably as far back as Charles II., when the tenant had the right of entry, will be found upon examination to be cases of disseizin at election, and not of actual disseizin. The words, "whose entry is not taken away," are significant, for it is conceded by him, and has never been disputed, that when the owner has lost his right of entry he is then

disseized. His words are, "when the right of possession was acquired and the owner put to his real action, then, without doubt, the possessor had got the freehold, though by wrong, and then was a disseizor." The instance put is when a dispossessor remains in possession twenty years, in which case the statute James I. takes away the entry of the owner. The wrong act of the dispossessor, *aided* by the *operation* of the statute of James, makes a disseizin in the same way that the wrongful act of the dispossessor, *aided* by the *concurrence* of *the feodal lord* in accepting homage, etc., made a disseizin in the days of strict feodal tenure. The result is that a freeholder cannot now be disseized of his seizin but by a dispossession *aided by the act of law* which takes away his right of entry; and as, in England, a dispossesion and continued adverse possession for twenty years, under the statute of James, amounts to a disseizin, so, in this State, a dispossession and continued adverse possession for seven years, under color of title, under the act of 1715, amounts to a disseizin. But so long as the owner has the right of entry it is a mere dispossesion and not a disseizin, which *Lord Mansfield* calls a "complicated fact," and requires the aid of the law or of the feodal lord to complete it. This will explain why the doctrine of a "descent cast," tolling an entry, has become obsolete, although so much is to be met with about it in the old books. Littleton and Coke devote a whole chapter to that "curious and cunning learning." When there was a
(335) disseizin, a descent cast tolled the entry, but in modern times there is no disseizin until the right of entry is lost. Hence, a "descent cast" can now have no effect. If the descent be *before* the right of entry is lost, "the entry is not tolled," because there was no disseizin. If after, then it has no effect, for the right of entry must have already been taken away to constitute a disseizin. In this State, after a possession of seven years under color of title, the law recognizes and concurs in the right of the wrongdoer, and the right of entry on the part of the former owner is taken away. There is then a disseizin, and not before. If a descent is cast before the seven years expire, the entry is not tolled, for there is no disseizin. If after, it can have no effect, for the estate was gone before. This is the reason why the doctrine of descent cast has never been insisted upon in our State since *Strudwick v. Shaw,* 2 N. C., 5, where it was discussed, but not directly decided, and the profession has quietly given up the doctrine and allowed it to become obsolete. This tends greatly to confirm the position that a dispossession under color of title is not a disseizin until the right of entry is lost by seven years possession.

We conclude, therefore, that Thomas Tyson was seized at the time of his death, in 1835, notwithstanding the entry of the defendant Harring-

ton in 1834, and his continuing in possession under color of title until the said Tyson's death. It must therefore be declared to be the opinion of this Court that the plaintiff is entitled to have her dower assigned as prayed for, and to recover her costs of the defendant Harrington.

PER CURIAM. Decreed accordingly.

Cited: *Crump v. Black, ante,* 323; *Blackwood v. Jones,* 57 N. C., 58; *London v. Bear,* 84 N. C., 271; *Edwards v. Dickinson,* 102 N. C., 523.

(336)

JOHN C. WASHINGTON ET AL. V. LEWIS SASSER.

Where the personal estate of a deceased debtor has been exhausted, and his lands have also been sold, creditors whose debts remain unsatisfied have a right in equity to have satisfaction decreed out of the rents and profits derived from the lands by the heirs—at least of so much as remains in their hands unexpended.

CAUSE removed from the Court of Equity of WAYNE, at Fall Term, 1849.

Bill and demurrer. The bill states that Edward Sasser was indebted to the plaintiffs respectively in certain sums stated, and that he was seized of certain lands in fee, and died intestate, and the land descended to his children as his heirs at law, some of whom were and still are infants; that Lewis Sasser, one of his sons, administered on his personal estate, and that the plaintiffs brought several actions against him, in which *plene administravit* was found for him, but the plaintiffs took judgment for their debts and sued out writs of *scire facias* against the said Lewis and the other heirs, and obtained judgment thereon against the lands descended, and that they were sold under execution, but did not bring enough to satisfy the debts to the plaintiffs. The bill further states that upon the death of the intestate the defendant Lewis, as one of the heirs and on behalf of the infants and other heirs, leased the lands descended for several years and received certain rents and now has them in his hands. The prayer is for an account of those rents and profits which accrued between the death of the intestate and the sale of the land and are held by the defendants, and for satisfaction thereout of the balances due to the plaintiffs respectively. (337)

Strange, with whom was W. B. Wright, for plaintiffs.
J. H. Bryan for defendants.

RUFFIN, C. J. Although this is the first time the point arising in this case has been presented to our courts, yet the principle on which the bill is founded seems to be clearly just, and to be established elsewhere by adjudications.

Rents and profits received by an heir cannot be reached at law, because judgment is given only against the land itself except when it is against the heir personally for false pleading. Still, as the profits of the land which came from the debtor, the rents are in conscience applicable to his debts, and the heir ought not to keep them to the hindrance of the creditors. It is true that the debts are purely legal demands, and that the liability of the land or heirs is also merely legal. Yet the jurisdiction is established of entertaining a creditor's bill for an account of the personal and real estate, and for satisfaction out of them, according to the order in which the parties are respectively liable. The cases in England are numerous and full to the point, and so they are in some of our sister States; and the doctrine has been recognized in this State. *Simmons v. Whitaker,* 37 N. C., 129; *Wilson v. Leigh,* 39 N. C., (338) 97. Upon such bills there have been decrees for the sale of the land descended or devised, and also for satisfaction out of the rents and profits received since the death of the ancestor. As far as discovered by us, the first time the question occurred was in *March v. Bennett,* 1 Vern., 428. It was urged that the profits of an infant heir's estate could not be taken for the ancestor's bond debt, and that no such decree had even been made. But the Master of the Rolls very naturally thought such a decree to be just and equitable, and he declared that if the case came before him he would decree satisfaction. The point was again presented in *Waters v. Ebrall,* 2 Vern., 606, in which the report states the decision to have been that the profits in the time of the infant were not, after his death, applicable to his ancestor's debts, which is at least plausible as between the administrator and the heir of the infant. But in Mr. Raithby's edition of Vernon the decree itself is given, and from that the decision seems to have been the other way, for the plaintiff got a decree to raise from the land only such sums as might be due on the obligations after applying the personal estate of the original debtor and also the profits of the land in the deceased heir's time, first allowing out of the latter for the maintenance supplied to the infant. After that all the cases seem to be one way; that is, in favor of the creditor. It was taken by *Lord Talbot* to be clear law, in *Chaplin v. Chaplin,* 3 Pr. Wms., 366. So in *Davies v. Topp,* 1 Bro. C. C., 524, the decree at the Rolls was that, after applying the personal estate, any deficiency should be supplied by a sale of the real estate descended; and if there should still be a deficiency, then it was declared that the rents and profits of the land

descended should be applied to make it good, and an account of them was ordered; and, if all those funds should not be sufficient, that any deficiency should be made good out of land devised, subject to a charge for the payment of debts. Upon the appeal of the heir, (339) the argument was against imposing all the deficiency, after applying the personal estate, on the descended land in front of that devised. But there was not the least question that the land descended was liable as decreed; the rents and profits were also liable before the land devised; and, it bing held that the decree was right as between the two descriptions of land, it was affirmed throughout. In *Curtis v. Curtis,* 2 Bro. C. C., 620, 633, the remark dropped incidentally from the Master of the Rolls that "It is the *practice* in equity that bond creditors coming for a distribution of the assets shall have an account of the rents and profits, which they could not have at law." Indeed, in *Rowe v. Reavis,* 1 Dick., 178, it is stated that rents and profits of land descended are to be applied before the court of equity will decree the sale of the inheritance. But in *Waide v. Clark,* 1 Dick., 382, upon a case like that of *Davies v. Topp,* there was a similar decree for the sale of the inheritance first, and then for an account and application of the rents and profits. The decrees in both of those cases are set out as precedents in Seaton's Forms and support the reports. The point would seem, then, to be perfectly settled in England; and the equity of the creditor is as strong here as there. To the purpose of relief in this Court against the lands of a deceased debtor or the profits, all debts stand upon the same ground as specialties in England, since our statute entitles all to satisfaction out of the real estate—regard being had, however, to their dignity in the course of administration. It is true that, upon simple contracts, the heir is not directly liable as he is in debt on a specialty in which he is named. But that does not affect this question; for the relief granted in equity to creditors by specialty is not founded at all on the personal responsibility of the heir for the debts, but on the legal liability (340) of the land in his hands and the inadequacy of the legal remedy against the land when compared with the more direct and perfect one in the court of equity. In other words, the relief here proceeds upon the ground of following the fund which ought to pay the debt as coming from the original debtor, and which can be more readily rendered here than at law. That principle applies alike to all debts for which the land is in any manner legally liable; and the more circuitous, dilatory, and expensive the remedy at law is for a articular debt, the greater are the reason and necessity for the interposition of the court of equity. In respect to the land itself, the ground of the jurisdiction seems plain. But in regard to profits received by the heir, the principle is not so apparently correct, since they cannot be reached at law at all. When

this case was opened, therefore, there was an impression in the Court that the bill could not be sustained. But in looking for precedents, the cases before cited were soon collected; and, moreover, the principle established by them is stated in the text writers as a settled one in equity. It has also been declared judicially in this country, and that in reference to demands for which the heir was not bound by specialty. In *Thompson v. Brown,* 4 John. C. C., 619, *Chancellor Kent* decreed the sale of land upon a bill by one partner against the executors and heirs of the other, for a balance due on the account, and the only reason why he did not decree an application of the profits also was that the heir was an infant and they had been *bona fide* applied to his maintenance and education by the guardian before notice. We think that was a very just ground of exception, and should be disposed to adopt it; but as the case is now before us, that matter is not a subject for consideration, for the bill alleges the profits belonging to the infants remain unexpended in the hands of the brother, who acted for them, and therefore there (341) can only be a decree for what he has or ought to have, which can come up only when answers shall have been put in and the facts ascertained upon the usual inquiry. At present the case is for the plaintiffs, as the demurrer admits there are unexpended profits; and to that extent, at least, the creditors ought to have satisfaction. The plaintiffs are therefore entitled to an account, and the demurrer must be overruled with costs, and the case remanded, that the defendants may answer and other proceedings had.

PER CURIAM. Remanded.

Cited: Moore v. Shields, 68 N. C., 331, 333; *Jennings v. Copeland,* 90 N. C., 580; *Shell v. West,* 130 N. C., 173.

JAMES G. ALLEN ET AL. V. JESSE SMITHERMAN ET AL.

1. On a motion to dissolve an injunction, there may be an order for its dissolution or for its continuance to the hearing; but the bill cannot be dismissed before the hearing.
2. When one of the next of kin of an intestate is entitled to a distributive share of an estate and is indebted to the administrator as administrator, the latter may require the former to take such debt in payment *pro tanto* of the distributive share. And if the distributee assigns such share, the assignee is subject to the same equities as the distributee.
3. If the debt so due to the administrator is a bond secured by a surety, the surety has a right in equity to compel the administrator to apply such distributive share towards the satisfaction of the said bond.

ALLEN *v.* SMITHERMAN.

APPEAL from an interlocutory order dissolving an injunction made at Fall Term, 1849, of MONTGOMERY Court of Equity, *Dick, J.*

Elijah Spencer died in 1843 intestate, leaving a widow, Sarah, (342) and several children, and the defendant Smitherman became his administrator. At a sale made by him of his intestate's estate, the widow purchased three slaves at the price of $575, and gave her bond therefor, with George Allen as her surety. Afterwards Allen and said Sarah intermarried, and Allen took the three negroes into his possession. He also applied in part payment of the bond the sum of $75, which had been assessed in money in part of the year's allowance of his wife out of Spencer's estate, but he made no further payment on the bond, nor was anything said to him or to his wife, during his life, on account of her distributive share of Spencer's property. The bill states, as a reason therefor, that it was agreed by and between Smitherman, Mrs. Spencer, and Allen, when the bond was given, that no payment should be made on either side until the estate should be ready for a final settlement, and that then the debt and the distributive share should be applied, the one to the satisfaction of the other as far as it would go. Allen died intestate in November, 1847, and the said Sarah had dower assigned of his lands of the value of $200 or $300, as stated in the answer; and she also made purchase of personal effects to the value of $600 at the sale made by his administrators, who are the plaintiffs, and the defendant Smitherman became her surety in a bond therefor. She had no other property but her said dower and the effects so bought from Allen's administrators, and her distributive shares in the estates of her two deceased husbands. The value of the whole was not more than sufficient to discharge those debts, and she was in fact insolvent. In that condition of things, Mrs. Allen conveyed to the defendant Smitherman her dower lands aforesaid and her distributive shares; and then Smitherman brought suit against Allen's administrators on the bond which he took from Mrs. Spencer and Allen for her purchases, and recovered the balance of the (343) principal, $500, and the interest thereon. This bill was then brought against Smitherman and Mrs. Allen; and, after stating the above facts, it charges that the conveyance and assignment from the latter to the former, who married her daughter, were voluntary, and were in fact made with the resign and to the end that, by suing the present plaintiffs alone on the bond, Smitherman might raise the money out of Allen's estate, and that the plaintiffs should have no effectual remedy over against the principal, Mrs. Allen, by reason of her insolvency. The prayer is that the amount of the defendant Sarah's distributive share of the estate of her husband, Spencer, may be ascertained, and to that end the defendant may account, and that the same and also the dower lands may be applied to the satisfaction of the debt for which the plaintiff's

intestate was the said Sarah's surety, or so much as may be necessary for that purpose, and for general relief; and in the meanwhile for an injunction against taking out execution on the judgment for the debt.

The answer of Smitherman states that the estate of Spencer was much involved and its affairs so complicated that he had been unable to close his administration and settle the estate, and, therefore, that he could not render a final account nor make a probable estimate of the amount of the widow's distributive share, but that he did not think it would amount to as much as the debt due on her bond. It denies positively any agreement whatever with the said Sarah or with Allen that the distributive share was to be applied in payment of the bond or any part of it; but it admits that upon a settlement of the estate, if anything had been going to her, he would have discounted the sum in his hands. It further states that, after the death of Allen, his widow had but little estate, and that all her children were grown and most of them had left the State,
(344) and that she was unable to cultivate her dower land; and that by reason of the distress to which she was reduced it became necessary for her to dispose of the dower and of her distributive share in Spencer's estate in order to provide a comfortable home and livelihood for herself; and to that end that he, Smitherman, purchased the dower and said distributive share, and that the consideration therefor was his agreement to provide his mother-in-law with a comfortable home and maintenance during her life; that the agreement and conveyance and assignment were not intended to defraud or defeat the plaintiffs, but *bona fide* for the purposes mentioned, and in the discharge of a final duty on his part, and of an obligation on the part of the said Sarah to remunerate him therefor, as far as she had the means. The answer further states that the reasons for suing the plaintiffs alone on the bond were that this defendant thought it just and equitable, as Allen got the negroes, that his estate should pay for them; and that he did not deem it prudent, by bringing a joint suit, to enable the plaintiffs to establish that said Sarah was the principal debtor, and thus compel him to proceed against her in the first instance at much expense, trouble, and delay before resorting to them—especialy as the other defendant, Sarah, had no property, after the death of Allen, but the claims before mentioned, which she had disposed of as aforesaid.

On the motion of the defendant Smitherman, founded on his answer, the injunction which was granted on the bill was dissolved, and the bill dismissed with costs; and the plaintiffs appealed.

Strange for plaintiffs.
No counsel for defendants.

RUFFIN, C. J. That part of the decree which dismisses the bill was probably inserted by mere inadvertence, as it is so obviously erroneous. On motion to dissolve an injunction, there may be an order for the dissolution or for its continuance to the hearing. But the bill (345) cannot be dismissed before the hearing; for that is the ultimate disposition of the cause, after the parties have taken issue by a replication and taken their proofs upon the issues, and a hearing had thereon upon the merits. It is contrary to the course of the court, and also unjust to the parties, to dispose of the bill at an earlier stage; for here, for example, the plaintiffs ought to have had liberty to reply to the answer and establish by evidence, if they could, the agreement, alleged on one side and denied on the other, that the widow's purchases and her distributive share should extinguish each other to the amount of the smallest of the two. The decree must, of course, be reversed in that respect.

But the Court holds that it was also erroneous to dissolve the injunction; for, without any such agreement for setting one demand against the other, the plaintiffs have a clear equity, and a right to the relief they ask. It need not be considered now whether the conveyance of the widow's dower, upon the consideration and under the circumstances stated, was not fraudulent against creditors, and whether this surety of an insolvent principal—as the other parties concur in describing Mrs. Allen—is not in a situation, by reason of the judgment against the plaintiffs, to insist on it as against these defendants. There is great reason to consider it fraudulent in an insolvent woman, against whose body no process is given in our law, to convey all her visible estate to a son-in-law for the purpose of securing to herself an intangible annuity in the form of his obligation to provide for her a comfortable support as long as she lives. That is especially true where the circumstances render it so highly probable, as in this case they do, that the object of those parties was not merely to provide for the mother-in-law, but in so (346) doing to throw the burden of the debt on the surety, because they thought the surety ought in conscience to pay it, and then deprive the surety of the means of getting reimbursed from the principal's property. But, for the present purpose, that transaction may be deemed fair, and still the plaintiffs ought to be relieved, upon the ground that the creditor has in his hands adequate means belonging to the principal to satisfy the debt, or a great part of it, and, as the principal is insolvent and the surety has no other means of obtaining indemnity, if he should pay the money, it is the duty of the creditor to protect the surety by applying the fund to the satisfaction of the debt, instead of raising it from the surety.

First, let the case be considered in respect to the sum in which the administrator of Spencer is indebted to the widow for her distributive share. It is quite clear that if one who is entitled to a distributive share becomes indebted to the administrator, the latter has a right in equity to require the next of kind to take his own debt in payment of his distributive share; and if the next of kin sell the share, it cannot affect the rights of the administrator. At all events, it cannot when such sale is made after the debt to the administrator has fallen due and the next of kin has also become insolvent; for although a distributive share may be assignable in equity, yet it is not assignable like a negotiable instrument, but the assignee only comes in the shoes of his assignor and is subject to all equities against the claim. If, then, the widow had assigned her share to any third person, the administrator would still have been at liberty to insist that such assignee should take the widow's bond in payment, as she would have been obliged to do. Having that security in his hands, the creditor would have been obliged to insist on it for the protection of the surety, and he could not surrender it to the prejudice of the surety without discharging the latter *pro tanto;* for sure-
(347) ties are entitled to all the securities which the creditor acquires, and the latter cannot capriciously nor for his own advantage discharge or impair them. He cannot act willfully to the prejudice of the surety; and if he does, he is bound to make good the loss to the surety. *Nelson v. Williams,* 22 N. C., 18. We conceive, therefore, that the creditor here, buying, as he did, with knowledge of Mrs. Allen's insolvency, stands bound to the sureties in the same manner precisely as he would be if, after he knew of her insolvency, he paid the distributive share to her or to her assignee; for he could not have made such purchase or payment without, in effect, giving up a specific security for the debt upon the real debtor's effects, apparently with the view of throwing the debt on the security, as that would obviously be the necessary consequence. For the same reason he is bound to apply towards the discharge of the debt, at least in respect to the surety, the value of such an annuity as he is bound himself to make to Mrs. Allen—that is, her comfortable support for life. All these mutual liabilities have arisen in the administrator's time, and they constitute demands which, on equitable principles, ought to extinguish each other; and there can be no doubt that the administrator would insist thereon, if he had no other security for his debt but the widow's own bond. But he is equally bound to take care of the surety when he can; and if he wantonly or in bad faith refuse to do so, he must take the loss to himself. There can be little doubt that the matter would have been readily adjusted if Allen had lived; and the course of the defendants, since his death, has obviously been adopted as a device to avoid what they considered the hardship of

Allen's getting the slaves purchased by his wife, and at the same time leaving her to pay the price of them. Indeed, nearly as much is stated in the answer, which insists that in equity and conscience the debt thereby became Allen's own. But that notion is entirely un- (348) founded, for at law, the negroes belonged to the husband by his reducing them to possession, while the price remained the price of the wife as principal in the bond and her husband as her surety only; and there is no equity between those two parties which will enable this Court to vary their respective rights as fixed by the law.

Upon the whole, then, the Court holds that the plaintiffs are entitled, at least, to have the distributive share of Mrs. Allen in the estate of Spencer applied in their exoneration, and also the value of the dower land, or, rather, of such part of the annuity to the widow as the land would purchase; and, therefore, that the order dissolving the injunction was erroneous, and must be reversed, with costs. It is true, it does not appear that the debt will be thereby satisfied. But, on the other hand, it does not appear that it will not be; and it is the fault of the defendants not to have stated the accounts so as to show the amount of the distributive share. Those matters can now appear only by an inquiry; and therefore the injunction ought to stand to the hearing, when an inquiry can be directed.

PER CURIAM. Decree accordingly.

Cited: *Wallston v. Cobb,* 54 N. C., 138; *Ramseur v. Thompson,* 65 N. C., 630.

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(349)

BRITTAIN HART v. JAMES C. ROPER ET AL.

1. The maxim, "*ignorantia legis neminem excusat*," is founded upon the presumption that every one, competent to act for himself, knows the law; but the presumption that he knows it is not conclusive, but may be rebutted.

2. Therefore, when a plaintiff alleges in his bill that he was ignorant of the law, and the defendant demurs, it seems that the latter cannot take advantage of the maxim.

3. Where a plaintiff alleges an important equity, he is at liberty to add a small item, not by itself within the jurisdiction of the court, when it is connected with and tends to elucidate the main subject.

4. Where a cause is removed to this Court upon bill and demurrer, or overruling the demurrer, the cause will be remanded to the court from which it came for further proceedings.

CAUSE removed from the Court of Equity of RICHMOND, at Fall Term, 1849.

James Roper died in 1833, leaving a will, which was admited to probate at July Term, 1833, of the county court of Richmond. The testator left no children surviving him, but left a widow and two grandchildren, James C. Roper, one of the defendants, and Sarah, the wife of the other defendant. By the will the testator gave to his widow a negro girl named Lucy, and some other personal property, "to her and her heirs forever," and "lent to her for and during her natural life and *widowhood*" a tract of land and two negro men, Robert and Elias, and some personal property. The rest of the estate, both real and personal, was given to his two grandchildren.

(350) At the said term of the county court the widow entered her dissent; and the jury, appointed according to the provisions of the act of Assembly, allotted to her, in addition to the property willed, to make up her share of the personal estate, the absolute estate in the negroes Robert and Elias; also a negro girl Nancy and two or three other small negroes, besides other personal property. This report was confirmed, and the widow accordingly took the negroes into her possession and retained them until her marriage, with the exception of Robert, whom she sold.

In November, 1847, the plaintiff married the widow. In January, 1849, she died, leaving the plaintiff in possession of the land, which had been assigned to her as dower, and the negroes and other personal property.

The bill then alleges that the plaintiff is illiterate, not able to read, ignorant of law and legal proceedings; that "he was entirely ignorant of the rights which he had acquired by his marriage, and also of the rights which his wife had acquired by her dissent, and of the extent of the interest and title which she had acquired to said property, and to which he had succeeded by his marriage; that a few days after the death of his wife the defendants claimed, or pretended to claim, under the will of James Roper, an interest in all the estate and property of his wife at the time of his marriage"; and, particularly, that they were entitled to two negroes, Elias and Robert, and the rent of the land for 1848 and 1849, and insisted that the plaintiff should surrender the two negroes and pay rent for the dower land; and finally, "your orator, being ignorant of his rights, did surrender the negro Elias and a negro girl Nancy, in place of Robert, who had been sold," and executed a note for $50 as rent for the land, and signed an instrument of writing, purporting to be a relinquishment or release to the defendants of all claim to the negroes; "and at the same time the defendants gave to your orator a paper-writing purporting to be a release and relinquishment of their claim to all the other property of his wife."

The bill proceeds: "Your orator is advised that the defendants (351) had no claim, interest, right, or title to the said negroes Elias and Nancy, or to any other property of his wife, and that no consideration passed from them to your orator; and that said release is inoperative, defective, and void, inasmuch as there is no seal to said instrument of writing, no estate in the defendants for the release (if it be one) to operate upon, and no consideration upon which said writing was obtained; the same having been obtained from your orator in ignorance of his rights and by imposition and fraud."

The bill then offers to surrender the release or paper-writing given by the defendants, and prays that the negroes may be restored to the plaintiff, the release or paper-writing signed by him canceled, and his note of $50 credited with $25, the rent for 1848.

The defendants filed a demurrer.

No counsel for plaintiff.
Strange for defendants.

PEARSON, J. The first ground taken is that by the plaintiff's own showing the acts were done by him with a full knowledge of all the facts, and the whole ground for relief is that he acted in ignorance of the law.

Admitting the bill to be liable to this objection, it may be gravely questioned whether advantage can be taken of it by *demurrer*. The maxim, *"ignorantia legis,"* etc., is founded upon the presumption that every one, competent to act for himself, knows the law. It (352) is necessary for the courts, whether in reference to civil or criminal matters, to act upon this presumption, however wide of the mark it may be in many cases; for, in the language of *Lord Ellenborough*, "otherwise there is no saying to what extent the excuse of ignorance might not be carried"; and there would be much embarrassing litigation, and no small danger of injustice from the nature and difficulty of the proper proofs. 1 Story Eq., 123.

But while, on the one hand, whether a party knows the law is not left as an open question for inquiry, as it is whether he knows of the existence of a fact: on the other, the presumption that he knows it is not conclusive, but may be rebutted. For instance, if there be an intention to pass a freehold estate, and the vendee accepts a deed of feoffment, without livery, he will be relieved upon the ground that he was under a mistake as to the law; for, the intention being clear, the failure to effect it makes the mistake manifest, and rebuts the presumption. So, in *McKay v. Simpson, post,* 452, relief was given because of a mistake of law as to the form of a transfer of bank stock. It is different, however, when the

intention is carried into effect, because, in such cases, there is nothing to rebut the presumption, and the ignorance of the party can only be shown by going into proof, which is not admissible.

As this presumption is not conclusive, it would seem to follow that if a defendant, by demurring, admits that the plaintiff was ignorant of the law, the court must act upon the admission, and it may be that such would also be the case when the answer makes the admission, so as to dispense with the necessity of any proof to rebut the presumption. That it is so in the case of a demurrer is strongly sustained by the fact that the learned and diligent counsel for the defendant has not been able to cite any case in which the objection was taken by demurrer.

(353) We put our decision upon the ground that the bill is not liable to the objection; for it does not appear that the plaintiff had a full knowledge of all the facts. A fair construction of the bill leads to the conclusion that the plaintiff was "ignorant of the extent of the interest and *title* which his wife had acquired, and to which he had succeeded by marriage," in consequence of his ignorance of the facts, as well as of the law, upon which his title was founded.

The bill is hastily drawn. A confusion of ideas is introduced by the use of generalities and sweeping expressions, than which nothing is more calculated to destroy certainty, so much to be desired in all judicial proceedings. It does appear, however, that *fourteen years* intervened between the dissent and the marriage; that during the life of his wife the title of the plaintiff was not called in question; that she died a little over a year after the marriage; and that in a few days after her death the defendants "claimed *under the will* an interest in all the estate and property of his wife at the time of the marriage, and, particularly, that they were entitled to the two negroes, Elias and Robert, and the rent of land from the time of the marriage."

It is certain the parties knew the contents of the will. By it the land and the two negroes, Elias and Robert, were *"lent"* to the widow for her life or *widowhood.* Elias is surrendered; Nancy is substituted for Robert, who had been sold; and rent is exacted from the *marriage,* not the *death* of the widow.

It is almost as certain that the *contents of the report* of the jury were not known to the plaintiff, and possibly not to the defendants. In the absence of any admission that the plaintiff knew the contents of the report, his being ignorant of the extent of his title must be ascribed to his want of information as to this fact, rather than to suppose he

(354) was so stupid as not to know the difference between an estate for the life or widowhood of his wife and the absolute estate. But if it is to be ascribed to both causes, the ground of demurrer fails.

The next ground is that, by the plaintiff's own showing, the instrument signed by the defendants, purporting to pass their interest in the rest of the property to the plaintiff, is void for want of seal, and that no consideration passed to make the transfer of the two slaves by the plaintiff to the defendants valid, as the instrument signed by him was not under seal, and, therefore, the plaintiff had a clear remedy at law.

This objection is based upon a misapprehension of the plaintiff's allegation. There is no allegation of a *gift,* which would not be valid without a deed. The allegation is that the transaction was made to assume the form of a *sale and delivery* of the two slaves for a pretended consideration; whereas, in fact, there was no consideration, and the pretense of one was the means used to effect the fraud and induce the plaintiff to deliver up his property. This Court has concurrent jurisdiction in matters of fraud; and it would be a disgrace to any court, having jurisdiction, to decline to exercise it because the fraud is so palpable and gross that, possibly, redress might be had in some other court.

The third ground is that the $50 note is under the jurisdiction of this Court. That is true; but as the plaintiff has alleged an important equity, he is at liberty to add a small item, as it is connected with and tends to elucidate the main subject.

The demurrer must be overruled, with costs.

The opinion and decree will be sent, together with the other papers, to the court of equity below, to which the cause is remanded. The cause was removed to this Court under an act of the Legislature. There is no express provision as to what is to be done in a case like this. But it is a remedial statute, and by a liberal construction, in connec- (355) tion with the other statutes, we infer that it was the intention of the Legislature to have the cases sent back, to be further prosecuted in the court below.

PER CURIAM. Ordered accordingly.

Cited: S. v. McIntyre, 46 N. C., 5; *Smith v. Kornegay,* 54 N. C., 43; *Foulkes v. Foulkes,* 55 N. C., 264; *White v. Butcher,* 97 N. C., 10; *Kornegay v. Everitt,* 99 N. C., 34.

WILLIAM RAY ET AL. v. JOHN RAY ET AL.

Where a bill was filed against two, one of whom put in an answer, to which there was a replication, and the other filed a demurrer, the cause, while in that state, cannot be removed to this Court under the act of 1848, ch. 30.

CAUSE removed from the Court of Equity of ORANGE, at Fall Term, 1849.

The bill was filed against two, one of whom put in answer, to which replication was taken, and the other put in a demurrer, which was set down for argument; and the case was then sent to this Court.

Graham and Norwood for plaintiffs.
W. H. Haywood for defendants.

RUFFIN, C. J. The cause cannot be entertained, we think, in its present state, but must be remanded. Until the act of 1848, ch. 30, no suit could be brought to this Court upon a plea or demurrer, unless by (356) appeal; and if the decree were interlocutory, the cause, under the act of 1831, ch. 34, was not removed, but only the particular point involved in the appeal, and on that this Court certified an opinion to the court on the circuit. *Littlejohn v. Williams,* 17 N. C., 380. The act of 1848, however, allows the removal of causes before a decree, upon a plea or demurrer, when set down for argument, with the view, no doubt, to avoid incurring unnecessarily a set of costs in each court, and also, chiefly, to avoid delay in the decision of a point of law which may *in limine* determine the litigation. When those purposes can be answered by it, the provision will operate beneficially enough. But it cannot be supposed the Legislature intended to apply it in any case in which it would not have those effects, but others directly opposite. Such would be the consequence of entertaining this case. It would produce delay, without diminishing the expense. The act does not, like that of 1831, authorize the plea or demurrer to be brought here, and in the meanwhile the cause to go on in the court below, but "the cause is to be removed into the Supreme Court."

The court of equity can do nothing more in the case, because it is taken from it entirely. Neither can this Court take the steps necessary to prepare the cause for hearing upon the bill and answers; for, certainly, the act was not intended to repeal the important provision of the act of 1818, which withholds from this Court jurisdiction of suits in equity at issue until they shall have been prepared to be heard here by being set down in the court below. That would, in effect, indirectly confer on us original chancery jurisdiction, contrary, unquestionably, to the legislative intention. It is plain, therefore, when answers or pleas

are put in by some defendants and replications are taken, that the removal of the cause into this Court for the argument of the plea or demurrer of another defendant, instead of speeding the cause or saving costs, would produce the opposite result; for, before the judgment on the plea or demurrer, nothing whatever could be done anywhere, as between the other parties; and after the judgment and the costs incurred in obtaining it, the cause would have to be remanded for further proceedings in the court of equity, beginning, as between the other parties, at the very point which they had reached when the cause was taken from that court a year previously, perhaps, or more. The act ought not to be construed so as thus to arrest all possibility of progress in the cause as between those who put it at issue on the facts, and to whom it may be of the utmost consequence to preserve their proofs by taking them immediately; and it seems apparent that the case within the mischief and, we conjecture, in the mind of the writer of the act, was that in which the decision upon the sufficiency of the plea or demurrer would determine the whole cause; as, where there is but one defendant, or, if more, they all plead or demur, and the pleas and demurrers are all set down for argument. In such cases as those only can the good ends be answered which the act was designed to effect. But in cases situated like the present, "the removal" to this Court cannot fail to produce delay and in most cases also increase the costs; and therefore it is not within the purview of the act. The cause must be remanded.

(357)

PER CURIAM. Ordered accordingly.

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(358)

JOEL TISDALE v. WILLIAM A. BAILEY ET AL.

Where a woman, just before marriage, secretly and with the intent to deceive her intended husband, conveys away her property: *Held*, that the conveyance was void as to him, though the children to whom it was conveyed were themselves innocent.

CAUSE removed from the Court of Equity of JOHNSTON, at Fall Term, 1849.

Elizabeth Bailey was the widow of Austin Bailey, by whom she had four children. He died intestate, and at the sale of his effects she purchased two slaves and other things to the value of $500 or upwards, for which she gave a bond to the administrator. The present plaintiff subsequently made a proposal of marriage to her which she accepted, and it was agreed between them that the marriage should be celebrated on 24 December, 1846, and it took place accordingly. On the day preceding

the marriage she executed a deed to her children for the said slaves and all her other property, conveying the same to them immediately and absolutely.

The bill was filed by the husband against the children in February, 1848, and stated that the plaintiff had no knowledge, at the time of the marriage, that the deed had been executed, nor had he been informed nor had reason to believe at any time before the marriage that his intended wife had any purpose to convey away her property or any part of it to any person or for any use; and that, on the contrary, he believed (359) she had not, and that he would upon the marriage become entitled to the slaves and other effects which she then had in her possession. The bill states that accordingly the plaintiff took possession of the property when he married, and used it as his own for several months before he had any intimation of the conveyance so made by his wife—that is, up to 29 April, 1847, when the deed was registered. And the bill further states that the deed was not only executed secretly, but that in fact the existence of it was purposely concealed from the plaintiff, and the writer of the deed and the subscribing witnesses to it were specially requested and induced by the wife not to make it known to the plaintiff, but to keep it secret from him. The prayer is that the deed may be declared fraudulent and void.

The answer of the children by their guardian admits the deed and the marriage; but it insists that it was executed without their knowledge or any fraudulent contrivance on their part, and therefore that they have a right to hold under it.

(360) *H. W. Miller and J. H. Bryan for plaintiff.*
G. W. Haywood for defendants.

RUFFIN, C. J. The evidence fully sustains the statement of the bill. The deed bears date 23 December, 1846, and is witnessed by two persons, who say that one of them prepared it, and that after execution it was left with him for safe keeping for the children, with a request to both of them not to let the intended husband, the plaintiff, nor any person know of it until after the marriage—the wife saying that she had worked for the property and wished her own children to have it, and not to leave it under the control of her husband, if she should marry, as she expected to do. Those witnesses state that they were present at the marriage the next day, and each of them says he did not communicate to the plaintiff the existence of the deed. One of them, however, states that he gave information of the circumstance to the person who married them, and who was the administrator of the wife's first husband; and that person says that the bond for the wife's purchases was still due to him, and that

he did not tell the plaintiff of the deed, and that he had been sorry ever since that he did not, as he did not believe the plaintiff knew it, and he did not think it right that he should be so cheated.

The evidence brings this case within the restricted rule on which the Court acted in *Logan v. Simmons,* 38 N. C., 487; for there is not only a secret conveyance, but such secrecy was expressly designed to deceive the intended husband, and did deceive him as to the state of the wife's property. He was therefore, to use the language of the witness, cheated, and is entitled to have the conveyance put out of his way, which would have the effect, if it stood, of making the cheat successful. (361)

Since the decision of that case it is found that the general question has again come up for consideration in England, whether concealment of itself would not render a conveyance by a woman, pending the treaty of marriage, of all of her property for her separate use or for the benefit of children, fraudulent; and it is very obvious that the opinion of *Vice Chancellor Wigram* strongly inclines to the affirmative. *Taylor v. Pugh,* 1 Hare, 608. He refers to the rule laid down by Mr. Roper, which was quoted in *Logan v. Simmons,* and says he takes it to be correctly stated as the rule of the Court; and then he says that the several circumstances which have been sometimes thought material to negative the imputed fraud, such as the poverty of the husband, the want of a settlement from him, the reasonable character of the wife's settlement upon the children of a former marriage, and the ignorance of the husband that the wife owned the property, may, indeed, be material considerations for the guidance of the parties as to the manner in which the wife's fortune should be settled; but that they should constitute a reason for concealing the arrangement from the husband, he confesses that he cannot comprehend, nor that the concealment should be treated as immaterial. Certainly those are forcible expressions, and seem to be just views; for fraud has been aptly described to be "what is done in secret, and when there is a concealment from the party in a matter which concerns his interest." *Tyrrell v. Hope,* 2 Ath., 560.

In this country there has been no case in which it has been held or intimated that such a conveyance, whereby a woman makes herself destitute, or bestows all upon herself to the entire exclusion of the intended husband, ought, if concealed, to stand against his marital rights and just expectations; but there are divers cases to the contrary, and strongly so. *Ramsay v. Joyce,* 1 McMul. Eq., 237; *Manes v. Durant,* 2 Rich. Eq., 404; *Tucker v. Andrews,* 13 Shep., 124. In the latter case it was held, indeed, that though the husband was entitled to relief, yet a (362) suitable provision should be secured to the wife—a doctrine which for very sufficient reasons does not prevail in our law. In this case there was an intentional and practiced concealment, for the express purpose of

preventing the intended husband from a choice of acting as he might if he knew all. As to the idea that the children can hold under the deed upon the ground of their innocence of any fraud, it is altogether inadmissible. *Lord Chief Justice Wilmot* said in *Bridgeman v. Green,* Wilm.'s Notes, 64, that though not a party to an imposition, whoever receives anything by it must take it tainted with imposition; partitioning and cantoning it out among relations and friends will not purify the gift and protect it against the equity of the person imposed upon. Let the hand receiving it be ever so chaste, yet, says he, if it comes through a polluted channel, the obligation of restitution will follow it. That principle has been applied in *Harris v. Delamar,* 38 N. C., 219, and several other cases in this Court; and it refutes entirely the argument relied on for the defendants.

The plaintiff is entitled to the decree he asks; but, of course, without costs.

PER CURIAM. Decree accordingly.

Cited: Joyner v. Denny, 45 N. C., 178; *Spencer v. Spencer,* 56 N. C., 406; *Ferebee v. Pritchard,* 112 N. C., 86; *Brinkley v. Brinkley,* 128 N. C., 508, 516.

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(363)

EDWARD MOONEY AND WIFE v. JONATHAN EVANS, EXECUTOR, ETC.

1. A bequest of "corn, fodder, meat, and other *provisions* on hand" includes wine and brandy which the testator had laid in and provided for his own use.

2. A testator gave two slaves to his wife for life, and after her death to B. R. One of the slaves died and the other became paralytic, so as to be a source of constant expense, and the legatee in remainder refused to accept the legacy. *Held,* that the expense of this slave must be defrayed out of the residue of the estate not disposed of.

3. A testator devised as follows: He gives to his executors certain lands, a number of slaves, bank stock, etc., "in trust to receive the rents, issues, dividends, and profits until J. M. arrives at the age of 35 years, and to apply the same to the comfortable support and maintenance of the said J. M. and family, and upon his arrival at the age of 35 years, if his habits are good and regular and he is attentive to business, then in *further trust* to convey the same to him absolutely. But in case his habits are bad, and he should be inattentive to business, then in trust to settle such property so as to give the use and profits of the same to the said J. M. for life, with remainder over to such child or children as he may leave living at his death. But if he leaves no child, then remainder over to the children of Margaret Casey," etc. J. M. died before

he arrived at the age of 35. *Held*, that under this devise J. M. took only a life estate, subject to be enlarged to an absolute estate on the contingency mentioned, and that on his death before the time for the happening of the contingency, the remainder took effect and the absolute estate vested in his children.

CAUSE removed from the Court of Equity of CUMBERLAND, at Fall Term, 1849.

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

Strange, with whom was W. Winslow, for the next of kin.

Winston, J. H. Bryan, Dobbin, and W. B. Wright for the children of J. R. McGuire.

PEARSON, J. The bill and cross bill are filed to obtain a con- (364) struction of certain clauses in the will of John Kelly, and for an account. 1st. (Item 16) "I give and bequeath to my dear wife, absolutely, all the corn, fodder, meat, and *other provisions* on hand at my death." At the death of the testator there was a small quantity of wine and brandy in his cellar; he was not a dealer in wine and spirituous liquors. The wine and brandy had been *"laid in"* and *"provided"* for use, and clearly belonged to the widow under the word *"provisions."* 2 Williams Executors, 753.

2d. The testator gives to his wife the slaves Billy and Tibby, during her life, and at her death the slaves are given to the executor, M. Evans, "in trust for the use and benefit of Benjamin Rush." The executor assented to the legacy and delivered the two slaves to Mrs. Kelly, to hold during her life. Bill afterwards died and Tibby was stricken with palsy; she is old; there is no longer hope of her recovery; and she is now and will be for the rest of her life a charge. Mrs. Kelly is also dead. It is admitted to be against the interest of the legatee, Benjamin, who is an infant, to accept the legacy. No other property is given to him.

The support of Tibby is a charge upon the estate which must (365) be borne by the plaintiffs, who are entitled to the residue as next of kin. It was suggested that her support should be a charge upon the legacy to John McGuire, under the words, "all other slaves not herein disposed of." We do not think these words embrace Tibby. She was disposed of. The legal title to her is now in the defendant Evans, in trust for Rush, who declines accepting. It is therefore the duty of the executor and trustee, out of such part of the estate as remains in his hands undisposed of, to see that she is comfortably provided for, so as to prevent her from being chargeable to the county.

