[*Citations Include 165 N. C.*]

NORTH CAROLINA REPORTS

VOL. 45

CASES IN EQUITY ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FROM DECEMBER TERM, 1852, TO AUGUST TERM, 1853,
BOTH INCLUSIVE.

PERRIN BUSBEE,
REPORTER
(Bus. Eq.)

ANNOTATED BY
WALTER CLARK
(2ND ANNO. ED.)

RALEIGH
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CASES REPORTED

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CASES IN EQUITY

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

DECEMBER TERM, 1852

MARY GARNER v. HENRY GARNER, Administrator.

Where a husband executed a deed, intending thereby to secure certain property to his wife and her children by him—he having theretofore provided for his other children by a prior marriage; and he afterwards, and until his death, recognized said deed as passing the property, as he intended, though the same (being made directly to the wife) was insufficient for the purpose: *Held*, that these circumstances constitute a meritorious consideration, by which a Court of Equity will hold the husband's representative a trustee for the widow.

CAUSE removed by consent from the Court of Equity for NORTHAMPTON, at Fall Term, 1852.

The bill was filed by Mary Garner, widow of John Garner, against the defendant as his administrator; and the following are substantially the facts of the case, as set forth by the bill, and admitted by the answer: The plaintiff intermarried with defendant's intestate, in 1825, she being then a widow with two children, and owning, among other personal estate four slaves—Vincy, Ellick, Sucky and Hannah and he being a widower with eight children, and possessed of a considerable estate, real and personal. The parties had issue, by their marriage, three children; and the said John Garner, being a man of imprudent habits, and having from time to time made advancements to his children by his former marriage, was minded to make provision also for the plaintiff and her three children by him. Accordingly (2) on 5 January, 1831, he procured one William Moody (since dead) to prepare a deed conveying certain slaves, and other property set out therein, for the benefit of the plaintiff and their three children, to be kept together until, &c., "and the property to be in the hands of

William Moody, a trustee, to act as he may think best with." After directing how the land and slaves shall be divided among said children, he provides for the plaintiff as follows: "I give unto my wife, Mary Garner, all the right, title and interest of the negroes belonging to her before I married her, to wit, Vincy, &c., to her, her heirs and assigns forever." The purpose of this deed was to secure the slaves to the separate and exclusive use of the plaintiff; and from the date thereof, the slaves were considered and treated as hers absolutely. John Garner died intestate in 1839, from which time the plaintiff had been in the undisturbed possession of said slaves and their increase, until September Term, 1852, of Northampton County Court, when the defendant took out letters of administration on his estate, and claimed the slaves. The prayer of the bill is, that he be restrained from taking the property and decreed to execute a legal conveyance therefor to the plaintiff. It is admitted by the defendant that he has assets sufficient to pay the debts of his intestate, independent of the property conveyed to the plaintiff, but he insists in his answer, that there is no sufficient consideration to enforce the agreement between the plaintiff and his intestate.

Bragg, for the plaintiff.
Barnes, contra.

BATTLE, J. It has been long settled, that a husband may,
(3) after marriage, make gifts or presents to his wife which will be supported in equity, against himself and his representatives. *Lucas v. Lucas,* 1 Atk., 270; Atherly Mar. Set., 331. Mr. Adams, in his excellent treatise on the doctrine of Equity, classes meritorious or imperfect consideration under the head of "Jurisdiction of the Courts of Equity, in cases in which the courts of ordinary jurisdiction cannot enforce a right." In discussing the subject, he says at page 97, "the doctrine of meritorious consideration originates in the distinction between the three classes of consideration on which promises may be based, viz: valuable consideration, the performance of a moral duty, and mere voluntary bounty. The first of these classes, alone, entitles the promise to enforce his claim against an unwilling promissor; the third is, for all legal purposes, a mere nullity until actual performance of the promise. The second or intermediate class is termed meritorious, and is confined to the three duties of charity, of payment of creditors, and of maintaining a wife and children."

"Consideration of this imperfect class are not distinguished
(4) at law from mere voluntary bounty, but are, to a modified extent, recognized in equity. And the doctrine with respect to them is, that although a promise, made without a valuable considera-

tion, cannot be enforced against the promisor, or against any one in whose favor he has altered his intentions, yet if an intended gift or meritorious cosideration be imperfectly executed, and if the intention remains unaltered at the death of the donor, there is an equity to enforce it in favor of his intention, against persons claiming by operation of law, without an equally meritorious claim."

The doctrine, thus clearly and explicitly stated, is so directly applicable to this case, that it saves us the necessity of further investigation. The wife was certainly an object of meritorious consideration; the gift of the slaves, by the deed executed by the husband, was imperfect; the intention of the donor remained unaltered at his death; and the gift is sought to be enforced against persons, to wit; his children claiming by operation of law, without an equally meritorious claim, because those by a former marriage had been advanced by their father in his lifetime, and those by her were provided for in the same deed. *Holloway v. Headington,* 8 Simons, 324, (11 Con. En. Chan., 459), decided by Vice Chancellor SHADWELL, to which we are referred by the defendant's counsel does not militate against this principle. In that case, by a voluntary settlement, a husband and wife assigned all the property to which his wife then was, or which she or her husband in her right, might become entitled to, in trust to the wife for life, for the husband for life, and for the children of the wife living at her death, whether begotten by her then or any future husband. The Court refused to give effect to it, because it was vague and unreasonable; and because it might, in a certain contingency, if sustained, give the whole of the wife's fortune, not to her grandchildren by her husband, but to a child of a future husband In the case before us, on the contrary, the intended settlement is certain and reasonable—a provision made by a husband for his wife after his children had already been provided for. *Huntly v. Huntly,* 43 N. C., 250, decides that though a deed from a husband, to his wife for slaves cannot have the effect of vesting a title in her, yet it amounts to a declaration of trust in her favor.

The defendant must be declared a trustee for the plaintiff, and must execute a deed to be approved by the Clerk, by which the (5) legal title of the slaves in controversy, with their increase, if any, shall be conveyed absolutely to her.

PER CURIAM. Decree accordingly.

Cited: Parish v. Merritt, 48 N. C., 40; *Lamb v. Pigford,* 54 N. C., 200; *Paschall v. Hall,* 58 N. C., 109; *Smith v. Smith,* 60 N. C., 583; *McBee ex parte,* 63 N..C., 334; *Walton v. Parish,* 95 N. C., 263; *Winbourne v. Downing,* 105 N. C., 21; *Beam v. Bridgers,* 108 N. C., 278.

JONATHAN S. TAYLOE and another, Executors, v. MARY E. BOND and others.

The jurisdiction of a Court of Equity is limited to such matters, in the construction of wills, as are necessary for its present action, and in which it may enter a decree, or a direction in the nature of a decree.

To give jurisdiction, there must be some existing rights to be acted upon; and the Court will not advise as to the future or contingent rights of legatees, nor as to the past or future conduct of executors.

Where a testator, by his will, gave his wife all the personal property he acquired by the marriage with her, which should be a part of his estate at the time of his death, but after making his will, sold one of the slaves so acquired, and took bonds for the price:—*Held*, that this portion of the legacy was adeemed by the sale.

Where a father gives to two of his sons land, to be valued and brought into *hotchpot* at the final division of his estate, but directs that the sum of $1,500 shall be deducted from the valuation, by way of satisfying a debt which he owed them, *at his death: Held*, that the $1,500 drew interest until the time the sons were put in possession of the land.

Where general words of description are used in a will, they refer to the time of the testator's death; but where particular words are used, identifying the person or thing, they refer to the time of writing the will.

Where a testator gives the residue of his personal estate to his wife and six of his children, and sets forth that four of the children have been advanced in certain specific amounts, and provides that the benefit of this clause shall not extend to such of the children as do not bring their advancements into account; and in a subsequent clause, gives to his wife one-seventh part of the residue, in case all the children account for their advancements—one-sixth part, in case one refuses, and so on—*Held*, that if all account, the wife's share is to be ascertained, by adding the advancements to the value of the estate in hand, and dividing by seven, so as to give her the benefit thereof.

As a general rule, the growing crop goes to the devisee; yet where there is an express or implied dispositon of it otherwise, it goes to the executors.

In a devisee to A for life, and at her death, to go to such child or children as *she has had by me*, who may then be living:—*Held*, that the words "has had by me" refer to the time of her death, and that a child born after the writing of the will is provided for, and does not come within the meaning of the Act of Assembly.

Where personal property, slaves excepted, is given to one for life, with remainder over, the tenant for life is entitled to the use of the specific property and to the increase. But where, by the residuary clause, a mixed fund is given to one for life, remainder over, it is the duty of the executor to sell the whole, pay the life tenant the interest, and keep the principal money for the benefit of the remainderman.

CAUSE removed from the Court of Equity of BERTIE, at
(6) Spring Term, 1852.