3d. The testator gives to his nephew, John R. McGuire, his gold watch and chain and seal absolutely. He gives several tracts of land to his wife

for life, and at her death to his executors, in trust for John R. McGuire during his life, with remainder to his children; if he leaves no child, in trust for the children of Margaret Casey, etc.

In clause 3 he gives to his executors certain lands, a number of slaves, bank stock, etc., "in trust to receive the rents, issues, dividends, and profits until John R. McGuire arrives at the age of 35 years, and to apply the same to the comfortable support and maintenance of the said John R. McGuire and family, and upon his arrival at the age of 35 years, if his habits are good and regular and he is attentive to business, then in further trust to *convey the same* to him absolutely. But in case his habits are bad, and he should be inattentive to business, then in trust to settle such property so as to give the use and profits of the same to the said John R. McGuire for life, with remainder over to such child or children as he may leave living at his death. But if he leaves no child, then remainder over to the children of Margaret Casey," etc.

John R. McGuire died before he arrived at the age of 35 years, leaving two infant children.

(366) The plaintiffs in the original bill, who are the next of kin of John Kelly, insist that as McGuire died before he arrived at the age of 35 years, the limitation over did not take effect, and the property, being thus left undisposed of, belongs to them.

The executor of John R. McGuire, who is the plaintiff in the cross bill, insists that the absolute estate vested in him, subject to be divested if he arrived at the age of 35 years and was then not of good habits, which event being made impossible by his death, leaves the absolute property in his personal representatives. It is insisted for the infant children that a life estate was given to their father, to be enlarged to an absolute estate upon his arriving at the age of 35, provided he was of good habits, and otherwise to stand as a life estate, with a remainder to them; and as he died before arriving at that age, his estate was not enlarged, and the remainder took effect. It seems to us extremely clear that the construction contended for in behalf of the children is the true one, and does not need argument or authority to sustain it.

The property was certainly disposed of; McGuire was to have a life estate, at all events, which was to become absolute upon a contingency; and in the event it did not become absolute, there is a limitation over at his death to his children. So solicitous was the testator not to leave it undisposed of, that he makes a second limitation over to the children of Mrs. Casey, if McGuire died without children. The fallacy of the very ingenious argument made for the next of kin consists in assuming that the limitation over was made to depend upon the event of McGuire's attaining the age of 35 and being then of bad habits; whereas the limitation over was to take effect at his death, and depended upon the event

of his life estate not being enlarged to an absolute estate in the (367) manner provided for; so that his attaining the age of 35 and having certain habits does not bear directly upon the limitation over, *as being necessary to call it into existence,* and could only affect it indirectly, by enlarging the first estate and absorbing the whole, thus leaving nothing to be limited over. The intention obviously is that unless McGuire took the absolute estate, it should go to his children or to the children of Mrs. Casey.

It is equally clear that McGuire did not take the absolute estate, subject to be defeated by a condition subsequent. He took an estate for life, subject to be enlarged by a condition precedent, which has not happened. The will expressly provides that the executor *shall convey to him* the absolute estate upon a contingency: this is not consistent with the idea that he had it before. The provisions made for the favorite of the testator are of three kinds: The watch, etc., he takes absolutely; certain lands he takes for life, with remainder to his children; the property contained in the clause now under consideration he takes for life, with remainder to his children, but *with a chance* that he may take absolutely.

We have examined the cases cited in the argument, and see nothing in them to support the idea that in this case the absolute estate, as distinguished from a life estate, vested in the first taker, subject to be defeated by a contingency. The cases carry the doctrine of allowing the estate of the first taker to be a *vested* one to a great extent *in order to give the profits to the first taker* and thus prevent an accumulation, and make some provision for him until it be ascertained whether the contingency will happen or not. Here, then, is an express provision that the first taker shall have the profits, and it is admitted that his estate is a vested one. (But is it vested absolutely, or for life only? is the question.) So the cases cited are not in point. And the fact that such provision is made furnishes an argument against the position that the estate vested in the first taker was an absolute one; for if so, why make (368) the provision?

There must be a reference to state the account; and it must be declared to be the opinion of this Court that the wine and brandy belonged to Mrs. Kelly, and the defendant Evans is not to account for it; and the slave Tibby is a proper charge upon the fund remaining in the hands of the executor undisposed of; and that the "land, slaves, bank stock," etc., contained in clause 3 of the will, belonged to the two infant children of John R. McGuire.

PER CURIAM. Decree accordingly.

DOLLY ALSTON ET AL. v. JAMES W. BATCHELOR ET AL.

A legatee cannot pay off the debts of the testator and then file a bill against the executor for repayment.

CAUSE removed from the Court of Equity of HALIFAX, at Fall Term, 1849.

John Alston died in 1843, leaving a last will; and the executors named having renounced, the defendant Batchelor was appointed administrator, with the will annexed. The will contains this clause: "I give and bequeath to my beloved wife, Dolly Alston, after paying my just debts, all of my property, real, personal, and perishable, to be hers in fee simple, so that she can have the right of giving it to our six children (naming them) as she may think best." The estate was a good deal in (369) debt, and the plaintiff Dolly believing, as she alleges, that she was entitled to the beneficial interest in the whole of the surplus, and with a view to prevent a sale of the negroes, took up a note, which one Harvey held against the testator for $490, by substituting her own note, with the other two plaintiffs as her sureties. Harvey afterwards compelled her and her sureties to pay the amount of the note; and the prayer of the bill is that the defendant Batchelor may be decreed, out of the assets in his hands, to refund to them the amount so paid. There is no allegation that she substituted her note for the note held by Harvey at the instance of the defendant Batchelor. The bill was afterwards amended by making the six children of the testator parties defendants; and the plaintiffs by their amended bill insist that, whether the surplus, by a proper construction of the will, is to be paid over to the said Dolly for her own use, or in trust for her children, the plaintiffs are entitled to have the amounts paid by them to Harvey repaid to them by the said Batchelor out of the assets in his hands.

The defendant Batchelor admits that the testator owed the debt to Harvey which has been paid by the plaintiffs; but he says they acted officiously and not only without his consent, but against his advice, and he denies their right to call upon him for the sum so paid by them. He further insists that after his appointment as administrator with the will annexed he duly advertised for all creditors to present their claims for payment, and that the debt which the plaintiffs seek to recover is barred by the statute of limitations. The other defendants, who are the children of the testator, insist that the payment of the debt to Harvey by the said Dolly and her sureties, and the substitution of the note, were made without their knowledge, privity or consent, and refused to give their consent that the amount shall be repaid by the administrator.

Before the present bill was filed the plaintiff Dolly had filed a (370) bill against the defendant Batchelor for an account. The bill is still pending, and there is a decree for an account, for which reason the defendant Batchelor objects to a decree for an account in the present bill.

Bragg for plaintiffs.
B. F. Moore for defendants.

PEARSON, J. It is conceded that the plaintiff Dolly is entitled to whatever surplus may remain in the hands of the administrator, and for that she will have a decree in the bill filed by her for an account, which is still pending. Whether, after it is received by her, she will hold it for her own use, or in trust to divide it among the six children of the testator, will be a very interesting question; but it is one about which we do not feel at liberty in this case to express an opinion. It is a question between the plaintiff Dolly and the defendants, her children, with which the other plaintiffs in this case and the defendant Batchelor have no concern, and the present bill was not filed with a view or in a manner to present it for our decision.

The plaintiffs are not entitled to the relief sought for by this bill. There is no authority to sustain the position that a legatee may pay off the debts of the testator, and then file a bill for repayment. It is the duty of the executor or administrator to pay debts; and if a legatee was allowed to interfere, it would be inconvenient and derange the clear course of administration. In this case the administrator stands upon his rights; and the plaintiffs are without remedy, both upon the ground that they officiously intermeddled with a matter about which they had no concern, and upon the ground that the debt to which they seek to be substituted is barred by the statute of limitations.

PER CURIAM. Bill dismissed with costs.

Cited: Davidson v. Potts, 42 N. C., 274.

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(371)

THOMAS HORNER v. TIMOTHY DUNNAGAN.

Where there has been a suit between parties, an account taken, and a decree thereon, neither party, while the decree remains in force, can bring a new suit for the purpose of recovering items which it is alleged were omitted in the former account.

CAUSE removed from the Court of Equity of ORANGE, at Fall Term, 1846.

HORNER *v.* DUNNAGAN.

In the year 1811 the plaintiff purchased of the defendant a tract of land at a stipulated price, part of which was paid at the time and the balance secured by two bonds payable in one and two years. No title was made, but a bond binding the defendant to make one. In 1839 the defendant brought an ejectment against the plaintiff to turn him out of the possession of the land, when Horner filed a bill in equity against the defendant, in which he prayed for an injunction to restrain him from taking out a writ of possession and to compel him to convey, alleging that all the money due for the land had been paid. In his answer the defendant denied the payment of the money. Whereupon the injunction previously granted was dissolved and the defendant let into possession. The cause being subsequently set for hearing, after replication, was transferred to the Supreme Court, where, upon the hearing, there was a decree for an account. The account was taken by the master, whose report was duly confirmed and a final decree rendered. The plaintiff regained possession in 1844. In the master's account and report
(372) rendered in the Supreme Court nothing was allowed for the rent of the land or for waste committed by the defendant. The present bill was filed in January, 1845, to have an account for the rents during the time the defendant was in possession and also compensation for waste committed. In the original bill there was no claim for rents and waste, because at the time it was filed nothing of either kind was due. The plaintiff states that he did not, in taking the account before the master, embrace those subjects, because "he understool that he and the said Dunnagan were themselves to have that matter arbitrated, or otherwise settled, without further complicating the existing suit between them." The defendant in his answer insists upon the decree rendered in the former case as a bar to the relief sought in this bill, and positively denies that there was any understanding or agreement between him and the plaintiff to settle by arbitration or otherwise any question as to rent or waste.

Norwood for plaintiff.
H. Waddell for defendant.

NASH, J. *Interest reipublicæ ut finis sit litium* is a maxim as well of courts of equity as of those of law. All the relief sought for by this bill was open to the plaintiff and could have been obtained by him in the former proceedings. It is his fault that he did not. His excuse for not having brought his claim for rent and waste before the master when the account was taken, that "he *understood* those matters were to be settled by the parties themselves, by arbitration or some other mode," is not supported by any evidence whatever, and the defendant expressly denies

there was any such agreement. The plaintiff, in fact, does not aver it, but simply states "he understood it" to be so. He does not even say that the defendant in any manner contributed to such belief. (373) The decree in the first case is a final one, and while it continues in force puts an end to all litigation between the parties upon the subject-matter in dispute in that case.

PER CURIAM. Bill dismissed with costs.

HARRIET FREEMAN ET AL. v. JONES COOK ET AL.

1. A want of good faith or of proper diligence will subject a trustee to the loss which may be consequent upon it.
2. A marriage settlement stipulated that the property settled should remain in the hands of the husband; but if, in the opinion of the trustees, it should become necessary for any purpose to take the property out of the hands of the husband, the trustees should be at liberty to do so without the interruption of the husband. *Held*, that when the trustees found that the husband was wasting and disposing of the property, it was their duty to resume the possession, if it could be done by proper diligence, and if they failed to use such diligence they were responsible for any loss that might occur.
3. The advice of counsel will not protect a trustee from the consequences of a failure to discharge his duty properly. If he has doubts, he should apply to a court of equity, which will always give him directions upon which he may rely with entire confidence.
4. When trust property has been improperly disposed of, and is capable of being followed in specie, the party in possession, with notice, may be compelled to reconvey it. If it cannot be followed or the person in posssession cannot be made liable to the trust, the trustee will be decreed to compensate the *cestui que trust* by payment of the value of the property so lost, and also to account for all rents, hires, interest, and other profits which would or might have been made from the property so lost.

CAUSE removed from the Court of Equity of FRANKLIN, at (374) June Term, 1849.

Harriet Green, a minor, now the plaintiff, Mrs. Freeman, being about to marry William D. Freeman, a marriage settlement was executed by the parties whereby the property of Harriet Green was conveyed to the defendants upon the trusts therein expressed. The property conveyed consisted of lands, negroes, money and securities for money. By the settlement it is provided that William D. Freeman "is to have, use, and enjoy all and singlar the profits arising from the said land, negroes, and other property hereby conveyed, during his natural life"; and if he

should die, his wife surviving him, then the property "to inure to the benefit of the said Harriet Green and her children who are then alive, and their heirs forever, as tenants in common." It is then provided, "And further, it is the intention of the parties that if in the opinion of the said Marmaduke Jeffries and Jones Cook, or the survivor of them, etc., it shall become *necessary, for any purpose* whatever, to remove the aforesaid property hereby conveyed, or any other part of it, out of the possession of the said William D. Freeman, the said Jeffries and Cook or the survivor them, etc., shall be at liberty to do so without the interruption of the said William D. Freeman." The defendants executed the deed of settlement and assumed the trust. The infant plaintiffs are the only children of Mrs. Freeman by her husband, Mr. Freeman, and who were alive at his death, which occurred in February, 1828. Immediately upon the marriage, the whole of the property conveyed, both real and personal, was by William Harrison, the guardian of Harriet Green, delivered over to the husband, none of it ever having been in the actual possession of the defendants or either of them. The money and other property of that kind were wasted by Freeman; and soon after he took possession of the slaves they were seized by officers under executions against the husband, and sold to pay his debts. They were pur-
(375) chased by different persons, and some of them were carried out of the State, beyond the jurisdiction of the court. All that were retained in the State have been recovered at law and were in the possession of the plaintiffs. The defendants had full notice of the sale of the negroes and were present when it took place.

The bill charges a breach of trust in the defendants in not suing William Harrison for the money and the securities for money, and for the value of the negroes that were carried off, and for not taking proper steps to secure them. It prays for an account of the trust fund.

The bill is taken *pro confesso* against Marmaduke Jeffries, who has left the State and is insolvent.

Jones Cook, in his answer, avers that the property conveyed by the settlement was all put into the possession of William D. Freeman after the marriage, by an order or decree of the county court of Wake, without his knowledge or consent. As soon as he heard it, having *no confidence* in William D. Freeman, and anxious to discharge his trust to the best of his ability, he demanded the property from him. He refused on the ground that he was entitled to it during his life. He thereupon took the advice of respectable counsel, who stated that, under the settlement, the husband, W. D. Freeman, had an unquestionable right to the property during his life, and that the defendants could not interfere with it; and further, that he *doubted* if the marriage settlement was not void because of the nonage of Mrs. Freeman when she executed it; that the

strong impression on his mind was that, for that reason, it was void. They were further advised, if an attempt should be made to sell the negroes, it would be their duty to attend and make known to the purchasers the rights of Mrs. Freeman, so as to fix them with notice. All of which they did, exhibiting the settlement.

W. H. Haywood for plaintiffs. (376)
No counsel for defendants.

NASH, J. The first inquiry presented by the case is, Have the defendants been guilty of a breach of their trust? Justice Story, 2 Eq. Jur., 576, sec. 1275, thus sums up the duty of a trustee: He is to defend the title to the property at law, should any suit be brought concerning it; to give notice to his *cestui que trust;* to prevent any waste or injury to the trust property, etc., and must act in relation to it with good faith and reasonable diligence. He must be particularly careful, says Mr. Willis, in his treatise on trustees, p. 125, to execute the trust faithfully and according to the intention of the parties creating it; and however fully a discretionary power of management may be given, yet if he omit doing what would be plainly beneficial to his *cestui que trust,* he will be answerable. A want of good faith or of proper diligence will subject a trustee to the loss which may be consequent upon it. If the case before us be tried by these principles, the defendants have acted negligently: not with that diligence which was incumbent on them, but with a delay amounting nearly to an abandonment of the property.

Let it be admitted that William D. Freeman was, under the settlement, entitled to the possession of the property during his life, still as the legal estate was in the defendants, they were entitled to take the propprty out of his possession if the interest of those in remainder required it, or were bound to take steps to secure it against his illegal acts. *Tidd v. Lister,* 5 Mad., 429, 432, 433; *Whitfield v. Bennet,* 2 P. Wil., 242; Hill on Trustees, 384-5. They suffered the property to remain in the possession of a man who they knew to be an unsafe person to have the management of it. They stood by and saw it wasted, and the negroes sold, not by him, but for his debts; a man who, if not insolvent at that time, they knew to be much embarrassed. And yet they took no (377) steps to protect or secure it.

But the case does not rest on general principles. The parties provided a remedy for the very evil which has occurred, and which was anticipated. The marriage settlement provides that when, in their opinion, it should become necessary for any purpose to withdraw the property from the possession of William D. Freeman, they should do it. If they had a discretionary power given them, it was not an arbitrary one, to act

as a shield for negligence, but one to be exercised and regulated by reason and propriety, and *only* for the benefit of those interested. Hill on Trustees, 495. The defendants covenanted that they would, if it should become necessary, take the property from William D. Freeman. This they did not do, or attempt to do any farther than to demand it. They ought, immediately on his refusal, to have appealed to a court of equity, which upon a proper case would have compelled him either to surrender the property to the trustees or secure its forthcoming at the termination of his life estate. And if the interest of William D. Freeman was liable to be sold under execution, the purchasers acquired nothing but what was in him; they stood in his shoes, and might have been restrained from carrying the slaves out of the State. All this they neglected to do. Nor have they, as far as the answer discloses the fact, made the slightest effort to regain the possession of that portion of the slaves which has been carried away. This is clearly *causa negligentia.*

The defendants, however, allege that they ought not to be made answerable, as they took the advice of counsel and acted on it. The answer states that they were not only advised they could not disturb the possession of Mr. Freeman, but the counsel *doubted* if the settlement was not void for the nonage of Mrs. Freeman, and that he was disposed
(378) to think it was void. It was very important to the defendants, not only to have good advice, but such as would sustain or remove the doubts thus expressed and protect them in their action. What course, then, ought they to have pursued? Their only safe course was to have procured the advice of a court of chancery, which they had a right to resort to. Willis on Trustees, 125; 2 Fon. Eq., 172, note c. The chancellor is the only safe and secure counselor to trustees. The counsel, however, gave no *advice* upon this point; he merely suggested doubts. But if he had given a positive opinion, it would not have protected the defendants; it would have been palpably erroneous. An infant can enter into a marriage contract in relation to personal property, and if he does so, is bound by it. Atherly on Marriage Settlements, p. 49. The settlement in this case was not void.

The maxim, that ignorance of the law will furnish no excuse for a breach of duty or omission to perform it, is as much respected by equity as by law. 1 Fon. Eq. B., ch. 1, sec. 7, note V; 1 Story, 121, sec. 3; Hill on Trustees, 149. In *Doyle v. Blake,* 2 Sch. and Lefr., 243, it was admitted that the defendant, who was an executor, meant to act honestly, but had received wrong advice. *Lord Redesdale* said: "The Court must proceed, not upon the improper advice under which an executor may have acted, but upon the act he has done. If under the *best* advice he could procure he acts wrong, it is his misfortune; but public policy requires that he should be the person to suffer." Looking, then, alone

to the acts of the defendants, we are constrained to say that they have been guilty of such negligence as amounts to a breach of trust and subjects them to make good the injury the plaintiffs have sustained in consequence of it. In *Beal v. Darden,* 36 N. C., 54, the Court say: "The total neglect to look after the slaves for three years, when the character of the person in whose possession they were was so bad that he was generally considered unfit to be intrusted with the possession (379) of slaves, is almost an abandonment of the property altogether." Here there has been no attempt made by the defendants, for more than thrice that period of time, to recover the slaves carried away out of the State, or to recover from William D. Freeman the principal money put into his hands by William Harrison, or the value of the other property conveyed in the deed of trust. As to the money and the securities for money, it was unquestionably the duty of the trustees to have taken and retained possession of the fund for the benefit of those in remainder; and to permit them to remain unprotected in the hands of Freeman, after notice of their not being safe in his hands, was a breach of trust. Hill on Trustees, 386. William D. Freeman died insolvent.

In giving relief for a breach of trust, a court of equity endeavors, in the first place, as far as possible, to replace the parties in the situation they would have been in if no breach of trust had taken place. And for this purpose, when the trust property has been improperly disposed of, and is capable of being followed in specie, it will compel the trustee, or the party in possession, with notice, to reconvey it. If it cannot be followed, or the person in possession cannot be made liable to the trust, the trustee will be decreed to compensate the *cestui que trust* by payment of the value of the property so lost. And he will be decreed to account for all rents and hires and interest and other profits which would or might have been made from the property lost. Hill on Trustees, 522.

There must be a reference to the master to ascertain the number of the slaves sold to pay the debts of William D. Freeman, which have not been recovered and were alive at the death of said Freeman, and their increase up to that time, and their value; and also to take an account of the money and securities for money which came into the hands (380) of William D. Freeman from Harrison, and was by him appropriated to his own use, with interest upon the value of the abstracted slaves since the death of William D. Freeman, and to inquire whether the defendants could, after they received notice of his having received the proceeds, have recovered the money from said Freeman; and if they should find they could have recovered it, to compute interest thereon from the same time.

PER CURIAM. Decree accordingly.

Cited: *Satterfield v. Riddick,* 43 N. C., 271; *Deberry v. Ivey,* 55 N. C., 375; *McLeran v. Melvin,* 56 N. C., 200; *Cheatham v. Rowland,* 92 N. C., 344; *McEachin v. Stewart,* 106 N. C., 343; *Culp v. Stanford,* 112 N. C., 669.

JOSIAH THOMPSON ET AL. v. JOHN NEWLIN.

1. Where a testatrix left certain slaves to A. B., without expressing any trust on the face of the will, but there was a secret understanding that the slaves should be sent out of the State for the purpose of being freed, upon the conditions prescribed by law: *Held,* by a majority of the Court, that A. B. should be compelled to execute this trust within a reasonable time by procuring an order of the Superior Court, entering into bond as required by law, and removing the slaves to some country where they would be free.
2. *Held,* by PEARSON, J., *dissenting,* that the trust being secret, it must be inferred that the testatrix intended that the slaves should be sent out of the State to be free, without complying with the provisions of the law, but evading them, and that the bequest was therefore void and the next of kin were entitled.

(381) CAUSE removed from the Court of Equity of ORANGE, at Fall Term, 1846.

Sarah Freeman, by marriage articles with her intended husband, Richard Freeman, became entitled to her property to her separate use, with the power of disposing of it by a will during her coverture. She had some real estate, about thirty slaves, and money or securities for money to the amount of some $7,000 or $8,000; and by her will, dated May, 1835, she devised a piece of land to her husband during his life; and the remainder therein, and all her other land, her negroes, money, debts, and every other part of her estate she gave to the defndant John Newlin, and appointed him her executor. She died in 1839, and the executor propounded the will, which was contested by her husband, and heirs, and next of kin; but the will was finally established early in 1843. In August following this bill was filed by her next of kin against Newlin and Freeman, and charges that, although the devises and bequests to Newlin are absolute in their terms and without any trust expressed in the will, yet they were all upon the secret and unlawful trusts following: That the negroes should be held here, not for the benefit of Newlin, the apparent donee, but for the benefit of the negroes themselves, and in a state of *quasi* freedom, and that the devises and bequests of the other parts of the estate were in secret trust for the use and benefit of the negroes. The bill prays a discovery of those trusts, and that

they may be declared unlawful and void, and also that it may be declared that a trust resulted to the plaintiffs, and for an account and distribution of the slaves and other personal estate.

The answer of Newlin admits that the bequest of the slaves to him was not to his own use, and states that the testatrix wished them to be emancipated, and gave them to him in trust that he should have them emancipated according to law. The defendant states that the testatrix and he frequently had consultations together upon the subject of emancipating them, and at one time she had determined to manu- (382) mit and send them out of the State, but afterwards abandoned that purpose, with the view that the defendant should have it done after her death. He states that both the testatrix and he were fully informed that the negroes could not remain in North Carolina as free persons; and that it was at no time intended by them that they should remain here, but that they should go out of the State; that the defendant told the testatrix she might express the trust in the will that the slaves should within a certain time be sent out of the State, according to law, to any other State or country in which they might enjoy freedom; that the testatrix preferred not to express the said trust in her will, but to confide in the defendant to execute her wishes and to take the necessary steps to carry them into effect; which he undertook and promised her to do; and that upon the faith thereof she executed her will in the terms in which it appears. The defendant states further that the testatrix seemed to prefer Liberia as their place of destination; but that she left to the defendant's discretion the place, and also the manner of transporting the negroes to some other country than North Carolina. He further states that, having accepted the said trusts with the purpose of executing them to the best of his ability, he would long ago have done so by sending the negroes out of the State, if he had not been prevented by the continued litigation at the suit of the plaintiffs touching the will and property; and that it is still his purpose to execute the trusts according to the laws of the State; and he submits to do so under the direction of the court. He denies that there was at any time an understanding between the testatrix and himself to violate or evade the law by holding the negroes in a state of qualified slavery.

The answer further states that the devises and bequests of the (383) parts of the estate were upon the trusts to apply as much thereof as should be required to defray the expenses of removing the slaves and making some provision for them, and in part to compensate the defendant for his trouble for carrying into effect the wishes of the testatrix.

The reporter, at the request of one of the judges, annexes a full copy of the will, as follows:

"I, Sarah Freeman, of the county of Orange and State of North Carolina, being of sound and disposing mind and memory, do make, publish, and ordain the following to be my last will and testament, that is to say: First, I give and bequeath to John Newlin all my negro slaves, to him, his executors, administrators and assigns forever.

"Secondly. I give and devise all my lands or other real estate of which I may be seized or possesed unto John Newlin, his heirs and assigns forever.

"Thirdly. I give and devise unto Richard Freeman, my husband, during the term of his natural life, my lands on Rocky River in Chatham County, and after his death then to John Newlin, his heirs and assigns forever.

"Fourthly. I give and bequeath unto John Newlin, his executors, administrators, and assigns, all my moneys, notes, bonds, stocks, household furniture and all my personal property of whatsoever denomination it may be. And I do hereby revoke and make null and void all former wills by me at any time heretofore made.

"Lastly. I do hereby appoint the above named John Newlin the devisee of all my estate, real and personal, to be the executor of this my last will and testament, and to which I have set my hand and seal this 20 May, 1835."

Norwood, W. H. Haywood, Mebane, and Badger for plaintiffs.
H. Waddell, Graham, and J. H. Bryan for defendant.

(384) RUFFIN, C. J. If the trusts charged in the bill had been those on which the gifts were made, they would have been contrary to the policy of the law and void; and, of consequence, there would be a resulting trust for the plaintiffs. But the trusts disclosed in the answer for the emancipation and removal of the slaves are not unlawful. They are, indeed, in accordance with the policy, plainly appearing in the act of 1830, which, moreover, always prevailed here, provided only the emancipated slaves were carried, and kept, without our borders. If those trusts had been expressed in the will, they would undoubtedly be valid, and the executor and donee in trust would be compelled to execute them. *Cox v. Williams,* 39 N. C., 15. When this case was here before, it was held that the trusts would be no less obligatory on him in conscience and by the law of this Court, if the gifts were in fact made upon such express trusts, though not declared in the will, but resting in personal confidence between the parties. The defendant, when he acknowledges the trust, cannot be allowed to hold the property to his own use. The only questions in such a case are as to the effects of his breach of trust in not emancipating the slaves according to the laws of the State

and deporting them, and as to the modes of enforcing the execution of the trust. We suppose that one who accepts the property upon such trusts is bound to execute them, and that, having once undertaken the trust, he may be compelled to perform it in those methods which the law prescribes for the benefit alike of the subjects of the trust and the public security; and it would seem that he could certainly be thus compelled, either at the instance of the Attorney-General, by regarding such dispositions in the light of charities, or at the suit of the negroes themselves, upon the capacity imparted to them by heir incipient right to freedom under the will of their former owner, as authorized by the statute. If that be so, the right of the next of kin would seem to be extinguished by the creation of such a trust, for it does not belong to them to enforce it, nor does the breach of it work any injury (385) to them, but only to the negroes or the State. However, it is not incumbent on the Court now, nor, perhaps, is it proper, to discuss the rights of the next of kin in the event the defendant should fail to emancipate the negroes and carry them away after he may do so without impediment, since this defendant submits to perform those trusts according to law, under the direction of the court, and it is to be presumed for the present that he will. The act of 1830 authorizes the owner of a slave to direct the emancipation by will, and, of course, it is obligatory on the executor to do what is necesary to effect it. But the act further requires that, in order to obtain a grant of the emancipation from the court, the executor shall give bond to answer to the creditors of the testator for the value of the slave, and also a bond in the sum of $1,000 for each slave, that such slave shall be of good behavior while in this State, and will leave it within ninety days and never return. Where a person acting in the character of executor and trustee submits to proceed in the execution of the trust under the direction of the court, those acts must of course, be included in the directions, as they are for the security of creditors and in furtherance of the public policy; and a reasonable time allowed for procuring the emancipation and effecting the removal of the negroes—which, as the proceedings are to be in the Superior Court, one year would, in this instance, probably be. It must be declared, therefore, that the trust to emancipate the slaves in question, as disclosed in the answer, is lawful and proper to be executed by procuring or making the emancipation in the manner prescribed by the statute in such case made and provided; and the defendant is allowed one year from this time to effect the same. When he shall have refused or failed to do so, it will be time enough to consider whether the present plaintiffs can take benefit thereby; and, until that period, that point is reserved. It will be time enough then, because, if the defendant should in that manner perform the trust, the next of kin would certainly (386)

have no rights in the matter, and it is not to be supposed the defendant will not perform a trust which he submits to perform and about the execution of which he professes a sincere and conscientious desire.

NASH, J. I concur in the opinion of his Honor, the Chief Justice. The trust disclosed in the asnwer is one sanctioned by the laws of the State, agreeable to its policy, and ought to be enforced by a court of equity. The defendant submits to execute the trusts under the direction of the Court, and those directions are set forth in the opinion of his Honor with sufficient clearness. Another question has been argued in this case, as to the true and proper construction of Laws 1830, ch. 9, sec. 3; Rev. Stat., 111, sec. 59, as applicable to the execution of such trusts as are set forth in this case. I give no opinion on the point discussed, as I do not thing it arises here.

PEARSON, J. The slaves were not given to the defendant for his own use, but upon a trust. If the trust be unlawful, it is void, and they belong to the plaintiffs.

What is the trust? It is admitted to be a secret one. The defendant swears he did not disclose it to any one until ten years after the death of his testatrix, when he told it to his counsel who drew his answer, and the pleadings show he filed a demurrer and objected to making it known. It is admitted to be a secret trust by *design*. The answer states that the testatrix was distinctly told that her purpose of emancipating the slaves might be accomplished by expressing the trust in her will, and having them set free *"according to law,"* or my making her wish known to some person in whom she had confidence, and reposing in him the trust of transporting the slaves to Liberia, or some other free country, where they could enjoy their freedom. She selected the latter mode.

(387) Secrecy is a badge of fraud, and this trust, being a secret one by design, must be received with suspicion.

The admissions of the answer leave no doubt in my mind that the trust was that the defendant would transport the slaves to a free country, so as to give them their freedom in that way without complying with the provisions of the statute. If it was the intention to emancipate according to the statute, what reason can be assigned for not expressing the trust in the will? The defendant can suggest none. The testatrix knew such a trust was lawful; and the preference she gave to the secret trust satisfies me either that it was her intention that the slaves should remain in this State as free negroes—which is denied by the answer—or that they should be carried to a free country and in that way set free, without giving the bonds required by law. The latter, the defendant says, was

the trust, and that he would have executed "said trust by transporting the slaves to Liberia soon after the death of his testatrix, but for the litigation in which he has been involved."

Is such a trust lawful, laying aside the secrecy and supposing it inserted in the will? This depends upon the construction of the act of 1830. It provides "that any inhabitant of this State may emancipate his slaves by giving bond of $1,000 for each slave, with two sufficient securities, that the slave will leave the State and never return." This is the security taken by the public from the master. A security is also taken from the slave by the provision "that his emancipation shall be on condition that he will never return. If he does, he is to be sold as a slave and the proceeds of the sale shall belong to the informer and the wardens of the county." The act further provides that "*no slave shall be set free but according to the provisions of this act.*" (388)

The intention of the lawmakers should be ascertained, and the courts should then see that this intention is carried into effect and in no wise evaded.

The Legislature intended that slaves should not be emancipated unless the public had both securities, that they would leave the State and never return, the obvious policy being, not so much to get clear of the slaves as to keep clear of the free negroes. Here, then, is a law providing that any person may emancipate his slaves *upon certain conditions.* Does not this, as a matter of course, make unlawful a mode of emancipation without complying with those conditions, and without giving the two securities required? Did the Legislature do a vain and foolish thing? Is this the language of the law: You may emancipate your slave by giving a bond of $1,000 and upon condition that, if the freed man comes back, he shall be sold as a slave; but you may also emancipate him simply by sending him to a free country, without the bond or the condition? If so, the latter mode will always be adopted. The master will prefer not to incur liability, and if the slave returns he will belong to his former owner, for the title has not been divested; or if, by a forced construction of the statutes concerning free negroes, the slave is considered as a free negro migrating into the State, he will not be liable to be sold as a slave, but will be hired out for ten years, unless he leaves the State in twenty days; and in case of females the children would be free negroes. The act of 1830 seems to have been drawn with much care, and the fact requiring the security of a bond and the condition necessarily renders any other mode of emancipation, in which both or either of these securities are not given, repugnant and unlawful. If it had been the intention still to allow the mode of emancipation by simply transporting the slave, this repugnance could only have been avoided by providing that if the slave returned the master should be liable to a higher penalty, (389)

say $2,000, and the slave to a stronger condition, say thirty-nine lashes in addition to his being sold as a slave. Without some such provision the act of 1830 would be nugatory and lie as a dead letter upon the statute-book; for why should it be resorted to, as the other mode is the plainest and is free from all liability? No such provision is contained in the statute, and from abundance of caution there is an express provision, that slaves shall be emancipated in *no other way*.

I ask, then, can it be possible that in spite of this repugnance and in the face of this provision, a trust, by which slaves are to be set free by sending them out of the State without giving the securities required, is lawful? It is said this mode has been frequently pursued since the act of 1830. That may be true. If so, it is time attention was called to it, and the courts should not countenance so palpable an evasion of an important law by recognizing, under any circumstances, those slaves as free persons who have been sent out of the State since its enactment without a compliance with its provisions.

Again, it is said this is not an open question, but is settled by *Cameron v. Comrs.*, 36 N. C., 436; the opinion delivered in this case when it was before the Court upon demurrer, 38 N. C., 338, and *Cox v. Williams*, 39 N. C., 17.

If the point had been directly decided in those cases, as the decision would make the act of 1830 a dead letter, I should hesitate long before adopting the conclusion that this Court was bound to consider the question settled. But the point was not directly decided in either case, and the attention of the Court not called to it. In *Cameron v. Comrs., supra,* there was an expressed trust, and the slaves had been sent to Liberia and settled there *before the bill was filed;* and the question was, to whom a certain fund belonged. The Court, *assuming that the slaves had been duly emancipated,* say: "The policy of our law never did forbid
(390) the removal of slaves to a free country, in order to their residence there as free people, and the act of 1830 provides for their emancipation, so that they be removed, and *kept* without the State." The question was not made whether the mode of sending off slaves without giving the bond and subjecting them to the condition was not unlawful, as evading the provisions of the act of 1830, and, in fact, directly in violation of it. It is not intimated how the slaves are to be *"kept removed* without the State." So in this case, upon the demurrer, the bill charged that the slaves were given to the defendant, "in trust for their own benefit, and for the purpose of their enjoying a qualified freedom in this State." The decision is that if the trust be as charged and admitted by the demurrer, it is unlawful and void. It is true, in discussing the question, the Chief Justice says, among other things: "Since the act of 1830, it is not unlawful to bequeath or convey slaves for the purpose of being

removed out of the State, and *kept away* from this State. If, in truth, the trust was to send them out of the State, and the defendant intends to do so, and will enter into the *obligations which the law requires* that they shall not return, let him so answer." The question was not before the Court, and if any inference is to be drawn from the opinion of the Chief Justice, it is that he considered the mode of emancipating, by simply sending slaves to a free country, unlawful, as evading and violating the act of 1830; for he says, "Bonds must be given as the law requires," and evidently had in his mind "a trust" to emancipate according to the statute, and not a trust to transport slaves to a free country and thereby set them free—which is the trust set up in the answer.

In *Cox v. Williams, supra,* the bequest is of slaves to the Colonization Society, upon condition that the slaves are to be sent to Liberia. The decision is that such a trust is lawful. In what manner the trust was to be executed was not before the Court. So there has been (391) no decision that the mode of emancipation by simply sending slaves to Liberia is lawful since the act of 1830; and for the reasons given I think it is clearly unlawful.

It is urged for the defendant that, admitting the trust, as originally declared, to be unlawful, he may claim the aid of this Court "to remodel it," and make it a trust to emancipate under the provisions of the act of 1830, and he submits to act under the directions of this Court and to given bond, etc.

The defendant asks aid with an ill grace after having concocted an unlawful trust, and after his testatrix has made her election to declare an unlawful instead of a lawful trust. I find no ground upon which to remodel the trust and *make it the very trust* which she refused to insert in her will. If this Court had the power to do so, to exercise it would be to give encouragement to secret unlawful trusts by allowing them to be made lawful in case of detection. But this Court has not the power. It would violate the wish of the testatrix and be making a trust for her in place of the one she chose to make for herself, and it would violate the rights of the plaintiffs. They have a vested right to the slaves, if the trust be unlawful and void. Is it in the power of any court to deprive them if it? In the cases of *Cameron* and of *Cox* there was an open express trust to cause the slaves to be sent to Africa. The general words imply that it was to be executed as the law requires. The fact that it has not been legally executed does not render the trust void, although the slaves cannot be treated as free persons until the law is complied with. In this case the trust is secret, and the implication that it was to be executed as the law requires is repelled by the positive refusal of the testatrix to insert it in her will.

PER CURIAM. Decree for emancipation of the slaves upon the defendant complying with the requisitions of the law.

Cited: *S. c.*, 43 N. C., 32; *Hurdle v. Outlaw*, 55 N. C., 78; *Hogg v. Capehart*, 58 N. C., 72; *Robinson v. McDiarmid*, 87 N. C., 462.

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(392)

THOMAS S. HASSELL ET AL. v. WILSON W. MIZELL.

Where the dower has been assigned to a widow, by giving her one-third of the net profits of an estate, this is no impediment to a partition or sale for partition by the heirs.

APPEAL from the Court of Equity of WASHINGTON, at Fall Term, 1849, *Bailey, J.*

One J. L. Harrison died seized of 3 acres of land, upon which was a grist and sawmill, cotton gin, storehouse, and outbuildings. One-third of the net profits was assigned to his widow for dower, subject to which the land was sold and purchased by one Aaron Harrison, who sold one undivided third part to the defendant Wilson Mizell, and another undivided part to the other defendant, Anson J. Mizell, and afterwards sold the remaining undivided third part to the plaintiffs, who pray for a partition and suggest that a sale will be necessary, as an actual partition cannot be made without injury to the interest of the parties concerned.

The defendants object to a partition, for reasons which it is unnecessary to state, as they were properly abandoned by their counsel in this Court. They also insist that there is no necessity for a sale.

The court below decreed a sale of the premises, from which decree the defendants appealed.

Heath for plaintiffs.
A. Moore for defendants.

(393) PEARSON, J. Tenants in common in possession are entitled to partition as a matter of right; and "where it appears to the satisfaction of the court that actual partition cannot be made without injury to some or all of the parties interested," this Court will decree a sale for the purpose of partition. The four plaintiffs are each entitled to one undivided fourth part of an undivided third part of 3 acres of land, upon which is situate a valuable grist and sawmill, a cotton gin, storehouse, etc. It is self-evident almost that an actual partition cannot be

made without injury to them, and the proof clearly satisfies us that a sale is necessary, and that an actual partition is impracticable without injury to the defendants as well as the plaintiffs. Under these circumstances it is against conscience for the defendants to resist a sale, and the opposition made by them gives ground for the inference that their object is to compel the plaintiffs to sell out to them for less than could be obtained if the whole is sold. This is an advantage that equity will not allow a tenant in common to take of his cotenants.

It was urged in the argument that partition could only be made by tenants in common who were seized of the freehold, and not by such as have a remainder or reversion after an estate for life. This position is true, when the life estate extends to all the premises. Coke Lit., 167 *a*, as to the writ of partition by coparceners at common law, the benefit of which writ is extended to joint tenants and tenants in common by 31 and 32 Henry VIII., and the same principle is applicable to the proceedings for partition under our law, Rev. Stat., ch. 85, sec. 1, where an entry and survey by the commissioners is provided for. But the widow's right to dower would be no impediment to partition by sale, for she is authorized to join in the application and take one-third of the proceeds of the sale for life. Rev. Stat., ch. 85, sec. 11. Whether if dower (394) be assigned by metes and bounds it will be an impediment to partition of that kind need not now be decided, for in this case dower has been assigned by giving to the widow one-third of the net profits, thus leaving the possession and seizin of all the land in the plaintiffs and defendants as tenants in common.

The defendants must pay the costs of this Court.

PER CURIAM. Affirmed.

Cited: Miller, ex parte, 90 N. C., 629; *Wood v. Sugg,* 91 N. C., 99; *Osborn v. Mull, ib.,* 207.

HENRY J. TOOLE ET AL. v. WILLIAM A. DARDEN ET AL.

A purchaser for value from a fraudulent grantee, when there is actual fraud, gets a valid title, unless he has notice of an existing debt unpaid, or of a debt subsequently contracted, before he makes the purchase.

CAUSE removed from the Court of Equity of EDGECOMBE, at Fall Term, 1849.

The bill alleges that the defendant Eason, being indebted to one Pender, with the defendant Sugg and Robert Belcher as sureties, the said Eason, Sugg, and Belcher entered into a fraudulent agreement by which

Eason was to execute to Sugg and Belcher two notes for $500 each, to be held and appropriated by them for his use, and was then to con-
(395) vey the land described in the bill and his other property to one Lewis Belcher, in trust to sell and pay the said debt due to Pender and the said feigned notes of $500 each; that the two notes and the deed of trust were accordingly executed on 4 January, 1843. The bill avers that the two notes were executed without consideration, and were included in the deed of trust for the secret benefit of Eason; and that the notes and deed were made with the intent to create a secret trust for Eason and to defraud his creditors. The bill also alleges that in January, 1844, the trustee sold, and the defendants Eason, Sugg, and Robert Belcher contrived to enable Sugg to buy, all the property for $2,879 (a sum much less than its value), for the fraudulent purpose that Sugg should hold it for the secret use of Eason; that in March, 1844, Sugg, having taken a deed from the trustee for all the property, sold the land to the defendants Darden and Beeman, "who had notice of the aforesaid fraudulent agreement, combination, and understaning"; that in November, 1846, the plaintiff Toole, *being a creditor,* obtained a judgment against him for $113, with interest from 20 November, 1846, and on which execution issued, and the land was levied on and sold and bought by the plaintiffs. The prayer is for a conveyance.

Biggs for plaintiffs.
B. F. Moore for defendants.

PEARSON, J. The bill is filed upon the idea that, as there was *actual fraud* in the deed of trust and the deed to Sugg, by reason of the fraudulent contrivance and understanding that the property was to be held for the secret use of Eason, the deeds are void as against Toole, a *subsequent* creditor, and the plaintiffs, having purchased under the execution, could folow the land in the hands of the defendants, who paid value, but had notice of the fraud.

(396) When a subsequent creditor seeks to avoid a conveyance upon the ground that it was voluntary, and void as to creditors on account of fraud in *law* as distinguished from *actual fraud,* he must be able to show that there is some *existing debt remaining unpaid;* for if all such debts were provided for and paid, or afterwards paid without being provided for, that fact repels the presumption of fraud which the law makes from the mere fact that the conveyance was voluntary. The general expression in *Hoke v. Henderson,* 14 N. C., 14, "that a conveyance void as to one creditor is void as to all creditors," is qualified by what immediately follows. The meaning is, there must be one *existing*

creditor unpaid, as to whom the conveyance is void; if so, that will let in all creditors and "bring the whole fund into subjection to general creditors."

In this case there was an *actual* fraud. The conveyance was colorable and in trust for the debtor; and being a continuing trust and a continuing fraud, a subsequent creditor can take advantage of it without the aid of an existing creditor whose debt is unpaid. The plaintiff could, without doubt, have reached the land in the hands of the trustee or of Sugg, but I do not think they can do so in the hands of the defendants, to whom it passed for value more than two years before the creation of Toole's debt, although they had notice of the original fraud.

In *Martin v. Conly,* 18 N. C., 30, it is held that a purchaser from a fraudulent grantee *without* notice can hold against an *existing* creditor. Here the creditor is a *subsequent* one, but the purchaser *had notice* of the original fraud, and the question is, What is the effect of the notice?

Eason, the debtor, had no right to the land as against the trustee of Sugg; nor could he have compelled them to execute the fraudulent trust, being *"in pari delicto."* The defendants, then, although (397) they had notice, did him no wrong. They did no wrong to any existing creditor, for there is none such unpaid; and they could do no wrong to the creditor Toole, for his debt was not then created; and as a matter of course the defendants could not have notice of it. The defendants, then, at the time they bought, did wrong to no one. And there is no reason why they were not at liberty to purchase. The plaintiffs have not the shadow of a right to complain, for the defendants took possession and have had possession ever since. And the plaintiff Toole cannot say that he trusted Eason on the credit of the land, nor does he venture to allege that he had not full notice of the defendant's purchase when he gave credit to Eason.

My conclusion is that a purchaser from a fraudulent grantee, when there is actual fraud, gets a valid title, unless he has notice of an existing debt unpaid, or of a debt subsequently contracted, before he makes the purchase.

PER CURIAM. Bill dismissed with costs.

NOTE—See opinion of *Nash, J.,* in this case, *post,* 501-504.

(398)

JOHN J. LOCKHART ET AL. v. JOSEPH J. BELL ET AL.

1. A testator, after making provisions for the payment of his debts, supposing they were much larger than they were found to be, and after devising and bequeathing lands and personal property to his widow and three sons and a grandson, giving the largest portion to his two youngest sons, devised and bequeathed to these two sons, B. F. and J. J., all the residue of his real estate, including the land and plantation lent his wife, to them or the survivor of them, their or his heirs. He then gives to his wife and his said two sons all the rest of his negroes. He then directs as follows: "It is my will and desire that if the fund set apart for the payment of my debts—that is, the debts due to me and the sales of all the perishable estate—shall not be sufficient, then my executors shall sell such of my slaves as shall be necessary; and all of the devisees shall contribute in proportion to what they may receive under this will; and for the purpose of educating and maintaining my said two sons, provided my estate shall prove to be indebted to a greater amount than may be supposed, it is my will and desire that my executors sell personal property to educate my said sons, either before or after a division; and the devisees under this will to contribute in like manner." There was no direct, general, residuary clause of the personality.
2. *Held*, that the expense of educating the two younger sons was, in the first instance, a charge upon the residue of the estate, and if any thing remained of such residue, after the payment of the debts and such expense, it must be divided among the widow and next of kin of the testator, as in case of intestacy.

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

William B. Lockhart of Northampton County died in January, 1841, leaving a widow, Sally, and a son, John J. Lockhart, of full age and residing in Alabama, and two other infant sons, Benjamin F. and Joseph J., and also a grandchild, William F. Bell, who was the son of
(399) Ann E. Bell, a deceased daughter of the testator. That was also the state of the testator's family when he made his will on 26 December, 1839, whereby he devised and bequeathed as follows:

"First. For the payment of my debts I will that my executors sell all the surplus crops standing, growing, or gathered, and the surplus stock of mules, horses, cattle, sheep, and hogs, plantation and farming utensils, and all other articles and things except as hereinafter excepted and disposed of; and also that all debts due me be applied to the same purpose; and if the fund set apart as above shall prove inadequate for that purpose, then to sell such part of the articles excepted as they may think proper, by and with the consent of my wife, so as to leave her a reasonable portion of corn, fodder, pork, and other articles necessary for a year's support for herself and family, and a portion of stock of cattle, horses, mules, hogs, and sheep to commence farming and raising stock.

"Second. I lend to my wife Sally, the land and plantation whereon I reside during her lifetime, and give her as much provisions as will serve her for one year, including corn, wheat or flour, fodder, oats, and pork, and my carriage and horses, which articles form the exception in the preceding clause: *Provided,* that she will not charge my sons Benjamin F. and Joseph J. with board during their temporary or necessary stay on the said plantation with her; and as a further exemption referred to in the first clause of this will, it is my desire that my family pictures, clock, secretary, sideboard, tables and rounds, maps and library, and such other articles of furniture as my wife may think proper to reserve, regard being had by her and my executors to the situation of my estate as to its indebtedness, form a part.

"Thirdly. I give unto my said wife my tract of land called Gee's, to her and her heirs, thinking that if she does not choose to cultivate it, she will permit Joseph J. Bell to do so until he shall form other (400) connections, and then permit him to cultivate it for the benefit of my grandson, William F. Bell, and at or before her death give or convey the same to my said grandson, with a proviso that in the event of his death before coming of age or marrying, the said land shall vest in my two sons, Benjamin F. and Joseph J., or the survivor of them, in fee; *Provided, however,* that the above suggestions be construed not as obligatory or in any way to influence her in her free will to make what disposition of the same she may judge proper or in any way to disparage her fee-simple estate."

By a fifth clause the testator gave a certain plantation and slaves, stocks and crops thereon, to his son-in-law, Joseph J. Bell, until the grandson, William F. Bell, should come of age, and then to the grandson; and if the said William F. should die under age, then to the said Joseph J. Bell until he should thereafter die or marry, with remainder to the testator's sons Benjamin F. and Joseph J. or the survivor.

By a sixth clause the testator gave certain real and personal estates in Alabama to his son John J., with limitations over, in the event of the said John J. dying without leaving children, etc., to the wife of John J., for her life and then to the two sons, Benjamin F. and Joseph J., or the survivor of them. The testator then adds these words in that clause: "*Provided, nevertheless,* that inasmuch as the said estate, added to the money I have paid for my said son John J., is more than his ratable proportion of my estate, I charge upon the estate the sum of $5,000; $3,000 to be paid to my son Joseph J. in six annual payments, and the other $2,000 to be paid to my son Benjamin F. in four annual payments, to commence twelve months after my death."

In the next two clauses dispositions are made to the wife and (401) the son John J. which are not material to this case.

Then follows, ninthly, a devise to the two sons, Benjamin F. and Joseph J., of "all the residue of my real estate, including the land and plantation lent to my wife, to them or the survivor of them, their or his heirs.

"Tenth. I give to my wife and my two sons, Benjamin F. and Joseph J., all the rest of my negroes; but those which may be allotted to my said sons not to be divided until my son Benjamin F. shall arrive to 21 or marry.

"Eleventh. It is my will and desire that the said negroes which may be allotted to my sons be kept on my Deans plantation" (being a part of the land devised to them), "and a sufficiency of mules, horses, cattle, sheep, and hogs, corn, fodder, oats, wheat, and farming utensils to keep up the plantation for the benefit of my said sons. Although it is my earnest wish that the plantation may be kept up as above, I leave it at the discretion of my executors, after advising with my wife, to do so or not, having a view to the situation of my estate, as regards indebtedness, and to the means of affording my sons a good education.

"Twelfth. It is my will and desire that if the fund set apart for the payment of my debts, that is, the debts due to me, and the sales of all the perishable estate, shall not be sufficient, then my executors shall sell such of my slaves as shall be necessary; and all of the devisees shall contribute in proportion to what they may receive under this will; and for the purpose of educating and maintaining my said two sons, provided my estate shall prove to be indebted to a greater amount than may be supposed, it is my will and desire that my executors sell personal property to educate my said sons, either before or after a division; and the devisees under this will to contribute in like manner. And to that end I charge the same as a lien on all such devises in real or personal estate, except on the devise to my son John James.

(402) "Thirteenth. It is my will that my wife keep my grandson, William F. Bell, with her, at the expense of my estate, until his father may think proper to send him to school; and I also desire Joseph J Bell to continue to live with my wife, if he thinks proper, as long as he remains single."

By codicil without date, the testator directed a small place he had in Halifax to be kept as a summer retreat for his family, as long as any of them should think proper to use it as such but afterwards to be sold for the benefit of his two sons Benjamin F. and Joseph J.

The bill was filed in 1848 by the widow, the son of John James, and the grandson William F. Bell against the executors and the two younger sons, Benjamin and Joseph, and prays for an account, and that the residue of the personal estate, after the payment of the debts and satisfying the specific legacies, may be declared to be undisposed of by the will

and distributed among the widow and next of kin. It appears by the pleadings that when the testator made his will it was probable a debt of $3,000 or $4,000, which was owing to him, might be lost by reason of the insolvency of the debtor, and also that he might be forced to pay a considerable debt as surety for another person; but that it so turned out that the debt to the testator has been collected, and that the other debt was paid by the principal; and, in consequence thereof, there remains a surplus of $4,000 or $5,000, after paying all the debts and the expenses of the administration, and supplying to Mrs. Lockhart all the stock, crops, provisions, furniture and other things given to her specifically, and after stocking the Deans plantation for the two younger sons, as directed by the will. On the part of the defendants it is insisted that the surplus belongs exclusively to the two sons, Benjamin F. and Joseph J., or, at the least, that they are to be educated out of it and main- (403) tained during the period of their education.

Bragg for plaintiffs.
B. F. Moore and W. N. H. Smith for defendants.

RUFFIN, C. J. It does not appear to the Court that the younger sons are entitled to the surplus of the personal estate absolutely. The residue of the real estate and the residue of the slaves are given away by distinct clauses. But there is no general residuary disposition of the personalty at large, after the payment of debts, charges, and legacies; and any surplus not disposed of goes of course to those entitled under the statute of distributions. It seems highly probable from the face of the will that the testator did not expect any surplus, or very little, and he may not have considered it worth giving away. But a residue is always more or less uncertain, and the amount of it can afford but a feeble inference of an intention that this or that person should have it. Here, indeed, it was said that the general scheme of the will shows a preference for these two sons, after having made a provision for the eldest son; and therefore the testator must be taken to have intended they should have the surplus, if ther should be any, and not merely be educated out of it. But those considerations cannot have that effect; for the large bounties to the younger sons—if out of due proportion with the estate—may have induced the testator to give them no more, instead of raising a presumption that his will was that they should succeed to all that should be left. Besides, the argument is inconsistent with itself, since the charging of their education upon the residue implies that the sons were not to take the residue absolutely. At all events, whatever conjectures may be formed as to the desires of a testator, and as to what he would have put in his will, if it had occurred to him, yet the will cannot be con-

(404) strued as if it had a clause expressive of the supposed desire, but must be taken as it is. Here there is no residuary clause under which the sons, or any one, can claim; and therefore what may remain after deducting the debts and charges must be declared to belong to the widow and next of kin.

But the Court is also of opinion that the education and maintenance of the two younger sons is in the first instance charged on the residue, if there should be enough to defray the expenses after payment of the debts. After directing, in the beginning of the will, that the money due him and all his personal property (except his slaves and such other things as should be afterwards specifically bequeathed) should be the fund for the payment of his debts, the testator in clause 11 expresses a strong desire that as much of the stock of horses, mules, and cattle, provisions and farming tools should be reserved thereon as would be sufficient to keep up a certain plantation, which he gave to the two sons, and work it for their benefit. Nevertheless, he would not order it peremptorily, but left it to the discretion of his executors. Yet it was not an arbitrary discretion, nor one to be exercised upon their general judgment of what might be best for the sons. On the contrary, the testator plainly says they are to stock and work the plantation, if it can be done consistently with two things, that is, with a view, first, to the indebtedness of the estate, and, secondly to the means of affording the sons a good education. That implies the intention that the fund was to be provided for the education before the stock reserved for the plantation should be put on it, and imports a prior charge of the education on the general residue. But it was argued for the plaintiff that the testator might have meant there that the education was to be a charge on the residue in case the profits of their own property should not be sufficient for that purpose; and

(405) that he may have expected they would, if the Deans plantation should be worked for them, and then it would be reasonable they should not look to the residue. The will might have been more explicit on that point. But there does not seem to be enough to import the supposed restriction on the provision for the education. The argument yields that it was certainly the intention of the testator that his younger sons should be well educated at all events, and that the expense was to be paid out of his estate in some events. But it supposes an exception to have been intended when the profits of their property should be sufficient for the purpose. Now, that exception is not declared in the will, and it could not be interpolated on conjecture, even if the question stood on clause 11 alone. But clause 12 furnishes further and convincing proof that the testator intended them to be educated independent of their own property, except as it might contribute *pro rata;* for the testator then again connects the debt and education, and provides that, if the money

due to him and the sales of his perishable estate should not be sufficient to pay the debts, then negroes were to be sold, and each legatee contribute in proportion to the value of his or her donations; and then immediately follows precisely a similar provision for raising a fund "for the purpose of educating and maintaining my said two sons, provided my estate shall prove to be indebted to a greater amount than supposed." The charge on the estates given to the younger sons is only in common with that on the other gifts, and does not attach to either gift until the fund constituting the residue should be exhausted. Consequently, as they are to be well educated at all events, the residue is the proper fund to be applid in the first instance for that purpose.

There must, therefore, be a reference to ascertain the residue, and what part of it ought to be set apart for the education of the younger sons and their maintenance during the periods of their education. The costs of the suit will be paid out of the fund in the hands of the (406) executors.

PER CURIAM. Decree accordingly.

THOMAS LATHAM, EX PARTE.

1. When the land of a lunatic is sold on the petition of the guardian, the proceeds are under the direction of the court, and no creditor can claim a priority.
2. When the lunatic dies, or his disability is removed, then the property remaining, or its proceeds, is to be delivered over—to the lunatic himself in the latter case or to his representatives in the former case, and, of course will then be subject to the claims of the creditors as in other cases of individual debtors.

APPEAL from the Court of Equity of BEAUFORT, Fall Term, 1846, *Bailey, J.*

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

Shaw for Plaintiff.
J. H. Bryan for defendant.

RUFFIN, C. J. This cause was here at June Term, 1846, upon cross appeals by the guardian of Daniel Latham, a lunatic, and by two of his creditors. It was remanded with a declaration that a fraud (407) in court was not more than adequate to the maintenance of the lunatic, and, therefore, that no part of it ought to be paid to the creditors, who had proved their debts before the master, or retained by the guardian by way of reimbursing to him a balance due for debts of the

lunatic, discharged by him without the previous authority of the court. *Latham, ex parte,* 39 N. C., 231. The fund consisted of $942.14, which was the produce of real estate ordered by the court of equity to be sold, and it was all that remained of the lunatic's estate, and was in the master's office. Afterwards the lunatic became of sane memory, and at his instance the commission was superseded; and he then applied to the court of equity, on petition, for an order that he might withdraw the residue of the fund remaining unexpended, in order to apply it to the payment of his debts, stating that he had examined the accounts rendered by his late guardian, and was satisfied of their correctness. The guardian made no objection, though a considerable balance appeared to be due him. But Wiswall, one of the creditors, opposed the application, and moved for an order that a debt to him should be first satisfied, the same being due on a judgment on which an execution was issued, which was levied on the land before it was sold under an order for that purpose. The court directed the money to be paid to Daniel Latham; and Wiswall appealed.

The notion on which the appeal was taken is that the creditor got a priority by force of his judgment and execution. But the decisions between these parties, when the case was first brought here, *Latham v. Wiswall,* 37 N. C., 294, and also when last here, are clearly against that. After an order of the court directing a sale of the lunatic's estate for the purpose of the proceedings in the matter of the lunacy, creditors cannot get at the fund in any manner but by an order of the court.
(408) The maintenance of the lunatic is to be provided for, in the first instance; and then the means of doing so cannot be touched but by the leave of the court, under whose direction the support of the lunatic and the ordering of his affairs are placed. There can, then, be no lien in the case; at least, when there is no specific property of the lunatic not embraced in the order for the sale. The consequence is that, when the charge of the lunatic and his affairs by the court ceases by reason of the death, or restoration of the reason, of the lunatic, and the rendering his account by the committee, the court proceeds no further in administering the fund, but simply gives it into the hands of the lunatic or his representative, where it will be amenable to creditors in the same manner as the estate of other debtors, and with the same power of preference by the debtor between his creditors.

PER CURIAM. Order affirmed, with costs.

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

(409)

SAMUEL NELSON ET AL. v. ELIZABETH NELSON ET AL.

1. An indorsement, alone, of a bill or note, even though it be in full, is not sufficient to pass the interest in it. There must be a delivery, either to the indorsee himself or to some one for him.
2. Where slaves are bequeathed specifically to different persons, and the executor, being compelled by circumstances to keep possession of them for some time after the death of the testator, either receives profits or incurs expenses, such profits or expense must be attached to and go with the slaves from which they respectively arise.
3. A testator in one clause of his will says: "I give to my daughter E. a negro woman Leah and her baby, Anderson, her youngest child living." In another clause he says: "If there should be any increase from my negro woman Leah, I want that equally divided between my three daughters, J., E., and A., some to buy and pay the others, as I would not wish any sold out of the family." *Held*, that the increase here spoken of meant the increase born during the life of the testator.

CAUSE removed from the Court of Equity of GUILFORD, at Fall Term, 1849.

James Nelson of Guilford made his will on 12 September, 1843, and died on 6 January, 1844. He devised and bequeathed certain estates to his wife. The will then makes the following dispositions: "I give to my son Lemuel a negro boy, Elijah, and his equal part of my personal estate not otherwise disposed of hereafter. To my son John E. one negro boy, Jesse, and $100, and his equal part of my personal estate not otherwise disposed of. To my daughter Jane C. Magee, during her life, and then to the heirs of her body, a negro girl, Hannah, and her equal part of my personal estate not otherwise devised. To my daughter Elizabeth one negro woman, Leah, and her baby, Ander- (410) son, her youngest child living, one horse worth $60, one cow and calf, feather bed and furniture, one desk and half the cupboard ware and half the kitchen furniture, saddle and bridle, and four head of sheep, and $100, and her equal part of my personal estate not otherwise devised. To my daughter, Aley Amanda, my two negro girls, Eliza and Nelly, one horse, saddle and bridle worth $75, one cow and calf, one feather bed and furniture, one desk, half the cupboard ware, and half the kitchen furniture, four sheep, and $150 in cash, and her equal part of my personal estate not otherwise devised. To my son James my two negroes, George and Priscilla, one horse and saddle worth $75, one cow and calf, one feather bed and furniture, four sheep, one sow and pigs (his choice), $200 in cash, my rifle gun, and his equal part of my personal estate not otherwise disposed of. All my household furniture not disposed of heretofore to be equally divided between my three children

Elizabeth, Aley Amanda, and James. My will is that my land be equally divided between my three sons Lemuel, John, and James; and when divided into three equal parts by three disinterested men, James is to take choice of the three lots, and Lemuel and John must draw for choice if they cannot agree. And if there should be any increase from my negro woman Leah, I want that equally divided between my three daughters Jane Magee, Elizabeth, and Aley Amanda; some to buy and pay the others, as I would not wish any sold out of the family."

The testator appointed his son Lemuel his executor, and the will was proved by him as a will to pass both real and personal estate.

The testator's son John lived in Missouri at the making of the will, and died there on 28 December, 1843, intestate, leaving an only child, Angenetta, an infant at the date of the will. The testator's real (411) estate consisted of a tract containing 639 acres, which he owned in fee, and on 20 December, 1843, he sold and conveyed 90 acres thereof on one Bowman at the price of $300, and took his bond therefor, payable to himself. The testator made the sale with the view to give his son John money in place of the land; and accordingly he indorsed the bond in full to his son John, then in Missouri, and had the indorsement witnessed, saying at the time that, as John lived in Missouri, money would do him more good than land in this State, and putting the bond thus indorsed, among his own bonds and notes, where it remained up to his death. Administration of the estate of John Nelson was also granted to Lemuel Nelson, and he was likewise appointed guardian to the infant Angenetta. Upon that state of the facts several questions arose as to the rights of the parties in respect of Bowman's bond: whether it belongs to the administrator of the son John, or falls into the residue of the personal estate of the testator; and whether, if the former, the right of Angenetta, the child of John, to the share of the land and the specific legacies to her father would thereby be affected, and to what extent.

The different pecuniary legacies amount to $550, and the value of the horses and saddles and bridles given to three of the children is $210, making together the sum of $760; and the executor states that the residue of the estate (not specifically given), including debts to the testator, amounted to the sum of $616.16 only, and that his disbursements and charges are $482.34—which leaves only a balance of $133.72 applicable to the satisfaction of the legacies of $760, provided Bowman's bond should not form part of the residue. If that should fall into the residue, then the sum of $345, received on it for principal and interest, is to be added to that of $133.72, making an aggregate of $477.72 applicable to those legacies. The testator did not own, when he made his will (412) or deed, any horses, saddles, or bridles which could be delivered

in satisfaction of the legacies of those articles. Questions have arisen whether, in case of a deficiency of the residue of the estate to discharge all those legacies, the other donees in the testator's will ought to contribute in proportion to the value of their several gifts to make up the deficiency; and, if not, how those general legatees are to abate between themselves.

The widow of the testator attempted to dissent from the will, and filed a bill against the executor to have the benefit of a dissent, which put it out of the power of the executor to settle the estate or deliver over the specific legacies until the decision of that suit against the widow in 1849. While it was pending the executor hired out such of the negroes as would bring wages, and for the maintenance of some he was obliged to pay. A question has arisen whether the hires and expenses during that period fall into the general account of the estate or belong to or must be borne by the several legatees to whom the particular slaves are given.

Between the making of the will and the death of the testator the woman Leah, given to Elizabeth, bore no other child; but she hath since had three; and a question has arisen whether they belong to Elizabeth exclusively or are to be divided between her and her two sisters.

The bill is filed by Lemuel Nelson and the infant Angenetta against the other son, James, and the testator's three daughters, to obtain the opinion of the court upon the proper construction of the will, and to have a declaration of the rights of the several parties under it and upon the other facts stated.

Iredell for plaintiff.
No counsel for defendants.

(413) RUFFIN, C. J. Although the point seems to present but little difficulty, yet it is not worth while to consider what effect, if any, the indorsement of Bowman's bond to John Nelson could have on the devises and bequests to him, had the indorsement been an effectual transfer of the bond, because the Court is of opinion that the bond was not transferred, for want of a delivery to the son or to some one for him. In Bayley on Bills, 98, it is said that bills or notes are assigned either by delivery or by indorsement and delivery; and that is adopted by Byles, 110. In several modern cases the same doctrine has been judicially held. In *Marston v. Allen,* 8 M. & W., 484, one Harriss, an officer of a bank, indorsed a bill in blank, and delivered it to another servant of the bank, to be kept as the property of the bank; but he, *mala fide,* passed it to the plaintiff, who sued the acceptor on it; and upon a plea that Harriss did not indorse the bill to the plaintiff, it was held that the indorsement, actually appearing on the bill, was not legally an indorsement that would

transfer the bill to the plaintiff, because it was not completed by the requisite delivery from Harriss to the plaintiff, inasmuch as his delivery was to his fellow-servant for a particular purpose, in fraud of which the plaintiff obtained the bill from that person. But the previous case of *Brind v. Hampshire,* 1 M. and W., 365, is yet more in point. It was trover for a bill of exchange, indorsed by one Usher to the plaintiff's wife, in payment of a debt from Usher to her. It was remitted by Usher to the defendant, his agent, who got the bill accepted, and advised Mrs. Brind that he was directed by Usher to pay her some money, and desired to be informed how it should be delivered. But before he parted from the bill he was instructed by Usher to keep it, and not deliver it to the plaintiff or his wife; and for that reason he kept the bill and refused to deliver it. The pleadings were drawn out to a sur-rejoinder, to (414) which there was a demurrer, on the ground that it was admitted thereby that the defendant was the agent of Usher, and that the bill remained in his hands the same as in Usher's, indorsed, but not delivered, to Mrs. Brind, and so no property in the bill vested in her or her husband; and there was judgment for the defendant thereon. It was insisted for the plaintiff that it was not competent to the defendant to say he did not hold the bill for the person to whom it was specially indorsed and was to be delivered in payment of a debt, especially after having got it accepted with the indorsement on it, and given notice to the plaintiff. But the Court did not think those circumstances changed the character in which the defendant stood to the parties and held the bill, namely, as the agent of Usher; and therefore that there was no transfer of the property in the bill. In the beginning of the argument the plaintiff's counsel contended that he ought to recover because the bill was indorsed to the plaintiff's wife, and that passed the right to the plaintiff, and that, in the case of a special indorsement to a particular party, it was not necessary to aver a delivery or show one. But *Baron Parke* replied that it was not necessary to aver the delivery specially, because it was implied in the allegation of indorsement; yet that a delivery to the indorsee was necessary to pass the bill. And *Lord Abinger* puts the very case now before us, by supposing that Usher, after indorsing the bill, had kept it in his own possession; and he asks, Would the plaintiff have any property in it? It is clear he held that he would not, for he gave judgment for the defendant, because, he said, the case, as to him, was exactly the same as if Usher had carried the bill for acceptance, after indorsing it to the plaintiff, and afterwards renounced his intention of paying it over to the party whose name he had indorsed on it. (415) The same principle is deducible from the two other cases of *Adams v. Jones,* 12 Adol. & El., 455, and *Williams v. Everett,* 14 East, 582.

It seems therefore established that, even by a full indorsement, a note or bill is not transferred to the indorsee if the indorser keep it in his own possesion; nor, indeed, is the property passed by such indorsement, though the bill be sent to the agent of the indorser for the purpose of handing it to a creditor of the indorser as a payment, provided the delivery be countermanded before its completion.

The present case is much stronger against the immediate and absolute operation of the indorsement, since the indorser never parted from the possession of the instrument, but it was merely voluntary, and it is perfectly certain the father did not intend that his son John should have the whole proceeds of the land sold, and also have an equal share with his two brothers in that which remained unsold; and, therefore, he never would have delivered the bond to John while his will continued unaltered, since that inequality would have been the consequence. Not doubt, he intended to alter his will so as to preserve the original equality, in point of value, in the provision made for his sons, and in that event he would have, probably, delivered the bond to John or bestowed it on him in his will. But death followed so speedily that he did not carry out those purposes; and, under such circumstances, it cannot be inferred that the father intended to give up the control of the bill, and the property in it to pass immediately.

It must therefore be declared that the bond did not vest in John Nelson, but belonged to the testator at his death, and forms a part of the residue of his estate, and is applicable, as such, to the payment of the debts and general legacies.

If there should be a deficiency of assets, not otherwise disposed of, for the satisfaction of those legacies (amounting in the aggregate to $760), they must necessarily abate among themselves *pro rata.* Devisees or specific legatees are under no circumstances liable to contribu- (416) tion towards making up general legacies of any kind.

As all the negroes are given specifically, the respective donees are entitled to the profits arising from, or liable for the charges incurred for, the several negroes which constitute their legacies respectively. It is assumed from the pleadings that the executor justifiably withheld his assent to the legacies pending the suit by the widow, and that he acted *bona fide* in hiring and maintaining the slaves. Of course, then, the incidents of profits and losses must go with the principal, that is, the slaves which are the subjects of the gifts. For example, the expense of maintaining the woman Leah and her family is stated to have been $329.75; but there are now four children besides the mother, and it is nothing but right that the increase and the outlay should go together.

Upon the remaining question, as to the construction of the clause disposing of any increase Leah should have, the Court is unable to form an

opinion as clear and satisfactory as is desirable, inasmuch as the intention is imperfectly and vaguely expressed. But after considering it a good deal we have been led to conclude that the testator meant therein only such issue as the woman might thereafter have in his lifetime. In the first place, it is the natural construction that a will refers to the death of the testator, as much in reference to the subject of the gift as in reference to the donees. Now, it is well settled that a legacy to the issue or children of another, when no time is fixed for a division, vests in those *in esse* at the death of the testator, to the exclusion of the *post nati;* for, as the legacy is immediate, it vests and is divisible at the same time, which is the death of the testator, although the words may be "to the children of A., begotten or to be begotten." The English cases on this point are collected in 1 Roper on Legacies, 48 *et seq.;* and (417) *Petway v. Powell,* 22 N. C., 308, and several others in this Court were decided on that principle. So it would seem, likewise, that when the children of a particular female slave are given separately from the mother to one set of donees, and the mother is given to another, and no time is specified within which the children are to be born, and they are not given as the first or second child, but as children generally, it must upon the same principle follow that all such as may have been born before the death of the testator, and be then *in esse,* are included except those that may be specifically disposed of to some other person; and that none are included but such as may have come into being in the testator's lifetime. Besides the analogy between the two cases to which the rule is thus applied, other reasons lead to the same conclusion. It is difficult to suppose that a testator, and especially a father, in providing for a daughter by the absolute and immediate gift of a negro woman, could mean that she should be at all the expense of providing for the mother during her pregnancies and confinements after childbirth, and yet give away two-thirds of the offspring—almost the only profit of such slaves—which she may have in the course of her whole life. It would destroy the value of the gift, and, in effect, render the negro inalienable. Again, the issue is to vest in three daughters, if at all, when and as it comes into existence; and it is most unnatural that the testator should have intended, on the one hand, that the infants should be immediately taken from the mother, and not reasonable, on the other hand, that the owner of the mother should be obliged to keep the children for the other owners until it should be fit to separate them from the mother. No doubt, a testator may give the mother to one and her first or second child, or even all her children, as they may be born during her life, to some one else. But to effect that, there ought to be words plainly denoting the meaning to be that the child or chil-

dren should pass, whether born after as well as before the vesting (418) in possesion of the mother. That cannot be gathered from a gift simply of the children, when the mother is absolutely and immediately disposed of in the will; for that term may be satisfied by the children born at the making of the will, or before the death of the testator, and the gift of the mother includes the children born after the gift takes effect, unless the contrary be plainly provided for. It is true that in this case the terms are prospective, so as to embrace only "the increase" of Leah, "if there should be any"; yet the reason is the same for restricting the sense to such future children as should be born in the lifetime of the testator as it would be for not including the children born after his death, if the terms children or issue generally had been used.

On these grounds the Court holds that all the children of Leah which have been born since the testator died belong to the daughter Elizabeth.

PER CURIAM. Decree accordingly.

Cited: Fairly v. McLean, 33 N. C., 159; *Carroll v. Hancock,* 48 N. C., 473.

WILLIAM DAVIS v. THOMAS DAVIS ET ALS.

Although a court of equity assumes jurisdiction upon lost bonds, upon the grounds of the oath of the party and the indemnity decreed, yet, where the bond has been destroyed or suppressed by the obligee, no relief will be given.

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

John Council died intestate in 1820, in Robeson County, and (419) at November term of that year administration of his estate was granted by the county court to Thomas Davis and John B. Johnson. The grant of the administration is entered on the minutes of the court, and therein it is stated further, that they entered into an administration bond in he sum of $10,000, with Jesse Jackson, John Curry, Willis Council, and William Wilkinson as their sureties.

The bill is brought by the next of kin of the intestate against the said administrators and the said sureties, except William Wilkinson, who died and whose administratrix is a party defendant. It was filed in 1840, and states that in 1833 the said administrators had wasted the assets of the intestate, and that, in order to recover the sums due to them respectively, the next of kin instituted an action on the administration bond against the obligors therein; and that, pending the action,

the bond in some manner became lost or mislaid, and that, being unable to establish the loss before the jury, they were nonsuited in the Spring of 1840. The bill states that the said bond was duly executed by all the said parties, and that the plaintiffs have been unable, after diligent search by the clerks of the courts, to find it, or to learn what has become of it; and the prayer is for a discovery or relief by having an account of the estate taken, etc., and decree for what may be found to be due to them against the principals and their sureties. The bill was verified by the oath of one of the plaintiffs.

The bill was taken *pro confesso* against all the defendants, except Willis Council and the administratrix of Wilkinson. The former denies that he executed such a bond, as far as he can recollect. He admits that one of the administrators applied to him to become his surety; but he says that he became much intoxicated, and has no recollection or (420) belief that he signed the bond. He states further, that he has understood that the bond had blanks in it, which rendered it ineffectual, and that they were afterwards filled up by one of the plaintiffs or at his instance; and he insists, for that reason, that the bond, if executed, was not obligatory. The answer further states that the defendant believes the plaintiff William Davis, who married the intestate's widow, destroyed the said bond or suppresses it in order to conceal its defects.

The defendant Mrs. Wilkinson has no knowledge on the subject, and leaves the plaintiffs to their proofs.

Strange for plaintiff.
Badger and W. Winslow for defendants.

RUFFIN, C. J. The evidence is entirely satisfactory upon the point of the execution of the administration bond by the several persons stated in the bill and the minutes of the court. The clerk of the court says he has no doubt it was duly executed and was payable to the justices of the county court, as that was then the form used in the court. He states, likewise, that while the suit at law was pending, Davis and he were looking at the bond, when Davis called his attention to the circumstance that the name of the obligors who had executed the bond were not inserted in the body of it, and that he, the witness, then wrote their names in the bond, considering it his duty to do so. As a security to the present plaintiffs the instrument cannot be affected by that act of the clerk, who was a stranger to them. Besides, if the clerk had destroyed the bond, or if it were originally defective, the plaintiffs would still be relieved in this Court to the extent to which they could have remedy on the bond at law, if it were valid and in existence. *Armstead v. Bozman,* 36 N. C., 117.

There appeared upon the evidence at the hearing some, though not very strong, cause to suspect that the plaintiff Davis might have suppressed the bond. Although the jurisdiction of this Court (421) upon lost bonds is assumed upon the grounds of the oath of the party as to the loss and of the indemnity decree, as explained in *Fisher v. Carroll, post,* 485, yet we conceive the Court would not be found nor at liberty to help an obligee if it should appear affirmatively that, instead of losing the bond, he had destroyed or suppressed it. An inquiry was therefore directed on that point, and it has resulted in satisfying the Court that there is no just reason to impute to that or either of the plaintiffs the charge of destroying or cencealing the instrument, but that it has been in fact lost or mislaid—the present and late clerks having stated that they were unable to find it in the office and had no knowledge where it is.

It must be declared, therefore, that William Wilkinson and the other defendants duly executed the administration bond in the penalty of $10,000, and that, in consequence of its being lost, the plaintiffs are entitled to relief therein against the obligors in this Court for the sums due to them as next of kin of the intestate, within the penalty of the bond. And it must be referred to the clerk to inquire what sums may be due to the plaintiffs respectively in the premises.

PER CURIAM. Decree accordingly.

Cited: Respass v. Jones, 102 N. C., 12.

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(422)

WYATT CANNADY v. HORACE L. ROBARDS.

An award for the payment of money merely can only be enforced at law. Equity has no jurisdiction over it.

CAUSE removed from the Court of Equity of GRANVILLE, at Spring Term, 1849.

James Nuttall was indebted to William Robards upon two bonds for the sum of $666.66⅔ each, bearing date 10 November, 1837, and payable one day after date, and Alexander H. Nuttall and Charles N. Nuttall were sureties in both; one of those notes was indorsed by the obligee to William D. Williams, who brought suit on it against the obligors and recovered judgment in Granville. James Nuttall was also indebted to William Robards in two other bonds, bearing date 3 February, 1838; one for $749.99, due one day after date, and the other for $1,104, pay-

able on 1 May, 1838, with interest from 1 June, 1837. On 3 February, 1838, James Nuttall conveyed to the defendant Horace L. Robards five slaves, a tavern and lots in Oxford, sundry articles of furniture, horses, cattle, and a barouche, wagon, and other chattels, and assigned to him all his interest and share in the estate of assignor's father, John Nuttall, then lately deceased, upon trust to sell the real and personal estate upon the terms therein specified and collect the money and pay the debts due as aforesaid to William Robards, and also, in case the said James should not by a certain day discharge the debt due to William D. Wil-
(423) liams, for which William Robards was liable as indorser, to pay out of the said money into the hands of the said William Robards a sum sufficient to pay what might be due thereon.

The bill was filed in March, 1846, against Horace L. Robards, the trustee and the executor of his father, William Robards, who had in the meanwhile died; and it states that, by sundry payments, made by James Nuttall to William Robards or to the defendants, and the proceeds of the real estate and certain parts of the personalty, the whole of the debts had been satisfied before 7 August, 1839, except the judgment to Williams, and the further sum of $442.18 remaining due to William Robards on the other debts; that the five negroes, besides some others of the chattels, still remained unsold and in the hands of James Nuttall; and that the present plaintiff was before and then a creditor of James Nuttall by judgments in Granville, on which writs of *fieri facias* were in the hands of the sheriff of Granville, and had been, as well as an execution on the judgment of Williams, levied on the said slaves and other effects so remaining unsold; that the plaintiff, in order to put it out of the power of any other person to prevent him from reaching and selling the said property by his executions, purchased the debts so due to Williams, and took an assignment of the judgment, and also on 7 August, 1839, caused William Robards to be duly released from all liability as andorser of the bond, and gave his own bond to William Robards for the said sum of $442.18, which was accepted by him in satisfaction of the balance due to him on all the debts mentioned in the deed of trust, and was so expressed in the bond; that some of the negroes were removed by Nuttall from Granville to Warren County, and were there sold by other creditors on execution, and the purchasers had acquired a good title by a possession of more than three years, and that by reason thereof the plaintiff failed to obtain satisfaction of his said debts by
(424) executions at law; that the plaintiff did not seek to charge the defendant for the loss of the said slaves; but that he insisted he was entitled to be satisfied out of any other funds of the trust in the hands of the defendants as trustees, or which remained undisposed of; that two of the slaves and some other articles had been sold under the

executions after August, 1839, by the sheriff of Granville, who held the proceeds in his hands and would not apply them without the consent of the defendant, upon the ground that the debts secured in the deed must first be paid thereout; and also that, after that period, the defendant, as the assignee of James Nuttall under the deed of trust, received certain sums, amounting to nearly $700, as and for the share of James Nuttall in the estates of John Nuttall, and never accounted for the same to James Nuttall nor to the plaintiff; that the plaintiff was entitled to have those sums applied to the satisfaction of the judgment in the name of Williams, and to reimburse to him the sum so paid by him to William Robards and also to have any parts of the property remaining on hand sold, and the proceeds applied to the discharge of the residue of those debts and of the other judgments of the plaintiff against James Nuttall; and that, being so entitled, he applied to the defendant Horace L. to account to him accordingly; but that they were not able to concur about the sum in the hands of said Horace L. as trustee, and that thereupon they mutually agreed that the same should be ascertained and determined by the arbitrament of two persons, David J. Young and James M. Wiggins, and that on 22 May, 1844, the arbitrators awarded that the defendant should pay to the plaintiff the sum of $682 as the balance then in his hands as trustee, which was received after 7 August, 1839; that the same, when paid, will not satisfy all the debts from James Nuttall to the plaintiff, and that the defendant is bound now to pay that sum and also to take whatever other steps may be necessary to dispose of the other specific effects not yet sold, and to (425) apply the proceeds to the satisfaction of the several demands of the plaintiff. The prayer is that a decree may be made accordingly, and to that end that the defendant may render an account, and discover the several matters charged, and also what part of the property remains unsold, and for general relief.

The alleged award is annexed to the bill and is as follows:

"Wyatt Cannady against Horace L. Robards. Referred to the undersigned for settlement.

"Wyatt Cannady having on 7 August, 1839, executed to William Robards his bond, expressing on its face to be in full for the demands of said Robards under the deed of trust from James Nuttall, we find that Horace L. Robards did afterwards receive of the funds of James Nuttall $682, and this sum being in his hands of the trust funds, we award that it shall be applied to the payment of such claims then due to Wyatt Cannady against James or Alexander Nuttall, or any other person, as by the operation of law created a valid lien on said funds to the amount thereof—provided claims of the above description shall then have existed

or been since created; and, if not, after satisfying such as do exist, with the interest thereon, the surplus, if any, to be applied according to the directions contained in the deed."