Lewis Bond died in June, 1851, leaving a will in which he bequeathed as follows:*

1. "I give, devise and bequeath to my wife, Mary E. Bond, her heirs and assigns forever, all the estate and property of every kind, real, per-

* At the suggestion of the Judge, the will is copied entire.

sonal and mixed, which I have acquired or may acquire by my marriage with her, and which shall belong to, or be a part of my estate at the time of my death. My estate is not however to be held liable for any income, rents, profits or interest, arising or accruing from the estate or property above mentioned, between the time of my marriage with my said wife, Mary E. Bond, and the time of my death. I also give to my said wife, Mary E. Bond, her heirs and assigns forever, all and every part of the furniture, purchased on our marriage, known as our 'new furniture,' except one carpet. There being two new carpets, she is to take but one of them, and is to have her choice. No part of the foregoing estate or property is to contribute any thing to the payment of my debts, or the charge of supporting my sister, Mary Ashburn, hereinafter provided for. My other property, or in other words, my property derived otherwise than by my said marriage with my wife, Mary E. Bond, is, I think, sufficient to pay said debts and answer said charge, and must first be taken.

2. "I give and bequeath to Dr. John T. Rascoe, his heirs and assigns for ever, my negro boy named Logan.

3. "All the rest, residue and remainder of my estate and property of every kind, whether real, personal or mixed, whether in possession or action, I give, devise and bequeath to my executors, in special trust and confidence, that they will comply with my wishes, as stated in the following clause of this my last will and testament.

4. "I wish all my just debts paid, to which end my executors are directed to sell, either publicly or privately, that part of the land which I purchased at the sale of George Outlaw's land by the Court of Equity, which lies north and east of the old road. I suppose the quantity to be sold will be between three and four hundred acres. My executors may also either sell enough of the personal property so conveyed to them, in the third clause of this will, to finish and complete the payment of the debts unpaid, after the application of the money (7) raised from the sale of said land; or they may keep the whole of the property conveyed to them in the third clause together, except the said land directed to be sold, until the rents and profits of the same shall discharge my said remaining debts. In this matter, my executors have entire discretion.

5. "Whatever plan they may adopt to pay my debts, my sister, Mary Ashburn, is to receive from them a comfortable support, from the said property so given in the third clause, from and after the day of my death, during her natural life. To which end, my said sister, Mary Ashburn, is to have an estate for her life in the tract of land on which I live, on the Indian-woods road, with the use for her natural life, of a sufficiency of household and kitchen furniture, of my stock of hogs,

cattle, sheep and horses, and of my negroes, to support her. These articles are to be for her life only. Should my sister Mary, however, prefer it, she is to have the value, to be judged of by my executors, of her life estate in said lands, which said amount is to be a charge upon said land in the hands of a trustee hereinafter provided for, who shall hold said land as hereinafter directed. Should my sister Mary also prefer it, she is to receive from my executors, instead of the articles of property of a personal kind herein given her for life, their equivalent; or, in other words, that which my executors shall deem equal to the use of said articles for life, which amount they are to raise out of my personal property, so given them in the foregoing third clause.

6. "After paying my debts and providing for my sister, as above, all the remaining property and estate of every kind mentioned in the third clause of my will, whether real, personal or mixed, is to be held by them for the benefit of the following persons, subject to more particular directions in the 9th, the 10th, the 11th and the 12th clauses of this will, viz.: my wife, Mary E. Bond; my son, William P. Bond; my son, John T. Bond; my daughter, Lucinda Wheeler, by means of a trustee hereinafter to be provided for; my daughter, Esther Sutton; my son, Lewis Bond; and my son, James Bond. But the benefit of this sixth clause of my will is not to be had and enjoyed by any one of the above named seven legatees, until he or she shall account for the advancements which he or she has received from me; my object, design and wish being, that those of the above seven legatees who have been advanced, are to receive nothing until those of them who have been advanced, shall receive enough to make them equal to those advanced respectively. And I hereby declare that I have advanced to my son, William P. Bond, property to the amount of eight thousand (8) dollars; to my son, John T. Bond, to the amount of six thousand dollars; to my daughter, Esther Sutton, property to the amount of three thousand dollars, and to my daughter, Lucinda Wheeler, property to the amount of twenty-seven hundred dollars; and that to my wife, Mary E. Bond, to my son, Lewis Bond, and my son, James Bond, I have made no advancements at all. I direct my executors to adopt the foregoing amounts of money, as the advancements to each of the said four legatees. I also direct my executors, that no interest is to be charged against the said four legatees, on the amounts of their said advancements, until the division in the seventh clause hereafter. The said four legatees are respectively to account for their said advancements, before they receive any part of my estate, whether real or personal. Should any one or more of the said four legatees refuse to account, the others are to have the whole benefit of this clause of my will, in manner and form hereinafter provided for.

7. "My executors are invested with a discretion to make the ultimate division contemplated by the sixth clause of my will, either at the death of my sister, Mary Ashburn, or at any time before that, or to have the share of any one laid off, at any time, upon his or her contributing ratably to the payment of debts, and the charge of supporting my sister, Mary Ashburn.

8. "I wish my executors to ascertain, by having the same estimated, as soon after my death as they can conveniently, the value of my estate of every kind, after taking out the property given my wife, Mary E. Bond, in the first clause of my will, the negro boy, given to Dr. John T. Rascoe, the debts which I owe and the probable charge of supporting my sister, Mary Ashburn, for life. I wish them to value the real and personal estate separately from each other.

9. "The benefit in land which my sons, Lewis Bond and James Bond, are to receive under the said sixth clause of my will, I hereby designate more particularly, as follows:—they are to have, as tenants in common, my Turner tract of land of bout three hundred and fourteen acres, on the east side of the public road leading to Roanoke; the Carter tract of land, containing three hundred acres; the Roquist swamp land, purchased of Thomas Gilliam, containing about two hundred acres; and the remainder of the Leggel tract, which remainder is about one hundred and fifty acres, after taking off the portion hereinafter given to my daughter, Esther Sutton. The foregoing lands are to be valued. From that valuation the sum of fifteen hundred dollars is to be deducted, as I shall owe my sons, Lewis Bond and James Bond, each the sum of seven hundred and fifty dollars at my death, and they are to be considered as having received lands of the value (9) of these lands, less the sum of fifteen hundred dollars. If either of my sons, James or Lewis, should die unmarried, and before the age of twenty-one years, I give the share of the one dying, in the said four tracts of land, to all my children, equally to be divided, and their heirs and assigns forever, and this without regard to any advancements. And if both my sons, Lewis and James, should die under twenty-one and unmarried, then I give the whole of the said lands to all my children, their heirs and assigns forever, as above. Upon the arrival of either of my sons, Lewis and James, to the age of twenty-one or their marriage, his share of the said lands to be his absolutely, to him, his heirs and assigns forever.

10. "I give to my daughter, Esther Sutton, her heirs and assigns forever, about two hundred acres of land, consisting of the Rhodes tract, of about one hundred and sixty acres, and that part of the Leggel tract lying on the west side of the public road leading to Roanoke river.

This is to be the portion of land to which, under the said sixth clause of my will, Esther is to be entitled.

11. "I give and devise to my executors, in special trust, that they themselves will hold or appoint a trustee, whom they shall select, to hold for the sole and separate use of my daughter, Lucinda Wheeler, during her natural life, my tract of land on which I reside on the Indian woods road, subject to the life estate or charge for the benefit of my sister, Mary Ashburn, created in the fifth clause of my will. And I hereby direct, that my said executors or their trustees shall hold the said tract of land, together with every other article of property, real or personal, in possession or remainder, vested or contingent, heretofore given in this will, or hereafter to be given in the same, for the benefit of my daughter, Lucinda, for her sole and separate use during her natural life, not subject to the control, debts or contracts, or other acts of her husband, S. J. Wheeler; and after her death, for the sole and separate use and benefit of her children, if any living at her death; and if none, then in trust for her husbad, S. J. Wheeler. They or the said trustee, are to permit my said daughter, Lucinda, to have the annual income of every species of property given her heretofore or hereafter in this will, for the support of herself and family for life; but the said income is not to be subject to the control, acts or contracts, or debts of her husband, S. J. Wheeler. The said tract of land, is the share of real estate to which my said daughter is entitled, under the said sixth clause of my will.

12. "I give, bequeath and devise, to my wife, Mary E. Bond, during her natural life, a certain tract of land called the 'Simon Turner' place, containing one hundred sixty-six and two-third acres, and also one-seventh part of the negroes and other personal estate mentioned (10) in the sixth clause of this will, in case all the advancements should be accounted for, or one-sixth part, in case any one should not account for his or her advancements, or one-fifth part, in case any two should not account; and so on for the whole four. The real and personal estate given in this clause to my wife, Mary E. Bond, is all that I design for her out of the property given to my executors in the said third and sixth clauses. The property, real and personal, in this twelfth clause, given to her, is given to her for her life, and at her death, to go to such child or children as she has had by me, who may be then living, to them, their heirs and assigns forever; and if there be no living child of our marriage at her death, or the issue of such then the property given in this clause to be equally divided between all my children, the share of my daughter Lucinda, being disposed of as directed in the eleventh clause of this will.

13. "As the shares of the land given to Esther, Lewis, James, and

for the benefit of Lucinda, are probably unequal, the excess in value of each share, over the least valuable one, is to be accounted for in the division of the negroes and personal property, mentioned in the sixth clause so that of land and negroes both, these four of my children shall receive an equal amount, that is to say, after the advancements to Esther and Lucinda are accounted for by them. In case William P. Bond, or John T. Bond, or both, should bring their advancements into account, they are to receive from the said negroes and personal property mentioned in the sixth clause of my will, a sum which, added to their advancements, shall make them equal to my other children. So that, after taking off the share of my wife, Mary E. Bond, according to the twelfth clause of my will, and which twelfth clause I intend as controlling the sixth, so far as my wife is concerned, and after modifying the said sixth clause, not in the value of property given to each of the other legatees, but by assigning different parcels of land to different ones, the said sixth clause is here repeated, subject to said control and modifications.

14. "The valuation directed to be made by my executors, in the eighth clause of my will, is for the benefit of my advanced children, that they may be informed of their true interest. In said valuation, my executors are directed to estimate the devise and bequest in the thirteenth clause of my will, given to my wife, as well as all other property of every kind, alluded to in the sixth clause of my will.

15. "The personal property and negroes, for the benefit of Lucinda Wheeler, in the thirteenth clause of my will mentioned, are to be held on the same trusts in every respect by my executors, or their trustee, as are stated in the eleventh clause of my will. (11)

16. "I do not wish my executors to be held responsible, unless for gross neglect, of which I am sure they will not be guilty. I wish them to repay themselves for all advancements which they may make to my estate. And I hereby request them to act as guardians to my sons, Lewis and James, until they arrive to the age of twenty-one years, or marry."

The bill is filed by the executors against the legatees and devisees under the will, and sets forth, that the defendants Henry Bond and Daniel Bond are children of Mary E. Bond, the widow, by the testator; that the defendants, Lucinda Wheeler, Esther Cooper, William P. Bond, John T. Bond, Lewis Bond, and James Bond, are children of the testator by a former marriage; that the defendant, John T. Rascoe, is the child of Mary E. by a prior marriage; and that the defendant, Mary Ashburn, is an aged sister of the testator, who, for many years, lived with him.

That Lucinda, long before the making of the will, intermarried with

the defendant Samuel J. Wheeler; that Esther was also intermarried with the defendant, Joseph Cooper, before the testator's death; that Henry was born before the execution of the will, and Daniel was born after that event, but before the death of testator, and both are infants; and that Lewis and James have arrived at the age of twenty-one years, since the making of the will.

The bill further states, that the testator left, besides the estate which was his wife's at their marriage, a large estate, real and personal; and further, that the executors have not yet executed their power of appointing a trustee for Mrs. Lucinda Wheeler, according to the directions of the will.

The object of the executors in filing the bill, is to obtain the advice, direction and opinion of the Court in construing the said will:—*First,* the testator having, after making his will, sold a slave, Maria, which was of the property of his wife before their marriage, and having taken a bond for the price, which was unpaid at his death—whether this bond passed by the first clause of the will to the widow? *Secondly:* The testator having sold other slaves, acquired by the marriage, and converted them into money—whether the executors are liable to account therefor to Mrs. Bond? *Thirdly:* The testator having hired out
(12) a number of the slaves acquired by his said marriage, in January, 1851, for that year, and the hires not being due and payable until 1852, and having in his service others of the slaves so acquired, which worked on the farm after his death, and to the end of the year—whether the widow has any claim, and what, to the hires, and for the services of those retained on the farm? *Fourthly:* At the time of testator's marriage with defendant Mary, he owned a furnished house in the country, and she one in the town of Windsor—both of which were occupied and kept up after the marriage: the testator, on the marriage, having purchased a parcel of new furniture, and between that time and the date of his will, bought another lot, and still again another after the making of the will—what furniture was Mrs. Bond entitled to? *Fifthly:* There having been found, among the testator's papers, a bond made to him by Dr. John T. Rascoe, the balance due on which was quite as much as the slave Logan, bequeathed to Rascoe, was worth—whether Dr. Rascoe was not bound to pay the balance due on the bond? *Sixthly:* Mary Ashburn holds testator's bond for $2,000, with interest, and the support for her life given by the will, being a charge, less than the amount of the bond—whether she is entitled to both the payment of the bond and support for life? *Seventhly:* The plaintiffs having delivered over, subject to the decision of the points presented by the bill, to the widow the estate in the first clause of the will bequeathed to her; also the slave Logan to Dr. Rascoe; and the estate,

real and personal, to Mrs. Ashburn; this property not being necessary to be retained for the payment of debts—whether any injustice is done thereby to other persons taking under the will? *Eighthly:* The executors having delivered over to Mrs. Ashburn, her share of the estate for life, which was deemed abundantly sufficient for her support, but which might by accident, death of negroes, dearth of crops, &c., prove otherwise—whether the executors have a right to claim of this devisee a release of all further claim to support for life? or has she a right to call on them from time to time, as her necessities may require? and in what way are they to meet the exigencies as they arise? *Ninthly:* The executors, to pay the debts, having sold the land and personal estate, (except the slaves,) as by the will directed; and having rented out the other lands, not those devised in the first clause, and (13) hired out the slaves, which, when realized, will be sufficient to pay all the debts—whether any injustice was done to the unadvanced legatees by this arrangement, under the sixth clause of the will? whether the division of the estate should be at the earliest practicable period? whether the executors were under any obligation to divide sooner than at the end of the year, when the debts could be paid? and whether they could keep the estate in hand for a longer period for the purpose of paying the debts? *Tenthly:* In making the valuation directed by the eighth clause—whether the executors can do this themselves? or can they designate others to make it? or should they have it done by order of Court? *Eleventhly:* The testator having received the purchase money for the fee simple in a tract of land belonging to the heirs of his former wife, of which he was tenant by the curtesy, and being indebted therefor to his sons, Lewis and James, in the sum of $1,500, their joint shares—whether Lewis and James are entitled to interest on the debt from the death of testator? If not, from what time? *Twelfthly:* Whether, (1) under the 12th clause of the will, Mrs. Bond is entitled to any more than the specific land devised to her and one-seventh of the negroes? or is she entitled to one-seventh of the whole? (2) whether her share of both real and personal estate is liable to the payment of the debts and the support of Mrs. Ashburn? and (3) whether the crop growing, at the testator's death, on the land devised to the children in the 6th clause, goes to Mrs. Bond or to the executors? *Thirteenthly:* Daniel Bond having been born after the making of the will—whether he is provided for, or is he to have a child's part laid off to him under the Act of Assembly? *Fourteenthly:* On the land given to Mrs. Ashburn for life, remainder to trustees for Mrs. Wheeler, was a cotton gin, consisting of a box not fastened to the house, which contains the saws; and in the dwelling house on the same land were several valuable carpets, fastened to the floor with iron

tacks—whether the gin and carpets go to the trustees of Mrs. Wheeler, at Mrs. Ashburn's death? *Fifteenthly:* (1) whether the executors are at liberty to take from Mrs. Ashburn an inventory of the estate delivered to her, whereby their responsibility for the safe keeping and ultimate forthcoming of the property will end, and be thrown on
(14) those in remainder? or is it their duty to see that the life estate is kept and ultimately delivered to them? (2) their like rights and duties as to Mrs. Bond? (3) the executors intending, after their settlement of the estate, not longer to act as trustees for Mrs. Wheeler—how can they, with safety to themselves, convey to the new trustees contemplated by the will? Are they to require him to give bond and security for the forthcoming of the estate? And in case the trustee and sureties should become insolvent, would the executors become liable? and can they rid themselves of responsibility, by having a trustee appointed by a Court of Equity?

The facts stated in the bill were admitted by the answers, and the cause being set for hearing on the bill and answers, was by consent, transmitted to this Court.

Winston, Jun., for the plaintiffs.
No counsel for the defendants.

PEARSON, J. The bill is filed by the executors of Lewis Bond, against the legatees. It sets out the will, and prays for a construction in reference to several matters specified, and submits to dispose of the fund under the direction of the Court. It also prays for the advice and opinion of the Court, in reference to several other matters.

The questions of construction, although furnishing proper grounds for the application, are not very difficult of solution; and the case would have been disposed of at last term, but for the several matters in reference to which, the *opinion* and *advice* of the Court (as distinguished from its *direction*) is asked. The subject was thus made complicated, and an *advisari* was taken, for the purpose of ascertaining the full scope and object of the bill, and of defining the jurisdiction of a Court of Equity in regard to such matters.

Besides asking for a construction of the several parts of the will, which is necessary for the present action of the Court, a construction is asked for on various other parts, in reference to the past conduct of the executors, and to their future rights, and the future rights of the legatees—the bill proceeding on the assumption, that an executor
(15) has a right to ask for the opinion and advice of the Court, as to any matter, past, present or future, provided it has, does, or may grow out of the construction of the will, upon the general idea, that a

Court of Equity has a sweeping jurisdiction in reference to the construction of wills.