The answer states that, besides the judgment assigned by Williams to the plaintiff, he, the plaintiff, claimed to be creditor of James Nuttall by several other judgments, and that he had executions thereon levied on three of the five slaves, which were offered for sale on 6 August, 1839, when the defendant forbade it; that in consequence thereof an arrangement was made between the plaintiff and William Robards, on the next day, the object of which was to enable the plaintiff to sell those three slaves under his executions, which the said William was willing
(426) should be done if the plaintiff would become responsible to him for $442.18, part of the debt of James Nuttall to him, and release him, Robards, from liability as indorser of the bond to Williams, and agree further that the trust funds should be wholly freed and discharged from all liability to the plaintiff, and that he should not be entitled to the satisfaction of any of his demands out of the trust property; and that it was then so agreed between those two persons. The answer admits that the plaintiff's bond to William Robards was expressed to be in full of the debt of James Nuttall to the latter; but it avers that such was not the fact, and that it was thus expressed for the satisfaction of the sheriff and to enable the plaintiff to effect an immediate sale of the three negroes on the executions, and that the same was done accordingly, and to have the proceeds applied to the benefit of the plaintiff. Moreover, the answer states that there was a distinct understanding and agreement that a large balance was due to Robards, and that James Nuttall's interest in John Nuttall's estate was to be retained for such balance. The answer further states that all the property conveyed in the deed, which the defendant had not sold before August, 1839, had been sold under the executions of the plaintiff in Granville, or under those in Warren, which are mentioned in the bill; and that it was altogether the plaintiff's own fault, as he had been discharged from any duty in respect thereof by the plaintiff, as before mentioned.

The answer admits the defendant's receipt of the sum of $682, as alleged in the bill, and for the reasons before mentioned denies that the plaintiff is entitled to any part of it, and insists that it is applicable to the balance of the debts to William Robards; and an account is set forth which shows a balance yet due of $31.22 after applying that sum of $682. It also admits the reference to Young and Wiggins, but states that the arbitrators never came to a final determination, and that
(427) they did not intend the paper annexed to the bill as an award, as

far as the defendant was informed and believes; and it insists, if it was so intended, that it is void because it does not order the money or any part of it to be paid to the plaintiff.

One of the arbitrators proves that the paper was intended as an award, and states his impression that it was communicated to the defendant.

The deposition of the sheriff of Granville states that he held the execution of Williams and several others in favor of Cannady against James and Alexander Nuttall, and that the plaintiff, in order to get in all the claims against those persons and prevent the creditors from sacrificing their property and save something for Alexander's family, agreed to take the judgment to Williams at the full amount of principal and interest due on it, and pay the debt to Colonel Robards; that, accordingly, on 7 August, 1839, the plaintiff paid up the sum due on the judgment and took an assignment of it, and also gave his bond to Robards for $442.18, which, upon a computation and adjustment between the parties, was ascertained to be the balance remaining due; and that it was the intention of those persons thereby to release the property from the deed of trust, so that it might be sold under the executions; and that he, the sheriff, did sell three of the negroes and applied the money, as far as it would go, to the satisfaction of Cannady's demands, and that he endeavored to seize the other negroes and personal property mentioned in the deed, but was unable, because James Nuttall carried it to Warren.

The plaintiff likewise examined James Nuttall to prove various payments to the defendant or his testator, and that there was a balance of the trust fund in the defendant's hands after discharging the debts secured by the deed.

W. H. Haywood for plaintiff. (428)
Graham for defendant.

RUFFIN, C. J. The plaintiff cannot have relief upon the footing of the award, which seems to have been the purpose of the bill. As an award for the payment of money merely, the remedy is at law, and performance cannot be compelled by bill, as it might if it had been for the conveyance of an estate. *Hall v. Hardy,* 3 Pr. Wms., 187; *Wood v. Griffin,* 1 Swans., 54; *Bouck v. Wilber,* 4 John. C. C., 405. But if it were otherwise, this award is so defective upon its face, in not ascertaining any sum to be due the plaintiff or awarding any sum in particular to be paid to him, that it cannot be sustained. It merely decides that the defendant holds $682 of the trust fund, not necessary for the payment of the debts to William Robards, and awards that the defendant shall pay it to the plaintiff or any other person who may have such claims as by law constitute a lien on it. Being neither certain nor final, it could not be sustained at law nor enforced here.

It was next said that the plaintiff was entitled to an account, independent of the award, and to a decree for the satisfaction of his judgments out of any balance that may be found in the defendant's hands. As the bill does not seek to make the defendant liable for more than is in his hands, and the answer accounts for his receiving the proceeds of John Nuttall's estate in a manner which, under the circumstances, is not at all satisfactory, the Court would willingly send the cause to the master if the frame of the bill and the facts of the case were such as to allow it. But we think they are not. In the first place, it is nearly admitted in the bill that the plaintiff took the assignment from Williams and made the payment to William Robards under an agreement
(429) that he would look to James Nuttall and to the remedy at law by judgments and executions, to obtain satisfaction, and that he was not to have recourse in any event to the deed of trust or to the defendant or his father. At all events, the answer states that fact positively, and in that respect it is supported by the testimony of the sheriff, who makes it plain that the whole purpose of the agreement was to get clear of the deed, so that the plaintiff might use his executions. If the construction of the deed be that, in reference to the debt transferred to Williams, it did not provide merely for the indemnity of W. Robards as indorser, but was a security for the debt itself, yet the assignment of the bond or judgment to the plaintiff could not carry the benefit of the deed of trust as a further collateral security, in opposition to the express stipulation of the plaintiff with William Robards and the trustee, that it was renounced. But if the plaintiff were not fettered by that agreement, and came simply as assignee of one of the debts secured by the deed, for an account and satisfaction, in which case he ought to have the benefit of the deed (*Miller v. Hoyle, ante,* 269), still he could not be relieved on this bill, because his assignor and the debtors, the Nuttalls, would be indispensable parties, both for the protection of their interest and for the security of the trustee. So if the plaintiff be not regarded as a creditor provided for in the deed, but as filing the bill in the character of a judgment creditor merely, his case is still more defective; for the same persons would be necessary parties, and, besides, the bill does not allege a return of *nulla bona,* nor the insolvency of the debtors, nor plaintiff's inability to obtain satisfaction at law. In fine, it appears almost certain that the bill was not drawn with any view to an account upon either of those grounds, but only to entitle the plaintiff, either as the party to the alleged award or as a person who might claim under it, to have satisfaction out of the specific sum found by the arbitrators to be in the
(430) defendant's hands. As he cannot have that, as has been already

stated, he must fail altogether; for although the defendant may be liable to James Nuttall, the maker of the deed, he cannot be called to account by the plaintiff upon the facts now appearing.

PER CURIAM. Bill dismissed with costs.

THOMAS TOMLINSON v. SAMUEL SAVAGE ET AL.

1. Though equity will not compel a purchaser to accept a doubtful title, yet the doubt must be a reasonable one.
2. In a bill to rescind a contract for land purchased at auction, upon the ground that the vendor employed "puffers," the time when the vendee discovered this fact must be set forth.

CAUSE removed from the Court of Equity of MONTGOMERY, at Fall Term, 1848.

At Fall Term, 1830, of the court of equity for Montgomery, Charles Savage, Samuel Savage, and Robert Lyde and Augusta, his wife, filed their bill *ex parte,* in which they allege that, as the heirs at law of their mother, Elizabeth Savage, the said Charles, Samuel, and Augusta were the owners, as tenants in common, of a plantation on Peedee River, containing 650 acres, and prayed for a decree of sale for the purpose of partition, and the sale was decreed accordingly. Pursuant thereto the clerk and master sold the plantation to the plaintiff for the price of $4,500, payable in three equal installments, and took three several (431) bond of $1,500, payable 1 January, 1831-2-3, with interest from 5 December, 1830, the day of sale. The plaintiff went into possession immediately after the sale, which was confirmed by the court, and has been in possession ever since. He paid the first bond, but after the second one fell due, he refused to pay, and filed the bill to rescind the contract, which bill was afterwards dismissed without prejudice. He then filed the present bill, by which he seeks to have the contract rescinded upon two grounds: because of a defect in the title as to all or some part of the land, and because Charles Savage, who, as he alleges, was aware of the defect in the title, "was himself the principal bidder in running said land up to $4,500 upon your orator."

A reference was made to the master to report upon the title, and he reported that a good title can be made. Exceptions are filed by the plaintiff.

Strange for plaintiff.
Winston for defendants.

(432) PEARSON, J. It will be convenient to consider them under two heads. First, in reference to the title of Johnson; and, second, in reference to the title of Elizabeth Savage, derived from Johnson. As to Johnson's title, the plantation contains two tracts: one of 300 acres on the river, which is mostly cleared and in cultivation; and the other of 350 acres, lying back in the hills and mostly woodland. The two tracts do not adjoin, being separated by a narrow strip of land, but they were sold together, and the one is necessary to the other for a supply of wood for fencing, fires, etc.

In 1785 a grant issued to Johnson for the 300-acre tract; but a grant had issued to one Hall in 1751, which covers the whole of this tract. In 1839 a grant issued to Johnson for the 350-acre tract; but a grant had issued to one Whitfield in 1783, which covers the larger part of this tract; and in 1783 a grant issued to one Colson which also covers 17½ acres of this tract. The part covered by this grant is still in woods. Johnson, by his tenants, cultivated the 300-acre tract and got wood from the 350-acre tract until 1792, when he made a contract of sale to Mrs. Nesbitt, who resided upon the 300-acre tract and used the other tract for wood until 1793, when she married one Blinett, who lived upon the 300-acre tract, and used the other for wood until 1823. Mrs. Nesbitt paid for the land before her marriage with Blinett, but did not take a deed from Johnson, and died in 1796, having had a child, born alive, but which died soon after its birth. Blinett, after her death, claimed as tenant by the curtesy, and, besides the possession above stated, he settled his daughter, Mrs. Lanier, upon the 350-acre tract, who cleared a field and lived on the land. The house was near the Salisbury Road, and both the house and field were upon that part of the tract which is covered by the Whitfield grant, but her possession did not extend to the part covered by the Colson grant. Mrs. Lanier continued upon
(433) the place until her death in 1819, when the field was turned out, and no one had possession of this tract, except for the purpose of getting wood to support the plantation on the other tract, until the plaintiff took possession in January, 1831. Prior to 1823, Mrs. Savage, the mother of the defendants Charles, Augusta, and Samuel, and who was the only child of Mrs. Blinett by a former husband, one Nesbitt, had filed a bill against Johnson and Blinett, in which she alleged that her mother, who was her guardian, bought the land for her and paid for it with her money; and in 1823 a decree was entered, in pursuance to which Johnson conveyed the land to Mrs. Savage, and Blinett released to her all claim as tenant by the curtesy. Mrs. Savage held possession in the same way that Blinett had done, until her death in 1830, when the land was purchased by the plaintiff, who was in possession before the sale, as tenant, and, after the sale, has continued in possession up to

this time. In 1831 the plaintiff built a house and cleared a field on the 350-acre tract, near where Mrs. Lanier had lived, and he has lived there ever since.

One of the plaintiff's exceptions raises a question as to the validity of Johnson's title, the whole of one tract and the greater part of the other being covered by elder grants. The reply is that the length of possession, from which every presumption necessary to sustain the title under which it has been enjoyed will be made, and the statutes of limitations have not merely taken away any right of action under those old grants, but have perfected the Johnson title. As to the 300-acre tract, there has been a continued possession under the Johnson title for about sixty years, during which time Hall, to whom a grant issued in 1751, has not been heard of, and neither he nor any one claiming under him has ever set up claim to the land. It is said that, for aught that appears, Hall may have died before Johnson's grand issued, leaving an (434) heir under disability, and by an accumulation of disabilities it may be that some person may now have a right to set up his title. Such an event is possible, but it is a remote possibility; and although equity will not compel a purchaser to accept a doubtful title, the doubt must be a reasonable one (*Emery v. Gracock,* 6 Mad., 41; *Hillory v. Waller,* 13 Ves., 249), such as would deter a prudent man, who wished to buy, from making the purchase; especially when, as in this case, the purchaser takes possession without objection until long afterwards.

As to the 350-acre tract, possession was held of that part which is covered by the Whitfield grant, by Mrs. Lanier, claiming under Blinett, who held under the Johnson title for more than seven years prior to 1819; and possession has been held by the plaintiff, himself, for more than seven years before this bill was filed; and besides this actual possession, the land has been used during the whole time by the persons cultivating the other tract, for the purpose of getting wood. The same doubt does not exist as to the person entitled to the Whitfield grant as was suggested in reference to the Hall grant; for it is shown that Whitfield's title belongs to one Wall, who brought an action of ejectment against the plaintiff, claiming all that part of the 350-acre tract which is covered by the Whitfield grant. The case was tried several times in the court below, and once in this Court, and was finally decided in favor of the Johnson title. It appears from the plat, filed as an exhibit, and the proof, that the possession of Wall did not extend over any part of the 350-acre tract, and there was nothing to prevent the possession of the plaintiff from perfecting the Johnson title. The law upon that question is clear, and there is no doubt as to the fact of possession. It is true (435) that a recovery in ejectment is not of itself sufficient to show that the title is good; for a new action may be brought, but the pendency

of the action is calculated to elicit the facts, and in this case the title is put beyond question by the operation of the statute of limitations. It is objected that a purchaser should not be required to take a title which has been made good by the statute. We see no force in the objection. So that the title be good, it matters not how it is made so.

As to 17½ acres of this tract, which is covered by the Colson grant, the Johnson title is not good; for, this parcel being in woods and no possession being taken of it by those claiming under the Johnson title, so as to interfere with the Colson grant, the continued possession has been in Colson and those claiming under him, as his was the older title. But taking off this parcel does not so materially affect the value of the rest or make such a substantial alteration in the subject of the contract as to entitle the plaintiff to have it rescinded, because compensation can be made by making a deduction of the value of this parcel; and it must be declared to be the opinion of this Court that the plaintiff has an equity to have a credit entered upon his bonds for such sum as may be the value of this parcel, compared with the residue, upon the supposition that the whole is worth $4,500.

Second. As to the title of Mrs. Savage. Mrs. Nesbitt, the mother of Mrs. Savage, had two children by a former husband—John Colson and Jane, who are both living. Jane married one Norwood, who is dead. John Colson and Norwood and wife were parties plaintiffs to the bill filed by Mrs. Savage against Johnson and Blinett, and are concluded by the degree under which Johnson conveyed to Mrs. Savage, and cannot be heard to impeach it after so long an acquiescence. Blinett has released his claim as tenant by the curtesy, and Mrs. Norwood, since the death of her husband, has also released. This makes it unneces-
(436) sary to decide the many interesting questions that were raised in the argument upon the supposition that the decree did not conclude them. The fact that they were parties seems to have been overlooked in framing the exceptions. The exceptions to the report of the master are overruled, except as to the 17½ acres.

It was further insisted that the plaintiff had a right to have the contract rescinded because there was unfair bidding or "puffing," as it is termed. Before the sale, Charles Savage and Lyde contracted to let one Wall and Waddell have the tract for $3,000, whether it sold for more or less, and for this purpose Charles Savage was to buy the land at the clerk and master's sale; and if he was forced to bid more than $3,000, he and Lyde were to lose, each, a third of the excess, and Wall and Waddell were to pay the other third to Samuel Savage, who was under age, and could not be bound by the agreement. When the land was run

up to $4,000 by the plaintiff, Wall and Waddell released Savage and Lyde from their contract, and Savage afterwards continued to bid until it went up to $4,500, and was struck off to the plaintiff.

If Savage, after the release, continued to bid, not for the purpose of buying the land, but with a view to run it up on the plaintiff, in pursuance of an understanding between himself and Lyde, acting for themselves and their infant brother, upon this fact being shown, the court would not have confirmed the sale; and it may be that if it had been properly charged and in apt time it would have sustained a bill to rescind the sale. But there are no sufficient allegations in the present bill to raise the question. There is no allegation of an understanding between Savage and Lyde to run the land up on the plaintiff; and, for aught that is alleged, Savage may have continued to bid for the purpose of buying the land for himself, as he had a right to do. There is no allegation that the plaintiff was, by reason of the bidding, induced to (437) give more for the land than it was worth, or than he had before made up his mind to give; and there is no allegation as to the time when these facts came to the knowledge of the plaintiff, so as to take the cause out of the principle laid down in *McDowell v. Simmons, ante,* 278. The allegation is simply that, after the release, "Savage was the principal bidder in running said land up to $4,500 upon your orator."

The injunction must be dissolved, except as to the sum of $261, which sum is retained until the report is made as to the 17½ acres. The plaintiff must pay all costs. There must be a reference to ascertain the value of the 17½ acres, compared with the whole land, supposing the whole worth $4,500.

PER CURIAM. Decree accordingly.

Cited: *Knight v. Houghtalling,* 85 N. C., 31.

THOMAS H. HENDERSON ET AL. v. PLEASANT H. WOMACK, EXECUTOR, ETC.

1. A testator bequeathed as follows: "First, I give to my sons T. and J. and E. F.'s children all the balance of the negroes, to be equally divided between them, with what they have had heretofore, to have and to hold during their natural lives. The reason I give this property to the children of E. F., my daughter, is that I am fearful S. F. would spend it. My desire is that the property which shall fall to E. F.'s children shall remain in the hands of my executors, and it is my wish for them to be hired out until they shall arrive at the age of 21. Secondly, if there should be any surplus, after payment of debts, expenses, and legacies, such surplus shall be equally divided and paid over to my said wife and three sons" (the

(483) testator had a third son for whom he had made a previous provision), "and E. F.'s children to have their mother's part of the surplus, their executors and assigns, absolute forever." The testator in his lifetime and before he made his will gave some slaves and other chattles to his three sons and his daughter E. F. John died before the testator, leaving four children.

2. *Held,* first, that the children of E. F. take as a class, and not *per capita;* that although the general rule is that the words "equally to be divided" import a division *per capita,* that rule does not apply in this case, the context evidently showing that the class was to take as a unit, the representative of their mother.

3. *Held,* secondly, that the issue of John who died in the testator's lifetime, living at the death of the testator, could not take a life estate in the slaves bequeathed to him specifically, and that these must go into the residue; but that the issue of John living at the death of the testator were entitled to his portion of the residue bequeathed to him, under the act of 1816, and the term "issue" includes all the descendants of John living at the time of the testator's death, and they are, under the act, equally entitled to distribution with their immediate ancestors.

4. *Held,* thirdly, that only the children of E. F. who were *in esse* at the death of the testator can take, the general rule being that when the division is not postponed in the will, but the shares of each are ascertainable at the death of the testator, only those can take under a gift to children of a particular person who were in being when the will took effect.

5. *Held,* fourthly, that there may be an immediate division of the slaves bequeathed to legatees for life, and also an immediate division of the residue bequeathed among all those entitled.

6. *Held,* fifthly, that the reversion to which the representatives of the testator will be entitled, after the expiration of the life estates in the slaves, the same having been undisposed of by the will, cannot be immediately divided, but at the expiration of each legatee for life the slaves so devised to him for life will constitute a part of the general residuum, any may then be divided.

7. *Held,* sixthly, that the provision in the will as to advancements applies only to slaves advanced, and these are to be brought in by the several donees, in determining their respective shares; and that, in estimating these advancements, the value of the slaves out and out must be set upon them, it being presumed that the advancement was of the absolute interest in the slaves, and not a life estate.

(439) CAUSE removed from the Court of Equity of CASWELL, at Fall Term, 1849.

Jacob Henderson made his will on 4 April, 1845, and died in June, 1846. After giving to his wife certain lands, slaves, and other chattels for life, with remainder over for his infant son, Albert, the will contains the following dispositions:

"First. I give to my sons Thomas and John, and to Elizabeth Fielder's children, all the balance of the negroes, to be equally divided between

them with what they have had heretofore, to have and to hold during their natural lives. The reason I give this property to the children of Elizabeth Fielder, my daughter, is that I am fearful Samuel Fielder would spend it. My desire is that the property which shall fall to Elizabeth Fielder's children shall remain in the hands of my executor; and it is my wish for them to be hired out until they shall arrive at the age of 21.

"Secondly. If there should be any surplus after payment of debts, expenses, and legacies, such surplus shall be equally divided and paid over to my said wife and three sons, and Elizabeth Fielder's children to have their mother's part of the surplus, their executors and assigns absolutely forever."

The testator, in his lifetime and before he made his will, gave some slaves and other chattels to his three children, Thomas, John, and Elizabeth; and he left thirteen slaves besides those specifically given to his wife and Albert. John Henderson resided in Missouri and died there on 26 April, 1846.

The bill is filed by Thomas Henderson, the widow, and her infant son, Albert, and by four persons as the children of John Henderson, against Womack, the executor, and against Sarah S. Fielder and Martha E. Fielder as the children of Elizabeth Fielder, and prays that the rights of the parties under the will may be declared, and for an account, and satisfaction of their respective legacies.

The answer of the executor submits to an account and to dis- (440) pose of the effects under the direction of the court. But it states that he is not acquainted with the families of the son John and of Mrs. Fielder, and does not know what children they had, nor whether the parties to the suit are their children respectively.

No counsel for plaintiffs.
Kerr for defendant.

RUFFIN, C. J. Strictly speaking, it was incumbent on the plaintiffs to offer proof on the hearing to establish number and names of the children of Elizabeth Fielder and of the issue of the deceased son, John. But as the object of all the parties is to obtain a construction of the will, the defendant made no objection on that ground, and therefore there may be an inquiry on that point.

Several questions were raised as to the construction of the will. The first is, whether the children of Elizabeth Fielder take as a class or *per capita*. The opinion of the Court is very decidedly that under both clauses they represent their mother, and take as a unit, as between them and the other donees. It is true, as a general rule, that "equally to be

divided" imports that each of the persons among whom the division is to be made is to take the same share, and consequently they take separately as individuals within the description. But that does not hold when there is sufficient in the context to show clearly that the children of Elizabeth, for example, were the objects of the testator's bounty, as her children, and were in truth donees in her place; for it is manifest the intention was that they should come in as a family. The reason assigned here for giving the negroes to the daughter's children, instead of the daughter herself, shows the testator's purpose to have been to deal equally between his children or their families, and makes the case like that of *Martin v. Gould,* 17 N. C., 305. The same intention is evinced by the direction in the residuary clause, "Elizabeth's children to (441) have their mother's part of the surplus," and by that in the previous clause, that the division was to be equal, "with what they have had heretofore." That last circumstance brings this case within *Spivey v. Spivey,* 37 N. C., 100, in which it was held that a direction to include in the fund advancements to the mother imported that the children took as a unit.

Another question is, what effect the death of John before his father had upon the gifts to him. Were it not for the act of 1816, his share of the residue, that is, one-fifth, would have lapsed and gone necessarily to the next of kin. *Johnson v. Johnson,* 38 N. C., 426. By force of this act, however, the bequest took effect and vested in the son's issue. But it cannot give the issue a share of the slaves under the clause which disposes of them specifically. The act does not operate as if the names of the issue were inserted in the will instead of that of the testator's child; but it transfers to the issue the thing given to the child, to be held by the issue in the same manner and to the same extent as it would have vested in the child, if living at the testator's death. Then this gift, which is for the child's own life, necessarily expired upon his death. and there is nothing to which the issue could succeed under that clause; but that share falls, of course, into the residue.

There are further inquiries: who are entitled to the residue and when the different parts of it are to be divided. It is to be observed, in the first place, that the will disposes of the thirteen slaves for the lives only of the several takers. Therefore, besides the residue derived from other parts of the estate after payment of debts and charges, the share of John in the thirteen slaves, towit, one-third, forms part of it; and there is no reason why to that extent the division of the residue should not take place immediately. It is to be made into five equal shares, one (442) for the widow and each of the two surviving sons, one for the issue of John, and one for the Fielders. The reversion of the other two-thirds of the slaves, after the deaths of the son Thomas and

the children of Mrs. Fielder, also forms part of the residue; and, as those persons shall respectively die, the slaves which each held will be divisible as parts of the residue in five shares, as before, for the residuary legatees or their representatives. The bill is filed upon the idea that the children of the son John succeed to his share. It may be that they do, as there may be no grandchildren or other issue of that person. But all his issue living at the death of the testator took equal and transmissible interests; for the act does not transfer the bequest to the children of the child, but says expressly that the title shall "vest" in the "issue," and as it does not specify in what proportions the several persons constituting the issue shall take, all those who answer the description at the testator's death take equally. Of course, the shares of any of the issue dying afterwards will go to their representatives. The consequence is that if John Henderson had grandchildren, they come in equally with his living children, though the parent of such grandchildren be one of the children. That is the sense of the term "issue" even in a will, and when unexplained it includes all offspring or descendants; and they take as joint tenants, and, of course, equally. *Davenport v. Hanbury,* 3 Ves., 257; *Bernard v. Montague,* 1 Mer., 424 and 436. Much more must be received in that signification, when used in a statute without qualification, as is the case here; for the act has no reference to the statute of distribution or the canons of descent, or anything else that can restrain the natural and most extensive sense that term.

It does not appear that there is any change in the children of Mrs. Fielder since the making of the will; and therefore no question may arise whether any child of the heirs is or is not to be excluded. Supposing the parties, however, to desire a declaration of their rights (443) to be made as definitely as possible, the Court deems it proper to express the opinion entertained by us, that only those of her children who were *in esse* at the death of the testator take under either of the bequests. If any died before and left issue, such issue cannot take. Not under the act of 1816, because that is confined to gifts to a child of the testator, and does not include one to a grandchild, so as upon the death of the grandchild to vest the thing in the grandchild's issue. Nor could the issue come in under the description of Elizabeth's children in the will; for that does not include grandchildren, except under very particular circumstances, which are not suggested here. Then, the general rule is that when the division is not postponed in the will, but the shares of each are ascertainable at the death of the testator, only those can take under a gift to children of a particular person who were in being when the will took effect. This Court might decree an immediate sale, although some of the parties be infants. But that is not the case, as Mr. Henderson, the son of Albert, and the issue of the deceased son,

John, have no interest but in the reversion, as a part of the residue, and their rights ought not to be prejudged for the sake of promoting the convenience or interest of the other claimants.

It is lastly to be considered what species of advancements are to be accounted for, and in reference to what parts of the estate they are to be taken into the account. The provision upon the subject of the previous gifts is found in the specific disposition of the slaves to the sons Thomas and John, and the Fielders; and it seems plainly to mean by the term "what," such slave or slaves as they had received from the testator. In the division of those slaves he intended things *ejusdem*
(444) *generis* to be brought in by the several donees in determining their respective shares. For that reason, and also because the residuary clause is, in its terms, a simple disposition of the residue equally among certain persons, without any qualification, but the single on that some of those persons are to take one share as a class, the provision concerning the advancement does not apply to the residue at all, but only to the provision of the slaves among the tenants for life. Of course, the son Thomas must bring in his advancements. The children of Mr. Fielder must bring in those to her. It is not suggested that the testator had made a prior gift to the children or either of them, but he had to her. Besides, in furtherance of the equality he intended between his children, as they take in her stead, it is to be inferred he intended they should take as he would have required the mother to do. It is equally necessary to include the advancement to the deceased son, John; not, indeed, to assign a share to him or his family, but in order to ascertain what goes into the residuum for division presently, as his share; for it is to be recollected that the will does not give to each a third of the thirteen negroes, but a third with what they before had respectively; then the slaves on hand and those previously given constitute the fund, and each one gets a share of the fund *minus* his advancement. That is what John would have got, had he lived; and although the previous gifts to him cannot be taken back, yet they must now be esitmated in order to find what proportion of the thirteen negroes would have gone to him, and, that failing, goes into the residue. In estimating the different parts—it not appearing that either of the advancements was for the life of the child—we suppose the testator must have meant the value of the slaves out and out to be set on them, but that in those left by him the legatees should in the first instance have only an estate for life, while in the others their interest was absolute.

PER CURIAM. Declared accordingly.

Cited: *Bivens v. Phifer,* 47 N. C., 439; *Cheeves v. Bell,* 54 N. C., 237; *Burgin v. Patton,* 58 N. C., 427; *Lee v. Baird,* 132 N. C., 766.

(445)

GEORGE W. KINDLEY v. JOHN S. GRAY.

A. purchased a tract of land from B. and, afterwards, supposing that B. had not a good title, procured a conveyance from C., the original owner, under whom B. claimed. *Held*, that if B.'s title was but an equitable one, when A. was induced to believe that it was a legal one, upon B.'s refusal to procure and convey the legal title, A. had a right to have the contract rescinded. But, as he chose to purchase the legal title himself, he cannot claim more from B. than to be reimbursed what it cost him to get the legal title.

CAUSE removed from the Court of Equity of RANDOLPH, at Fall Term, 1848.

On 22 January, 1844, the defendant sold to the plaintiff a tract of land containing 100 acres, on a short credit, at the price of $100, and he then executed a conveyance to the plaintiff, with general warranty, and took his bond for the purchase money. The defendant represented that the title was good, and the plaintiff purchased without further examination. The land was granted in 1838 to one John Cooper, who shortly afterwards removed to Illinois. In 1841 one Jesse Cooper, a brother of John, came in from Illinois, and, alleging that he had purchased the land from his brother, sold it to the defendant at the price of $50, and made him a deed. Jesse Cooper had then in his possession the original grant, and also a manuscript copy of it, with the difference that Jesse Cooper's name was inserted in it instead of John, as the grantee, and that it was signed by John Cooper, and dated 27 November, 1840; and when he, Jesse, made the conveyance to the defendant he delivered to him also the other two papers. The latter was without a (446) seal or subscribing witness, and it was represented by Jesse Cooper to be the conveyance made to him by John Cooper. In April, 1844, John Cooper wrote to the plaintiff that he had never conveyed or contracted to sell the land to Jesse Cooper, but that he still owned it and wished to sell it. Upon receiving this information, the plaintiff communicated it to the defendant; and the defendant replied that John Cooper did sell and convey the land to Jesse, and, as proof of it, the defendant produced and delivered to the plaintiff the grant and the said paper so signed by John Cooper, and represented that they were the title papers, under which Jesse Cooper claimed, and which he had delivered to the defendant when he made the deed to the defendant. John Cooper came to this State in May following, and made claim to the land; and the plaintiff then purchased from him and took a conveyance, expressed to be in consideration of $105, containing covenants of general warranty and against encumbrances.

The bill was filed in June, 1846, and states that John Cooper did not sell or convey to Jesse, and that Jesse's representations to the defendant on that subject were false; that when the plaintiff received the grant and other papers from the defendant, he became satisfied that the title was defective, and urged the defendant to get a conveyance from John Cooper in order to complete the title; that the defendant insisted that the paper purporting to be signed by John Cooper was a good deed, and passed his title to Jesse Cooper, and that it was then vested in the plaintiff, and the defendant refused to proceed further in the business; that the said John Cooper threatened to bring an ejectment against him; and the plaintiff, knowing he could not defend it successfully, made the purchase from John Cooper before mentioned. The prayer is (447) that it may be declared that the defendant's deed to the plaintiff passed no title, and therefore that the plaintiff ought to be relieved against the bond for the purchase money, as having been obtained without consideration, and, to that end, for an injunction against a judgment at law on the bond.

The answer states that Jesse Cooper represented to the defendant that John Cooper had sold and conveyed the land to him, and, as he had the grant and also a deed from John to him in his possession, the defendant believed him and purchased the land from him, and took those papers with the deed to himself. The defendant further states that, besides the price ($100) which the plaintiff was to give him, it was agreed orally between them that if any gold should be found on the land, the plaintiff was to give the defendant one-half. He admits that the plaintiff afterwards informed him that John Cooper denied having sold or conveyed to Jesse Cooper, and that he claimed the land, and applied to the defendant to complete the title; and he says that he then insisted that John Cooper had conveyed to Jesse by a good deed, and had no title; and that he then produced the grant to John Cooper and his deed to Jesse Cooper, and delivered them to the plaintiff, and that he received them and professed to be satisfied that John had no title. The answer states the defendant believed that the plaintiff's subsequent purchase, or pretended purchase, from John Cooper was intended fradulently to get clear of that part of the bargain respecting the gold, which both parties thought then to be binding; and that the defendant believes further that the plaintiff did not pay Cooper anything for the land. The answer then avers that John Cooper did sell to Jesse Cooper, and that the said instrument, purporting to have been made by John Cooper, was executed by him, and it insists that it is a good and valid conveyance, whereby the defendant was seized of the premises in fee at the time he sold to the plaintiff.

Morehead for plaintiff.
Iredell for defendant. (448)

RUFFIN, C. J. The title is certainly defective, as the paper from John to Jesse Cooper is not a deed; for, supposing it to have been signed by John, it is not sealed, nor attested, nor acknowledged. The plaintiff had no knowledge of the defect when he bought; for the defendant, though he had that paper in his posession, did not then show it to him. The equity between the parties in that state of the case would soon be evident. As the purchase money was not paid, and the vendor had represented the title to be good and covenanted for it, and the vendee did not know otherwise, the latter had a right to insist on its being made good. In order to avoid circuity of action and to secure the purchaser from loss by insolvency of the other party, equity would suspend the payment of the purchase money until the defect should be supplied, and, indeed, after a reasonable time, would, at the instance of the purchaser, rescind the contract; for when one bargains for a good title he has, in the view of a court of equity, a right to have it made good, as long as the contract in any part is unexecuted; and the case is therefore in such a state that the Court can lay hold of that part of it and thereby enforce the parties to a faithful fulfilling of the bargain as it was identified between them. That is always the case when the purchase money is behind; for the Court is able to treat that as a subsisting and stable security, which the vendee ought to have, and it will not put him off with the personal responsibility of the vendor on a remote breach of the covenant for quiet enjoyment. That is the equity between parties when neither was aware of the defect of the title; for the equity goes on the view taken by the Court of the representations and covenant respecting the title, as obliging the seller to perform it specifically before he can draw (449) the price out of the hands of the other party. It is a jurisdiction in the nature of decreeing specific performance, and, in the meanwhile, allowing the purchaser to hold to the security he has in the purchase money. It is singular that the defendant could have thought the paper signed by John Cooper was a deed; and it might be strongly suspected that he doubted it, and that it was for that reason he did not show it to the plaintiff. But no stress is laid on that, since the plaintiff's equity, as the matter now stands, does not depend on that at all. If he did not know that the title was defective, then, upon the discovery of it, the vendor had the same right to complete the title as the vendee had to require him to do so. The plaintiff, after taking a deed and going into possession under it, could not rescind at once, upon finding a flaw, but the other side had a right to mend it. Then the plaintiff's duty was to inform the defendant of the defect, when he found it out, and request

him to make the title good. That is what he did. If the defendant had then got a good deed from John Cooper, that would have put the title to rest. But he did not; and, insisting most erroneously, indeed, that the title was good, he refused positively to move another step. Now, whether the defendant knew, or not, that the title was defective, it was so; and in either case the plaintiff might well have insisted that he was not always to be held in a state of uncertainty, and therefore declared the bargain at an end—that is, after a fraud, or an express refusal to complete the title. But the plaintiff did not take that course; nor was he bound to do so; for he might wish to hold the land, and he is entitled to have it made good to him, at least as far as his purchase money will go towards effecting it, since the one party, as much as the other, has the right to make good the contract by completing the title. Here, instead of availing himself of the power to annul the contract after the
(450) defendant's refusal to buy John Cooper's outstanding legal title, the plaintiff, without further communication with the defendant, took a deed from Cooper to himself, and then filed this bill, asking peremptorily, in the first place, to have the first contract rescinded. But he cannot get that, for he has now a title to the thing which he bought from the defendant. Then, the equity between the parties, now, seems to be easily understood as that which before existed. It is that the plaintiff shall be reimbursed by the defendant what it cost him to get the legal title. At least, that is the utmost he can claim; for, being in possession under the defendant, he may by that means have made his last purchase the easier and upon better terms, and therefore his first vendor has a right to participate in the benefits derived therefrom. The parties stand in such a relation that while the plaintiff held to his possession and deed, obtained from the defendant, he could not appropriate to himself exclusively any benefits derived from dealing for the land. The plaintiff was not obliged to buy from Cooper, but, without first being off with Gray, he could not so bargain with another as to secure to himself an election to rescind and to leave none to the other party. If, then, the plaintiff had got the deed from Cooper for nothing, he would have no right to disturb his bargain with the defendant; or, if he had paid a price, he could only ask for an abatement *pro tanto* out of the purchase money. He says he paid $105, but that is denied and not proved, and therefore an inquiry must be directed on that point. If it should turn out that he did pay or oblige himself to pay that sum, it will not be a case of abatement, but of consumption of the purchase money, and the plaintiff would be entitled to a perpetual injunction; that is to say, provided he gave no more for the conveyance from John Cooper than it was worth; for although the legal title of Gray was defective for the want of a formal deed from the patentee, yet the defendant

alleges that in fact that person sold to Jesse Cooper or in some (451) way authorized him to make sale of the land, and to that end put into his hands the grant and the other papers, and that the paper may at least be regarded as a binding contract, if not a deed; and those papers had been communicated to the plaintiff before he made his bargain with John Cooper. Therefore the defendant urges that the plaintiff bought at the risk of taking from Cooper a title not worth the buying. Now, it might be that the defendant declined purchasing from Cooper because he considered that he already had his title in equity, and could compel him to convey. That would have been a justifiable ground for refusing, as he might have believed that Cooper would not sue for the land and expose himself to the cost of a suit in equity. In that state of things the plaintiff assumed too much in taking on himself to determine that Cooper's title was good, and, so, purchase it with the view of charging the defendant, absolutely, with what he might think proper to give for it. The plaintiff is not entitled, then, to what he paid or agreed to pay Cooper, but to only to as much as Cooper's title, legal or equitable, such as it was in reality, was truly worth, or, rather what it would have cost the defendant to get it in. The plaintiff can justify claim as much only as he saved the defendant by dealing for the land; for the purchaser has no right to constitute himself the agent of the vendor, so as to bind him absolutely for whatever he may choose to give for an outstanding claim, whether good or bad. The purchaser buys in such a claim at the risk of losing, because the title is good for nothing, or because it was a naked legal title, and could have been obtained at less expense by legal proceedings. Then, the rights of these parties depend upon the inquiries of fact whether John Cooper did or did not contract with Jesse Cooper for value so as to bind him to convey the premises to the latter in fee, or in any sufficient manner authorize (452) Jesse Cooper to contract for the sale thereof on his behalf; and, if so, what it would reasonably have cost the defendant or the plaintiff to have compelled John Cooper to make a proper conveyance of the premises; or, if there was no such contract or authority on the part of John Cooper, what the title conveyed by him to the plaintiff was worth at the time of conveyance, and whether the plaintiff paid or agreed to pay for the same; and it must be referred to the master to have those inquiries made.

PER CURIAM. Decree accordingly.

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

ARCHIBALD T. McKAY v. HUGH SIMPSON.

When an instrument is intended to carry an agreement into execution, but, by reason of a mistake either of fact or of law, does not fulfill that intention by passing the estate or the thing barbained for, equity corrects the mistake by decreeing a proper instrument to be executed.

CAUSE removed from the Court of Equity of RICHMOND, at Fall Term, 1849.

In May, 1846, the plaintiff sold to the defendant a negro boy for the price of $350, to be paid $150 in cash and the balance by a transfer of three shares of stock in the Bank of Cape Fear, marked No. 32. Accordingly the negro was delivered and a bill of sale executed by the plaintiff in the usual form, with a warranty of title and soundness, "except (453) a small rupture"; and the $150 was paid, and a paper purporting to transfer the three shares of stock was signed by the defendant and accepted by the plaintiff. This paper was drawn by the plaintiff, and both parties, at the time it was signed, believed it to be a valid transfer. It turned out not to be so, and the bank refused to recognize the plaintiff as the owner of the stock unless he procured a legal transfer to be made on the books of the corporation. The plaintiff called upon the defendant to make the transfer; he refused, and this bill was filed. The prayer is that the defendant be decreed to execute a legal transfer of the stock and be enjoined from receiving the dividends.

The defendant admits that he refused to execute a valid transfer of the stock, and alleges that he had a right to refuse, because the plaintiff cheated him in the sale of the negro by inserting the exception "as to a shall rupture" in the bill of sale without his knowledge, and because the rupture is in fact a large and serious one, greatly impairing the value of the slave.

W. Winslow and Haigh for plaintiff.
Strange for defendant.

(454) PEARSON, J. It was urged in the argument for the plaintiff that stock in a bank or manufacturing company could not always be bought in the market, like cotton, corn, or Government stock in England, and therefore equity should decree a specific performance of contracts to convey such stock, because a recovery of the value will not, as a matter of course, enable the purchaser to get *"the thing"* which he contracted for. There is some force in this suggestion, but it is not necessary to decide the question, as there is another ground upon which the plaintiff is entitled to relief.

This is not merely an executory contract. It is an *executed* contract, or at least one which the parties intended to be executed. The defendant paid the $150 and signed the instrument which purports to transfer the stock, intending to execute the contract on his part. It was accepted as such by the plaintiff, who delivered the negro and bill of sale as an execution on his part. It turns out that the instrument is not effectual, by reason of a mistake as to the manner in which the transfer is required to be made. The plaintiff seeks to have the mistake corrected. His equity is clear. He stands on higher ground than one who seeks the specific performance of an executory contract.

When an instrument is intended to carry an agreement into execution, but, by means of a mistake either of fact or of law, does not fulfill that intention by passing the estate or the thing bargained for, equity corrects the mistake. In the exercise of this jurisdiction no distinction is taken in any of the cases between real or personal property, whether the mistake be in reference to a matter of law or of fact.

If a vendor, by mistake in drawing a deed, conveys land which he did not intend to sell, the mistake will be corrected. *Pugh v. Brittain,* 17 N. C., 34. So if a deed conveys only a life estate, when the contract was for the fee simple. So if a deed of bargain and sale, by (455) mistake as to the necessity of enrollment, is not enrolled in six months, equity will compel the execution of another deed, which may be enrolled. *Curtis v. Perry,* 6 Ves., 745.

If a *dtfective* conveyance be made, as a mortgage in fee by feoffment, *without livery,* equity will make good this defect. So when a power is defectively executed. *Cotton v. Sayer,* 2 P. Wms., 623. So in case of copyhold land, where the conveyance is not effectual for want of a surrender. *Drake v. Robinson,* 1 P. Wms., 442. In all cases where the intention of the parties is to execute a contract by a conveyance, and their purpose is not effected, by reason of a mistake, equity gives relief; for it is against conscience to take advantage of a mistake.