This idea is an erroneous one. The jurisdiction, in matters of construction, is limited to such as are necessary for the present action of the Court, and upon which it may enter a decree, or direction in the nature of a decree. The Court cannot, for instance, entertain a bill for the construction of a devise. Devisees claim by purchase under the devise, as a conveyance. Their rights are purely legal, and must be adjudicated by the courts of law. A Court of Equity can only take jurisdiction when trusts are involved, or when devises and legacies are so blended, and dependent on each other, as to make it necessary to construe the whole, in order to ascertain the legacies in which case, the Court having a jurisdiction in regard to the legacies, takes jurisdiction over all other matters necessary for its exercise.

The power of a Court of Equity to decree the payment of legacies is a well settled and ancient jurisdiction, assumed on the ground that the Ecclesiastical Court cannot take the accounts usually involved, or enforce its decrees. The power to entertain bills of interpleader is also a well settled and ancient jurisdiction, assumed in cases of conflicting trusts, on the ground that, as the Court has the exclusive control of trustees, it is right to allow them, where there are conflicting claims, to bring in the fund, have the claims adjusted, and the fund disposed of under its decree, so as to save the trustee from responsibility and future litigation; and assumed, in cases of conflicting legal claims, for the protection of any person, of whom several claim the thing, debt, or duty, (provided he has incurred no independent liability to either, and has no interest), on the broad ground of protecting a mere *stake-holder,* and because this principle, although always recognized at common law, is excluded from practical application in the courts of law, by their technical forms of pleading.

From these two powers is clearly derived jurisdiction to entertain a a bill, at the instance of executors, for the purpose of construing wills, fixing the legacies, and having them paid under the direc- (16) tion of the Court. This jurisdiction has been long exercised, and in fact, is nothing more than an extension of the doctrine of interpleader to the case of executors and legatees, under the power of the Court to decree payment of legacies—treating the executor as a trustee or stake-holder of a fund over which the Court has control. The jurisdiction is extended even further, and in cases of difficult and complicated accounts, a Court of Equity will have the accounts taken, the debts ascertained, and the assets, legal as well as equitable, paid over to the creditors under its direction—in these cases, the ingredient of

account, (a very extensive head of equity jurisdiction), being also involved.

We can see no ground, upon which to base a jurisdiction, to allow executors to ask the opinion of the Court as to the future rights of a legatee;—for instance, "Who will be entitled, when a life estate expires?"—"When property is given to one for life, with a limitation over, does the first taker have the entire interest by the rule in Shelly's case?"—or, "What would be the consequence of a supposed state of facts that may hereafter arise?" True, these are matters of construction, but the questions cannot now be presented, so as to be settled by a decree. A declaration of opinion would be merely in the abstract, until existing rights come in conflict, so as to give the Court a subject to act on.

Again: we can see no ground for the jurisdiction to give opinion to executors as to whether their past conduct was right, if they chose to act. It is then too late to ask the opinion of the Court, because the Court can then make no decree in the premises. Such a jurisdiction is directly excluded by the doctrine of interpleader. It is well settled, if the stakeholder pays over the fund to one of the parties, he comes too late; for he is not then able to put the fund in the power of the Court, so that it can be disposed of under its directions.

Again: we can see no ground for the jurisdiction to give advice to an executor in regard to his future conduct or his future rights. He must get such advice from a lawyer; but he can only get the advice (more properly, the *direction*) of the Court, when its present action is invoked in regard to something to be done under its decree.

(17) These conclusions are almost self-evident, and are necessary consequents of the fact, that the Court can only act by its decree, which must be made on an existing state of facts, so as to be the action of the Court, as distinguished from an abstract opinion. It is therefore unnecessary to pursue the discussion further, especially as no authority, *dictum* or intimation to the contrary was cited. It was considered proper to announce them, and to trace the limits of the jurisdiction of the Court, in order to prevent the present bill from being drawn into precedent, whereby bills may become unnecessarily complicated, by the introduction of matters foreign to the jurisdiction.

1. Mrs. Bond is not entitled to the note taken by the testator as the price of the negro girl, Maria. The note is not embraced by the terms of the gift; it was not *acquired by the marriage*. The negro is not embraced; for, although acquired by the marriage, she was not a *part of his estate at the time of his death*. It is said that, as the note was taken in the place of the negro, it ought to pass in her stead. There is no ground upon which the gift can have this effect. The words do not

include the negro. But suppose she had been included, the legacy was adeemed as to her by the subsequent sale, and it is the ordinary case of a testator selling an article given by his will, without any direction that the price should be substituted. The proviso, that "his estate is not to be liable for any income, rents, profits or interests arising or accruing from the property acquired by the marriage," can not have this effect. They were obviously inserted from abundance of caution, under a vague apprehension, (we suppose), of liability arising from what may have passed between the parties.

2. The same reasons apply, with additional force, to exclude Mrs. Bond's claim to the price of the negro, sold before the making of the will.

3. The same reasons apply to exclude her claim to the sums for which certain of the negroes were hired for 1851. The testator had disposed of a part of his estate in these negroes, to wit, his interest for one year; and the legacy was adeemed *pro tanto,* by this partial disposition, in the same way as if there had been a sale out and out. The widow takes them, subject to the right of the persons who had hired them. But she is entitled to the value of the labor of the slaves not (18) hired, for the residue of the year. As to them, there is no ademption, either partial or absolute, and the will takes effect from the death of the testator. There must be an account to ascertain the amount, after deducting the expense of keeping such as may have been chargeable, unless the parties agree on it.

4. Mrs. Bond is entitled to all of the furniture, except one carpet, purchased after the marriage, and before the execution of the will; but she is not entitled to any part of that which was purchased afterwards. As to that purchased soon after the marriage, no question is made. The words "all the furniture purchased *on* our marriage," taken by themselves, would seem to mean such as were purchased about the time of the marriage, by way of outfit made necessary by that occurrence; but they may mean such as was purchased in consequence of "our marriage," and so include the second lot purchased some time afterwards, in addition, or by way of supplement, to the first lot—that turning out insufficient. The doubt, however, is removed by the additional words, "known as our *new* furniture." *New* is used in opposition to, and to distinguish it from, the *old* furniture, which the parties had before their marriage; and both lots of the new furniture are evidently embraced. The third lot, purchased after the execution of the will, is not included. A will takes effect at the death of the testator, and when general words are used, they are presumed to have reference to that time; because it is natural that the testator should be looking, and speak in reference, to the state of things when the will is to go into operation;

e. g., a legacy, "to the children of A," or of "all my horses," is presumed to have reference to the time of the testator's death. But when particular words of description are used, so as to identify a person or thing, the words necessarily have reference to the time of using them; for the fact of identification is a present act, inconsistent with the idea of a reference to a future state of things, and must refer to the time when it is made, *e. g.,* a legacy to "John, the son of A," or of "my horse, Jackson,"—if John or Jackson die, although the testator should have another son and name him John, or the testator should purchase another horse and name him Jackson, this John or Jackson would (19) not be the person or the horse meant; for the inference that he was speaking in reference to the state of things, as they might exist at the time when the gift was to take effect, is excluded by the fact of identification. *Pearson v. Taylor,* 20 N. C., 188; *Vanhook v. Vanhook,* 38 N. C., 581. The testator in this case has identified the furniture, to-wit, "that purchased on, (or in consequence of), our marriage, known as our new furniture, (giving it a name), except one carpet, there being two new carpets;" so that he evidently had in his mind a particular *corpus* existing at that time, and was speaking in reference to the then state of things, and had no reference to any additions which he might afterwards make, or to a future state of things.

5. Dr. Rascoe is bound to pay the balance due on his note. The mere fact that a legacy to a debtor has no tendency to show an intention to release the debt.

6. Mrs. Ashburn is entitled both to the legacy and the note. The mere fact of a legacy to a creditor has no tendency to show an intention to make the legacy dependent upon a release of the debt.

7. The allegation that the property was delivered, *subject to the decision of the point,* saves this interrogatory from the objection, that after a thing is done, it is too late to come for directions. We assume that the legatees took as mere bailees, the executors withholding their assent, and still having control of the property. The object is to present the question, Are these legacies liable to contribute to the payment of the debts? There is no room for doubt. The legacies to Mrs. Bond and Dr. Rascoe are specific, and the other property is given expressly as a residue, in trust to pay debts, &c. The legacy to Mrs. Ashburn is also expressly exempted from liability to contribute to the payment of debts, by the words *"after paying my debts and providing for my sister as above, all the remaining property," &c.*

8. The executors have delivered over to Mrs. Ashburn the land, negroes, stock, &c., at her election. This property is now amply sufficient for her support; but they suggest that by possibility, from negligence or accident, it may not, at some future time, yield a support;

and the Court is asked whether, in reference to such future contingency, the executors have a right to require a release? Or (20) has she a right to call on them, from time to time, hereafter, as her necessities may require? If so, how are they to meet the exigencies? The Court is not at liberty to answer, for two of the reasons above pointed out. If a release was necessary and proper, it should have been required before the property was delivered. After the thing is done, it is too late to ask for directions. Whether she may hereafter require further support, will depend on casualties, bad seasons, sickness, death of negroes, loss of stock, and so on, which may never occur. The question might have been put into a shape requiring the present decision of the Court, by making a suggestion that Mrs. Ashburn set up such a claim, and it was necessary to have it passed upon, so as to provide a fund; but there is no such suggestion—probably because she makes no such claim, and has no expectation or belief that she will ever hereafter come to want; or, if she does, that she will have a right to make a further requisition, inasmuch as she had made her election to take the property, and not its amount in money.