The defendant relies upon the ground that he was cheated, and insists on the rule that "a plaintiff must come into equity with clean hands." The rule is not applicable to this case, for the effect of it would be to allow the defendant to keep the negro, although he has only paid one-third of the price he agreed to give—in other words, to take advantage of an admitted mistake by way of reprisal or set-off for the fraud alleged to have been practiced upon him.

There is no proof of the fraud alleged by inserting the words "with the exception of a small rupture" in the bill of sale without the defendant's knowledge. There is some proof in reference to the extent of the rupture, but we do not feel called upon to declare how the fact is; for if the degree of unsoundness exceed that provided for in the bill of sale,

the defendant has a plain and adequate remedy by an action at law upon the warranty. There is no principle of law, equity, or morals by which he can keep the negro and take advantage of a mistake to avoid paying the price.

(456) If he had offered to rescind the contract, and to return the negro upon the repayment of the $250, he would have made out an equity, provided the fraud had been proved. But to pay over one-third of the price, refuse to pay the balance, and hold on to the negro, is a summary mode of redress, inconsistent with the course of this Court in the administration of justice.

The defendant must be decreed to execute a transfer of the stock, to be approved by the master, and of the dividends accrued since the time of the contract, and to pay the costs of this suit.

PER CURIAM. Decreed accordingly.

Cited: Hart v. Roper, ante, 352; *Foulkes v. Foulkes,* 55 N. C., 264; *Womack v. Eacker,* 63 N. C., 163; *Lyman v. Califer,* 64 N. C., 573; *Day v. Day,* 84 N. C., 410; *Kornegay v. Everett,* 99 N. C., 34.

WILLIAM S. MILLS ET AL. v. WATSON P. ABRAMS.

When one purchases a tract of land with full knowledge that he is buying a defective title, and takes a covenant of general warranty from the vendor, and also a written declaration from some of those who are the legal owners of the land, that they assent to the sale, he has no right to have the contract rescinded or to prevent the vendor from collecting the purchase money.

CAUSE removed from the Court of Equity of RUTHERFORD, at Fall Term, 1846.

Humphrey Parish was seized in fee of a tract of land situate on Green River in Rutherford County and containing 200 acres, and

(457) died intestate in November, 1840, leaving as his heirs at law a daughter, Lydia Abrams, a widow; another daughter, Elizabeth, the wife of Andrew Miller; three grandchildren, named Humphrey, Walker, and Mary Parish, who were the children of Nathaniel Parish, a deceased son of the intestate, Humphrey; and four other grandchildren, named Thomas, Robert, Anne, and Martha Steele, who were the children of Mary Steele, a daughter of the said intestate. Walker and Mary Parish were infants, and a guardian was appointed for them, and at the filing of the bill the said Mary had intermarried with one Dickey,

but was still under age. The four children of Mary Steele were also infants at the death of their grandfather, and the defendant Abrams was their guardian, and Martha was still under age at the filing of the bill. The defendant administered on the personal estate of the intestate, and a verbal agreement was made between such of the heirs as were of full age and the guardians of the others, that when the defendant sold the personalty he should also sell the land. Accordingly, on 13 December, 1841, the defendant exposed the land for sale on a credit of one year, and it was bid off for John Mills, the testator of the plaintiff, William S. Mills, at the price of $2,312, and two days after he gave his bond therefor with two other plaintiffs as his sureties, payable to the defendant as administrator. At the same time the said John Mills took from the defendant a deed of bargain and sale for the land to himself in fee, in which the defendant is called administrator of Humphrey Parish, deceased, and in which is contained a general warranty from the defendant personally. Immediately thereafter John Mills entered into possession of the premises.

The bill was filed against Abrams only, 1 November, 1843, and it states, besides the facts above set forth, that John Mills died in 1842 and that he made a will and appointed the plaintiff William (458) S. Mills his executor, and "that amongst other devises in said will is one by which his executor is directed to sell the tract of land aforesaid; and that upon inquiry he, the executor, was informed that the said deed from the defendant conveyed to his testator no title for the land, and he therefore declined making any sale." The bill then states that on ascertaining that fact the plaintiff William S. requested the defendants to rescind the contract and give him up the bond for the purchase money, but that the defendant refused to do so, and instituted suit on the bond. The prayer is that the contract be rescinded and declared void, and for an injunction against the suit at law.

The answer states that at the time of the sale it was understood between the heirs and their guardians, and also by the bidders and others present, that the defendant could not make a valid conveyance of the land, and that the purchasers should take the deeds of those of the heirs who were of full age, and should await the arrival at age of the others for conveyances respectively. It further state that John Mills was not present at the sale, but that one of his sons bid for him, and was informed of the views and understanding above mentioned; that a day or two after the sale, John Mills and the son who had bid for him came to the premises to give a bond for the purchase money, and, after having done so, the said John required the defendant to make him a deed with general warranty, and that the defendant refused, for the reason that he could not convey the title, and had no interest in the subject but as

guardian of some of the infant heirs; and that upon Mills still insisting on having the conveyance, the defendant told him that the contract might be rescinded, as he would not undertake to convey the land, to which he had not the title and in which he had no interest; but that he,

Mills, refused to rescind the bargain, and said that he had bought
(459) the land and wanted it, and that he would be satisfied with the title the defendant could make him and would risk that title. The answer further states that the price given by Mills was very high, and it was unquestionably the interest of the heirs at law never to disturb Mills in his possession, but to accept respectively their shares of the purchase money; and that after the defendant's refusal to convey, both Mills and the heirs who were of age, and the guardian of the other infant children, represented the matter in that light to the defendant, and urged him to make a conveyance as demanded, saying that he would be in no danger, and that at all events he might make himself safe by holding the purchase money of each heir until he should convey upon coming of age. The answer further states that the defendant finally consented to make the deed upon an agreement of the adult heirs and the guardian of the others with him and Mills to execute to Mills a written declaration that they had assented to the sale made by the defendant and then approved and confirmed it; and that thereupon such written assent or declaration was executed and delivered to Mills, and the defendant made the deed with general warranty, which Mills accepted as a satisfactory title and at his risk, with a full knowledge of the state of the title and of all the facts of the case. The answer further states that all the heirs who were then and have since become of age have refrained from disturbing the purchaser or those claiming under him, and are willing and ready, as the defendant believes, to make conveyances to the heirs or devisees of Mills or to any person who may be entitled under him; and that he has no doubt the two who were still infants would do so when they came to full age.

Alexander and Edney for plaintiff.
Bynum for defendant.

(460) RUFFIN, C. J. On the part of the plaintiff there are no proofs, excepting only that he filed as an exhibit the deed made by the defendant. Several depositions have been taken by the defendant which sustain the answer throughout as to the value of the land, the circumstances of the sale, the knowledge of the purchaser of the state of the title, his refusal to rescind the contract on account of the title, though requested by the defendant, and his acceptance of the deed of the defendant as a sufficient title at his risk, and also of the written declaration of an assent to the sale by the heirs and their guardians.

If there were no other objection to the plaintiff's case, his omission to put in the will of his testator as evidence would be fatal to it. Although the title might be defective yet as the purchaser entered under his deed, he was seized so far that the land descended from him, taking with it the general warranty, and the heir would have the right to the action on the warranty, and he may choose to keep it. *Markland v. Crump,* 18 N. C., 94; *Thrower v. McIntire,* 20 N. C., 493. Therefore the executor, as such, would have no right to have the purchase rescinded or refuse to pay the price out of the personal estate. *Rutherford v. Green,* 37 N. C., 121. Hence the will was a necssary part of the plaintiff's title, in order to show that the title did not go to him, but vested in him as devisee; for no doubt the land is the subject of devise as well as descent, and the covenant for quiet enjoyment would go with it, as it had not been broken in the time of the testator. Whether the will, if in evidence, would give the executor by himself the right to file the bill may well be questioned; for, as stated in the bill, the land is not devised to the executor, but he is only "directed to sell it"—thus creating a power in the executor, and leaving the land to descend. But that point need not be looked into, since the will is not before us, and therefore we cannot see (461) that the plaintiff has either an estate or a power.

But if that point were out of the case, the merits are clearly against the plaintiff. No doubt the purchaser might, upon the strength of their assent to the sale given to him in writing, claim from the adult heirs a conveyance of their respective shares of the land; and it is possible, if they were made parties, that the court would stop *in transitu* their parts of the purchase money until they should respectively comply with the decree against them to convey. But, even then, the purchaser could not claim to have the whole contract abrogated because one or two would not convey, but would only have the right of keeping back the portion of the purchase money belonging to those who could, but would not, make deeds, so as to complete the vendee's title as far as they could. But the plaintiff has not made any of the heirs parties, and he cannot, therefore, claim relief upon the ground that they will not comply with the equitable terms the court might impose on them; but he founds his prayer for relief solely upon the ground that the title which the defendant sold and conveyed to him is not a good one, but is defective in the manner pointed out in the bill. That might be a very sufficient ground on which the court should allow a purchaser to retain the purchase money until the title should be made good, and, if that were not done in a reasonable time, rescind the contract upon proper terms, provided any fraud had been practiced by the vendor in concealing the defect of title, or the parties had been mistaken as to the title. But when the actual state of the title is fully known by all the parties, and the purchaser agrees to

pay the purchase money at a particular day, which will come before the defect in the title can be legally cured, and by way of securing himself from loss from such defect he agrees further to take covenants (462) from the vendor or some other for the title or against eviction or disturbance, there is no possible ground upon which a court of equity can interfere, unless it were that the court will not let a man, with his eyes open, bind himself by any bargain but such an one as a wise man would deed advantageous or prudent. The vendee here knew every defect which the plaintiff now suggests in the title, and, with that knowledge, he persisted in completing the purchase, choosing his own remedy for any injury from the defect in the title, in the form of a covenant from the defendant of general warranty and quiet possession, and on that he must rely. If this bargain had rested in articles, the purchaser, under those circumstances, would be obliged to pay the purchase money, as he contracted, and could not retain any part of it. Sugd. Vend., ch. 9, sec. 6; *Sadler v. Wilson,* 40 N. C., 295. Much more must that be so when, with aknowledge of the title, he takes a conveyance from one person with convenants for title, and a paper from others, who were legal owners of parts of the land, assenting to the sale; for it is obvious that the purchaser gets precisely what he bargained for, that is, a defective title, with covenants against loss from those defects; and in such a case we held (*Merritt v. Hunt,* 39 N. C., 406) that the plaintiff could not repudiate the contract, but was bound to pay the purchase money.

PER CURIAM. Bill dismissed with costs.

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(463)

JOHN W. INGRAM v. ROBERT KIRKPATRICK.

When a deed of trust has been executed, conveying property in trust for the payment of debts, and the trustee has accepted the same, the grantor, afterwards, has no right to vary the trusts, and any of the creditors secured may compel the trustee to execute the trusts as declared, although they were not privy to the execution of the deed.

CAUSE removed from the Court of Equity of RICHMOND, at Fall Term, 1849.

The defendant became bound as surety for Edward Pittman for several debts to different persons; as also did one Alexander for some of them jointly with the defendant; and the plaintiff became also his surety in a note for about $400. Becoming insolvent, Pittman, on 15 November, 1842, conveyed to the defendant, by deed of bargain and sale, expressed to be in consideration of $10 paid, certain land, slaves, and other chattels— being all his property. The deed recites the several debts, and

that Alexander, the plaintiff, and the defendant were respectively sureties as above mentioned, and that Pittman was "desirous of securing the above named Kirkpatrick and the other sureties by conveying his property aforesaid to the said Kirkpatrick as trustee upon the following trusts," namely, that on Pittman's failure to pay the whole specified debts by 1 January, 1843, Kirkpatrick should sell the land and other property or such part as should be necessary for that purpose, and out of the proceeds "satisfy the above debts, or whatever may remain unpaid, and return the balance to the said Pittman or his as- (464) signs." The defendant accepted the deed, and the next year sold all the property and applied the proceeds to the debts for which he and Alexander were, or he alone was, bound. Afterwards the plaintiff was obliged by execution to pay the debt for which he was the surety; and then he filed this bill, praying an account of the trust property and that he may be paid in full or *pro rata*.

The answer of Kirkpatrick states that he prepared the deed and that Pittman executed it at his instance and in his presence; that when he was drawing it and had enumerated the debts for which he was liable alone or with Alexander, Pittman mentioned the debt for which the plaintiff was bound for him, and proposed to insert it in the deed also, saying that he was desirous to indemnify all his sureties in preference to paying debts to other persons. That the defendant objected to the proposal, but that Pittman assured him the property was sufficient to pay all those debts, and said that his object in including the plaintiff was that, after the other specified debts should be satisfied, the surplus should go to the indemnity or satisfaction of the plaintiff; and that upon that representation and understanding the defendant consented that the plaintiff should be included, and the deed was executed in its present form without the knowledge of the plaintiff. The answer then admits the sale of all the property, and sets forth an account of the proceeds and of the debts, from which a balance of nearly $1,000 appears to be due on the debts for which the defendant was bound, after applying the whole proceeds to them and excluding the debt to the plaintiff.

The defendant examined Pittman, and he stated that he intended to indemnify the defendant fully, and that he thought he was doing so by giving the deed of trust, as he believed the property was sufficient to pay all the debts mentioned in the deed, and it would have been (465) had not several of the negroes been sold on executions upon judgments which at the time he did not suppose to have been rendered. He stated also that he did not wish or intend any preference between his sureties; but that he and the defendant both thought that the latter, having the funds in his own hands, might apply it so as to save himself, and that the deed was executed under that belief or understanding.

No counsel for plaintiff.
Strange for defendant.

RUFFIN, C. J. It is not deemed material to notice any difference between the statements of the defendant and the witness. There is but little doubt that both of the parties to the deed have been disappointed in the result. But as the deed expressly puts the plaintiff and the defendant on the same footing, it is clear that if it be binding as a contract it cannot be varied upon evidence in the manner urged by the defendant. It is said, however, that conveyances of this kind are of a peculiar nature, and that the grantor can direct a different appropriation of the effects from that prescribed in the instrument; and, indeed, as the plaintiff did not execute the deed nor was privy thereto, that he cannot claim (466) the benefit of it. In *Wallwyn v. Coutts,* 3 Mer., 707, there is a very short note of a decision of *Lord Eldon,* on the authority of which other judges have proceeded to lay down a doctrine to the extent stated, which is a very remarkable instance of important legal principles being deduced from a very inadequate source. As the case is there reported, two noblemen conveyed land to trustees upon a trust for the payment of specified debts, without an agreement of any creditor, and without any consideration moving from any one of them. Upon a bill by a creditor for relief under the deed, *Lord Eldon* refused a motion for an injunction against a misapplication of the fund, saying only, as reported, "that the trust being voluntary, the court could not enforce it against the duke and marquis, who might vary it as they pleased." The report is very unsatisfactory, not stating the provisions of the deed particularly, and the reason assigned is so clearly erroneous that there can be little doubt that it does not correctly state that which did influence *Lord Eldon,* whatever it might be; for, there being an executed conveyance, which passed the legal estate to the trustees, it was altogether immaterial whether the trusts were voluntary or not. The trustees would be bound to perform the trusts, though voluntary, because they took the estate on those express trusts, and, therefore, could neither keep the estate nor convey it to another exonerated of the trust. It was so held by *Lord Thurlow* in *Coleman v. Sorrell,* 1 Ves., Jr., 50, and expressly laid down by *Lord Eldon* himself, a few years before, in *Ellison v. Ellison,* 6 Ves., 656. In distinguishing between the rights of different volunteers to call for the execution of trusts, he said, if one needs the assistance of the court of equity to constitute him a *cestui que trust,* he cannot have it if the instrument be voluntary, as upon covenant to convey; but if there be a legal conveyance effectually made, though it be voluntary, the equitable interest, will be enforced; for, he adds, where (467) an actual transfer is made, that constitutes the relation of trustee

and *cestui que trust,* though without a good or meritorious consideration, and voluntary. The distinction seems to be perfectly sound. Indeed, it only applies a principle which was before familiar at law in respect to the creation of uses with and without a consideration: it being held, as explained by Mr. Hargrave, that in conveyances under the statute of uses a consideration is necessary, because they are in truth bargains or covenants, which will not raise a use, if voluntary, to which the statute can transfer the legal estate; but that, in those at common law, as a fine or feoffment, a consideration is not necessary, because they operate by transmutation of possession to pass the land itself from the grantor without interposition of equity, and the grantee, thus receiving it coupled with a use, must hold it to that use, whether voluntary or not; and then the statute would transfer the possession to the use. It would be against conscience for the feoffee to keep the estate for himself, and there could be no use resulting to the grantor, because the deed disposed of it to another. Therefore the use must belong to him, whoever he may be, for whom it was declared. The principle is that uses and trusts annexed to a perfect conveyance of the legal estate will be sustained, but that a trust will not be raised against the owner of the legal estate upon an agreement with him, unless there be a valuable or good consideration. Now, in *Wallwyn v. Coutts, supra,* it is assumed that the deed was effectual at law. Whether as a feoffment or as a bargain and sale, expressing a consideration as passing from the trustee, or as a lease and release, is not material. The legal title was vested in the trustees, and it followed from the rule of the common law as to uses, and from the consequent doctrine of equity as to trusts, that any trusts coupled with the estate in the conveyance, or declared by the trustees, ought to be executed, though gratuitous; and it is not seen how trusts for (468) creditors, supposing creditors who are not parties to the deed to be but volunteers, can be distinguished from trusts for children or others not founded on a valuable consideration. It is most questionable, therefore, whether the report correctly attributes that as a reason of *Lord Eldon's* judgment. That it is erroneous in that respect is the more probable, since subsequent judges, who approved of the decision, have undertaken to assign for it other and very different reasons. It has been said that the true ground of the decision was not that a *cestui que trust,* under a voluntary conveyance, had not the right against the grantor, but that, in the view of the Court, the relation of trustee and *cestui que trust* never existed between the trustee and creditors, but that the grantor was himself the only *cestui que trust;* and that what is said in the deed about paying debts is not for the benefit of the creditors, but the grantor's own convenience, and hence he had a right subsequently to direct the application of it, as his own trust fund. *Garrard v. Louderdale,* 3 Sim., 1,

and upon appeal, 2 Russ. and Mylne, 451; *Bill v. Cureton,* 2 Mylne and Keene, 511. In the opinion given by *Sir Launcelot Chadwell* in the former case, he states the provisions of the deeds in *Wallwyn v. Coutts,* and, as the report of it in Merivale is so defective, 3 Sim., 14, sets forth the bill and the several deeds particularly, and the order made by *Lord Eldon.* It appears thereby that the estates conveyed belonged to the Duke of Marlboro, and that, after reciting that the duke's son, the Marquis of Blanford, had granted certain annuities, and that the duke was desirous of relieving him from the payment of them and also to make provision for his son, he, the duke, in consideration of natural love and effection for his son, etc., conveyed to the trustees in fee certain lands upon trust to raise money sufficient to repurchase the annuities granted by the son, and then in trust, if
(469) the trustees should think proper, to raise any further sum which they might decree expedient, to pay debts then due from the marquis, that the trustees should consider advisable to be paid; and for the purpose of raising such sums it was declared that the trustees should, at such times as to them should seem proper, sell the lands; and that they should in the meantime mortgage any part of them, and stand possessed of the money raised thereby upon trusts to pay off the annuities, and then upon trust, if the trustees should think proper, but not otherwise, and at the request of the marquis, to pay such of his debts as they should consider advisable to be paid; and upon the further trust to pay to the duke any surplus money raised in his lifetime, and to pay any surplus raised after his death to the marquis; and, subject thereto, the trustees were to stand seized in trust for the duke for his life, and then for the marquis in fee. By subsequent deeds between the same parties and reciting the first and certain acts done under it, other trusts were declared. One of the annuitants filed a bill, on behalf of himself and others, praying that the fund should not be applied to the purposes of the substituted trusts until the annuitants specified in the first deed were satisfied; and *Lord Eldon* refused an injunction. But the one case came before that great chancellor which called for his opinion on this point, and therefore it cannot be said positively whether he meant to confine what he did to the particular terms of that deed and circumstances of that case, or proceeded on the general principle which has been since laid down on the authority of the decision. But it would seem from the incongruity of such a principle with his judgment in *Ellison v. Ellison,* 6 Ves., 656, that he must have gone on the peculiar facts of that case. It is apparent that the position rests upon a supposed intention of the grantor to make a conveyance for his own convenience or pleasure, because not executed at the instance or with the concurrence of a
(470) creditor; and it was then considered that, the thing being done

in that way, and to that intent, creditors cannot claim benefit under it or interfere with the grantor's arrangements. Now, it may be said upon that deed, though with some scruples, that it owed its existence to an intention of that sort. The estate belonged to the father, while the debts were those of the son, and the father reserved to himself a life estate, subject only to the discretion of his trustees to raise a fund by sale or mortgage for the payment of the debts when and if they thought it proper and advisable. It is manifest, then, that there was no consideration to support the deed against purchasers from the father, or his creditors, because it was thought voluntary in every sense of the term. There was then color for regarding the transaction as an appointment by noblemen of persons to act in the name of trustees, stewards in fact and attorneys in the management and sale of large estates, under their control, indeed, but without troubling the owners about them until they should choose to recall the appointment or make other dispositions of the estates, and in the course of such management to pay such debts as the grantors, or the trustees, might prefer. It is to be observed that there is nothing on the face of the deed or in the case to raise a suspicion that the debts were not perfectly secure to the creditors, independent of the deed. The father does not say he was desirous of securing the payment of his own debts, nor even those of his son, with any reference to the interest of the creditors; but, on the contrary, the motive for the deed was the father's desire to relieve his son from paying his debts, to promote the son's convenience and happiness merely, apart from the claims of his creditors. Viewed in that light and with an understanding, founded on experience and observation, of the probable purposes of persons of such fortune and rank as the parties to that deed, much more perfect than can be formed here, it is very possible that (471) *Lord Eldon* was correct in not considering the deed to have been intended to vest rights in the son's creditors, independent of the continuing pleasure of the father and son—if, indeed, such was the reason that actuated him. But it seems impossible to infer such an intention, when an insolvent person, or one greatly embarrassed, assigns his estate expressly as an immediate security for particular debts or for his debts generally, and this is the means, through sales by the trustees positively prescribed, of paying the debts as far as the effects will suffice; for the inference is directly against the express declaration of the deed. Such a grantor plainly makes the deed, not to promote his own convenience, merely or chiefly, but to discharge a duty of conscience by making a positive provision for the payment of his debts in convenient time, as far as he is able; and it cannot be presumed that he did not, from the beginning, intend a benefit to the creditors. To what end shall a debtor retain a subsequent control over the property? To allow him to have it

by virtue of a doctrine of equity is substantially to insert in the deed a general power of revocation and appointment, the effect of which would be to render it void against other creditors. *Farback v. Masbury,* 2 Vern., 510; *Cannon v. Peebles,* 26 N. C., 207. As an insolvent cannot honestly revoke a security which he has once provided for his creditors, an intention to do so, or to reserve a power to do so, is not to be imputed to him as a reason for construing his deed in opposition to its words and his duty. There seems, indeed, to be no more reason why his deed, when duly executed to pass the legal estate, should not be as obligatory on him and enure to the behalf of the creditors as much as a devise in trust for creditors is binding on his heir or devisee. It is true, the devise is a bounty. But we have already seen that when the deed is effectual
(472) to vest the estate in the trustee, a gratuitous trust is valid. But a devise for payment of debts is not received simply as a bounty; for if debts and legacies be both charged on the estate, undoubtedly the creditors are to be satisfied first, because in their nature they are of higher obligation, and it is considered that the testator, in providing for them, was but performing an act of honesty. Admit, then, that the creditors, when entering into no covenant, and not privy to the execution of the deed, are volunteers; yet they may stand upon the words of the instrument, and upon the honesty of the trust in their favor, as against the debtor and trustee, and upon its honesty and priority as against creditors provided for in a subsequent deed. Accordingly, there are cases in England in which such trusts were executed at the instance of the creditors.

In *Langton v. Tracy,* 2 Ch., 30, the trust was for payment of debts generally, naming no creditor, and the deed made voluntarily. It was argued that for those reasons it was revocable by the grantor; but *Lord Keeper Bridgman,* assisted by the judges, held clearly that the debts were a just and honest consideration, and the creditors might, as *cestuis que trustent,* compel the execution.

In *Leach v. Leach,* Chan. Cases, 249, it was held again, first, that a trust created by deed is supported by that consideration, and, secondly, that a trust for payment of debts generally is good against the heir, though no creditor be a party to the deed. This last consideration, that is, the operation of such a deed after the death of the maker, is very material in determining its proper construction from the beginning; for it can hardly be supposed that the grantor intended that his heir might frustrate his settlement; and yet, if the power of revocation be impliedly in the ancestor, it must extend to the heir.

There is also the still later case of *Small v. Ondley,* 2 P. Wms., 427, when an assignment by an insolvent to a creditor to secure his debt was held good against assignees in bankruptcy, although the deed was

made without the privity of the creditor. There are, moreover, (473) many instances in which assignments for payments of debts have been sustained against purchasers and other creditors, as founded on a valuable consideration, and, therefore, not fraudulent, though the secured creditors were not privy to the deed. *Stephenson v. Haywood,* Finch, 310; *Marbury v. Brooks,* 7 Wheat., 556. Now, that cannot be if the creditors cannot enforce the trust, but is with the debtor to allow or forbid its execution; for it would be strange, indeed, if a creditor could not bring an estate to sale under his execution which the defendant in the execution could control through his trustee, especially since the statutes authorizing executions to be done on trusts. It may be a circumstance on which a judgment creditor may the more readily impeach an assignment as fraudulent, when it is made of the debtor's own accord and without the knowledge of the creditors whom it purports to secure. But that does not concern the question between those creditors and the grantor and trustee. As between them, the terms of the deed being plain, its purpose as a security for a true debt being perfectly just, and the efficacy of the deed as a security for the debt being indispensable to its honesty and validity to any purpose, the equity and necessity of holding the trust for the creditors obligatory seem to be almost above question; and one is led almost irresistibly to think that *Lord Eldon* meant to confine himself, in *Wallwyn v. Coutts,* 3 Mer., 707, to the particular circumstances of that case, and not to lay down a general proposition, that unless the creditors are privy to a conveyance upon trust to pay debts, they are but volunteers, and for that reason they cannot as *cestuis que trustent* enforce the trust. It must be admitted, however, that whether he intended to be so understood or not, there have been so many other cases professing to go on his authority, in which the judges have laid that down as a general principle, that probably it is to be considered now the settled rule in England.

But whatever the courts in that country may think themselves (474) bound to hold on this point, it is certain, as was said in *Walker v. Crowder,* 37 N. C., 478, that the doctrine, deduced from the note of *Wallwyn v. Coutts,* has not been adopted in this State, nor, it is believed, in this country. No instance has been found of even an intimation that a creditor provided for is not entitled to insist, as against all persons, on the full benefit of the trust as expressed in the deed. In the circumstances of this country, and regard being had to the pecuniary condition and general purposes of those who make assignments for creditors, it is plain that the principle is most applicable here on which the older English cases proceeded. It has been considered among us, when the grantor says in the deed that he makes it for the purpose of securing and paying his debts, that he in fact intends the debts to be thereby secured and paid.

There have, accordingly, been many instances in which such trusts have been executed at the instance of creditors, and the deeds upheld also as valid conveyances against third persons, upon the ground of the obligation created thereby on the trustee to satisfy the debts out of the trust property.

In *Nicholl v. Mumford,* 4 John. C. C., 522, *Chancellor Kent* laid it down that if an assignment be to trustees for the payment of debts and the legal estate vests in the trustees, chancery will compel the execution of the trusts for the benefit of the creditors, though they be not parties, nor at the time assenting to the conveyance. He had before held to the same purpose in *Shepherd v. McEvers,* 4 John. C. C., 136, and *Moses v. Murgatroyd,* 1 John. C. C., 129.

In the case of *Halsey v. Whitney,* 4 Mason, 206, *Mr. Justice Story* stated the doctrine thus: As to trusts created for the benefit of creditors, and to which they are not, technically speaking, parties, they are unquestionably valid if the deed be made *bona fide* and pass the legal
(475) estate to the trustees; for it can be no question whether it is for a valuable consideration or not, because the debts due to the creditors constitute a valuable consideration in the highest sense, and the obligation of the trustee to perform the trust according to the provisions of the deed is a sufficient consideration as far as he is concerned.

Similar views were taken of this matter, as supporting, against an attachment, an assignment voluntarily made by a debtor to a trustee of his own selection, in trust for creditors without their privity, by *Chief Justice Marshall* in *Marbury v. Brooks,* 7 Wheat., 556, and yet more fully in the same case, when it came before the Supreme Court a second time, 11 Wheat., 78. He said that deeds of trust are often made for the benefit of persons who are absent, and even for those not in being. Whether they be for the payment of money or for any other purpose, no expression of the assent of the persons for whose benefit they were made has ever been required as a preliminary to the vesting of the legal estate; and such trusts have always been executed on the idea that the deed was complete when executed by the parties to it. He then proceeds to consider how the creditors not being privy to the execution may be evidence of fraud, and how that presumption may be repelled. But, if *bona fide,* the deed is obligatory throughout.

In each of the cases at law it is evidently assumed that the creditor could, as *cestui que trust,* enforce the trust according to the terms of the deed; and neither of those distinguished judges conceived it competent to the debtor and trustee to defeat the trust to any extent. In truth, they plainly hold the contrary, since they put the validity of the deed, in point of *bona* or *mala fides* and of the sufficiency of the consideration, upon the ground that by its execution the deed became complete and

secured a benefit to the creditors. In the cases in New York the trusts were actually enforced in chancery at the suit of the creditors. There are other most respectable adjudications in equity to the (476) same purpose.

In *Ward v. Lewis,* 4 Pick., 518, an insolvent debtor made an assignment to trustees to pay debts in a certain order, which the trustees accepted. Afterwards the debtor and some of the creditors compounded upon other terms, and the trustees applied the effects according to the new agreement. Yet it was held that a creditor secured in the first deed, though not privy to its execution, had a right to affirm the trusts; and he had a decree for his debt against the trustees who had received and misapplied the fund. Two years afterwards, under circumstances not at all favorable to the creditor, and although *Wallwyn v. Coutts* was cited, the Court gave a second decision to the same effect, in a suit upon the same instrument. *Bank v. Lewis,* 8 Pick., 113.

In this State no question has been made on the point before the present case, as far as recollected; and there have been but few occasions on which an observation has been made concerning it.

In *Walker v. Crowder, supra,* the remark was made which has been already quoted; and in *Moore v. Collins,* 14 N. C., 126, where there was a single creditor privy to the deed out of many secured in it, *Judge Hall* said the creditors secured had a right to be paid their debts, and, for that reason, that the deed of trust made to effect that end was not fraudulent.

Upon the whole, therefore, the Court holds, upon the intrinsic soundness of the principle, the prevalent impression in the profession, and the course of the adjudications in the United States, that the relation of trustee and *cestui que trust* is constituted by the execution of such a deed in favor of a creditor assenting at the time, or in a reasonable time afterwards, and, indeed, that such assent is to be presumed unless the contrary be shown. Consequently, the trustee cannot, with or without the direction of the grantor, apply the fund to any other purpose until the trusts of the deed are satisfied; and therefore the plaintiff is entitled to the account and to have his proportion of the fund, if (477) there be not enough to pay him in full.

PER CURIAM. Decree accordingly.

Cited: Smith v. Turrentine, 43 N. C., 191; *Baggerly v. Gaither,* 55 N. C., 82; *Stimpson v. Fries, ib.,* 160; *Potts v. Blackwell,* 57 N. C., 67; *McRary v. Fries, ib.,* 239; *Wiswall v. Potts,* 58 N. C., 189; *Dixon v. Pace,* 63 N. C., 605; *Hogan v. Strayhorn,* 65 N. C., 285; *Blount v. Windley,* 68 N. C., 8; *Blanton v. Bostic,* 126 N. C., 421.

JOHN J. HAILES ET AL. v. JOHN M. INGRAM.

JOHN M. INGRAM v. JOHN J. HAILES ET AL.

Bill and Cross Bill.

A. being an executrix and legatee for life, joined with B., a contingent legatee in remainder, in the conveyance of a share to C., the conveyance not purporting to be made by her as executrix: *Held,* that this conveyance only passed the respective interest of the legatees, and not the absolute title to slaves as if made by A. in her character as executrix.

CAUSE removed from the Court of Equity of ANSON, at Fall Term, 1848.

In 1833 Daniel Hailes died leaving a will, which was duly proven and Sarah Hailes qualified as executrix.

Under the will Sarah Hailes took an estate for life, with a contingent bequest to Alexander Hailes in the event of his surviving her, but to his children if he died during her lifetime, as is decided in *Hailes v. Griffin,* 22 N. C., 425. In 1834 Sarah Hailes sold a negro boy (one of the (478) many slaves bequeathed) to one Hart for $550, and executed a bill of sale with a general warranty of title and soundness. Alexander Hailes joined in the bill of sale, which was in the usual form and did not purport to be executed by Sarah Hailes as executrix.

Alexander Hailes died in the lifetime of Sarah, leaving two children, who are the plaintiffs in the original bill which was filed against Hart to compel him to give security for the forthcoming of the slave at the death of Mrs. Hailes. In 1842 Hart sold his right to Ingram, who was made a defendant, and executed a bond for the forthcoming of the slave, under an order made in the cause. In 1844 Mrs. Hailes died, and, the slave not being delivered by Ingram, an action at law was brought on the bond and judgment taken against him. He then filed a cross-bill, alleging that although at the time he bought the slave, and when he executed the bond, he believed he was only entitled to an estate during the life of Sarah Hailes, he had since learned and is advised that the absolute title passed by the sale made by her, as she was the executrix and had a right to sell, and did sell as executrix, for the purpose of paying the debts of her testator, and prays an injunction against the judgment at law. He also obtained leave and filed an answer to the original bill, insisting upon the same grounds.

The plaintiffs in the original bill, in their answer to the cross-bill, deny that Sarah Hailes sold the slave as executrix, but allege that she sold as legatee, and that Alexander Hailes joined with her in making the sale in order to pass his contingent interest as legatee.

No counsel for Hailes.
Winston and T. S. Ashe for Ingram.

PEARSON, J. The only fact in dispute is whether Sarah Hailes (479) made the sale as executrix or as legatee. We are satisfied from the exhibits and proofs that she made the sale as legatee. The bill of sale is executed by her and Alexander Hailes, and does not purport to be executed by her as executrix. The sale was not made in the manner in which sales are usually made by executors and administrators. There is a general warranty of title and soundness. And there is no proof of debts to an amount sufficient to induce an executor to resort to his power to sell slaves. It is not necessary to give the proofs more than this passing notice. It must be declared that the sale was made by Sarah Hailes as legatee.

Taking this to be the fact, yet as she was the executrix and in that capacity had power to sell, so as to pass an absolute estate, the question is presented whether the absolute title did not pass, notwithstanding she sold as legatee, by reason of her power as executrix. It is urged that it should be so held in order to give effect to the deed, under the maxim, *"ut res magis valeat quam pereat."*

It is true, when a deed cannot take effect in the manner intended, effect will be given to it in some other way, if possible, rather than permit it to *be wholly inoperative;* as if a deed be executed in the form of a release, and the relation of the parties is not such as to give it effect as a release, it will be supported as a bargain and sale or covenant to stand seized, if there be a sufficient consideration. So if an officer arrests under a void process, and yet at the time has a valid one, under which he did not profess to act, the officer is protected, on the ground that he had power to arrest, and the efficacy of the arrest depends, not upon what he says or professes, but upon the power which he has. *Meeds v. Carver,* 30 N. C., 298. The *latent* power (if I may use the expression) under the valid process is not inconsistent with the assumed power under the void one.

But in the case under consideration the title and the right to (480) sell as legatee are inconsistent with the power to sell as executrix—the exercise of the one necessarily presupposes the other to be extinguished; for to give the right, as legatee, *"an assent"* was necessary, and such assent divested the title and the power to sell as executrix, and passed them to the legatee.

It is clear that the act of making sale as legatee is an implied, if not an express, assent. Such assent determined the right of Mrs. Hailes as executrix, by vesting the title in her as legatee. After an assent, the legatee becomes the owner to all intents and purposes. It can make no

difference that in this case the executrix and legatee were the same individual. By the assent the title vested in her as legatee, and she ceased to have any power in the capacity of executrix.

The question may be considered in another point of view. If the executrix had not been also legatee, and had sold as an individual, and not in the capacity of executrix, the sale would have been wholly ineffective, and nothing would have passed unless it could, in such case, be supported by the *"latent"* power to sell as executrix; and it may be effect would be given to it in that way, *"ut res magis valeat quam pereat."*

But as she was legatee for life, the sale was not wholly inoperative—a life estate passed; and as the deed operated to pass an estate, when made by her as legatee, it would be repugnant to consider it as also taking effect as if made by her as executrix. The same deed cannot operate in two ways. This is illustrated in the instance of estoppels. If the deed passes any estate, although less than the parties intended, it is never allowed to operate as an estoppel. If such was not the law, and a legatee for life should sell, intending to pass only his estate, but using general terms, and *happened* to be executor, this circumstance would be taken advantage of by the vendee to make an absolute estate pass, contrary to the intention.

(481) There is another consideration: when a legatee sells it is to answer some private purpose of his own. In such a case, to give an *additional* effect to the deed because he was executor would be to prevent the power to sell, given for the interest of the estate, by calling it into use when such interest had not been taken into the account, thus by implication supposing a power to have been exercised under circumstances which, in case of a direct exercise of it, would have amounted to a gross abuse. In this case, for instance, the legatee for life and the person apparently entitled to the contingent limitation join in the sale of a slave for their own private purposes, because they wanted money to build a new mill and to support the other negroes, which was a charge on the legatee for life, and not a debt of the estate. The interest of the estate did not call for the sale of a negro, as there was perishable property; the debts did not exceed $25, and the sale of a valuable negro under the pretext of paying off that sum would have been a gross abuse of power. There is no principle upon which this Court will, by implication, make the executrix guilty of this abuse of her power in order to sustain a sale made by her as legatee.

The plaintiffs in the original bill are entitled to a decree for costs. The cross bill must be dismissed with costs.

PER CURIAM. Decree accordingly.

Cited: Quince v. Nixon, 51 N. C., 292; *Windley v. Gaylord,* 52 N. C., 57.

(482)

BENJAMIN BARNES v. SOLOMON PEARSON ET AL.

A husband has a right to assign for the payment of his debts a legacy due to his wife.

CAUSE removed from the Court of Equity of WAYNE, at Fall Term, 1849.

The plaintiff, as the surety of the defendant John Hooks, had paid an amount exceeding $12,000, and Hooks is insolvent. In 1845 Ichabod Pearson died, leaving a will, in which he bequeathed to his daughter Sally, one of the defendants and the wife of the said Hooks, a legacy of $1,500 to be paid in notes, and one-sixth part of the residue of his estate. The defendants Solomon and Lazarus Pearson are the executors. In February, 1847, Hooks by deed assigned to the plaintiff all of his interest in right of his wife under the will of her father "for the purpose of partially indemnifying or making a payment to the plaintiff for his payments as surety." At the death of the testator, Hooks owed him two notes which now amount, principal and interest, to near $1,500, and the testator was bound for him as cosurety with the plaintiff in a note for a large sum. The executors have since paid the one-half thereof, $1,541. The plaintiff paid the other half, and that forms a part of the amount for which the assignment was made. At the time of the assignment the plaintiff had notice of the indebtedness of Hooks to the testator and of his liability as cosurety, and that Hooks was insolvent. Soon after the executors qualified they made an unsuccessful attempt to arrange the matter with Hooks. The bill is filed for an account, and for (483) the payment of the amount which may be found to be due Hooks under the will, to the plaintiff as assignee. The defendants insist upon a right to apply such amount to the discharge of the two notes, and of the sum paid by them on account of the suretyship of the testator.

J. H. Bryan for plaintiff.
W. H. Haywood and W. B. Wright for defendant.

PEARSON, J. The husband is not entitled absolutely to a legacy given to his wife. It becomes his if he reduces it into possession, or he may dispose of it, if it be such an interest as he can presently reduce into possession. But if he dies without doing so, the wife is entitled to it. Out of respect to this right of the wife, a court of equity will not compel the husband to apply the legacy to the payment of his debts; and if he remains inactive the chance of the wife to get the legacy at his death is preserved. But if he puts an end to the right of the wife by disposing of the legacy, and she is out of the way, there is then no reason why the court may not interfere and see that the fund is applied to the payment of his debts.

In *Allen v. Allen, ante,* 293, it is held that creditors of the husband may subject a distributive share of the wife, after an assignment of it by the husband, although the assignment was made for her benefit, because by the assignment she ceased to have any original right of her own, and was put in the condition of a donee of the husband, and so could not stand out against existing creditors.

In this case the executors, who have the fund in hand, are, as executors, creditors of the husband; and when the plaintiff, who is the assignee with notice, and who paid nothing (for his debts were lost anyhow, as (484) Hooks was insolvent), and who stands in the shoes of his debtor, sets up his claim to the fund, there is no reason, as the wife's right is at an end, why they may not insist that the fund should be first applied to the payment of their debt; for, in truth, it is only the balance that Hooks is entitled to. This is a plain principle of set-off, which is acted upon in courts of law. We lay no stress upon the fact that the legacy was to be paid in notes.

As to the excess after paying off the notes, there is another principle involved. The plaintiff and the testator were cosureties. Between them "equality is equity." If one surety, by any means, gets a fund belonging to the principal, he is not at liberty to take the entire benefit, but must share with his cosurety. The fund in fact belongs to the principal, and should be applied as a payment *made by him,* and this reduces the amount which will fall upon the sureties. The excess must then be considered as a payment made by Hooks, and the plaintiff, having paid one-half of the original debt, has paid more than his share by an amount equal to one-half of the excess, and is entitled to contribution as against the executors of his cosurety. In other words, the plaintiff has a right to share the benefit of this excess and to recover one-half of it by way of reimbursing himself for having paid one-half of the original debt, instead of one-half, *minus* the excess, which is a fund of the principal debtor. These principles are well settled and are so consonant with natural justice that no authority need be cited.