9. The testator, after directing the sale of a tract of land for the payment of his debts, gives the executors a wide discretion, either to sell enough of the personal property to pay the balance of his debts, or retain the property until such balance can be paid out of the rents and profits. They have sold the land, and have exercised their discretion, by selling all the personal property except the negroes, and hiring them out for 1852, for an amount sufficient to pay the residue of the debts. They now suggest that the unadvanced children complain of this exercise of discretion, because it favors the others who are to pay no interest until the division, and ask—"Is the time when all the debts are or can be paid, at the end of this year, the proper time to divide? Or, were your orators under obligations to divide sooner? Or, have they power, without liabiitiy, to continue the estate in hand longer than the present year?" The first two questions came too late. The executors have exercised their discretion; the thing is done. The third question is obviously unnecessary, for there is no suggestion, even of a future event, which will require a longer postponement of the division.

10. "Can the executors make the valuation themselves? Can they designate others to do it? Can they have it done under a (21) decree of Court? If so, they prefer the latter, when the division shall be made." The valuation, directed by the testator, was to be made as soon after his death as could be done conveniently. This has not been done; and the valuation, contemplated by this question, seems to be in reference to the final division. If so, there is no objection to its being made under an order of Court; and the parties are at liberty

to name fit persons as Commissioners, and to move for further directions in reference to the division.

11. The $1,500 draws interest from the death of the testator until possession is given to the land. It is a debt which fell due at his death, and of course draws interest until it is satisfied in the manner provided.

12. The point is not stated with clearness. It is this: the other legatees admit that Mrs. Bond and those in remainder are entitled to the specific tract of land, and one-seventh part of personal property, in case all of the advancements are accounted for; one-sixth part, if one refuses; one-fifth part, if two, and so on; but they deny that the advancements are to be taken into the account for her benefit. She insists that she is entitled to the benefit of the advancements, and, as an unadvanced legatee, is entitled to a share of land and personal property both, equal to that of her co-legatees; or, if she gets no more of the real estate than the land devised to her, that she is entitled to the benefit of the advancements in the division of the personal estate and, in case all the advancements are accounted for, the amount is to be added to the personal estate, and she takes one-seventh part of the whole fund; in case one refuses to bring in his advancement then she takes one-sixth part of the fund, and so on.

By the sixth clause, which is subject to future clauses, the residue of the estate, real and personal, is given to his executors for the benefit of his wife and six of his children; but the testator provides that "the benefit of this clause is not to be had by any one of the above seven named legatees, until he or she shall account for the advancement which he or she has received from me—my object being that those of the above seven legatees, who have been advanced, are to receive nothing, until those of them who have not been advanced shall receive enough
(22) to make them equal to those advanced respectively." He then specifies the amounts which have been advanced to four of them, and says, *to his wife,* to Lewis, and to James, he has made no advancements. He provides that no interest shall be charged on the advancements until the division, and then repeats, "the said four legatees are respectively to account for their said advancements, before they receive any part of my estate, whether real or personal; and should any one or more of the four refuse to account, the others are to have the whole benefit of this clause, in the manner hereinafter provided for." If this clause stood alone, there could be no doubt that Mrs. Bond was entitled to a share of the real and personal estate both, equal to that of her co-legatees; but in regard to real estate, it is essentially modified. The land is all disposed of by specific devises. By the 9th clause, he gives certain land to Lewis and James, two of his children. By the 10th, he gives land to Esther, and by the 11th he gives land, subject

to the life estate of Mrs. Ashburn, to Lucinda, who are two of the children. By the 12th, he gives a tract of land to his wife, and by the 13th he provides that, as the shares of land given to Lewis, James and Esther are unequal in value the difference shall be made up in the division of the personal estate, *"So that land and negroes both,* these four of my legatees shall receive an equal amount, after the advancements to Esther and Lucinda are accounted for." The substance of this is, that out of the shares which each of these receive in the division of the negroes, those whose land is most valuable shall pay over to the others, so as to make them equal, both in regard to land and negroes. There is no such provision by which to make the wife's share equal in regard to land, and as the 6th clause is subject to be controlled by the subsequent clauses, she must be content with the tract of land devised to her.

The remaining question is, whether the 6th clause is modified also in regard to the personal estate. The intention to modify, announced in this clause, and the fact of having modified it, announced in the 13th clause, may be satisfied by the modifications in regard to the land. It is said this clause is modified by the 12th clause in which, after giving his wife a tract of land, he adds, "and also one-seventh part of the negroes and other personal property mentioned in (23) the 6th clause of this will, in case all the advancements should be accounted for, and one-sixth part, in case any one should refuse and not account for his or her advancement, and one-fifth part, in case any two should not account, and so on for the whole four." We are at a loss to perceive what modification this makes. If he had stopped, after giving her one-seventh part of the negroes and other personal property, the 6th clause would have been greatly modified; but as he adds, *"in case all four account for their advancements, and one-sixth part, in case one refuses, and so on,"* his intention manifestly is, to give her the benefit of the advancements which are accounted for. How are advancements accounted for? By adding the amount to the value of the estate in hand, and dividing the whole by the number of the parties. Thus the amount of one share is found. The party advanced keeps his advancement, and takes enough of the estate to make up a share—leaving each of the others a like share. Here, for instance, if all bring their advancements into the account, the amount of the advancements will be added to the value of the negroes, and the whole will be divided by seven. Mrs. Bond and the two unadvanced children will each take one-seventh part, so ascertained, and the four advanced children will take so many of the negroes as, added to their advancements, will also give to each of them one-seventh part of the whole. And thus, Mrs. Bond, in the words of the testator, will receive one-seventh part

of the negroes and other personal property, in case all of the advancements are accounted for and so on. Again: if none of the advancements are accounted for, it is clear Mrs. Bond will be entitled to *one-third* of the personal estate. Why are the advancements required to be brought into the account? Can any reason be suggested why, whether a provision for a wife and her children shall be one-seventh or one-sixth and so on, or one-third of the estate in hand; should be made to depend upon the circumstance of the advancements being accounted for or not, unless that fact is to have some effect? The proposition on the part of the children is, if all the advancements are accounted for, Mrs. Bond takes only one-seventh part of the estate in hand, *not counting the advancements:* if none of the advancements are accounted for,
(24) she is to have *one-third,* an amount double that of the former! This is absurd. The advancements are to be accounted for, and yet are not to be taken into the account! The plain meaning and good sense of the thing is, if she has the benefit of the advancements to all four of the children, her share is to be one-seventh; if of the advancements to but three, her share is to be one-sixth, and so on; but if she has not the benefit of the advancements to any of them, her share is to be one-third; thus making an equality between the three of the seven legatees not advanced, and such of the others as account for their advancements—such as refuse being presumed to be content with what they have already received. So that, under the 12th clause, Mrs. Bond is entitled to the benefit of the advancements in the division of the personal estate; and taking into consideration that in the 6th clause the testator declares his object, in requiring the advancements to be accounted for, to be to put all of the *seven named legatees* on an equality, there is no further room for argument. (2) This subdivision being an alternative, need not be noticed. (3) The crops are given to the executors for the payments of debts, &c., under the general terms of the will. A devisee claims by purchase under the will as by a conveyance, and consequently is entitled to the crop growing on the land at the death of the devisor, unless it be otherwise disposed of, expressly or by implication. In this case, there is a plain implication. The land is not given directly to Mrs. Bond, but with the other property, is given in the *first place* to the executors, who have a discretion to retain it until the debts are paid out of the rents; so it does not, as in ordinary cases, pass to the devisee at the death of the devisor. The discretion given to the executors to rent it out, necessarily includes a right to take the crop then growing, and apply it to the payment of debts. This is the purpose for which the land is first vested in them, and is afterwards to pass to the several devisees. Mrs. Bond not being entitled to the crop, it is unnecessary to consider the other branch of this subdivision.

13. Daniel, although born after the execution of the will, is provided for. So the case is not within the act of Assembly. He and Henry are on the same footing, and take a remainder in the legacy given to their mother. The property is given "to her for life, and (25) at *her death,* to go to such child or *children* as she *has had* by me who may then be living." The words "has had by me" do not refer to the time of writing the will, but to the antecedent, "at her death," as also the word "then," in the expression "who may then be living." The word "children" shows that he expected his wife might have more children than Henry, and he intended them to share the remainder with him. We presume the reason for not giving his children by Mrs. Bond as much as his other children, is on account of the gift to her of all the property acquired by their marriage.