There must be a reference to take an account of the estate and ascertain the amount of the excess coming to Hooks after deducting the amount of the two notes. Costs are not allowed to either side; and the costs of the reference will be paid out of the estate, as the plaintiff and defendants, who are residuary legatees, all have an interest in the account.

PER CURIAM. Decree accordingly.

Cited: Arrington v. Yarborough, 54 N. C., 81; *Brittain v. Quiett, ib.,* 330; *Leary v. Cheshire,* 56 N. C., 172; *Bryan v. Spruill,* 57 N. C., 28; *McLean v. McPhaul,* 59 N. C., 16; *Eason v. Cherry, ib.,* 263.

(485)

THOMAS FISHER v. RAIFORD CARROLL ET AL.

1. In a suit in equity to recover the amount of a lost note, an affidavit of the loss, annexed to the bill, is sufficient to give jurisdiction to the court, and at the hearing, to let in proof of the contents of the note, unless there be some opposing testimony.
2. The case would be different if the execution or contents of the note were denied; and that was, on the oath of the defendant, suggested as the plaintiff's motive for falsely alleging its loss. In such a case, although equity would not refuse to consider the mere affidavit as sufficient to account for not producing the original note, the strictest and clearest proof would be required of the execution and contents.
3. A party cannot avail himself of the plea of usury in notes on which judgments have been rendered, unless the judgments were rendered upon an usurious understanding.

CAUSE removed from the Court of Equity of SAMPSON, at Spring Term, 1845.

The plaintiff had some justices' judgments against one Underwood, stayed by the defendant Carroll, and amounting to $628.70, principal and interest. In October, 1841, executions issued and were levied upon a barouche, the property of Underwood, which was sold, and purchased by the plaintiff at the price of $94. The executions were also levied upon the property of Carroll. Five horses were sold, and bought by the plaintiff at the price of $18, and the officer was proceeding to sell other property, when the defendant Carroll delivered to the plaintiff a note for $763, executed by himself and the other defendant Sellers, which was accepted by the plaintiff in full satisfaction for the property purchased and of the judgments which he held against Under- (486) wood and Carroll. The note was due on 13 October, 1841.

The bill alleges that the note has been lost by accident; and the prayer is that the defendants be decreed to pay the principal and interest, upon being indemnified. There is an allegation of an offer of indemnity before the bill was filed, and it is filed upon oath.

The defendants deny the loss of the note. They admit its execution and contents, and rely upon the ground that it was given for a usurious consideration. They allege that *before* the sale of property of Carroll there was an understanding that the plaintiff would forbear the collection of the judgments, provided Carroll would give him a note for principal and interest, together with a further sum by way of usurious interest, and that as a cover for this agreement it was understood that the property of Carroll, or some part thereof, should be exposed to sale under the execution, and bid off by the plaintiff, when the note was to be delivered, the sale to be stopped, and the property redelivered to Car-

roll; all of which was accordingly done. The answers also contain a general allegation that the original notes upon which judgments had been rendered were tainted with usury.

W. Winslow, R. Strange, and D. Reid for plaintiff.
Badger and W. H. Haywood for defendants.

PEARSON, J. It was objected upon the argument that there was no sufficient proof of the loss of the note to let in evidence of its contents or to give this Court jurisdiction. Equity assumes jurisdiction, not merely upon the ground of accident, but because its mode of giving relief effects complete justice; for its decrees are modeled to suit every circumstance which may be presented in a cause; and a decree for the plaintiff, in the case of a lost bond, requires him to indemnify the
(487) defendant; whereas the judgment at law is absolute, either for the plaintiff or defendant.

The affidavit of loss, annexed to the bill, is sufficient to induce this Court to take jurisdiction, and upon the hearing it is sufficient to let in proof of the contents of the note, unless there be some opposing evidence; for the affidavit is aided by the consideration that the plaintiff will be required to indemnify the defendant, and can expect to derive no benefit by a change of the forum, when the answer admits the execution of the note and its contents. We think the affidavit of loss is not only competent, but sufficient, evidence to allow the plaintiff to read the answer for the purpose of showing the contents of the note; for there is then no motive for coming into equity unless the note be really lost. The fact that equity requires slighter proof of the loss is the main reason to induce parties to sue in that court, and distinguishes its mode of proceeding from that of a court of common law; for, there, strict proof of the loss must be required, as the judgment is absolute and there is no way to impose conditions.

The question of loss does not touch the merits, but is a collateral matter preliminary to the admission of secondary evidence. In many cases the affidavit of the plaintiff is the only proof he can make of the loss. He cannot expect upon this point any aid by a discovery from the defendant; for, as a matter of course, he knows nothing of the loss, and he cannot, except in a rare case, have a witness to the loss. He will, therefore, be without remedy unless equity can give relief upon his mere affidavit. If he can prove the loss, it is better for him to sue at law, where he will get an absolute judgment. In equity he is to give an indemnity, and his coming there strongly supports the affidavit. Relief is, therefore, given upon his mere affidavit as to this collateral matter; for it would be out of the question that one should lose his right
(488) because he cannot prove the loss of a note, and it is against con-

science for the debtor, who admits the execution and contents of the note, to seek to avail himself of an accident which does not affect the rights of the parties one way or the other. The case would be different if the execution or contents of the note was denied; and that was, on the oath of the defendant, suggested as the plaintiff's motive for falsely alleging its loss. In such a case, although equity would not refuse to consider the mere affidavit as sufficient to account for not producing the original note, the strictest and clearest proof of the execution and contents would be required. *Walmesly v. Child,* 1 Ves., Sr., 324.

We do not concur in the *dictum* of his Honor, *Judge Gaston,* in *Allen v. Bank,* 21 N. C., 7, that the plaintiff cannot prove the loss of a note by his own oath, although its correctness is assumed by *Judge Daniel* in *Dumas v. Powell,* 22 N. C., 122, who considers the affidavit evidence, but requires strong *corroborating proof.* In both cases the Court considered there was plenary proof of the loss, and it did not become necessary to *decide* whether, if there had been no proof upon this preliminary question but the affidavit, the plaintiff would have been entirely *without remedy.* The loss of a *deed,* even in a court of law, may be shown by the oath of the party, so as to let in secondary evidence; and the only reason why the same practice is not followed in those courts in reference to the loss of bonds and notes is the want of power to require an indemnity as a condition to the judgment.

Although the decrees of this Court are better calculated to effect complete justice than judgments at law in such cases, the mode of trying facts at law by examination of witnesses in the presence of a jury is preferable to the mode of trial in this Court, particularly when the very defective manner of taking depositions is considered. (489) Many are stuffed with impertinent matter, and very frequently the parties, by not apprehending the point of the case, omit, upon the examination or cross-examination, to ask the very questions which bear upon the important facts. By directing the trial of an issue before a jury, the parties will have the benefit of the common-law mode of trial, and at the same time have relief according to the course of this Court.

The defense cannot be sustained upon the general allegation of usury before the rendition of the judgments by the magistrate; for, admitting the original notes to have been usurious, there is no sufficient averment that the judgments were confessed in pursuance of a corrupt agreement, and as a cloak for usury; and no reason is assigned why the original debtor, Underwood, did not rely upon the plea of usury before the magistrate. The judgments, therefore, are conclusive as to all matters that could have been relied on as a defense upon the trial of the warrants.

The allegation in reference to the note of $768, if true, will fully sustain the defense, but the proof filed is confused and unsatisfactory, and

this Court directs the fact to be tried by a jury in the county of Sampson in the Superior Court, for which purpose the defendants will accept service of a writ in debt upon a note of $768, due 15 October, 1846; and upon the trial they will admit the execution and contents of the note and its loss, and put their defense upon the plea of usury, which will depend upon the following question, Was the note delivered in pursuance of an understanding between the plaintiff and the defendant Carroll, entered into *before the sale* of Carroll's property, as a cover for an usurious agreement? Or was it delivered as a consideration for property bought by the plaintiff, *without any previous understanding,* and for the balance of the judgments held by the plaintiff?

(490) Any deposition filed in the cause may be received on the trial by either party, if the witness has left the State, or is dead, or is too infirm to attend court. The finding of the jury will be certified to this court.

PER CURIAM. Ordered accordingly.

Cited: Davis v. Davis, ante, 421; *McRae v. Morrison,* 35 N. C., 48; *Fisher v. Carroll,* 46 N. C., 31; *Chancy v. Baldwin, ib.,* 79; *Smith v. Hays,* 54 N. C., 324; *Fisher v. Webb,* 84 N. C., 46; *Loftin v. Loftin,* 96 N. C., 100; *Harding v. Long,* 103 N. C., 7; *Gillis v. R. R.,* 108 N. C., 446; *Sallenger v. Perry,* 130 N. C., 138.

JAMES H. RAIFORD ET AL. v. BENJAMIN RAIFORD ET AL.

1. Where a conveyance has been made by a father to one of his sons of land and negroes to be managed under the direction of that son, in trust that he will apply the proceeds of such property to the support of the father and his family during the father's lifetime, and after his death sell the property and divide the proceeds thereof among his heirs and distributees: *Held,* that the son was entitled to a reasonable compensation for his care and trouble in the management of the estate.
2. Where in such a deed a negro was mentioned which had been previously conveyed by the father to his son, reserving his life estate, and it was shown that this fact was disclosed to the gentleman who drew the deed, and the son was informed by the draftsman that it was necessary to insert the name of the negro, as the father had a life estate, but this would not affect the son's title: *Held,* that the son was not precluded by his acceptance of the deed from asserting his right to the negro.
3. *Held further,* that as by the deed of trust the proceeds of the personal property, after the death of the father, were to be divided among all his distributees, in the same manner as if he had died intestate, according to

the statute of distributions, the gift of the reminder in this negro to the son must be accounted for as an advancement to him in the division of such proceeds; and *Held further*, that the value of this advancement must be estimated at the time it was made, that is, the value, at the time, of the remainder.

CAUSE removed from the Court of Equity of JOHNSTON, at Fall Term, 1849.

The bill states that Philip Raiford, on 15 February, 1840, in (491) consideration of his natural love and affection for his children and of $10, executed and delivered to the defendant Benjamin Raiford, his son, a certain deed indented, wherein and whereby he conveyed and assigned to the said Benjamin several tracts of land, a number of slaves, of which a slave named George was one, and a quantity of perishable property, all of which lands, slaves, and other personal property is particularly described in said deed, to have and to hold all the said property upon the trusts declared in the said deed, as follows, to wit:

"That the said Benjamin shall cultivate or rent at his discretion the said tracts of land and work thereon, or hire, the said slaves, and receive the proceeds and profits thereof and apply the proceeds of said labor to the support and maintenance of the said Philip and his family in a manner and style at lease equal to that to which they have been used, or so much of the said proceeds as may be necessary for that purpose, during the natural life of the said Philip, and after the death of the said Philip to sell all the premises, both lands and negroes, also the farming utensils, blacksmith's tools, riding chairs, cart wheels, and still, or make division of the same, at the option of my heirs and distributees or a majority of them, equally among all my heirs and distributees, except my daughter Sarah Jane Howell, who is to have $100, to be paid her out of the money arising from the sale of said property. The residue of the property, after selling enough to raise the sum of $100 for Sarah Jane Howell, to be equally divided, if not sold, among all the rest of my heirs and distributees, except Sarah Jane Howell, in the same manner and according to the rules of descent and distribution in intestates' estates. And the said Benjamin, for himself, his heirs, executors, administrators and assigns, doth covenant with the said Philip, (492) his heirs, executors, administrators and assigns, that he will devote the proceeds and profits of the said lands and negroes (or slaves) or so much thereof as may be necessary—after securing to himself such sum or sums as may be reasonable for his costs and charges in this behalf expended—to the support of the said Philip and his family, during the life of the said Philip, in a style at least equal to that to which he has been accustomed; that he will furnish him and his family good, wholesome, and suitable food and raiment during the lifetime of the said

Philip; that he will defray the expenses of educating in a suitable manner the family of the said Philip, if the funds arising from the said lands and negroes are sufficient for that purpose, and, at the death of the said Philip, that he or his heirs, executors, and administrators will either sell and distribute the proceeds of the said lands and negroes, stock, household and kitchin furniture, farming utensils, blacksmith's tools, riding chairs, cart wheels and still, etc., among the heirs at law and distributees of the said Philip, all except Sarah Jane Howell, who is to have $100 paid to her out of the fund arising from the sale of the said property; or make an equal division among them of the said lands, negroes, stock, household and kitchen furniture, at their discretion or option, or of a majority of them, reserving to himself the share which would by law fall to him as in the case of the intestacy of the said Philip." The bill then charges that the defendant accepted the said deed and undertook the performance of the trusts therein enjoined; that he immediately took possession of the property therein mentioned, and continued to cultivate the land with the slaves and stock until the death of the said Philip, and that he made profits to a much larger amount than was sufficient to defray the expenses of supporting the family and of educating the children. The bill further sets forth that the
(493) said Philip Raiford died on .. August, 1844, leaving a last will and testament, whereof he appointed James H. Raiford, one of the plaintiffs, and the defendant, executors, which will has been duly proved and recorded, and the said James has qualified as executor, but whether the defendant intends to qualify the plaintiffs do not know, but they aver that he has all the goods of the testator in his hands. The bill then states that the said Philip left a number of children, and grandchildren the issue of children who died in the lifetime of the said Philip, all of whom are particularly named, and that Sarah Jane, mentioned in the said deed, died in the lifetime of their father, and administration on her estate has been granted to James H. Raiford, who is one of the plaintiffs; that the other plaintiffs are all the heirs and next of kin of the said Philip Raiford, with the husbands of those who are married, except the defendants Benjamin Raiford and Needham Raiford, who are also the heirs and next of kind of the said Philip. The bill then charges that the defendant Benjamin, since the death of his father, has sold all of the said property, except the negro George, and that he claims the said negro under an alleged gift from his father many years before the date of the deed above referred to. The plaintiffs say they do not admit such gift to have been made, but if it were made, the defendant Benjamin, having accepted the trust as to George as well as in regard to the other property, cannot now set up such gift, but must hold the said George as a trustee in like manner as he held the other property.

And they say further that if such gift were made, and the defendant is not precluded from setting it up by his acceptance of the deed of trust, yet it is to be considered as an advancement and accounted for as such in the division of the proceeds of the personal estate conveyed by the deed. The bill further states that the defendant sets up a claim to a salary of $250 per annum for managing the property during (494) the lifetime of his father, and to commissions on the proceeds of the sale made after the death of his father, which demands the plaintiffs believe to be unjust and unreasonable. The bill then prays for an account and relief, etc.

The defendant Benjamin admits in his answer the execution of the deed of trust mentioned in the bill, and that under the said deed he took possession of all the property except the negro George, which he claimed under a bill of sale from his father, which was given to him in consideration of valuable services rendered to the father by the said Benjamin, and which was delivered to him many years before the execution of the said deed of trust; that he mentioned this fact to the gentleman who drew the deed of trust, and was informed by him that it was necessary to put the name of George in the deed, as his father had a life estate in him, but that it would not affect the title of this defendant. He admits also the death of his father, the said Philip, as stated in the bill, and that he left a last will and testament, of which he appointed the plaintiff James H. Raiford, and this defendant, executors, and that the said James has duly qualified as executor, but the defendant says he does not himself intend to qualify. He also admits that the names of the heirs and next of kin of the said Philip are correctly set forth in the bill, and that Sarah Jane Howell, mentioned in the bill, died before her father, leaving no issue, and that the plaintiff James is her administrator. The defendant admits that he sold the property mentioned in the deed. He claims a reasonable compensation for his services and submits to account for all his transactions as trustee under the said deed, and to pay to the plaintiffs whatever may be found to be justly due to them.

Depositions were taken and the cause transmitted to this Court.

W. H. Haywood for plaintiffs. (495)
H. W. Miller and J. H. Bryan for defendant.

PEARSON, J. There must necessarily be a reference in this case, as the defendant admits the right of the plaintiffs to have an account.

Two questions were urged with a view to obtain a declaration of the opinion of the Court in aid of the master in stating the account:

First. The plaintiffs insist that the defendant is not entitled to a credit for any amount as a salary in compensation for his services dur-

ing the time he superintended and managed the estate; nor to a credit for any sums that he may have advanced, over and above the profits of the farm, for the maintenance of Philip Raiford and his family, and the education of his children, and the other purposes of the trusts; because, as they allege, by the true meaning of the deed of trust the defendant undertook and engaged that the income should suffice for the support of the said Philip Raiford and his family after all costs and charges.

Unless positive words forbid it, such a construction will be given to a deed as to make its provisions reasonable. It is not reasonable for a man to "work for nothing and find himself"; and yet such would be the effect of the construction contended for by the plaintiffs.

If, in the division after the death of his father, a larger share was given to the defendant than to any of the other children, that would readily suggest itself as a reason for his agreement to work without any direct or indirect compensation, and, possibly, also as a reason for his undertaking and engaging that the income should suffice for the support of his father and family. There is, however, no such provision in the deed, and after the death of his father it is made the duty of the defendant to divide the land, negroes, stock, etc., equally among all of (496) the children, except Sarah Jane, "reserving to himself the share which would by law fall to him as in case of intestacy of said Philip." The trust declared by the deed is that the defendant will cultivate the tracts of land, or rent them and hire out the negroes, and apply the proceeds to the support and maintenance of the said Philip and his family during his life in a manner equal to that to which they had been used, or so much thereof as may be necessary for that purpose, and at his death divide the land, negroes, etc. If the deed stopped here, there might be some ground for the conjecture that the parties believed the proceeds would certainly be sufficient for that purpose, and leave an excess; and that, as the excess or accumulation from the income is not expressly mentioned in the clause directing a division, the intention was that this excess should be the compensation of the defendant for *insuring* that the proceeds would be sufficient for the support, etc. But taken in connection with the covenant of the defendant, no doubt is left as to the proper construction; for therein, to the stipulation that he will apply the proceeds, or so much thereof as may be necessary, to the support, etc., is added, "after *securing to himself* such sum as may be reasonable for his cost and charges," etc., and the excess is directed to be applied to defray the expenses of educating the children in a suitable manner, if sufficient for that purpose. It must, therefore, be declared to be the opinion of this Court that in taking the account the defendant will be entitled to a credit for such an amount as may be a reasonable

compensation for his services, and for any sums advanced by him for the purposes of the trust, over and above the profits of the farm or what ought to have been made by proper management.

Secondly. The plaintiffs insist that, as the slave George is included in the deed of trust, the defendant is not at liberty to set up title in himself, or, at all events, that he is chargeable with his value at the death of Philip Raiford, as an advancement. (497)

The defendant insists that he is not bound to bring George into the division as a part of the trust property, because, as he alleges, the said slave belonged to him at the death of his father by force of a deed of gift, executed by his father long before the execution of the deed of trust, and that he mentioned this fact to the gentleman who drew the deed of trust, and was told by him that it was proper to put George in the deed, as his father was entitled to his services during his life, but that this would not affect the rights of the defendant under the deed of gift after his father's death. He also insists that he ought not to be charged with the value of George as an advancement; but if he is charged, the value of his interest should be fixed at the date of the deed of gift, May, 1828, his interest being a remainder in a negro boy, 14 years of age, after the life estate of his father.

The deed of gift was duly executed in May, 1828, and registered in August, 1834. By it Philip Raiford gives to the defendant the slave George, reserving to himself a life estate. The deposition of Mr. Husted, who drew the deed of trust, fully sustains the allegations of the answer. This proof and the circumstances clearly show that it was not the intention of the parties that George should be embraced in the division to be made by the defendant after the death of his father, although the general words in the deed of trust, "lands, *negroes,* stock," etc., would include him. Such being the manifest intention, there is no doubt that the defendant is at liberty in this Court to set up his title under the deed of gift.

The next question is, Ought George to be accounted for by the defendant as an advancement?

The declaration of trust provides that, after the death of Philip Raiford, the lands, negroes, stock, etc., or the proceeds of sales (if a majority of the parties interested prefer to have a sale) shall be (498) equally divided "among all of my heirs and distributees, except Sarah Jane Howell, in the same manner and according to the rules of descent and distribution in intestates' estates," and in the covenant of the defendant, set out in the deed, after providing for the division, these words are added, "reserving to himself the share which would by law fall to him as in case of intestacy of the said Philip."

In *Croom v. Herring,* 11 N. C., 393, the testator directed the proceeds of the sale of real and personal estate "to be divided among all of my heirs, agreeable to the statute of distribution of intestates' estates." Some of the children had been advanced; but the main question was, who should take the personal estate under the word "heirs." After a learned discussion of the meaning of the word "heirs," *Judge Henderson* concludes that, in reference to personal estate, it did not mean "children," "next of kin," or heirs at law, or have any fixed or definite meaning of itself, but as there used, with a reference to the statute of distribution, its meaning was heirs *quoad the property;* in other words, the persons who would under the statute succeed to the personal estate, or, as we now express it in one word, instead of a phrase, "the distributees"; and that the statute was referred to "to designate who were meant by the word heirs"; and he held (with great hesitation) that, having answered this purpose, the reference to the statute could not also be made to answer the purpose of pointing out the manner of division of that property, *in connection with* the other property which had been advanced, but must be confined strictly to that property and exclude advancements. Pages 401-2. This conclusion is adopted at the end of an elaborate argument upon the other queston, and his train of reasoning is not as clearly developed as was usual with that very able judge.

(499) He seems to have had a vague notion that, because the reference to the statute was made to answer one purpose, it ought not to be so far taxed as to make it answer a second, probably from some undefined analogy to the doctrine in reference to the statute of uses, by which it is held that the statute, having carried the legal estate to the first use, could not carry it to the second. But however that may be, he expresses great hesitation; and it may well be questioned whether the reference to the statute ought not to have been permitted to answer the *whole purpose,* as well to point out the manner of the division as to designate the persons, instead of being stopped at the halfway point.

At all events, that decision has no application to the point now under consideration. There the word "heirs" was used in reference to personal property. Here the word "heirs" is used in reference to land, and the word "distributees" in reference to personal property—both words of definite legal meaning, appropriately used; so that here the maker of the deed has designated the persons himself, leaving no office for the reference to the statute of distributions to prefer, unless to point out the manner in which the division is to be made, and he expressly invokes the canons of descent and the statute of distributions for that purpose, by the words "in the same manner, and according to the rules of descent and distribution of intestates' estate." But so far as the defendant is

concerned, there cannot be a question; for he is "to reserve to himself the share which would fall to him as in case of intestacy of the said Philip." This of necessity brings in the advancement.

The remaining question is as to the time when the value must be fixed upon the slave George. It is clearly settled that the value at the time of the advancement is the sum to be accounted for. The plaintiffs contend that the defendant should account for the value at the death of Philip Raiford. This is not consistent with the idea of its being an advancement; for if the gift did not take effect until the death (500) of the parent, then it could not be an advancement; for advancements must be made during the *lifetime* of the parent. We think it clear that the gift took effect at the date of the deed of gift in 1828. The enjoyment or right of possession was future, but the deed passed a present vested estate—such as the defendant might have sold and converted into money and such as could have been taken under a *fi. fa.*

The defendant must be charged with the value at that time, subject to the life estate of his father.

There must be a reference to take the account as prayed.

PER CURIAM. Ordered accordingly.

Cited: *Rouse v. Bowers,* 111 N. C., 368.

HENRY J. TOOLE ET AL. *v.* WILLIAM A. DARDEN ET AL.

The following opinion (accidentally omitted in its proper (501) place) was delivered by *Nash, J.,* in *Toole v. Darden, ante,* 394:

NASH, J. The case is here upon the bill and demurrer. A bill in equity is a statement of the complainant's case, showing his right or title to what he claims. It must state whatever is essential to his right to a recovery with reasonable certainty and with such precision as to enable the chancellor to decide by inspection upon the proper decree. The plaintiff, after stating the injury he sustains from the nature of the relation existing between himself and the defendant, prays the court for such specific relief as he conceives himself entitled to. If the defendant denies the right to relief from the facts as stated, he may, in general, take advantage of it by a demurrer, as that is a valid bar *in limine,* and, if sustained, puts an end to the litigation. It is merely an allegation on the part of the defendant that the matters set forth in the bill are insufficient, *as set forth,* to oblige him to answer. The question submitted is, Does the bill, upon its face, set forth such facts as will enable a chancellor to grant the relief asked for? A demurrer will be sustained as

well for matter which ought to appear as for the statement of such as ought not to appear; and it is an admission of such as is sufficiently stated.

The bill alleges that one of the defendants, Jonathan Eason, was indebted to one Joshua Pender by bond; that the defendants Pleasonton S. Sugg and Robert Belcher were his sureties, and that, at their (502) instance, he executed a deed of trust on 4 January, 1843, conveying to Lewis Belcher, as trustee, the land in dispute, to indemnify them, "in consideration he should retain the possession of the said property, and in case of a sale of the same, or in any contingency, that he might be permitted to realize a benefit therefrom; and thereupon it was corruptly and fraudulently stipulated between the said Eason, Sugg, and Robert Belcher that the said Eason should execute two notes, each for $500—one to the said Sugg and the other to the said Belcher, upon a secret trust that the amount thereof should be held by them and appropriated and used for the benefit of said Eason, and to defraud his creditors." These facts, so set forth, the demurrer admits. But it is contended that they are not sufficient to entitle the plaintiffs to the relief they ask; that the bill ought to have gone further and alleged either a debt of Eason's existing at the time the deed of trust was executed, and still unpaid, or that the debt which Eason owed them was contracted so soon after its execution as to connect the purpose of making it with that of contracting. For these deficiencies I think the bill is defective and ought to be dismissed. There can be no doubt but that the deed of trust is fraudulent and void as to all the debts of Eason existing at its execution, and the collection of which could be hindered or delayed by it. For aught that appears on the face of the bill, Eason owned no debt but the one to Pender, which was assured by Sugg and Robert Belcher, and the deed was made at their instance and for their security. It could not, therefore, have been made to defraud them or Pender. And, in fact, the property so conveyed was sold by the trustee; and it is to be presumed that the debt was paid. The plaintiffs argue that a conveyance made to defraud a creditor is void as to all creditors. That is true, and *Hoke v. Henderson,* 14 N. C., 12, and *O'Daniel v. Crawford,* (503) 15 N. C., 197, fully show it. If at the time the conveyance is made the grantor or donor owes any debt, and it becomes *necessary* to resort to the property so conveyed to satisfy it, the creditor has a right to do so. Those cases rather sustain the demurrer than the bill. The question here is upon the frame of the bill. The plaintiffs allege that they are purchasers under a judgment against Eason obtained in 1846—near three years after the execution of the deed of trust. The bill shows that the land was sold by the trustee in January, 1844, at public vendue, and purchased by the defendant Sugg, who subsequently

sold it to the defendants Darden and Beeman, who had notice of the original fraud. As purchasers, the plaintiffs do not come within the exception in 27 Elizabeth. That extends only to purchasers from the grantor or grantees in the fraudulent conveyance. This is under neither, but directly antagonistic to both. All they can demand is to stand in the place of the creditor, under whose judgment the land was sold, and to this they are entitled, they being themselves the creditors. What, then, was it necessary for the plaintiffs to allege in their bill to entitle themselves to the interference of a court of chancery? This bill is in the nature of what are called fishing bills, which are filed to find out a creditor whose debt existed at the time of the execution of the conveyance, to subject the fund to all the creditors, as well those subsequent as antecedent. In *Holloway v. Millard,* 1 Mad. Ch., 414, the Chancellor refused an inquiry whether the party was indebted at the time of the conveyance, because the bill laid no foundation for that inquiry. The plaintiffs were subsequent creditors, and the bill did not state that the party was indebted at the time the conveyance was made. To the same effect are *Lush v. Wilkinson,* 5 Ves., 384; *Taylor v. Jones,* 2 Atk., 600, and *Read v. Livingston,* 3 John, Ch., 481. It is true, the bill here alleges that when the deed of trust was executed Eason was indebted to Pender, but it at the same time shows that it was made, not in fraud of the debt, but to secure it. In my opinion, to sustain (504) such a bill as the present, it must either allege the existence of a debt of the grantors at the time of the execution of the conveyance, the collection of which might be hindered or delayed by it, and which is still unsatisfied, or that the subsequent debt was contracted so soon after its execution as to afford evidence that it was made with a view to contracting it and defeating it. Here the bill does not set forth when the debt to the plaintiffs was contracted, but does state that the deed of trust was executed early in January, 1843; and the judgment under which the plaintiffs claim was rendered in November, 1846—near three years thereafter. I am at liberty to presume that at least more than a year elapsed between the time when the deed was made and the contracting of the subsequent debt. I am at liberty to make this presumption, because the plaintiffs were the subsequent creditors, and could have stated the precise time if they had chosen, and it is necesary for every bill to state with precision what is necessary to sustain the complaint. There is nothing alleged in the bill which connects the contracting of the subsequent debt with the making of the deed of trust. The bill, for the above reasons, is, in my estimation, so defective in its construction that it cannot be sustained. I concur with his Honor that the demurrer ought to be sustained and the bill dismissed with costs.

PER CURIAM. Decreed accordingly.

GENERAL ORDER

AT

DECEMBER TERM, 1849

The judges of the Supreme Court will hereafter require that applicants for license shall have gone through the following courses of reading:

FOR THE COUNTY COURTS

Blackstone's Commentaries, 4 vols.—2d volume *particularly.*
Coke on Littleton, or Cruise's Digest.
Fearne on Remainders and Executory Devises.
Saunders on Uses and Trusts.
Roper on Legacies, or Toller on Executors.
Revised Statutes: chapter 37, Deeds and Conveyances; 38, Descents; 121, Widows; 122, Wills and Testaments.

FOR THE SUPERIOR COURTS

Third and Fourth Books of Blackstone's Commentaries.
First volume of Chitty's Pleadings.
Stephens on Pleading.
Fonblanque's Equity.
Newland or Powell on Contracts.
Mitford, or Cooper, Equity Pleading.
First volume Phillips, or Starkie, on Evidence.
Revised Statutes: chapter 31, Courts, County and Superior; 34, Crimes and Punishments; 63, Lands of Deceased Debtors.
Selwyn's *Nisi Prius.*

E. B. FREEMAN, *Clerk.*

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

JUNE TERM, 1850

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(507)

JOHN RUFFIN v. ALEXANDER MEBANE.

1. Where a person authorized another to buy and sell negroes for him, this was a general authority, and the agent had a right to buy for cash or on credit, at his discretion.
2. Where such agent bought a negro, with a view of carrying out his agency, and gave a note, under seal, in the name of his principal, and the principal repudiated the note, because under seal: *Held*, that the vendor was remitted to his original right against the principal for the price of the negro.

CAUSE removed from the Court of Equity for BERTIE, at Spring Term, 1850.

Smith and A. Moore for plaintiff.
Bragg for defendant.

PEARSON, J. On 1 December, 1838, Alexander Mebane, the tes- (508) tator of the defendant, and one Williams, entered into an agreement under seal to the following effect: Mebane was to furnish $4,000 and Williams was to buy negroes for, and in the name of, Mebane, to take the bills of sale in his name and to resell the negroes to the best advantage; and for his trouble was to be allowed one-half of the net profits, after deducting expenses—the agreement to be in force until 1 January, 1840.

On 9 January, 1840, the parties settled in full, and agreed to continue the business under the same terms until 1 January, 1841.

On 31 January, 1841, the parties again settled in full, and agreed to continue the business under the same terms until 1 January, 1842.

On 23 March, 1842, the parties again settled in full, and agreed to continue the business under the same terms until 1 January, 1843.

The testator Mebane was a man of large estate, residing in the county of Bertie, and Williams was a man possessed of no visible estate.

On 23 September, 1841, the plaintiff sold to Williams, as the agent of Mebane, a negro man for $525, and received a note from him signed and sealed by him in the name of Mebane, and by one John Sutton as his surety. The negro was thereupon delivered to Williams, and he afterwards sold him and received the price for Mebane.

The bill charges that as Williams had been openly acting as the agent of Mebane for several years. in the county of Bertie, in buying and selling negroes, the plaintiff, when requested to sell the negro to Mebane, did so under the full belief that Williams had ample authority to bind Mebane, and under that belief accepted the note and delivered the (509) negro, knowing that Mebane was a man of large estate. It further charges that Sutton is entirely insolvent, and that Mebane, when applied to, refused to pay the note, on the ground that Williams had no authority to bind him by a sealed instrument. The prayer is that Mebane be decreed to pay the price of the negro with interest.

The answer of Mebane denies that Williams had any authority to buy negroes for him on credit, or to bind him by a sealed instrument; and he insists that it was the plaintiff's "own folly" to deal with him without requiring a power of attorney, and that the plaintiff, by accepting the note executed by Sutton, discharged the defendant Mebane; and he avers that Williams afterwards failed to settle, became insolvent, and left the county, largely in his debt.

Upon the coming in of the answer, setting forth the agreement as above stated, there was an amended bill, charging that the agreement constituted a copartnership between Mebane and Williams. The answer denies that there was a copartnership, and insists that there was only the relation of special agent, whose pay was to be measured by the net profits.

We do not feel called on to decide whether the agreement between Mebane and Williams constituted a copartnership, so far as the rights of third persons are concerned, or not; for we think it entirely clear that as Williams was the agent of Mebane, authorized to buy and sell negroes for him, and as this negro was bought for him, became his property and was sold for his benefit, he is bound to pay the price.

It is true that Williams was not authorized to bind Mebane by a sealed instrument. That would preclude all inquiry as to the consideration; and for this reason the law will not permit either an agent or partner to bind his principal or copartner by an instrument under seal.

But in this case the plaintiff says, I ask no benefit from the seal, but

wish the whole matter opened. I aver that I sold you a negro; (510) you became the owner; and your agent took possession and afterwards sold the negro for your benefit, and it is against conscience that you should refuse to pay the price.

The position, that Williams had no authority to buy on credit, is not tenable. The authority to buy and sell is given in the most general terms, and in the absence of any restriction it is clear that the agent had authority to buy for cash or on credit as he deemed best, and to sell in the same way. The position, that by accepting the bond the plaintiff discharged the defendant from the original consideration, is equally untenable. Such would have been the effect if the bond had been what it purported to be. But when Mebane refused to adopt it as his bond, the plaintiff had a right to treat it as a nullity and to look to Mebane for the price of the negro, it being admitted that Sutton is insolvent.

The plaintiff must have a decree for the price of the negro, with interest; and the defendant must pay the costs.

PER CURIAM. Decree acocrdingly.

Cited: Brittain v. Westall, 137 N. C., 32; *Swindell v. Latham,* 145 N. C., 149.

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(511)

RICHARD O. REED v. JOSEPH M. COX, ADMINISTRATOR, ETC.

Where at an execution sale a person said that if he could buy a negro at a small price he would convey him to the son of him against whom the execution was, and the negro was accordingly bought by him at one-third of his value: *Held,* that this was only a parol promise, which did not bind the party making it, and that he could not be held to be a trustee for the son.

APPEAL from a decree of the Court of Equity of PERQUIMANS, at Spring Term, 1850, *Ellis, J.*

Heath for plaintiff.
A. Moore for defendant.

NASH, J. The bill alleges that a negro boy named Nelson, the property of the plaintiff's father, was levied on by the sheriff to satisfy an execution against him, and that at the sale he was purchased by Jonathan Jacocks, the defendant's intestate, for $50. The bill further alleges that before the sale commenced, many persons who were creditors of his father being present for the purpose of securing their debts, the deceasd, who was the uncle of the plaintiff, "publicly proclaimed that that boy

Nelson was the playmate of his nephew, your orator, and if they, the creditors of your orator's father, would allow him, the said Jacocks, at some small sum, to purchase the boy, he, the said Jacocks, *would* (512) *make a present of him to his nephew,* your orator." The bill states that the testator did purchase him for $50, he being worth $150, received a bill of sale from the sheriff, took the boy into his possession, and that the defendant, his executor, still so has him. It prays that the defendant may be decreed to convey the boy Nelson to the plaintiff. "And if your orator is not entitled to have and receive the said slave as a gift from his uncle, then that your Honor will decree that the said Joseph M. Cox and his testator held and do hold the said slave in trust for your orator, and, upon the payment of the sum bid for said slave, with interest thereon, that your orator receive a title to said slave" —and a prayer for an account.

The answer denies all knowledge of the transaction as set forth, and denies the right of the plaintiff to the relief he seeks.

Replication was taken to the answer, and upon the hearing the court decreed that the defendant should convey the negro Nelson to the complainant, and account, etc., from which decree the defendant appealed.

We are of opinion that the decree appealed from is erroneous. The bill does not contain such a statement as authoriezs the court to grant the relief asked for. The bill expressly states that the promise made by the testator, Jonathan Jacocks, at the time of the sale was that he would make, at some future time, a gift, a present, of the negro Nelson, to the complainant, if he was permitted to purchase him cheap. That such was the fact appears from the prayer of the bill; it is, "That if the plaintiff is not entitled to receive the negro Nelson as a gift, etc." Now, we know of no case, nor has any been cited in the argument, to show that a court of equity ever has or can decree the performance of a patrol promise to make a gift of a slave. It would be directly in conflict with the statute of frauds, by which it is declared that "No gift of any (513) slave thereafter to be made shall be good or available either in law or equity, unless the same is in writing, signed by the donor and attested by at least one credible witness." Conscious of this obstacle, the prayer is varied in the latter part: if the plaintiff cannot receive Nelson as a gift, "then that it may be decreed that Jonathan Peacocks and the defendant, his administrator, may be decreed to be trustees for him, and upon his paying the $50 and interest, a conveyance may be decreed," etc. In substance it is the same prayer, and relies upon the same statement of facts to sustain it. Place them in any position you please, it is still an attempt to induce the court to compel the defendant to carry into execution a parol promise to give to the plaintiff a negro. Calling it a trust does not make it one. In no point of view was Jona-

than Jacocks an agent of the plaintiff in making a purchase. Nor does the bill so charge. It is drawn with the view that there might not be a discrepancy between the *allegata* and *probata*. The whole of the conduct of Jonathan Jacocks and his declarations at the time of the purchase show that he was purchasing for himself. If he has trespassed upon the rights of any by his conduct at the sale, it was not upon those of the plaintiff. The cases cited in the argument on behalf of the plaintiff do not affect this case. In *Jones v. Foster,* 22 N. C., 201, the decision was upon the ground that the proofs did not support the allegations of the bill. *Cook v. Redman,* 37 N. C., 623, was upon a bequest in a will. The testator gave two legacies to his son, the defendant, who had previously promised to hold one of them to the use of the plaintiff, his sister. This promise was held to create a trust in the defendant for the plaintiff. Here, according to the testimony, was a clear trust in favor of the sister. And it would, say the Court, be a fraud upon the testator, to whom the property belonged, to permit the son to avail himself of an omission in the will caused by his own promise. And in my opinion (514) it would have been a clear fraud upon the plaintiff. But for the promise made by the defendant, the father would have given the property claimed by the will. These cases, it is believed, do not assist the plaintiff.

PER CURIAM. The bill dismissed with costs.

Cited: *Davis v. Hill,* 75 N. C., 229.

ELIZABETH HUNTLY v. ROBERT S. HUNTLY ET AL.

A., being separated from her husband, it was agreed between B., the brother of A., and the husband, that in consideration of $200 and other considerations from B. to the husband, the husband should deliver three negroes to B., for the sole and separate use of A., and the negroes were accordingly so delivered. Afterwards A. became reconciled to her husband. *Held,* that B. held these slaves as trustee for the sole and separate use of A., and must account for them as such, with the right, however, to be reimbursed such sums as he had advanced for A.

APPEAL from a decree of the Court of Equity of ANSON, at Spring Term, 1847.

The bill was filed in March, 1847, by a married woman, by her next friend, against her husband and her brother Samuel H. Ratcliff. It states that in 1838 differences arose between the plaintiff and her husband for causes which obliged her, as she conceived, to separate from

him; and that she did so and put herself under the protection of her said brother, who undertook the office of her next friend, and to direct her and maintain and aid her in asserting her rights, and in that capacity he brought a suit in her name against her husband for alimony, and certain slaves of the husband were seized under an order in the (515) cause, and, in order to regain the possession of them, the husband was under the necessity of procuring a bond to be given for $4,000 for the production of them as the court might decree; that friends of the parties then interposed their good offices to arrange the differences and put an end to the controversy with as little expense and scandal as possible; and that, to that end, it was finally agreed between the parties that, in consideration of $200 paid to him by the brother on behalf of his sister, the plaintiff and the said Ratcliff would pay the costs of the suit for alimony and indemnify the husband against the debts and contracts of the plaintiff, while they should live separate, and also that the said bond for the production of the negroes should never be enforced; he, the husband, should convey three slaves, named Mary, Lewis, and Joe, to the sole and separate use of the plaintiff, so that she might possess and enjoy them free from the debts, disposition, or control of the husband; that on 22 May, 1838, in order to perpetuate the said agreement, and bind the parties to its performance, the defendant Ratcliff, with one McColl as his surety, executed a bond to the husband in a parol sum of $3,000, with a condition underwritten as follows: "The condition of this obligation is such that whereas a misunderstanding has taken place between the above mentioned Robert S. Huntly and his wife, Elizabeth, and they separated, and she took legal measures to procure from said Huntly a separate maintenance, and the sheriff seized certain negroes, etc., and took the bond of one Elijah Huntly for the delivery, etc.; and the friends of the said parties, being anxious that the said controversy should be settled with as little expense and delay as possible, and the parties agreed to settle all existing lawsuits on the following conditions, towit: The said Robert S. Huntly has agreed to give to his wife, Elizabeth, a negro woman by the name (516) of Mary and her two children, Lewis and Joe, of which negroes he agrees to awarrant and defend the title forever to her and her heirs, and that she may forever hereafter use, possess, and enjoy said negroes free from any contract or liabilities on his part; and the said James H. Ratcliff agrees, in behalf of his sister, the said Elizabeth, to pay to the said Robert S. Huntly $200 in cash in part consideration of said negroes, and to pay all such costs and expenses as may have accrued or shall accrue in consequence of any suit or suits of the said Elizabeth against the said Robert S., and that the bond given by Elijah Huntly to the sheriff of Anson for the delivery of the said negroes shall forever be

null and void, and that the said Robert S. shall never be liable for the debts and contracts of his wife, so long as she may live separate and apart from her husband: Now, if the said James H. Ratcliff shall shall well and truly perform all his part of this agreement, then the above bond to be null and void; otherwise, to remain in full force."