14. Do the cotton-gin and carpets, after the death of Mrs. Ashburn, belong to the trustee of Lucinda Wheeler? This is a question, (suggested by the idea of these articles being attached to the land), which may arise at her death; but it does not arise and cannot be presented now. We are not at liberty to give an opinion upon it, for the reasons above pointed out. There is nothing now for the Court to act on. Its opinion would be merely in the abstract and not binding, if the question ever should arise, which may never be the case, as the gin and carpet may be worn out and worthless before the lady's death.

15. (1.) The executors having put this property into the possession of Mrs. Ashburn, to be used by her for life, the interest in it, subject to a free use by her, is a part of the estate to be divided among the seven legatees named in the 6th clause. After the division, the executors will have nothing more to do with it. The party to whom it is allotted, if it should hereafter become necessary, may take measures to prevent the removal or destruction of such of it, as is not of a nature to be consumed by the use. *Smith v. Barnum,* 17 N. C., 420; *Jones v. Simmons,* 42 N. C., 178, does not conflict. In that case, a mixed and indiscriminate fund is given as a *residue* to one for life, with a limitation over; and it is settled to be the duty of the executors in such cases to sell the property and pay the interest to the first taker during his life, keeping the principal for him to whom it is limited over, on the ground that this is the only mode in which the latter can be let into a fair participation of the testator's bounty. This case differs in many particulars, and stands on its own peculiar circumstances. *First,* the fund, though mixed, is to be designated and allotted by the (26) executors. Thus a specific nature is impressed on it, so as to distinguish it from a mere residue. *Secondly,* there is no limitation over, but the interest in such of the property as remains on hand at the death of the first taker, not being consumed by the use, is left to fall

into the residue. *Thirdly,* the very object of the gift is, that Mrs. Ashburn may be supported by the *use of the property.* This object would be defeated by a sale. *Fourthly,* the testator gives an election to take the property for life, or the value of the life estate in money. This election would be defeated by a sale.

(2.) When the legacy of Mrs. Bond is delivered to her, the assent to her legacy will be an assent to the remainder, and the executors will have nothing more to do with it. *Smith v. Barnum,* cited above.

(3.) It will be in the power of the executors to have these questions decided, by instituting proper proceedings, when they wish to have a new trustee. They do not present the question to be now acted on, but intimate an intention at some future time to rid themselves of the burden of acting longer as trustees for Mrs. Wheeler, by substituting some other person as trustee, and ask how they can do so with safety, and so on? For the reason above stated, the Court is not at liberty to answer these interrogatories.

PER CURIAM. Decree accordingly.

Cited: Marrow v. Marrow, 45 N. C., 153; *Gwyn v. Gwyn,* 54 N. C., 148; *Rhea v. Vannoy, Ib.,* 289; *Williams v. Cotten,* 56 N. C., 397; *Ritch v. Morris,* 78 N. C., 380; *Robinson v. McDiarmid, Ib.,* 460; *Ellis v. Meadows,* 84 N. C., 95; *Houston v. Howie, Ib.,* 355; *Britt v. Smith,* 86 N. C., 307; 87 N. C., 460, 461; *Alsbrook v. Reid,* 89 N. C., 154; *Edwards v. Warren,* 90 N. C., 605; *Pitman v. Ashley, Ib.,* 614; *Cozart v. Lyon,* 91 N. C., 284; *Little v. Bond,* 93 N. C., 71, 72; *Starbuck v. Starbuck, Ib.,* 185; *Woodlief v. Merritt,* 96 N. C., 228; *Tyson v. Tyson,* 100 N. C., 368; *Diocese v. Diocese,* 102 N. C., 454; *Balsley v. Balsley,* 116 N. C., 476; *Baptist University v. Borden,* 132 N. C., 504; *Heptinstall v. Newsome,* 146 N. C., 504; *In re Knowles,* 148 N. C., 466; *Haywood v. Trust Co.,* 149 N. C., 216, 217; *Haywood v. Wright,* 152 N. C., 432.

ELMIRA BRASWELL, by Guardian, v. JAMES T. MOREHEAD, Executor, and others.

Where a testator by his will bequeathed certain slaves to his infant grandchild, and if she die before arrival at twenty-one years of age, then over: —*Held,* that such particular tenant, by her guardian, residing in another State, has no right to remove the property beyond the limits of this State, against the wishes of the remaindermen.

Owners of executory bequests and other contingent interests stand in a position, in this respect, similar to vested remaindermen, and have a similar right to the protective power of the Court.

The particular tenant, in such case, is entitled to the hires and profits of the property bequeathed to her, until the event shall happen on which they are limited over.

BRASWELL *v.* MOREHEAD.

CAUSE removed from the Court of Equity for GUILFORD, at Fall Term, 1852. (27)

James Cole died some time about 1848, leaving a will in which he bequeathed as follows:

"I give and bequeath to my granddaughter, Elmira Braswell, my negroes Patty, Harriett, Fanny, Amy, Sarah and Miles, and their increase. Also a bond I hold on B. W. Braswell for $860, with interest thereon, two feather beds, and furniture. At my death, my desire is that my executors take possession, hire out the negroes, and apply the proceeds to the use of my granddaughter, Elmira Braswell. I also give to my granddaughter, Elmira, at the age of twenty-one years, my tract of land I bought of Henry Tatum, with the exception of the home plantation, which I grant him and his wife during their natural life the use of: and if my granddaughter, Elmira, should die before she arrives at the age of twenty-one years, then the property bequeathed to her is to be equally divided between the heirs of my two daughters, &c."

Before the death of the testator, Blake W. Braswell removed to Mississippi, where the plaintiff, an infant, and her guardian now reside; and this bill was filed against James T. Morehead, surviving executor of Cole, and the legatees in remainder, praying the opinion and advice of the Court upon the above clause, and asking for a decree authorizing the guardian to remove the negroes and other personal property bequeathed to his ward to the State of Mississippi. And the bill also prays that the executors be decreed to account for the hires and profits of the slaves and other personal estate given to the plaintiff.

The defendants, in their answers, admit the facts set forth in the bill, but insist that the removal of the slaves and other property beyond the jurisdiction of the Court, would be prejudicial to the rights of those in remainder; and that the executors are not bound to account for the hires and profits, which should be retained for the benefit of the remaindermen, in the event of the infant's dying under twenty-one years of age.

Miller, for the plaintiff.
J. T. Morehead, for the defendants.

BATTLE, J. The only questions presented by the pleadings, upon which the opinion of the Court is necessary, are— (28)

First. Whether the plaintiff can, by her guardian, under the sanction of the Court, take the slaves and other personal property bequeathed to her by her grandfather, and carry them to the State of Mississippi, where she now resides, notwithstanding the executory devise to her aunts, in the event of her dying under the age of twenty-one years?

Second. Whether she is entitled, during the period of her infancy, to the hire of slaves and interest and profits of the other personal estate, bequeathed to her? or are said hires and profits to accumulate for her aunts, in the event provided for?

We think that there is no difficulty in either question. The Court certainly would not authorize the particular tenant of a slave, or other personal chattel, to carry such slave or chattel beyond its jurisdiction, against the wishes of the remainderman. Such an act would be in direct opposition to the power which it claims, and in a proper case always exercises, of restraining the particular owner from carrying the slaves or other chattel out of the state. *Wilcox v. Wilcox,* 36 N. C., 36; *Brown v. Wilson,* 41 N. C., 558. Owners of executory bequests, and other contingent interests, stand in a position, in this respect, similar to vested remaindermen, and have a similar right to the protective jurisdiction of the Court. *Brown v. Wilson, ubi supra.*

The plaintiff is clearly entitled to the hires and profits of the slaves and other property bequeathed to her, until the event shall happen, upon which they are limited over to the aunts. To hold otherwise, would be to consult more the interest of the secondary than the primary objects of the testator's bounty. This is entirely inadmissible, and we think the cases cited in Fearne Remainders, 554, sec. 16, fully support our opinion.

There must be a reference to take the accounts, and the Master must inquire whether the bond on Blake W. Braswell, bequeathed to the plaintiff, was, or might by proper diligence have been collected by the defendant, Morehead.

PER CURIAM. Decree accordingly.

Cited: Williams v. Smith, 57 N. C., 256; *Gordon v. Lowther,* 75 N. C., 195; *Jones v. Britton,* 102 N. C., 170, 195; *Peterson v. Ferrell,* 127, N. C., 170.

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(29)

JAMES F. DAVENPORT and others v. SOLOMON HASSELL and wife.

Where a testator, by specific legacies and a residuary clauses in his will, disposes of all his estate, and then gives a pecuniary legacy to his executors, "in full of all services, and which I charge upon my estate generally:"—*Held,* that this is a charge upon the *residuum.*

Upon the description of "nearest blood kin," a sister takes in preference to nephews and nieces.

CAUSE set for hearing upon the bill and answer at TYRRELL, on the last Fall Circuit, and by consent removed to Supreme Court. The

case will be found sufficiently stated in the opinion delivered by this Court.

Heath, for the plaintiffs.
W. N. H. Smith, for the defendants.

PEARSON, J. In 1849, Joseph Wynne died, having duly made and published his last will, and leaving him surviving, a sister, the defendant, Mrs. Hassell, and a nephew and niece, the children of a deceased sister. To the nephew and niece he gives his slaves (two to each) and also the proceeds of the sale of his land. He then directs the balance of his property to be sold, and out of the proceeds gives to three children, who had been named after him, $200 each, which he directs to be kept at interest by his executors, until the children respectively arrive at age. He then adds, "the residue of my estate, if any, I give to my nearest blood kin living at my death." "I give to my executors $450, in full of all services, and which is *a charge upon my estate generally.*"

Undoubtedly, a sister is nearer of kin than a nephew or niece. The fact that the latter are children of a deceased sister can make no difference; because the right of representation is not provided for. The other question, whether the $450 is to be taken out of the residue, or is to be paid ratably by the specific, and the demonstrative and residuary legatees and devisees, is of more difficult solution. The words "I give my executors $450, in full of all services, and which is a charge on my estate *generally,*" are very indefinite. The only definite idea to be extracted from them is, that he wished the $450 to (30) be considered in the light of *a debt,* and to be paid, at all events, out of his estate. An intention that the specific legacies of negroes and land, and the demonstrative legacies of $200 each, given to his three namesakes, should be scaled down, so as to make a ratable contribution towards the payment of the $450, would be very singular—provided there was enough to pay the $450 otherwise, and not disposed of, except by the residuary clause. Our conclusion therefore is, that the $450 must be paid out of the residue, if sufficient; and that the intention was merely to put the $450 upon the footing of a debt, so that in case the residue proved insufficient, it was to be a charge upon his other estate, and not stand upon a footing of a general and mere pecuniary legacy. This conclusion is fortified by the fact that he speaks rather doubtingly of the "residue of his estate of funds, if any;" and, instead of giving it directly to his sister, the defendant Mrs. Hassell, contents himself by the use of the general words, "my nearest blood kin living at my death;" which is as much as to say—such blood kin may take the balance, after paying debts and charges; but the bounties given to

my peculiar favorites are not to be interfered with, unless it should become necessary to pay the $450, which I consider a debt, and therefore charge it "generally" on my estate.

PER CURIAM. Decree accordingly.

Cited: Boyd v. Small, 56 N. C., 42.

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(31)

CULLEN CAPEHART v. JAMES G. MHOON and others.

Upon a motion to dissolve an injunction, staying the collection of a debt recovered by judgment at law, the injunction will be dissolved, although the answer does not respond to an allegation of a fact, not charged to be within the knowledge of the defendant.

The rule in injunctions of this class is, the injunction must be dissolved, unless the equity of the bill is confessed by the answer, or unless the answer is unfair, evasive, and so defective as to be subject to exceptions.

It is otherwise as to injunctions of a special nature, as to stay waste—there the bill is read as an affidavit.

THIS was an appeal from an interlocutory order of the Court of Equity for BERTIE, at Fall Term, 1852, made by his Honor, Judge MANLY, sustaining the defendant's motion to dissolve the injunction, which had been granted in the cause.

In April, 1830, Kenneth West died intestate, seized and possessed of a large real and personal estate, leaving him surviving the defendant, Elizabeth West, his widow, and three infant children. In November, 1830, the defendant, Rhodes, was appointed administrator, and entered into bond, with the defendant Mhoon, and one Webb, as his sureties, took possession of the personal estate, and paid off the debts, or most of them. In 1832, Rhodes left this State, and in 1834 failed in business; and has ever since been insolvent, without having made a settlement of his accounts as administrator. The plaintiff and Rhodes were brothers-in-law, and his wife was a sister of Mrs. West; and the plaintiff at sundry times made considerable advances for the education of the infant children, from whom Mrs. West was appointed guardian, in 1837. In 1843, the plaintiff and James Allen, who had married one of the infant children, and who acted for himself and the other two children and his mother-in-law, came to a settlement by which, after deducting the advancements made by the plaintiff, there was a balance found against him of upwards of $4,000, part of which he paid, and secured the residue, by giving his note. Allen died in 1847. Judgment was taken on the note, and the plaintiff thereupon filed this bill.

The plaintiff alleges that, in 1842, he called on Mr. Allen, as the agent of Mrs. West and the children, for payment of the advancements

made by him; "and the said Allen then and there stated to your orator that he, your orator, was one of the sureties on the bond given by Rhodes as administrator of Kenneth West—that James G. Mhoon was the other surety—that Rhodes was unable to pay the amount due by him as administrator, which was over $4,000—and that, as Mhoon was a non-resident, the said Elizabeth West and the other distributees looked to your orator alone to pay them the respective amounts due from Rhodes, as administrator." "Your orator states, that he was also informed by the said Elizabeth West, at the time of the settlement hereinafter referred to, that he, your orator, was a surety on said bond." The plaintiff then alleges, that under the belief that he was one of the sureties of Rhodes, which belief was produced by the (32) statement of Mr. Allen and Mrs. West, he made the settlement in 1843, charging himself as surety for all that Rhodes, his supposed principal, seemed to be in arrear, and crediting himself by his advances for the children; and there was thus a balance against him of upwards of $4,000—part of which he paid in cash, taking receipts to himself as surety, and for the balance, gave his note to Mrs. West as guardian. And he further alleges, that in 1851, he discovered, for the first time that he was not one of the sureties of Rhodes. The prayer is to be relieved against the effect of this mistake, and for an injunction against the collection of the note.

The defendant, Elizabeth West, answers that when Rhodes was about to leave the State, she applied to him to know in what way he would dispose of the estate of her husband, and what provision was made for the management of the property, and the support of herself and children:—and was told by him, that he should leave everything in the hands of the plaintiff and his son, C. W. Capehart, and they would attend to the business of the estate in his stead, and as well as he could do himself. That accordingly Rhodes went off, without returning any account current or settlement, leaving the estate of her husband in the hands of the plaintiff and his son; and they, as she always thought and believed, managed the same in his stead: And she is satisfied that the plaintiff did have the management and control of everything, and took charge of the education of the children; for she lived on her dower land, and had the use of only a few slaves, without having the property divided, and without knowing how the profits were disposed of—having the most entire confidence in the plaintiff, who, as she believed, was acting in the place of Rhodes, and was hiring out the negroes, (about thirty in number,) and receiving the proceeds thereof. As to the settlement, she says she entrusted the whole matter to Mr. Allen; and he informed her, that he had made a full settlement with plaintiff, and handed her the note, payable to her as guardian—and this is all she

knows of the settlement. She never had it in her possession, and never saw it. She knew nothing, and thought nothing about the sureties of Rhodes; she had never spoken of the matter to anyone, to the (33) best of her recollection, prior to the settlement; and did not know who were the sureties until May, 1851, when she was first informed by plaintiff that Mhoon and Webb were the sureties. "This defendant does not believe that the plaintiff, in making the settlement, did so on the supposition that he was bound as surety;" and she positively denies that she informed him, at the time of the settlement, that he was the surety of Rhodes. For she never stated anything of the kind to the plaintiff, or to any other person, then or at any other time; for she had never been so told by Mr. Allen, or any other person, to the best of her remembrance, and, indeed, knew nothing of the matter, until informed of it by the plaintiff, in 1851. But she had been informed, that the plaintiff had received of Rhodes notes of the estate to a large amount, and supposed the settlement included the notes, hires of the negroes and other funds of the estate, which had come to his hands, and the advancements made by him for the children. She does not know in what form the receipts were drawn.

It is not necessary, in this stage of the case, to state the other answers. Only so much of the bill and answer of Mrs. West is stated, as is necessary to present the question made on the motion to dissolve the injunction.

Moore and *Heath,* for the plaintiff.
Bragg and *W. N. H. Smith,* for the defendants,

PEARSON, J., after stating the case as above, proceeded: The right of the plaintiff to an injunction is put on the ground that he was told by Mrs. West, and by Mr. Allen, who was acting for himself and wife, and as the agent of Mrs. West and the other two children, of whom she was guardian, that he was one of the sureties of Rhodes, the administrator; and that he made the settlement, and gave the note in question, under the supposition that he was one of the sureties—into which mistake he was led by the untrue statements of Mrs. West and Mr. Allen. Mrs. West denies positively the allegation that she ever made such a statement to the plaintiff. She says she never had any idea or notion, that the plaintiff was one of Rhodes' sureties; that Mr. Allen never told her any such thing, and she does not believe that the plain- (34) tiff made the settlement under any such supposition. On the contrary, she believes he made it because he had undertaken to act in Rhodes' place, and had received, and was accountable for, the assets of the estate. The answer of Mrs. West is full, so far as she has

any knowledge, information, or belief. But Mr. Allen is dead, and Mrs. West can say nothing about the allegation, that he told the plaintiff that he was one of the sureties; because she knows nothing, not being present at the settlement, except that Mr. Allen never told her any such thing, and from circumstances, she does not believe the plaintiff acted under any such mistake.