The bill further states that the husband accepted the money and bond, and that, in execution of his part of the agreement, he then delivered the three negros to the said Ratcliff, as trustee for the plaintiff, whereby the said Ratcliff became possessed of the slaves in trust for the sole and separate use of the plaintiff, and bound to apply them to her benefit and account to her for their profits, and convey them according to her directions; and that he, Ratcliff, had them in his possesion ever since.

The bill further states that, in 1840, the plaintiff and her husband became reconciled and again lived together in harmony, and had done so ever since; and that from the period of the reconciliation the deefndant Ratcliff had applied the profits of the slaves to his own use and refused to let the plaintiff have any benefit therefrom, and denied any right in her to the slaves. The prayer is that the slaves and their increase may be declared to be in equity the property of the plaintiff, and (517) that the defendant may be decreed to execute a proper declaration of trust for the sole and separate use of the plaintiff, or execute a conveyance to some fit person on such trust, and also account to her for the past profits.

The defendant demurred to the bill for want of equity and many other causes enumerated, and on argument the demurrer was sustained and the bill dismissed with costs, and the plaintiff appealed.

Winston for plaintiff.
Strange for defendant.

RUFFIN, C. J. The effect of the transaction between these parties upon the legal title is not an open question; for, in an action of detinue brought by the husband for the slaves, after the reconciliation, the Court held the title at law passed to the brother as upon a sale and delivery. *Huntley v. Ratcliff*, 27 N. C., 542. The question is, then, for whose benefit he took the title—his own, or his sister's, or the husband's Upon that it would seem there could be little doubt. As the bill is framed, there is no doubt at all, because the bill states explicitly that the original agreement by parol was that in consideration of the money paid to him by Ratcliff on behalf of his sister and the other stipulated benefits to Huntly, he, Huntly, should convey the negroes—not saying to whom—to the sole and separate use of his wife, so that she might possess and enjoy them free from the husband's debts or control; and further, that in execution of that agreement the husband, after getting the money and

bond, in consideration thereof actually delivered the negroes to the defendant Ratcliff, upon such trust, to the sole and separate use of the wife.

According to these allegations, which the demurrer admits to be
(518) true, it is perfectly clear that there was a parol sale and delivery of the slaves upon the alleged trust for the wife; and, thus taken, the whole beneficial interest would be in the wife, and the brother would have to be regarded as paying the money and assuming the obligations set forth, out of good-will and bounty to his sister, to prefer and advance her; and, of course, the demurrer would be overruled. But to have that effect it is not necessary to insist on the terms used in the bill, taken literally; but the written contract and the attendant circumstances are sufficient to convert the brother into a trustee for the plaintiff to her *separate* use with only one qualification, that is, that the brother should be entitled to insist on being reimbursed by his sister, or out of the property, the money he advanced in order to obtain the conveyance of the slaves, and for the costs and the maintenance of the plaintiff, or anything else on her account. It is just he should be thus reimbursed, if he choose to insist on it, as it does not appear that he intended a pure gift to her. But it is certainly as just that he should claim nothing more than the reimbursement of those sums and his expenses in the execution of the trust; for, undoubtedly, nobody intended or understood that the slaves were conveyed to him as his property, or, rather, to his own use. On the contrary, the articles—for so they are to be regarded—state that he, Ratcliff, agreed, "on behalf of his sister," etc.; thus showing, though confused and very badly expressed, the character in which he acted and the ends in view, namely, the securing a proper provision for the plaintiff, independent of the husband. Hence he disposes of her suit for alimony without scruple, and engages to pay the cost of it, and to give up all her claims on her husband or other parts of his estate. Then the instrument, though not executed by the husband, but in the form of an obligation to him, proceeds to state or recite what the husband agreed to do, which is, "to give his wife the said slaves, that she may for-
(519) ever use and enjoy them free from his debts or control." That was not intended as a present executed gift to the wife. Several reasons show that it was not. It would leave the legal title in the husband, as trustee by implication for the wife, which would have exposed her to the necessity of suing him again in equity, while it was the principal purpose of the arrangement to terminate all litigation between them. Besides, the husband was not to execute the instrument. Therefore, that deed was only intended as permanent evidence of an executory agreement by the husband to make a conveyance which would be proper to secure to the wife such a separate property in the negroes as would be equivalent to an absolute gife to her, if sole. That agreement was

afterwards executed by the delivery of the negroes to Ratcliff in consideration of the price paid and the other things specified. It would have been better, no doubt, if the conveyance had been in writing, with a clause plainly setting forth the trust. But the parties seem to have been *inops consilii* and very incompetent to put such transactions into approved form; and therefore the intention is to be gathered from all the attendant circumstances. It is true, then, that there is no written declaration of trust, nor any statement that one was expressly made, orally, upon the delivery of the slaves to Ratcliff. But the delivery is clearly to be referred to the prior contract, and therefore the trust for the separate use of the wife was incorporated into the parol transfer, subject, nevertheless, as before mentioned, to the making good to the trustee his advances. Upon the whole, therefore, it is manifest that there was an unequivocal intent to exclude the right of the husband, and that Ratcliff cannot in conscience hold the slaves for his own benefit; and it follows that he took them to the use of the plaintiff, who has a right to a declaration of the use, and to the profits of the slaves, and that, to those ends, she is entitled to the defendant's answer. Consequently, the decree must be reversed and the demurrer overruled, with costs in both courts. (520)

PER CURIAM. Decree reversed.

Cited: *S. c.*, 43 N. C., 250.

ABEL GRIFFIS v. JOHN W. YOUNGER.

Where a fraud has been practiced on an infant in order to procure from him a contract for the sale of his land, a court of equity will neither compel him to execute the contract nor will it require him to make compensation, if the infant has been guilty of no fraud himself.

APPEAL from the Court of Equity of ALAMANCE, at Spring Term, 1850.

Graham for plaintiff.
No counsel for defendant.

NASH, J. The case is before us upon an appeal from an interlocutory order of the court below, dissolving the injunction heretofore granted. The plaintiff requests the Court not to suffer the defendant to avail himself of the protection which the law throws around him, because of a fraud, it is alleged, perpetrated by him and his father, Richard Younger, upon his intestate, John Griffis. It is imposisble to read the plaintiff's bill and not be satisfied that there is no foundation for this charge. Richard Younger, the father, was indebted to John Griffis, the intestate,

(521) by note, and the defendant, a minor of 18 years of age, lived with him and constituted a part of his family. In July, 1850, a notice was published by the father in the public papers, that "he had set his son at perfect liberty to transact his own business, make his own contracts, pay his own debts, *manage his own farm, and claim the products from said farm,* as if he had arrived at full age." In two months thereafter, towit, in the succeeding September, John Griffis purchased from this liberated boy the tract of land in question. The bill nowhere charges that John Griffis believed, from the published notice, that thereby the defendant was invested with power to make a valid conveyance of his land. He must have known it could have no such effect. But again the bill states that the consideration given for the land was $400, which was paid "in a wagon and horse, and cash to the amount of $150, and the residue by the transfer of a note or bond held by John Griffis on the said Richard Younger." What was the estimated or real value of the wagon and horse, or the amount of the note or bond, we are not told; but we are assured "that the sale was highly *beneficial* to the defendant, as it *enabled* him to remove to the State of Missouri, and carry with him his father and family." The veil attempted to be thrown over the transaction is too slight to mislead any one. If a fraud was perpetrated, it does not lie at the door of the defendant, and it is a matter of surprise that the defendant should have been enjoined from asserting his legal right in disposing of his land. If any doubt could be entertained as to the true character of the transaction, it is removed by the answer. It states that at the time the circumstances occurred, Richard W. Younger, the father of the defendant, was entirely insolvent, and indebted by note to John Griffis, who was his nephew, in the sum of $230, and the defendant being the owner of the tract of land in controversy, the plan was formed between his father and John Griffis to make the land pay
(522) the note, and furnish the means of transporting the family to the State of Missouri; that the defendant was under 16 years of age at that time, and never received any part of the price of the land, but his portion of his traveling expenses; and that the money advanced by Griffis was $75. Here, then, is the case of a boy, not quite 16, induced by a needy father to sell his land, his only patrimony, to pay a debt for which he was in no way bound, and the bill alleges it was highly beneficial to him. We cannot perceive how. If the whole transaction was not a fraud upon the defendant, it was an unprincipal advantage taken of his youth and ignorance, and can receive no countenance or protection in a court of equity.

The bill prays that the defendant shall be enjoined from selling the land, and that it, the land, may be held, by a decree of this Court, liable to pay to the plaintiff what his intestate paid for it. In addition to the

reasons assigned in the bill why the prayer should be granted, it has been urged upon us in the argument that the injunction ought not to be dissolved, because the defendant has not offered to repay the money, nor to return the property given by John Griffis, nor to compensate the plaintiff for the improvements put upon the land. No one of these things was he bound to do. The bill does not allege that any portion of the price of the land was ever received by the defendant—the allegation is general that it was paid, but to whom it does not state—and the defendant expressly denies he had ever received anything but his portion of the traveling expenses, and that, doubtless, from his father. As to the improvements, the bill alleges that John Griffis sold the land to Faucett and Rogers, with warranty, who made valuable improvements, after the premises were recovered from them by the defendant. Mr. Griffis had paid them their purchase money with interest on it. If then, improvements had been put upon the land, the question of com- (523) pensation cannot arise between these parties.

We have examined the authorities cited in the argument by the plaintiff's counsel, and while we do not question their soundness, we do not consider them as applicable to this case. *Chancellor Kent,* in treating of the contracts of infants, lays down the general proposition that an infant is not to be protected in his *fraudulent* acts, and he refers to *Badger v. Phinney,* 15 Mass., 643. The only question was whether the administrator of the infant could avoid his contract, he having died without so doing. *Clark v. Cobley,* 2 Cox, 173, is more in point, but it is still no authority in this case, for the purpose for which it was used. The defendant's wife, while sole, had executed to the plaintiff two notes. Upon the marriage, the defendant took them up, giving his own individual bond for the amount. Being sued, he pleaded his infancy, which was allowed him. Thereupon, the bill was filed and the prayer was that the defendant should be decreed to pay the amount of the bond or return the notes, and the Court decreed the return of the notes upon the ground of *fraud* practiced upon the plaintiff. We have already said, we do not consider the defendant as having been guilty of any fraud, and that he had not received from John Griffis any part of the price of the land. The horse and wagon and money were in the possession of the father, and the note, as far as disclosed by the bill, was so likewise, and the debtor died insolvent soon after he reached Missouri.

We do not consider the difficulties to which the plaintiff alleges he will be exposed in making a recovery against the defendant if the injunction shall be dissolved, as any reason why it should be continued. They are difficulties into which John Griffis entered with his eyes open; he voluntarily encountered them. The plaintiff has no claim to the relief he seeks.

(524) The interlocutory order of the court below, retaining the injunction to the final hearing, is erroneous and must be reversed, and the injunction dissolved with costs. The plaintiff must pay the costs of this Court.

PER CURIAM. Reversed with costs.

A. H. MARCH ET AL. v. PHILIP BERRIER.

When the land of an infant is sold by a decree of a court of equity for a particular purpose, any surplus of money that remains after that purpose is accomplished will be regarded as real estate, and upon the death of the infant intestate, will go to his heirs at law and not to his next of kin.

CAUSE removed from the Court of Equity of DAVIDSON, at Spring Term, 1850.

Henderson Wilson died indebted beyond the amount of his personal estate, and leaving an only child, Sarah Ann, an infant, to whom several tracts of land descended from her father. In 1844, upon the application of the infant's guardian, one piece of land was sold under a decree of the court of equity by the clerk and master, and the proceeds, $1,891, brought into court; and under the direction of the court, the sum of $1,251.36 was applied in discharge of the costs and the residue of (525) the father's debt. The remaining sum of $639.64 was paid by the clerk and master to the defendant Perry, the guardian of the infant. In 1848 Sarah Ann died intestate, while an infant, and left no issue, parent, brother, or sister, but leaving a grandmother, who was her next of kind. The defendant Berrier was the husband of the grandmother and administered on the estate of Sarah Ann, and received from Perry the said sum of $639.64, with the interest thereon accrued in the guardian's hands, as a part of his intestate's personality, and claims it in right of his wife. The bill is brought by the paternal uncles and aunts of Sarah Ann, who are her heirs at law, praying that the money and the interest may be declared to belong to them, and for a decree accordingly.

Mendenhall for plaintiff.
No counsel for defendant.

RUFFIN, C. J. When a court of equity orders a sale of the real estate of an infant, in order to raise money for a particular purpose, it would not, upon its own principles and independent of any provision by statute, allow its decree to affect the right of succession to a surplus remaining after answering that purpose. The money stands for the land, of which it was the proceeds. The principle, however, has been

rendered yet more obligatory by the legislative sanction in the acts of 1812, 1818, and 1827; Rev. Stat., ch. 54, secs. 26, 27, and ch. 85, secs. 7, 8. Accordingly, it has been held that, when the owner died without having capacity to dispose of the fund it was to be regarded as land, in respect to the right of succession. *Scull v. Jernigan,* 22 N. C., 144; *Gillespie v. Foy,* 40 N. C., 280. Those cases show also that the receipt of the money by the infant's guardian makes no difference. The acts of that person, or the dealings between him and the infant's administrator, cannot change the equitable nature of the fund, so (526) as to disturb the rights of the heirs at law. The interest, indeed, which accrued during the infant's life, is personalty, as the profits of the land during that period would have been. But the capital and the interest thereon since her death belong to the heirs at law.

PER CURIAM. Decree accordingly.

Cited: Dudley v. Winfield, 45 N. C., 92; *Allison v. Robinson,* 78 N. C., 226; *Black v. Justice,* 86 N. C., 512; *Lafferty v. Young,* 125 N. C., 300.

GABRIEL P. COX ET AL. v. JAMES H. JERMAN ET AL.

A purchaser of land cannot be compelled to pay the purchase money before he has obtained a title.

APPEAL from a decree of the Court of Equity of DUPLIN, at Spring Term, 1850.

J. H. Bryan for plaintiffs.
D. Reid and W. Winslow for defendants.

PEARSON, J. The bill alleges that, in January, 1848, the plaintiff Cox purchased of one James P. Davis, the intestate of the defendants, a tract of land for the price of $860, and to secure the payment thereof executed two notes, one for $500 and the other for $360, with Windal Davis, the intestate of the other plaintiffs, as surety; that at the time of the purchase the said James P. Davis said he was not then able to make title, but promised to do so before the first of the said notes fell due, and executed an instrument, under seal, by which he acknowledged "that he had received the said two notes in payment for the land, (527) and bound himself to defend the land to the said Cox and his heirs absolutely forever"; that the intestate of the defendants had purchased the land at a sale made by the clerk and master, and had

given his notes for the purchase money, but died in March, 1848, without paying for the land and before he had obtained a title therefor; that the defendants in April, 1848, administered upon the estate of the said James P. Davis, and soon afterwards brought suit upon the first note, and have taken judgment, and intend issuing execution, and also intend to put the other note in suit. The prayer is that the defendants be enjoined from issuing execution and from suing on the other note, and for general relief.

The defendants admit the several allegations of the bill, but aver that the plaintiff Cox, at the time he purchased, knew that their intestate had not obtained title for the land, and that he could not get title until his notes to the clerk and master were paid. They also aver that the estate of their intestate is entirely solvent, and insist that as the plaintiff Cox has taken possesion of the land, they ought not to be restrained from collecting the money due the estate of their intestate, and that the plaintiff Cox should be left to his action for a breach of the bond or contract of sale. They further insist that, as administrators, they have no power to make title—the purchase money not having been paid—and that the heirs at law of their intestate ought to have been made defendants.

We concur with the judge below, and think the injunction ought not to have been dissolved. It is clearly against equity to compel the purchaser to pay the price before he has obtained a title, and when, it may be, he never will be able to get one.

(528) Whether the plaintiffs can bring on the cause for a final hearing as the bill is now framed and with the present parties is a matter for their consideration. They can hardly expect to be allowed the land and have a perpetual injunction against the collecting of the purchase money. The contract ought to be specifically performed, or else set aside, if those representing the vendor are unable to complete the title.

The defendant must pay the costs in this Court.

PER CURIAM. Affirmed.

Cited: Howard v. Kimball, 65 N. C., 178; *Miller v. Feezor,* 82 N. C., 195; *Leach v. Johnson,* 114 N. C., 88.

JASPER HICKS v. WILLIAM P. FORREST.

1. Where a parent, on the marriage of his daughter, delivers negroes to his son-in-law, his subsequent declarations, in the absence of the son-in-law, are not competent evidence.
2. Where negroes are delivered by a parent to a son-in-law, at the time of his marriage, and the son-in-law, afterwards, in the lifetime of the parent, sells the negroes, they are still to be considerer as a gift by the parent, and the advancement is to be valued at the time of the delivery.

CAUSE removed from the Court of Equity of GRANVILLE, at Fall Term, 1849.

J. H. Bryan and J. T. Littlejohn for plaintiff.
Gilliam and Lanier for defendant.

NASH, J. Mills Taylor died in 1840, intestate, and leaving the following children: James P. Taylor, Elizabeth Jane, wife of John Gill, and Frances, the wife of William P. Forrest. Elizabeth (529) died after her father, and John Gill, her husband, administered on her estate; and William P. Forrest was then duly appointed administrator upon the estate of Mills Taylor, and took into his possession all of the personal property belonging to it. The intestate, at the time of his death, owned a number of slaves, which were divided among the children.

The bill is filed against William P. Forrest and his wife, Frances, and against said Forrest as administrator of Mills Taylor, by the other children and those who represent them, for an account and settlement of the estate. It charges that during his life Mills Taylor lent to William P. Forrest a negro boy by the name of Stephen, whom the said Forrest subsequently sold in the lifetime of Mills Taylor for $1,050 cash, which he appropriated for his own use, and for which he is chargeable, together with interest. It further alleges that the defendant Forrest has exhibited a large account against the estate for the board of Elizabeth Jane Taylor, the intestate of the plaintiff John Gill, which, it charges, is unjust, as the said Elizabeth was, during the time she stayed with Forrest, a visitor at his own request; and if she was a boarder, the charges are too high.

The answer admits the sale of Stephen, and alleges that he was *given* to the defendant Forrest by his father-in-law, Mills Taylor, when he was quite young and of little value; and that he is an advancement to him, and that, as such, he is ready and willing to account for him. It further alleges that for the time board for Elizabeth is charged she was

not a visitor with the defendant, but, he being a teacher, she was placed by her father with him as a pupil, for whose board he promised to pay; and that he did, from time to time, furnish the defendant with provisions of different kinds, for which he is duly credited in the account filed by him.

(530) Upon the coming in of the answer, replication was taken, and upon the hearing a decree for an account was made and a reference to the master had to state the administration accounts of the defendant Forrest. The master made a report, which is excepted to by both parties.

In arguing the exceptions the parties agreed to bring before the Court for the present only those relating to the negro Stephen and the board of Elizabeth Jane.

Exception 11 is as follows: That the master, in and by his said report, hath certified that he finds that the negro boy Stephen was lent to the defendant and his wife, Frances, by Mills Taylor, the defendant's intestate, and has charged this defendant with the sum of $1,050 for which the said negro was sold by the defendant; whereas the master ought to have certified that the said negro Stephen was given by the said Mills Taylor to the defendant and his wife, Frances, and ought to have charged this defendant with only the value of said negro at the time he was delivered by the said Mills Taylor to the defendant and his wife, Frances, and as an advancement to them. This exception must be allowed. It is not difficult to see how the master was led into the error committed. All the testimony cited by him as sustaining his view are conversations and declarations of Mills Taylor, held and made by him after the delivery of Stephen and in the absence of the defendant. This testimony is inadmissible. This point is fully established by *Cowan v. Tucker,* 30 N. C., 426.

But another and much more important question is still to be disposed of. Stephen was sold by the defendant Forrest before the death of Mills Taylor. Was he, therefore, within the meaning of the proviso to the act of 1806, in the possession of the donee so as to render it an advancement? The language of the act is: *"Provided,* that when any

(531) person shall have put into the actual possession of *his or her child* or children any slave, and the said slave shall remain in the *possession* of such child or children at *the time of the death of such person," etc.* The case is very clearly not within the *letter* of the act. Is it within its meaning? We are told that if we adhere to the words alone of an act, we adhere to the bark. And if, in cases arising under the proviso to the act of 1806, we adhere strictly to the words, not one-half of them can take effect. In this case the delivery, the gift, was made to Forrest. He was not the *child* of Taylor; and yet was it ever doubted

such a gift came within the act? And why? Because it is certainly within the meaning of the proviso. We are at liberty to look to the meaning of the act; and that meaning is the law, when discovered. What, then, did the Legislature mean in using the words, "and the said slaves shall *remain in the possession* of such child at the time of the death of such person"? It means that the parol gift shall take effect as an advancement in all cases where the parent dies intestate without *resuming the possession.* Such is the opinion of the Court in *Stallings v. Stallings,* 16 N. C., 298. The language of *Judge Hall* is: "If the parent *suffered* the child to remain in possession during his life," etc. "The law is intended to give the parent power over property thus situated; but if he did not *think proper to exercise it,* the property should then be considered an advancement." The language of *Judge Henderson* in the same case is: "The act of putting the property into the possession of the child makes the gift, if it be not subsequently *revoked,* or if *consummated* by the parent's *permitting* the slave," etc. The language of the *Chief Justice* in *Cowan v. Tucker,* 27 N. C., 80, is still stronger to the same effect. Speaking of the proviso we are considering, he says: "It meant merely that where a parent intended to make a gift to a child, and put the slave into his possession, and did not in his lifetime retract the gift nor dispose of the property by making a will," etc. So far as the parent's right to the slave is concerned, (532) the gift is not consummated until his death. He may at any time revoke it, either by taking possession or disposing of him by will. If he does neither, it is evidence that he intended the gift to take effect as an advancement. And as he can reclaim the negro from the possession of any one if that possession has not ripened into a good title by laches, so it makes no difference in whose possession the slave actually is at the time of his death.

When *Cowan v. Tucker* was a second time before the Court, 30 N. C., 426, the same idea was again expressed by the Court, namely, that not resuming the possession by the parent and his failure to make any other disposition during his life is substantially the case stated in the proviso; and the slave is to be considered as in the possession of Forrest at the time of the death of Taylor, and was, therefore, an advancement to him; and is to be valued at the time of the delivery. The plaintiff's first exception is overruled, in confirming the exception of the defendants.

Exception 13 of the defendants is overruled. We are of opinion, from the proofs in the case, that the price allowed by the master for the board of Elizabeth Jane was a fair and proper one; and that she was not a visitor at the house of the defendant, but a boarder. This embraces the plaintiff's second exception, which is also overruled.

Exception 14 of the defendant is sustained, as the conclusion of the master was arrived at through an error as to Stephen.

PER CURIAM. Decree accordingly.

Cited: *Shiver v. Brock,* 55 N. C., 140.

(533)

JESSE W. LEE v. WILLIAM MCBRIDE.

When there is a tenant for life of slaves and a remainderman, it is no injury by the tenant for life to the remainderman simply to remove the slaves to another State, or thus to remove them and sell nothing more than his own interest in them, unless he does it fraudulently for the purpose of injuring the remainderman by such sale, and an injury actually results.

CAUSE removed from the Court of Equity of CURRITUCK, at Spring Term, 1849.

The bill was filed on 7 November, 1843, and states that Wilson G. Nash, on 14 June, 1841, by deed, conveyed to his daughter, Judith Lee, two slaves by the names of Sam and Harry, during her life, with remainder after her death to the plaintiff, then an infant son of the said Judith, reserving, however, to the donor the use of the negroes during his life; that the donor died, and shortly afterwards the defendant McBride purchased the said interest of Judith in the slaves, and took them into his possession and carried them beyond the limits of this State and sold them in October, 1843; that McBride was insolvent, but still had the money in his hands which he got for the negroes; and that the plaintiff believed he would lose his interest in the negroes unless McBride should be compelled to give security for their value. The prayer is, "that the defendant may discover what prices he obtained for the said negroes, and that he may be compelled to give security for the value of them, to be paid when the plaintiff should arrive at the age of 21 years, or to deliver the said negroes at that time to the plaintiff."

(534) The answer admits that Nash executed a deed for the negroes, but not to the effect stated in the bill. The deed is exhibited with the answer. By it the donor reserved the negroes to himself during his life, and limited them thereafter to his daughter, the mother of the plaintiff, until the plaintiff should arrive at the age of 21 years, and then to the plaintiff absolutely, with a proviso, however, that should the plaintiff die before arriving at that age, then to such other child as the daughter might afterwards have who should first live to be 21 years of age.

The answer states that Jesse B. Lee, the husband of Judith Lee, was in possession of the negroes after the death of Nash, claiming them under the gift of his wife, and that under sundry executions against his property the negroes were sold by the sheriff for and during the term limited by the deed, namely, until the plaintiff should arrive at full age; and the defendant became the purchaser of that interest in them; that the defendant, in October, 1843, sold the slaves to a person living in Virginia for $690, and received and used the same; that the defendant did not sell the negroes in absolute title, but expressly sold only his own interest in them, as he had purchased it, as aforesaid, that is, until the plaintiff should come of age, and that the sum received by him was not more than a fair price for the negroes during that period.

The evidence did not materially vary the case from what the answer states it to have been, but rather confirms it, as it appears that the whole value of the negroes was, perhaps, double the sum for which the defendant sold them. Upon the hearing on the circuit it was declared to be the opinion of the court that, inasmuch as the defendant purchased a particular estate in the negroes until the infant plaintiff should arrive to the age of 21 years, it was a fraud upon the plaintiff, and intended to defeat the right in remainder, for the defendant to carry the slaves into Virginia, and there to sell them; and it was there- (535) upon decreed that the plaintiff should recover from the defendant the full sum of $690, with interest thereon from the filing of the bill. and the costs of the suit, from which the defendant appealed.

Burgwin for plaintiff.
Heath for defendant.

RUFFIN, C. J. The tenor of the deed under which the plaintiff claims is so different from the statement of it contained in the bill that perhaps it might properly be held that the plaintiff has failed to establish the right alleged by him. But passing by that, the Court is of opinion that the decree is erroneous, both in the extent of the relief decreed and in the reason assigned for giving that relief. The decree is for the immediate payment to the plaintiff, though not yet of age, of the whole price which the defendant received for the negroes, with interest thereon from the bill filed, and that without any regard to the value of the particular estate or that in remainder, either at the day of sale or of the decree pronounced. That principle, as it seems to the Court, cannot be supported, even upon the supposition that the particular tenant sold the property out and out; for it amounts simply to this, that by such a sale the particular estate is forfeited or extinguished. That is true at common law in respect to conveyances of real estate in some instances. But even that is so only when the conveyance is one which passes the land

itself, whether rightful or wrongful, as a feoffment or fine; and a bargain and sale, or other rightful conveyance, has no such effect. But equity proceeds on no such idea of forfeiture in any instance, unless provided as a stipulation in the instrument creating the estate, or imposed by some particular law. We believe in several of the States there (536) are statutes which enact that a sale, or removal out of the State, of slaves by a tenant for life or for any other particular term shall work a forfeiture. It is so extremely difficult in many cases to fix upon any just rule for compensating the remainderman for the convenience and expense he almost certainly, and for the loss he may probably ultimately, sustain from an absolute disposition of slaves by the particular tenant or the removal of them by him out of this State and to parts unknown to the rainderman—and especially when the slaves are females—that it would certainly be a great relief to the courts and, apparently, wise legislation to provide by statute that by such a sale out and out, or by the removal of slaves out of the State, the particular estate should be forfeited, and the remainderman be entitled, at his election, immediately to recover the slaves themselves from the possessor or from the particular tenant the price he got or the value. But without the authority of the Legislature, the Judiciary cannot undertake to pronounce the particular estate extinguished by the wrongful act of the owner, in professing to sell and convey the whole property, or in removing them out of this State——which last may or may not be to the prejudice of the remainderman, though it generally is. Courts of equity, in particular, will never set up such a doctrine of forfeiture, as it is, on the other hand, one of the jurisdictions of those courts to relieve against it. Upon that ground the decree is deemed erroneous. How far it should be varied, and to what extent the plaintiff would be entitled to relief, if the defendant had sold the whole property in the slaves, or had carried them to parts unknown to the plaintiff, with the intent to baffle his search for them and defeat his right, it is not necessary at present to say, nor, in some cases which might be supposed, would it be very easy to say. As the case stands, it is not established that the defendant professed to sell the negroes absolutely; but the contrary is to be inferred. The (537) bill does not distinctly charge, nor does the decree find, an absolue sale, but only, in general terms, that the defendant sold the negroes. As the bill is thus vague, it is not seen how the Court could declare such sale absolute, thereby going beyond the allegations of the party.

But the defendant has answered, assuming the bill to contain that allegation; and he denies it explicitly, and says that he sold the negroes as he bought them, that is, until the plaintiff should come of age. There is nothing to contradict that, or to bring it into doubt, but the single

fact that the defendant carried them to the adjoining State of Virginia and sold them. We are not prepared to say that in any case that circumstance, by itself, would be sufficient to establish that the sale was of a greater interest than belonged to the seller. But it cannot have that effect here, in opposition to the positive averment in the answer, and when the price received, as stated in the answer (which the plaintiff admits to be true, in that respect, by taking his decree for the sum), was much less than the value of the whole property and only a fair price for the real interest of the seller. It ought not, therefore, to be assumed that the defendant sold the negroes for more than the term for which he owned them, nor a decree made upon that hypothesis, but the contrary. Then, if the defendant sold only the right he had, it cannot be questioned that he would have been justifiable in making it, had he made it to an inhabitant of this State, and not upon a concerted purpose that the vendee should carry them out of the State in such a manner as to place them out of the knowledge and beyond the reach of the remainderman. Does the mere act of carrying them out of the State and selling them entitle the remainderman to redress against the particular tenant? The sale even of the absolute property does not displace the remainder, and the person entitled to it may, upon the falling in of the particular estate, recover the negroes themselves. We will not lay it (538) down that the remainderman may not have an immediate action on the case at law, or be relieved in equity, as upon an injury to his rights as a remainderman by reason of the destruction of the property of which he is entitled to the remainder. But without pursuing that idea so as to ascertain in detail the different remedies and their extent in such a case, it may be safely laid down that it is not in law or in equity an injury by the particular tenant to the remainderman simply to remove slaves to another State, or thus to remove them and sell nothing more than his own interests in them; for if the remainderman knows the slaves and where they are, he has, against the purchaser, by way of securing his enjoyment of the slaves when his estate comes into possession, a right to the same remedy he had here against the particular tenant, and it must be supposed that he will there get due redress according to his right. If, indeed, the remainderman sees that the particular tenant is about to remove the slaves out of this State, he may anticipate that purpose, and upon his application the court will restrain the execution of the purpose and secure the forthcoming of the property. But when the remainderman lies by, and the other party does nothing more than part from his right to a person in another State, it is not seen that the remainderman has any cause of action therefor against the former tenant of the particular estate, or any ground for requiring him in equity to be responsible for the production of slaves over which he has

no longer a control, and which the law did not prohibit him from alienating. It is plain, therefore, that after a sale by a particular tenant the right to redress against him in either court depends upon the intention to injure the remainderman by the sale, and upon an injury to him resulting in fact therefrom. Now, that cannot be assumed when it does
(539) not appear that the slaves, though in another State, are not known to the remainderman, and as accessible to him as they were here before the sale. Here the bill states only that a few days before the suit commenced the defendant sold the negroes beyond the limits of this State; and it does not allege that the plaintiff did not know where they were, and could not trace them and have adequate remedy there by having their production duly secured; nor does it seek any discovery of the defendant's vendee, nor state any reason whatever for not following the property. Therefore, as the defendenat was entitled to the interest sold by him, the court cannot hold that he had not a right to make the sale, though to a person out of the State, and that it was af raud in him so to do; since the plaintiff neither charges nor proves that the slaves were thereby placed beyond his knowledge or reach, or that he has been otherwise defrauded or in fact injured in the premises. For these reasons the decree must be reversed and the bill

PER CURIAM. Dismissed with costs.

Cited: *Haughton v. Benbury,* 55 N. C., 341; *Isler v. Isler,* 88 N. C., 579.

(540)

ALEXANDER F. SMITH v. JAMES WISEMAN ET AL.

1. A testator devised as follows: "I leave with my daughter-in-law, Jane Smith, my negro boy, Ambrose, to work for her and Ebenezer's four children's support, until the youngest one arrives at the age of 17, then to be sold and the money be equally divided among them all, share and share alike.'" Jane was the widow of Ebenezer, a son of the testator; Ann, one of the four children, died in the lifetime of the testator.
2. *Held,* that the share of Ann lapsed, and because a part of the undisposed fund.
3. *Held,* secondly, that the widow was entitled, equally with the children, to a share of the money which the negro was sold for.
4. Susan, the youngest of the children, died after the testator, but before she arrived at the age of 17. *Held,* that here was a vested legacy and went to her administrator.
5. *Held,* secondly, that the sale of the negro should take place when the next youngest of the children, who survived, should arrive at the age of 17.

6. In another clause the testator devised as follows: "I give to Alexander two tracts of land, one called, etc. I enjoin it on him to pay to each of Ebenezer's four children, $50 to each child, as they arrive at the age of 16; then the said lands will be his right and property, to him and his heirs forever." Susan, one of the four children, died before the age of 16. *Held*, that the $50 so charged upon the land in favor of Susan, and that in favor of Ann who died in the lifetime of the testator, were sunk, and the land was to be held free of the charge.

CAUSE removed from the Court of Equity of DAVIDSON, at Fall Term, 1849.

No counsel for defendant.
Mendenhall for plaintiff.

PEARSON, J. The bill is filed to obtain a construction of two clauses in the will of James Smith.

The first is in these words: "In the seventh place, I leave with (541) my daughter-in-law, Jane Smith, my negro Ambrose, to work for her and Ebenezer's four children's support until the youngest one arrives at the age of 17, then to be sold, and the money to be equally divided amongst them all, share and share alike."

When the will was executed, Ebenezer, a son of the testator, was dead, leaving his widow, Jane, and four children, Margaret, Nancy, Ann Eliza, and Susan who was the youngest. Ann Eliza died in the lifetime of the testator; and one question is, Who is entitled to the share that was intended for her? No cross-remainders are limited in them expressly or by implication. The gift is not to the children, but to the *four children* of Ebenezer; and is just as definite as if the children had been separately named over. It is therefore clear that the share intended for Ann Eliza lapsed by her death, and is to be administered by the executor as an undisposed of fund.

The next question is, Is Jane, the widow of Ebenezer, entitled to a share of the money for which the slave may be sold? The words, "the money to be equally divided amongst them *all*, share and share alike," are broad enough, and we have no doubt include the widow. She is entitled to an original share of one-fifth.

Susan, who was the youngest child, died some years after the testator, but before she arrived at the age of 17. Two questions are made: What becomes of her share? It was clearly a vested legacy, and her administrator succeeds to it. At what time should Ambrose be sold? The executor insists that upon the death of Susan the sale and division ought to have been made immediately. The defendant Owen, who has since intermarried with the widow, insists that the sale should not be made until such time as Susan would have been 17 years of age had she lived,

(542) on the ground that a particular estate was limited until that time.

We do not adopt either construction; and it seems to us obvious that the sale and division should be made when Nancy, who is now the youngest child, arrives at the age of 17. The testator did not fix on either of the children as the one whose age should limit the particular estate. His purpose was to give them the services of the negro man as long as they required it as a means of making a support, which he thought would be until the youngest arrives at the age of 17.

The sale was postponed with a view to a particular purpose, and when that was accomplished by the arrival to the specified age of all the objects of his bounty, except such as died and could no longer stand in need of it, there ceased to be any reason for postponing the sale and division.

Secondly. The eighth clause is in these words: "I give to Alexander two tracts of land, one called, etc. I enjoin it on him to pay to each of Ebenezer's four children $50 to each child as they arrive at the age of 16; then the said land will be his right and property, to him and his heirs forever."

Susan died before she arrived at the age of 16; and the question is whether she had a vested right to the sum of $50, charged on the land, to which the personal representatives succeed. Or does this charge, upon her death before the required age, sink into the land in favor of the devisee? A legacy is a gift of a part of the personal estate which is passed by the will to the executor, who is directed to deliver it over to the legatee; and to prevent legacies from falling into the residuum, and being treated as a part of the personal estate, which, upon the death of the intended object of the bounty before arriving at the required age, would be undisposed of, the ecclesiastical courts made a distinction between such legacies as were vested in interest, although the time

(543) of enjoyment was future, and such as were purely contingent, and did not vest unless a certain event happened; and in the construction of legacies properly so called, courts of equity, when assuming a concurrent jurisdiction, felt bound to follow the rules laid down in the ecclesiastical courts, adopting all the nice distinctions between gifts, "when," "if," or "provided," and present gifts with an enjoyment in future or the *payment* of which only was deferred. The $50 in this case, if a personal legacy, would be of the latter description; and would, like the share of Susan in the proceeds of the sale of Ambrose, pass to her personal representative. But it is not a legacy. It is a charge upon the real estate, and therefore cannot pass over and become a part of the personal estate upon the death of the person for whom it was so intended, before the happening of the event, her arriving at the age of 16. It is a trust which is enforced in equity. But since the death of the party, who would have been entitled to enforce it, before the required age, there

is no one who can call for it; and the devisee is allowed to hold the land free of the charge. This doctrine is well settled. 1 Roper on Legacies, 431, 432, and the cases cited.

The same reasons apply with equal if not more force to the $50 intended for Ann Eliza, who died in the testator's lifetime. It is not a lapsed legacy, as if it were a part of the personal estate; but it sinks into the land for the benefit of the devisee, as the condition upon which it was to vest has not happened.

The decree will declare the opinion of the Court upon the several matters referred to, as hereinbefore stated. The costs must be paid by the executor out of the funds so as to divide it *pro rata* among the parties interested.

PER CURIAM. Decree accordingly.

(544)

WILLIAM R. STRONG ET AL. v. JOHN C. MENZIES ET AL.

1. When in an injunction bill the answer admits the equity charged in the bill, but brings forward a new fact in avoidance of it, the injunction must be continued until the final hearing.
2. When a voluntary deed of her property is made by a woman in contemplation of a marriage, afterwards consummated, without the existence of the deed being made known to the intended husband, this is in law a fraud upon him.

CAUSE removed from the Court of Equity of ROCKINGHAM, at Spring Term, 1850.

Morehead for plaintiffs.
No counsel for defendants.

PEARSON, J. It is admitted that in 1824 one Sneed conveyed to the defendant Menzies certain slaves in trust for the separate use of Elizabeth, the wife of the said Sneed, with a power of disposition by deed, will, or otherwise. Soon thereafter Sneed died; the slaves were taken into possession by the said Elizabeth, and Menzies removed from the State. On 14 August, 1826, the said Elizabeth executed a deed by which she gave five of the slaves (being all except one) to Erasmus Jones and the defendant Adolphus Jones, reserving to herself a life estate. In September or October, 1826, the said Elizabeth intermarried with Robert Strong, the testator of the plaintiff, who took all of the slaves into possession and has kept possession of them ever since. In 1844 the said Elizabeth died. Erasmus Jones died some years before, leaving an only child, the defendant Eleanor, and Martha, his widow, who administered

(545) upon his estate and intermarried with the defendant Hamlin. After the death of the said Elizabeth, the slaves were demanded of the said Strong in the name of Menzies, the trustee, action of detinue brought, and a recovery effected. At the time of his marriage, Robert Strong was a widower in easy circumstances, and Elizabeth Sneed owned no property, except the said slaves and a small piece of land. The deed was attested by one Dunlap, the uncle, and G. W. Jones, the father of Erasmus and Adolphus, and was registered in November, 1825. G. W. Jones was the cousin and intimate friend of the said Elizabeth. Erasmus and Adolphus Jones were quite young at the date of the deed.

The bill charges that the deed was executed without valuable consideration, and after marriage was contemplated between the plaintiff's testator and the said Elizabeth, in fraud of his marital rights and without his knowledge or consent. The prayer is to have the deed canceled and for an injunction.

The defendants admit that the deed was made without valuable consideration. They do not deny that the marriage was in contemplation at the time it was executed, but simply say, "they do not know how long before the marriage the deed was executed, but suppose it was but a short time." "They insist that the deed was fairly, legally, and honestly made, without any fraud upon the marital rights of the plaintiff's testator." "They deny that it is within their knowledge, or that it is their belief, that the deed was made without the knowledge or consent of the plaintiff's testator." And "they deny that the deed was a fraud upon the marital rights of the plaintiff's testator," for the reason that when the slaves were demanded, he at first offered to give them up if he was in-
(546) demnified against the claim of the Sneeds, and said he would take counsel; and for the further reason that he refused to pay for medical attendance upon them. One of the slaves whose name was inserted in the original draft was left out of the deed; and the plaintiff's testator did not in the lifetime of his wife make any complaint or attempt to have the deed set aside.

A motion to dissolve is heard upon bill and answer; and it is often said that, upon the hearing, the answer is to be taken as true. This must be understood with much qualification, and, as a rule, is very apt to mislead. To obtain an injunction the plaintiff must make certain allegations, upon which his equity rests, and these he is bound to prove. If they are admitted by the answer, his case is made out. If the answer is fair and denies the allegation, as it is the only mode of proof to which he can resort, he is without proof and the injunction has nothing to rest on. But if the allegations, which the plaintiff is bound to prove, be admitted, and the defendant is under the necessity, in order to avoid the plaintiff's

equity, of making an allegation, which he is bound to prove, then, in this stage of the proceedings, he is without proof and there is nothing for the motion to dissolve to rest on.

This is the reason of the well settled rule, "When the answer admits the equity charged in the bill, and brings forward a new fact in avoidance of it, the injunction is continued until the final hearing." *Lindsay v. Etheridge,* 21 N. C., 38; *Bellona Company's case,* 3 Bland. Ch., 442; *Simon v. Cleggett, ib.,* 162. In such cases the defendant furnishes proof of the allegations necessary on the part of the plaintiff, and is without proof so far as his own allegations are concerned, and of course there is no foundation for his motion. The difference in the effect of the answer upon a motion to dissolve and upon the final hearing depends upon this: in the one case the plaintiff has no proof but the answer; whereas, in the latter, he is at liberty to resort to other proof.

The plaintiff's equity consists in this: A voluntary deed made (547) by the intended wife of the testator, in contemplation of the marriage, which was afterwards consummated, without the existence of the deed being made known to him. From these facts the law implies fraud; for, by the marriage, certain rights accrued to the wife—the right to be maintained, to have her debts paid, and in case of survivorship to have a distributive share and dower; and it is necessarily a fraud for the wife, while she is acquiring these rights, to attempt to deprive the husband, by means of a deed made without his knowledge, of the corresponding rights which the marriage would confer on him. That the deed was voluntary and that the marriage took place is admitted; and that the marriage was in contemplation at the time the deed was executed, if not distinctly admitted, is certainly not denied. These are all of the affirmative allegations, and the fraud is made out unless the husband can be fixed with a knowledge of the execution of the deed before the marriage.

The plaintiff avers negatively that, according to his belief, his testator did not have this knowledge. This he does on oath, and supports it, as far as it is capable of being supported, by the allegation of two facts, both of which are admitted, viz., that the possession and apparent ownership of the slaves continued in the wife up to the time of the marriage, and that the deed was not registered at the August term of the county court, which was held after the date of the deed and before the marriage. This is all he could do, and he is not required to prove a negative.

It was therefore incumbent upon the defendants to rebut this *prima facie* case of fraud by an affirmative allegation that the fact was known by the plaintiff's testator before the marriage. And the burden of proving this allegation is upon them. They have no proof, and consequently there is no foundation for the motion to dissolve, (548)

even if the allegation had been properly made. There is, however, no such allegation; so that the motion had neither "allegation nor probation" to rest on.

The defendants aver that the deed was fairly, legally, and honestly made, without fraud upon the marital rights. This is a mere generality, and signifies nothing. What amounts to fraud is a question of law; and the defendants are thus made to swear to a conclusion of law. They deny that "it is within their knowledge, or that it is their belief, that the deed was made without the knowledge or consent of the plaintiff's testator." This is a most singular denial of a negative, and can hardly be considered as an affirmative allegation that they believe the plaintiff's testator knew of the existence of the deed before the marriage. They deny that the deed was a "fraud upon the marital rights," etc., for the reasons which they proceed to enumerate. This is an argumentative denial of a question of law, and it is sufficient to say there is no proof of the several allegations upon which the argument is based.

The injunction ought not to have been dissolved. The defendants must pay the costs in this Court.

PER CURIAM. Ordered accordingly.

Cited: Joyner v. Denny, 45 N. C., 178; *Wilson v. Mace,* 55 N. C., 8; *Spencer v. Spencer,* 56 N. C., 406; *Brinkley v. Brinkley,* 128 N. C., 507.

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(549)

JOSIAH TURNER v. THOMAS FAUCETT ET AL.

A creditor of an intestate has no right to be substituted in the place of the heirs, in regard to a debt due to them as heirs, unless he shows collusion between the debtor and the heirs.

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

W. H. Haywood for plaintiff.
Norwood and J. H. Bryan for defendants.

PEARSON, J. One Crane died in April, 1842. The plaintiff alleges that Crane owed him a debt. He commenced a suit at law against Fausett, administrator of the said Crane, and obtained judgment for his debt, admitting the plea of fully administered, and issued a *scire facias* against the heirs, who failed to appear and plead; whereupon, on 15 April, 1843, he filed this bill. It alleges that the personal estate of Crane was exhausted by executions running at the time of his death, and that

Crane had no real estate except the two funds which this bill seeks to subject. At the death of Crane the defendant Webb had judgment for $2,000 against one Frank Waddell, who is insolvent, and the defendants Hugh Waddell and Crane, as his sureties. The sheriff, at the death of Crane, held an execution upon this judgment, under which he sold personal property and land belonging to Crane, and after satisfying the executions there remained in his hands of the proceeds of the sale of land the sum of $270, which he paid over to the defendant Faucett, as administrator of Crane. The bill insists that this fund, (550) being real estate, was improperly paid over to the administrator, and prays to have it applied to the satisfaction of the plaintiff's debts.

The bill also alleges that by the sales made by the sheriff aforesaid, Crane was made to pay $600 more than his half of the judgment upon which Waddell was bound as his cosurety; which, being the proceeds of the sale of real estate, belong to the heirs of Crane; and he insists that it should be applied to the payment of his debt.

The bill further insists that Crane was indebted to him in another sum of about $225, for the hire of two negro men, blacksmiths, for 1842; that upon the death of Crane in April, the plaintiff took back the two negroes and had their services for the balance of the year; that the defendant Fausett refuses to pay the debt of $225, on the ground that there are no assets applicable to it, and has instituted suit against the plaintiff to recover the hire of the two negroes for the time the plaintiff had them in possession. The prayer is that the amount of such hire may be entered as a credit upon the debt of $225 due the plaintiff.

The defendant Faucett insists that his intestate was indebted to him to the amount of $270; that the personal estate being exhausted, he procured from several of the heirs of Crane deeds assigning to him the fund of $270, excess in the hands of the sheriff after satisfying the execution of Webb against Crane and Waddell, in satisfaction of his (the said Faucett's) debt. He also alleges that on 24 January, 1843, he filed a bill against the heirs of Crane, to subject the said fund to the payment of his debt; and it is admitted that at March Term, 1845, he obtained a decree to that effect.

The defendant Waddell admits that he did not pay his full share of the judgment of Webb; but he alleges that Crane was largely in his debt because of a payment which he was forced to make for (551) him shortly before his death upon another debt to Webb, for which he was Crane's surety, and also a debt of $125 which he owed to Mrs. Watters, and for which he was his only surety; and that Crane owed him $200, the price of a pair of horses, and also about $100 for professional services. He therefore insists that it was right that, by the

sale of Crane's property, he should have been required to pay $600, more than one-half of the judgment, and that upon a statement of the account Crane's estate would be in his debt.

The defendant Webb says that he has no personal interest in the matter; that having a judgment against Crane and Waddell and knowing that Waddell had paid a large sum for Crane, he thought it was right, and for that reason did receive from the sale of Crane's property about $600 more than half that debt, which, by a statement made some short time before the execution was returned, he believes made the matter about equal between Waddell and Crane.

The heirs at law are made parties by consent, and it is agreed that no decree is to be entered to charge them.

We see no reason to differ from his Honor, who heard the case in the court below, so far as respects the decree dismissing the bill with costs as to the defendants Webb and Faucett. To say nothing of the assignments which Faucett procured from some of the heirs, of the fund received by him, it is sufficient that he filed his bill to subject that fund *before* this bill was filed, and he has obtained his decree; so he has the prior equity.

As to the plaintiff's claim against the defendant Waddell, several interesting questions are presented. The land was levied on in Crane's lifetime, and the sheriff very properly proceeded to sell, and took no notice of his death. Is the payment to be considered as being made by Crane, so as to vest in his *personal representative* the right to sue
(552) for contribution, or is the payment to be considered as being made by the heirs, so as to give them the right to sue? Admit that the heirs have this right, is Waddell at liberty to set up his debt against their ancestor, with the amount which he paid as his surety as a counterclaim, and to say that the sum due the heirs is only the balance, if any, which may be found due on settlement, according to the view of the case taken by his Honor below? We do not feel called on to decide these questions; for, as it seems to us, the plaintiff has made out no equity by which he can claim to be substituted in the place of the heirs and call Waddell to an account for contribution as cosurety of Crane. The bill does not suggest that there is any collusion between the heirs and Waddell, as ground to entitle the plaintiff to call on a debtor of the heirs. And in the absence of this suggestion, there is no more reason why a creditor may not be allowed to call on a debtor of the personal estate and claim to be substituted to the rights of the administrator, as against such debtor, than for allowing him to be substituted to he rights of the heirs as against one who is their debtor. There is no principle of equity upon which such a right can be sustained in the absence of collusion; and in this case there is no such allegation, and the heirs may well say they do not feel called on in conscience to force the defend-

ant Waddell, who has advanced for their ancestor, to pay by way of contribution for the purpose of handing the fund over to the plaintiff, who is also a creditor of their ancestor.

We fully concur with his Honor that the plaintiff had no lien upon the two negroes for the payment of their hire, and the conversion of them by him, after the death of Crane, without the consent or subsequent ratification of his administrator, was wrongful and without authority of law. He is liable to pay damages therefor to be applied in due course of administration, and has no right to set (553) it off against the debt due to him for their hire.

PER CURIAM. Bill dismissed with costs.

Judge NASH, being a relation of one of the parties, did not take part in the decision of this case.

WILLIAM S. ARMSTRONG ET AL. v. MOSES BAKER.

A testator devised as follows: "It is my will and desire that my whole estate, both real and personal, except, etc., remain together as joint stock of my beloved wife and children, and my farm continued under the management of my executor for their support and education, and that each one, if a son, receive his distributive share when he arrives at the age of 21 years, and if a daughter, when she arrives at the same age or marries, always reserving my house lot as a residence for my infant children and my beloved wife during her natural life or widowhood." *Held*, that the widow was entitled to an equal portion of the estate with the children.

CAUSE removed from the Court of Equity of EDGECOMBE, at Spring Term, 1850.

B. F. Moore for plaintiffs.
Biggs for defendant.

PEARSON, J. The bill is field to obtain a construction of the will of David Baker. The plaintiffs insist that the plaintiff Catharine is entitled to one-fifth part of the whole estate, real and personal. The defendant insists that she was entitled only to her support and the privilege of living with her children in the mansion house (554) during her life or widowhood. The testator left four small children and his widow, the plaintiff Catharine, who intermarried with the plaintiff Armstrong some two years after his death. The will providing for the payment of his debts is in the following words:

"Second. It is my will and desire that my whole estate, both real and personal, except such as may be necessary to dispose of to pay my just debts, to remain together as joint stock of my beloved wife and children, and my farm continued under the management of my executor for their support and education; and that each one, if a son, receive his distributive share when he arrives at the age of 21 years, and, if a daughter, when she arrives at the same age or marries; always reserving my house lot as a residence for my infant children and my beloved wife, during her natural life or widowhood."

He then appoints his father, Moses Baker, his executor and guardian of his children. Ten days after the execution of his will he makes a codicil, in which he directs his executor, "in conjunction with my beloved wife, to sell such of the property as can be best spared and with the proceeds buy a trusty negro fellow who is skillful in management of a farm and repairing implements of husbandry."

One of the most difficult duties of the court is to ascertain the proper construction of a will. They are usually written by persons not learned in the law, and not accustomed to putting their thoughts in writing. Most testators are not aware of the rule of the law that the will must speak for itself and that the courts can derive no aid from collateral circumstances. Hence, although they may have a clear intention, they put in writing an ill-defined and indefinite intimation of it, and suppose that as all their friends know their intention, there will be no difficulty.

(555) It is a safe presumption in general that every testator intends to dispose of his whole estate, and not to die intestate as to any part. Partial intestacy is in most cases the result of an accidental omission (*casus omissus*).

So it is a safe presumption in general, as every man knows that his wife is allowed to dissent from his will, that testators intend to make such a provision for their wives as will reasonably satisfy them; for, otherwise, by a dissent, the whole will be deranged and his particular bequests cannot be carried into effect. This presumption is aided, except where the contrary appears on the face of the will, by the consideration that testators have just as much affection for their children and feel as much bound to provide for them.

These two general presumptions are in favor of the construction contended for by the plaintiffs, and will turn the scales in favor of the wife, if they are equally balanced.

The will admits of but two constructions: one, that contended for by the plaintiffs; and the other, that the testator did not dispose of his estate, except so far as to a particular use of it by his wife and children during her life or widowhood; for if there are no words of gift to the wife, then there are none to the children. And they are left to take by

descent and under the statute of distributions, except so far as the particular manner in which it is to be used for a limited time is directed by the will. We are to take, then, one or two constructions as the intention of the testator. The wife is to share equally with the children in the whole estate, real as well as personal; or the testator meant to leave his estate to be disposed of, except as to the manner in which it was to be used for a limited time. If instead of the words, "to *remain* together as a joint *stock* of my beloved wife and children, and each one to receive his *distributive share:* if a son, when he arrives at the age of 21," etc., he had used the words, *"to be* the joint *property* of my be- (556) loved wife and children; and each child as they come of age to receive his *ratable* share," there could have been no doubt. Such we think was his meaning. He gave his whole estate, real and personal, to his wife and children; and expressed his wish that it should be kept together for their mutual interest as long as, in the course of things, it was practicable to do so. When a child came of age, he was to have his share, *"always reserving"* from the division, thus made necessary, the "house lot" as a residence for his children who were still *infants,* and his wife, who was still his widow. But when their mutual interest no longer required that the property should be kept together as a joint stock, which would be when all of his children arrived at full age or married, or when his wife died or ceased to be his widow, then his intention was that there should be a division among them as of a *joint property.* The words, "distributive share," could not have been used in reference to the statute of distributions, as in case of intestacy, for it includes real as well as personal estate, and the testator, for that reason, thought it necessary to reserve out of the division which was to be made as the children came of age, *his house lot.*

What can be said in favor of the other construction? Did he mean to leave his property undisposed of, except so far as he directed the manner in which it was to be used for a limited time? If so, it is contrary to what most men do who make a will at all. Did he mean to force his wife to dissent, by leaving nothing but a bare support and the privilege of living in the house and lot with her children? This is to suppose him to be unaffected by influences which operate upon most men. Whereas from the general tone of his will it would seem that his wife and children were equally dear to him, and he felt under an obligation to provide for them all. He thought she was fit to remain in the (557) house and take care of their children while they were infants; and he shows confidence in her judgment by directing in the codicil that she is to be consulted as to what property should be sold to buy the negro man. All this is opposed to the idea that he intended to leave her destitute, and that when one child came of age he was to take a fourth of

all but the "house lot," and another a fourth; and so when the last of the four took a fourth, nothing was to be left her, although still alive and his widow, but the empty walls of the "house lot."

There is not the slightest intimation that he intended a forfeiture of her right to a share of his estate by a second marriage. The only allusion to her ceasing to be his widow is confined to the clause reserving the "house lot" out of the division, as the children may severally come of age, and there it is made for the obvious reason that when she died or married, the purpose for making the reservation would be at an end.

It must be declared to be the opinion of the Court that under the will of the testator, the plaintiff Catharine is entitled to one-fifth part of the whole estate, both real and personal. There must be a decree for an account and for a division; the costs to be paid out of the estate.

PER CURIAM. Decree accordingly.

Cited: Petway v. Baker, 44 N. C., 269; *Poindexter v. Gibson,* 54 N. C., 48.

(558)

JOHN S. BROWN v. JEMIMA WILSON.

Where there is a tenant for life of slaves and a remainderman, and the tenant for life sells the slaves to a third person, who threatens to convey them out of the State, the remainderman is entitled to his writ of injunction, etc.

CAUSE removed from the Court of Equity of PITT, at Fall Term, 1849.

Biggs for plaintiff.
B. F. Moore for defendant.

NASH, J. In 1833 William Wilson by deed conveyed to John Wilson, his son, four negroes, in trust for himself during his life, and at his death to his daughter Jemima, during her life, "and after her death, if she should have any issue, the said negroes to go to her issue forever; and in case of the death of the said Jemima without issue, then the said slaves and all their increase to go and belong to my son Lewis Wilson forever." William Wilson is dead. Lewis Wilson is also dead, and the plaintiff Brown is his administrator. After the death of the donor, Jemima, the donee for life took possession of the slaves. In 1845 she conveyed the whole of them to John Hardie, one of the defendants; and subsequently she sold one of them, named Margaret, to a man by the name of Cox; and another of them, by the name of Lucy, to William Wilson. John Wilson, the trustee, is dead, and James Wilson is his administrator, and is one of the defendants. After the slaves were

conveyed to John Hardie he conveyed them to the defendant Blow (559) for the purpose of paying his debts. The bill charges the sale of the negroes Margaret and Lucy to persons unknown, who have sent or carried them out of the State, to parts unknown; that Hardie has repeatedly threatened to carry the negroes out of the State; and that he and the defendant Jemima are entirely insolvent. It prays an injunction to restrain the defendants from selling or conveying the slaves out of the State, and that they may give security for their forthcoming, to answer such decree as may be made by the court, and for an account. The answer of Jemima Wilson, admitting the bequest as set forth, claims the negroes thereby conveyed in absolute property; admits the sale of the slaves Margaret and Lucy, the former to John Cox, to defray the expenses of a suit brought against her by Lewis Wilson, and the latter to William Wilson, to defray the expenses of the others, both of which have been carried out of the State by the purchasers; denies all threats or intention to carry the slaves from the State; admits her conveyance to Hardie, but states it was done to protect the slaves, and that Hardie has conveyed them to her; and that they are now all in her possession except those sold; has understood and believes the fact to be that Hardie did convey the negroes to the defendant Blow, but upon what trust or for what purpose she does not know; she denies that the plaintiff is entitled to an account, etc.

The answer of James Wilson, the administrator of the trustee, John Wilson, denies all knowledge of any threats to remove the slaves; admits the conveyance of the slaves by William Wilson as set forth; and of the conveyance of them by the tenant for life to John Hardie; avers it was to protect them that John Hardie conveyed them to the defendant Blow, and that they reconveyed to the defendant Jemima Wilson.

Neither Blow nor Hardie files any answer; and the bill as to (560) them is neither dismissed nor is any decree or order of any kind taken against them. The cause was set for hearing and transferred to this Court.

One question raised by the answer of Jemima Wilson is as to the nature and extent of her estate in the negroes conveyed to the trustee, John Wilson. She claims, under the deed of trust, an absolute title. By that deed she is entitled but to a life estate; and the remainder vested in Lewis Wilson, upon her dying without issue. She is now 60 years of age, as stated in the bill and not denied in her answer, and in all human probability will die without issue. Be that as it may, the contingency is so remote that we are at liberty to treat the case at present as if the limitation over was to take place to Lewis Wilson upon her death. The right of a remainderman in personal property to the aid of a court of equity in securing the property from destruction is not questioned. In

regard to legal rights, when there is a present right of enjoyment, the legal remedies will, in general, be found to be sufficient. But where the right of enjoyment is future and contingent, the party so entitled is often without any adequate remedy at law by which to secure his interest. In all cases of this kind a court of equity will interpose and grant relief upon a bill *quia timet*. This right, however, must not be capriciously or oppressively used. The plaintiff must lay a ground in his bill to justify the application; he must show the court that he has a real need of its interference. Threats by the tenant for life to sell or remove the property beyond the jurisdiction of the court are considered sufficient ground to come into this Court; and even when the court is satisfied that the threats were mere idle bravadoes, still, when made, they furnish a ground to the remainderman to claim that his fears shall be quieted, and that the person in possession should give some security against the (561) removal of the property. *Wilcox v. Wilcox*, 36 N. C., 42. Where the tenant for life is in good circumstances, the court will satisfy itself by an injunction; for a violation of the order or decree will be a contempt of court subjecting the perpetrator to an attachment of his person. The ground of the application here is that the tenant for life transferred the whole of the slaves to the defendant Hardie, and that both of them are insolvent, and that Hardie has threatened to send them out of the State; and upon the further ground, that the tenant for life, under a claim of an absolute right to the slaves, has sold two of them, who have been removed beyond the jurisdiction of the court. Hardie has not answered, and the defendant has not denied the allegation of his threats, which in fact she could not do; but denies what is not alleged in the bill, that she made any threats. The answer of James Wilson states that both Hardie and Blow had reconveyed the slaves to the defendant Jemima Wilson. When this was done, whether before or since the filing of the bill, we are not informed. It is not denied, but is admitted, that Hardie did convey the negroes to Blow, the defendant, in trust to secure his own creditors. Upon the whole matter, as set forth in the bill and answers, we are of opinion that the plaintiff's right to the interference of this Court to secure to those in remainder their interest in the slaves after the death of Mrs. Jemima Wilson is clearly established, and that the injunction must stand. As to the negroes Margaret and Lucy, sold by the tenant for life, the purchasers are neither of them parties to the suit and Jemima Wilson and Hardie are entirely insolvent.

The defendants must pay the costs.

PER CURIAM. Decree accordingly.

Cited: Braswell v. Morehead, 45 N. C., 28; *Williams v. Smith*, 57 N. C., 256; *Brantly v. Kee*, 58 N. C., 336.

(562)

ALEXANDER TATE ET AL. v. THOMAS DALTON ET AL.

Where an administrator bids off a slave of his intestate at his own sale, and the next of kin were present and did not object, some of them bidding against him, and he afterwards settled his accounts with the next of kin, charging himself with the price of this negro: *Held*, that the sale was sanctioned by them, and the administrator was bound only for the price at which he bid off the slave.

CAUSE removed from the Court of Equity of ROCKINGHAM, at Fall Term, 1849.

RUFFIN, C. J. Thomas Joyce died intestate, in Rockingham County, in 1822, leaving a widow and eight children surviving him, who were all of full age, and also the infant child of a son, Joseph, who had removed and died in one of the Western States. The estate was small, and consisted of a negro man, named Dick, and other chattels to the value of about $100. Administration was granted to the defendant Dalton, who married a daughter of the intestate; and he made a sale, at which he purchased the slave Dick at the price of $206. Alexander Joyce and several others of the children were present at the sale, and were competitors of the defendant in bidding for the negro; but the defendant, owning the negro's wife, was willing to give more than either of the others would, and became the purchaser. The intestate had also a claim to another negro, which was held adversely by another person; and the administrator was under the necessity of bringing suit (563) for him. It was contested and pending until 1830, when a recovery was effected of the negro and also of the sum of $800 for his hires; and the defendant then sold the negro for $334.25. In May, 1831, the defendant made up his account current, in which he charged himself with the price of Dick and also with the other parts of the estate above mentioned, amounting to $1,454.62, and took credit, for disbursements in prosecuting the suits and other charges and debts paid, for $574.32½—leaving a balance of $880.29½ in his hands subject to distribution; and he then returned the account to the county court and it was audited by a committee and approved. In 1831 and 1832 the defendant settled at different times with the children, except Alexander and the issue of Joseph. Those settlements were made upon the basis of the said account current, excluding Alexander, and estimating each share at $97.71; and the defendant paid to each of the said children that sum and took receipts therefor as their respective shares of the estate. On 1 November, 1832, Alexander Joyce (whose name had been changed to Tate) instituted an action on the defendant's administration bond to recover a distributive share, and it was defended upon the ground that

his father had been compelled to pay large sums as his surety, whereby he had been much more than fully advanced, and so was not entitled to any more of the estate, but the whole belonged to the other members of the family; and in November, 1834, the plaintiff suffered a nonsuit therein.

The present bill was filed on 1 November, 1847, by Alexander Tate and four others of the intestate's children against the administrator and the other children, and also the children of the deceased son, Joseph; and without taking any notice of the account current or of the (564) payments to the several children, it prays an account of the defendant's administration in the usual form, and that the balance of the estate may be ascertained and the shares of each of the plaintiffs paid. It insists particularly that the defendant's purchase of the slave Dick, at his own sale, was invalid, and that he should account for his hires and value; and it states as a reason for the delay in bringing this suit, that some of the plaintiffs lived at a great distance in other States, and that the others, who resided here, were too poor to incur the expense.

The answer of the administrator states that the price he gave for Dick was his value at the time, and that his purchase was made in the presence and with the concurrence of most of the plaintiffs, and with the belief among them all that he had a right, like other persons, to bid and purchase; and also that all the children knew at the time they settled that the defendant was charged in the account with the price of Dick, and neither of them objected or intended to question his title. The answer states that the defendant has paid to the several parties (except Alexander) all the estate, saving only the share of his own wife and that belonging to his codefendants, the children of Joseph Joyce, who reside in distant parts; and that for them he holds it ready whenever they may apply. The defendant further insists upon the settlements made with the respective parties and their receipts as above mentioned, for their several shares, and the lapse of time as a bar to an account in this suit.

Iredell for plaintiffs.
Morehead for defendants.

RUFFIN, C. J. The settlements made by all the plaintiffs except Alexander, and their acquittances to the administrator, undoubtedly bar them, especially after such a lapse of time and under the other circumstances of the case. The bill takes no notice of those settlements (565) or of the account returned by the administrator, and, *prima facie,* those plaintiffs could not call for another account, since they in no way impeach that formerly made between them and the administrator. But if the charges in respect of the negro purchased

by the administrator could be regarded as impeaching those settlements in that respect, and as laying a foundation for a decree to open the account, they would not furnish a sufficient ground for that purpose. It is true that an administrator's purchase at his own sale is liable to the objection of the next of kin, at their mere election. But they must come in reasonable time for that purpose, and must have done nothing to confirm the purchase, as by settling with the administrator, with the purchase money forming an item of the account or otherwise inducing the administrator to consider the thing purchased as his own. In this case, indeed, he had much right to think that from the beginning, as his purchase was made openly and in the presence of most of the next of kin, who sanctioned his bidding by bidding against him or by their silence; and, unquestionably, his subsequent accounting with them for the price, without any unfairness in the settlement, and with a knowledge on the part of the next of kin of all the facts, must be a ratification by them of what may have been before imperfect. *Petty v. Harman,* 17 N. C., 191; *Villines v. Norfleet,* 16 N. C., 167. Then, as to the plaintiff Alexander, the defense is equally good. It is true that he made no settlement. But he was fully aware from the beginning that the administrator and the other children, including his coplaintiffs, denied his right to any share in the estate, upon the ground that he had been advanced by his father. For ten years he submitted to that exclusion, and the administrator proceeded to settle the estate and make distribution upon that basis. It does not appear that he, Alexander, made the least objection or set up any claim until all that had been done. Then, in November, 1832, he first made known his pretensions, so far (566) as we see, and brought a suit on the administration bond to enforce them. But he did not prosecute that suit to judgment. On the contrary, after letting it hang up for two years, he gave up that suit, and apparently also gave up his claim; for nothing more is heard of it until this bill was filed in the latter part of 1847, which is fifteen years from the time of his former suit and nearly twenty-six years after administration granted, he and the administrator living in the same neighborhood all the time. The Court holds such laches a bar to his right to an account now; and the cases just cited, besides many others, are plain authorities to that purpose. It may be remarked that the case is not at all affected by the circumstance that the share of one of the next of kin is still held by the administrator; for that is between the administrator and that portion of the next of kin, and does not keep the trust open as to the plaintiffs, as they are excluded, the one because he was not entitled to anything when the father died, and the others because each of them settled and received his or her share. The administrator may be found to account for what he has to those of the next of kin who

are entitled to that share and are also defendants, or to the University as representing them; but he is not liable to account for it to the plaintiffs or either of them.

PER CURIAM. Bill dismissed with costs.

Cited: *Tayloe v. Tayloe,* 108 N. C., 73.

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(567)

THOMAS BATTLE v. JOHN JONES ET AL.

An *ex parte* judgment against a person, not a citizen or inhabitant of the country, has no extraterritorial obligation, and ought not to be respected by the courts of other countries, further than it may be made to appear to be right.

CAUSE removed from the Court of Equity of ONSLOW, at Spring Term, 1850.

On 10 April, 1837, the plaintiff gave to the defendant Franck his promissory note for $5,000, payable 1 January, 1839, in part of a debt he then owed him; and on 13 February, 1838, Franck indorsed it to defendant John Jones. Battle and Franck then resided in Henry County, Alabama, where the transaction occurred, and Jones in Onslow County, in this State. In June, 1839, and January, 1840, Battle made payments on the note, which together amounted to $3,469; and on 23 December, 1840, Jones sued out an original attachment in Onslow County for the balance due on the note, and summoned the defendant John A. Averitt as garnishee, who was the general agent of the plaintiff in this State, and in his garnishment confessed that he had in his hands cash and effects of Battle to the value of $1,158.67; and such proceedings were had therein that in August, 1841, judgment was recovered against Battle for $1,732.36 for principal money and $165.47 damages for interest, and also judgment against the garnishee for the sum confessed by him, which he, Averitt, paid.

(568) Previous to 1837, Franck was indebted to John Jones in two bonds, which together amounted to about $2,800, which the latter deposited with George Jones, also of Henry County aforesaid, and took his receipt therefor; and he, George Jones, received from Franck, in part payment thereof, the bonds of other persons residing in that part of the country to the amount of about $200, and then George Jones died. In February, 1838, John Jones went to Alabama for the purpose of getting the business settled with Franck and the administrator of George Jones; and then Franck, wishing to raise money and also to have again

the use of the bonds he had transferred to George Jones as aforesaid, proposed to John Jones to transfer to him the above mentioned note of Battle for $5,000 and take in part for the same the receipt given for his bonds by George Jones, and the residue in money; and it was so agreed, after consulting the administrator of George Jones, who said he would return to Franck the bonds the latter had passed in payment, and surrender his (Franck's) bonds, on which a balance was still due. Thereupon Franck indorsed, to John Jones, Battle's said note, and John Jones assigned to Franck the said receipt, which George Jones had given him, and returned to North Carolina.

In June, 1840, an original attachment was sued out in Henry County aforesaid, in the name of Franck against the estate of John Jones for $1,937 as due to Franck from Jones as guarantor and assignor of the said receipt, which was served—the time not appearing—in the hands of Battle as garnishee, who at Autumn Term, 1841, made his garnishment, "that he was indebted to the defendant John Jones in the sum of $1,082.10 as a balance on a note for $5,000, payable to the plaintiff Franck, and by him transferred to said Jones, on which said Jones had sued said garnishee by attachment in North Carolina." At the same term a suit of inquiry was executed and the damages as- (569) sessed at $2,366, and judgment given therefor, and also judgment against the garnishee condemning the said sum of $1,082.10 to the use of the plaintiff.

In April, 1848, this bill was filed in Onslow against John Jones, Franck, and Averitt, and it states that the plaintiff Battle had no due notice of the suit by attachment of Jones against him, and that he paid to Franck the sum of $1,082.10, so condemned in his hands as garnishee, on account of his said debt to John Jones and in part of Franck's recovery against said Jones; and that Jones and Averitt had notice of such payment, and that, notwithstanding, Jones procured Averitt to pay to Jones the said sum, being part of the sum of $1,158.67 so condemned in the hands of Averitt to the use of Jones. The bill further states that in fact the note for $5,000, assigned by Franck to Jones, did not belong entirely to Jones, but that he took it upon trust in part for Franck, and to a great amount than the said sum of $1,082.10; and it insists that it is unjust that the plaintiff should thus be compelled to pay the debt twice to the extent of $1,082.10, and prays that the then defendants, or some or one of them, may be decreed to pay the plaintiff the said sum, with interest thereon from the time he paid the same to Franck.

The answer of Franck disclaims, and that of Jones denies that he (Franck) had any interest in the note for $5,000 after the assignment to Jones, or now has any in the judgment thereon. Franck also denies that the plaintiff paid him the sum confessed in his garnishment, viz.,

$1,082.10, or any part of it; and he says that the attachment was taken out for the benefit of the plaintiff, and prosecuted by him, in order, if possible, to stop that sum in his own hands towards indemnifying him (Battle) against his liabilities as the surety of Franck; and that he (Franck) is not entitled to or liable for anything in the premises,
(570) as he became insolvent in 1840, and was duly discharged as a bankrupt on 2 May, 1843.

The answer of Averitt denies any collusion with Jones, and states that he gave the plaintiff advice of the attachment soon after it was served in his hands, and received instructions from the plaintiff to employ counsel to defend it, upon the ground of the attachment of the debt in Alabama, so as, if possible, not to allow judgment to be taken against him here, while he might be liable as garnishee there; and that, accordingly, this defendant spoke to counsel, who advised him that no plea could be put in unless the then defendant, Battle, would replevy by giving bail—which he did not do. This defendant annexes to his answer a letter from Battle to himself under date 5 April, 1841, containing those instructions.

The answer of Jones states that the whole sum recovered in his attachment against the plaintiff was justly due and belonged exclusively to himself, and was recovered without any collusion with Averitt. This defendant further states that he had no information from Battle, or suspicion, that the attachment had been taken out against him in Alabama until the judgment had been rendered therein, and denies positively that he owed Franck or was liable to him for anything upon the demand for which the attachment was brought, or any other. He states that, in fact, very soon after he transferred to Franck the said receipt of George Jones, the administrator of said George settled with and fully satisfied him (Franck) therefor by returning to him the bonds Franck had before transferred to George Jones, and by canceling or surrendering to Franck his bond, so as to extinguish the balance due thereon; and the said administrator was a young man, inexperienced in business, and a nephew and under the influence of Franck, and omitted to take up the said receipt when he made such transfer and surrender. He fur-
(571) ther states that if such had not been the case, Franck would not have had any claim against this defendant on the receipt and his indorsement or guaranty thereof, because the estate of George Jones was ample to make good the said demand to Franck and was immediately in his vicinity; and moreover, because, at the time of the transfer, he (Franck) was himself indebted to the estate of George Jones in a larger amount and continued so indebted up to the time of his bankruptcy aforesaid. He further states that he is informed and believes that Battle became involved as the surety of Franck for large sums,

which he was compelled to pay; and that upon ascertaining the insolvency of Franck, prior to suing out the attachment in Alabama, he (Battle) and Franck devised the plan of bringing that attachment in the name of Franck, but really for the benefit of Battle, with the view of effecting a recovery of a sum from this defendant, without notice to him of the suit, of which no part was due, as was well known to both of them; and he denies his belief that the plaintiff ever paid to Franck or any other person any part of the sum condemned in his hands in that suit.

A transcript of the proceedings in the matter of Franck's bankruptcy is filed; and the judgment against Jones does not appear in the inventory of his effects, while in the schedule of his creditors appears the estate of George Jones, deceased, for the sum of $1,500 on judgments.

The other material evidence is that of the administrator of George Jones and of the attorney who instituted and conducted the suit in Alabama. They support the answer of the defendant Jones; the former stating that in 1838 he satisfied to Franck the demand on his intestate's said receipt, and in the manner set forth in the answer; and also, that if anything had remained due thereon, the estate was sufficient to discharge the whole thereof, and that in fact Franck owed the in- (572) testate $1,500, and never paid any part thereof, and also owed the witness about $1,600 otherwise. The attorney likewise deposes that he brought the suit at the instance of Battle, the garnishee, and prosecuted it under his direction and for his benefit, for the reasons stated in the answer; and that it was understood between the witness Franck, and Battle, that Battle was not to pay any part of the condemnation money, but was to have the judgment as partial indemnity for what he was bound to pay as surety for Franck.

No counsel for plaintiff.
J. H. Bryan for defendants.

RUFFIN, C. J. Perhaps no case could present in a stronger light than the present case does the propriety of the rule laid down in *Irby v. Wilson,* 21 N. C., 568, that an *ex parte* judgment against a person, not a citizen or inhabitant of the country, has no extraterritorial obligation, and ought not to be respected by the courts of other countries further than it may be made to appear to be right. But resort need not be had to that legal principle, in opposition to the claim set up in the present bill; since, however regular the proceedings were and however conclusive the judgment might be in a court of law, the plaintiff, in this judgment in Alabama, or the garnishee, most clearly cannot claim benefit from it in a court of equity, when it so plainly appears to be against conscience,

for a demand wholly unfounded, and obtained by surprise, that is, without defense, as far as is seen. In this point of view, the circumstance that the judgment was rendered in a sister State becomes immaterial;

(573) for if it had been a judgment of a court in this State, obtained under such circumstances against an inhabitant of Alabama, our court of equity, upon its own principles, would undoubtedly restrain the plaintiff from making any use of it, and much more refuse to aid him in any manner to enforce it. *Bissell v. Bozman,* 37 N. C., 154; *Cranstown v. Johnston,* 3 Ves., 170; 5 Ves., 277. The judgment in this State in favor of Jones against Battle is not impeached at all. It is said, indeed, in the bill that the plaintiff had no notice of the pendency of the suit, and also that a part of the debt recovered is in trust for the plaintiff's debtor, Battle; and both of those statements are positively denied, and the former proved to be false, and the latter not supported by any evidence. It therefore clearly appears that the whole debt recovered by Jones was truly due him; unless, indeed, there is to be an abatement in respect of the sum condemned in the plaintiff's hands as garnishee, which he said he paid to Franck, the plaintiff, in the attachment in Alabama. Now, it appears upon the clearest evidence, not in any degree discredited, that the plaintiff has not paid Franck one cent on that account, and that from the beginning it was distinctly understood that no such payment was to be made, and that the whole proceeded was a contrivance between those two persons to defeat Jones of his debt by precluding him from a remedy therefor by attachment of Battle's estate in North Carolina. The plaintiff, therefore, cannot claim upon the idea that he has the merit of having paid a debt for Jones by compulsion of law, since he has made no such payment. The cause, then, is brought down to the merits of the demand of Franck against Jones, for which judgment was rendered. Now, as to that, the proof is plain that there are none whatever; for the person primarily liable, George Jones, left assets to discharge the debt, and accessible to Franck, and, moreover, it had actually

(574) been satisfied by the administrator of George Jones, and Franck was still indebted to the estate about $1,500. There could not, therefore, be a more unconscientious attempt to set up an unjust demand; and the bill must be dismissed, with costs to the defendants Jones and Averitt.

PER CURIAM. Decree accordingly.

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CREDITORS AND DEBTORS.

1. The creditor of a nonresident debtor, who is brought in by publication, cannot have a decree for the satisfaction of his claim out of debts due by persons in this State to such nonresident debtor *Logan v. Simmons*, 180.

2. Where the personal estate of a deceased debtor has been exhausted and his lands have been sold, creditors whose debts remain unsatisfied have a right in equity to have satisfaction decreed out of the rents and profits derived from the lands by the heirs—at least so much as remain in their hands unexpended. *Washington v. Sasser*, 336.

3. A creditor of an intestate has no right to be substituted in the place of the heirs, in regard to a debt due to them as heirs, unless he shows collusion between the debtor and the heirs. *Turner v. Faucett*, 549.

DEEDS.

1. An unregistered deed does not confer merely an equity. It is a legal conveyance, and, although it cannot be given in evidence until it is registered, and, therefore, it is not a perfect, legal title, yet it has, as a deed, an operation from its delivery, and so cannot be redelivered. *Walker v. Coltraine*, 79.

2. Such a deed will be set up in equity, whether voluntary or for value. *Ibid.*

3. Where a deed has been executed and delivered, and the donor, without the consent of the donee, obtains possession of it before it is registered, and suppresses it, the donee is entitled to call upon the donor for a conveyance of the legal estate. *Tyson v. Harrington*, 329.

DEVISES AND BEQUESTS.

1. A testator, by his last will, directed as follows: "I direct that my nephew L., be educated at my expense at the Episcopal School at Raleigh; I mean that all the expenses of the school be paid by my executors. The other expenses not belonging to his education to be paid by his father. In case, for any reason, he cannot be educated at that school, I direct my executors to pay for his education at any school in this State, and at the University; the school to be designated by his father and mother." *Held*, that the testator's estate was not chargeable with the clothes of L. while he lived with his father before he was sent to the school; but that it was chargeable with his board and and clothing when sent to school, and that the words, "other expenses, not belonging to his education," referred to the expenses of nurture while he was too young to be sent from home and was boarded and clothed by his father at home, to the pocket money which boys are usually allowed while at school and at the University, and to the expenses during the vacation. *Lindsay v. Hogg*, 3.

2. A testator living and making his will in the county of Chowan directed by his last will and testament, "that A. B. should receive a plain practical education." A. B. then resided with the testator, his uncle, in the county of Chowan. After the death of the testator, the mother of A. B. removed him to Baltimore: *Held*, that the executors of the testator were bound to pay such a sum as would furnish him with a plain, practical education, according to Chowan prices, includ-

children shall remain in the hands of my executors, and it is my wish for them to be hired out until they shall arrive at the age of 21. Secondly, if there should be any surplus after payment of debts, expenses, and legacies, such surplus shall be equally divided and paid over to my said wife and three sons" (the testator had a third son for whom he had made a previous provision), "and E. F.'s children to have their mother's part of the surplus, their executors and assigns, absolutely forever." The testator in his lifetime and before he made his will gave some slaves and other chattels to his three sons and his daughter E. F. John died before the testator, leaving four children. *Henderson v. Womack*, 437.

34. Held, first, that the children of E. F. take as a class,, and not *per capita;* that although the general rule is that the words "equally to be divided" import a division *per capita*, that rule does not apply in this case, the context evidently showing that the class was to take as a unite, the representatives of their mother. *Ibid.*

35. *Held*, secondly, that the issue of John, who died in the testator's lifetime, living at the death of the testator, could not take a life estate in the slaves bequeathed to him specifically, and that these must go into the residue; but that the issue of John living at the death of the testator were entitled to his portion of the residue bequeathed to him, under the act of 1816, and the term "issue" includes all the descendants of John living at the time of the testator's death, and they are, under the act, equally entitled to distribution with their immediate ancestors. *Ibid.*

36. *Held*, thirdly, that only the children of E. F. who were *in esse* at the death of the testator can take, the general rule being that when the division is not postponed in the will, but the shares of each are ascertainable at the death of the testator, only those can take under a gift to children of a particular person who were in being when the will took effect. *Ibid.*

37. *Held*, fourthly, that there may be an immediate division of the slaves bequeathed to legatees for life, and also an immediate division of the residue bequeatehed among all those entitled. *Ibid.*

38. *Held*, fifthly, that the reversion to which the representatives of the testator will be entitled, after the expiration of the life estates in the slaves, the same having been undisposed of by the will, cannot be immediately divided, but at the expiration of each legacy for life the slaves so devised for life will constitute a part of the general residuum, and may then be divided. *Ibid.*

39. *Held*, sixthly, that the provision in the will as to advancements applies only to slaves advanced, and these are to be brought in by the several donees in determining their respective shares; and that in estimating these advancements the value of the slaves out and out must be set upon them, it being presumed that the advancement was of the absolute interest in the slaves, and not of a life estate. *Ibid.*

40. A testator devised as follows: "I leave with my daughter-in-law, Jane Smith, my negro boy Ambrose, to work for her and Ebenezer's four children's support until the youngest one arrives at the age of 17, then to be sold and the money equally divided among them all, share and