The question is this: The defendant makes a full answer in regard to all matters, of which she has any knowledge or information; but there is one fact, not alleged to be within her knowledge, and evidently not so, in regard to which she can say nothing, because she knows nothing, and has no information except that derived from the plaitiff;—has the plaintiff a right to have the injunction continued to the hearing, because that one allegation is not answered?—every other allegation, upon which his equity rests, being positively denied, save the one in regard to which the defendant has no knowledge or information.

The injunction is, to stay execution upon a judgment for a debt recovered at law. This class of injunction differs very essentially from injunctions to prevent irreparable injury, as to stay waste, in regard to which very different considerations are involved. The distinction is a plain one; and yet, as we had occasion to say in *Purnell v. Daniel,* 43 N. C., 9, it does not seem to be sufficiently attended to on the circuits. In the one, the defendant in equity has established his right by the judgment at law; and the only question is, should the plaintiff in equity be allowed to keep him out of his money until an alleged equity is settled? In the other, the question of right is open, and there is the further consideration that to remove the injunction, would be to allow the thing about which the parties are in dispute, to be done before the dispute is heard, when the defendant cannot be put *in statu quo:* for "if a tree is cut down, it cannot be made to grow again." Hence, the principles regulating the dissolution of injunctions of the latter class are governed by considerations wholly different from those applicable to the former.

In regard to injunctions of the class which includes the case now presented, our courts have departed somewhat from the (35) English practice, by holding that when the answer is unfair and evasive, and does not respond to the allegations of the bill, the injunction will be continued to the hearing, although the equity of the plaintiff is not confessed. In the very great number of cases upon the subject, some confusion has arisen, and the line of demarkation is not as well defined as could be wished. Our present object is to fix this line, in order to see on which side our case falls. For this purpose, it will be necessary to advert to the English practice, and to ascertain, if possible, the grounds on which our courts felt obliged to make a departure;

and in this way fix on a *principle* which will limit the extent of the departure.

"Injunctions, (unless issued upon special application in *urgent cases,* as of waste,) after bill filed and affidavit, can only be obtained *upon the defendant's answer;* or upon an order for time to answer, or an attachment for want of an answer." 2 Madd., ch. 220.

"The Court will not, before answer, restrain proceedings on a judgment, unless it be for want of answer." *Ibid.,* 221.

Thus, according to the English practice, an injunction of the kind we have under consideration, could not be obtained, except upon the discovery made by the answer, and the confession of the plaintiff's equity—unless the defendant was in default, by failing to put in answer.

"It must be remembered that it is a general rule, that upon an original bill, the plaintiff cannot have the common injunction, until some default by the defendant." "The affidavit of merits must in general be made by the plaintiff himself." "Where the bill has been filed, and the subpoena to appear regularly served, the plaintiff may claim the common injunction, on the defendant's making default in not appearing, or, having appeared, in not answering within the times prescribed," (four days in a term cause, and eight days in a country cause). Drewry on Injunctions, 230, 231.

"The proper course to dissolve the common injunctions is, upon the answer coming in and an order *nisi,* that is, an order that unless, on a future day, the plaintiff shows good cause to the contrary, the injunction shall be dissolved." "On the day for showing cause the defend-
(36) ant moves to make the order *nisi* absolute, and the plaintiff then elects whether he will show for cause objections to the answer, or the merits *as they appear in it.*" If electing the former course, he excepts to the answer for insufficiency, and cannot maintain the exceptions, the injunction is gone—it is *ipso facto* dissolved, on the Master's reporting the answer sufficient." *Ibid.,* 267.

If he elects to show for cause merits confessed in the answer, the question depends upon the answer alone; and "except in a few excepted cases, though five hundred affidavits were filed, not only by the plaintiff, but by many witnesses, not one could be received to contradict the answer. *Clasham v. White,* 8 Ves., 35; *Ibid.,* 275.

"Though no affidavits can be read to *contradict* the answer, they may, to substantiate written instruments alleged by the bill, and neither admitted nor denied by the answer;" (*e. g.,* the receipt alleged in the bill to have been given to the plaintiff *as surety* of Rhodes, about which the defendant says she knows nothing, and which the plaintiff *does not produce*).

"It seems to have been formerly the practice to allow affidavits to be read, in support of allegations made by the bill as to *acts* of the parties, *neither admitted nor denied by the answer;* but it is settled to the contrary. If deeds or letters be stated in the bill, and the defendant says he does not know whether the statement is correct or not, they may be verified by affidavit. But as to facts and circumstances which the *defendants do not know of,* if the benefit of them cannot be had from the defendants' consciences; *it cannot be had at all,* except so far as the plaintiff in equity may be able to prove them *at the trial." Ibid.,* 276; for which is cited *Barrett v. Tickell* (Jac. 154) 4 Cond., ch. 70; which case we have examined, and find it fully supports the position for which it is cited.

"In a very late case, where, upon showing merits confessed in the answer, as cause against dissolving an injunction, the counsel for the plaintiff tendered an affidavit to substantiate certain allegations in the bill, *as to which the defendant stated in his answer that he was ignorant,* the Vice Chancellor refused it, saying 'the point was quite settled." *Ib.,* 276 (margin, 426). (37)

According, then, to the English practice, from which we derive our notions of equity practice, it is settled that if the answer is full, that is, not excepted to for insufficiency, the plaintiff can only support his injunction of the hearing, by a discovery obtained from the defendant, or, as is said in the English books, "upon equity confessed in the answer;" for, if the plaintiff fails to prove his allegations by the admissions of the answer, he is *without proof,* and "his injunction is gone." The idea that he can prove his allegations by his own affidavit, is out of the question. He is not allowed to prove them in this stage of the case, by the affidavit of disinterested persons; and it is a maxim, that the affidavit of the party interested is never received, except to initiate proceedings. It is upon this maxim that the rule is founded, which was contended for by Mr. Moore, that if the defendant admits the equity set up by the plaintiff, and seeks to avoid it, by alleging new matter, the allegations will not avail him, because he has *no proof of it,* and *his own affidavit cannot be taken as proof.* He is then like a plaintiff, who has failed to obtain a discovery from the defendant, *i. e., without proof,* and has no equity, except so far as he may be able to *prove his allegations at the trial.*

It remains to be considered how far, and on what ground, we have departed from the English practice.

In England, the Court of Equity is always open: here, it is only open twice a year, and then but for one week. It was therefore necessary to make some change, particularly in regard to injunctions to stay executions upon judgments at law; for if they were never to issue, ex-

cept upon equity confessed in the answer, or in default of an answer, they would in most cases come too late. Hence, it was provided by Laws, 1800, Rev. Stat., ch. 32, secs. 11, 12, that a judge at chambers, might issue an injunction to stay an execution upon a judgment at law, provided that bond was given to pay the amount, upon the dissolution of the injunction, and the application was made within four months after the judgement was obtained—thus, in this particular, placing injunctions of the kind we are considering, upon a footing with injunctions of the other kind, or to stay waste. It was then seen by the courts, that in every case a plaintiff could have his injunction continued over, for at least six months, simply by filing exceptions to
(38) the answer, which could not be reported upon at the first term of the court, owing to its limited duration. This bore hardly upon plaintiffs at law, who were kept out of their money. It was thereupon decided, that the motion for a dissolution, and the exceptions, might be brought on at the same time, and the injunction would be dissolved unless the exceptions were sustained, or the equity of the bill was confessed. The matter is fully discussed and explained by Chief Justice RUFFIN, in *Smith v. Thomas,* 22 N. C., 126, and again in *Edney v. Motz,* 40 N. C., 234. The preëminence of Chief Justice RUFFIN, in regard to equity practice is admitted by all and we have nothing to say except "what he has already said." Thereupon it grew into a practice not to dissolve an injunction, when exceptions were filed, *or might have been filed,* for insufficiency of the answer; either because it did not respond to the allegations within the knowledge of the defendant, or gave an unfair, equivocal or evasive answer, which would be good cause for exceptions. So the principle established is this: Inasmuch as our Courts of Equity are not always open, and are open only twice in the year, and then but for one week, the plaintiff (upon a motion to dissolve an injunction) may rely not only upon the equity "confessed in the answer," but may have the benefit of any exception to the sufficiency of the answer; so that, if it does not respond to an allegation, the want of which response would be good ground of exception, or if it is evasive or manifestly unfair, which would also be good ground of exception, the injunction will be continued to the hearing. In other words, the defendant cannot have the injunction dissolved, without putting in a full answer, that is, an answer which would be sustained upon exceptins.

The principle then is fixed, and the extent of the departure is limited by the necessity growing out of a different state of things in our judiciary sustem—and it is this: We have not time to consider exceptions to an answer; therefore, upon a motion to dissolve an injunction, we

will look into any matter of exception, and not confine ourselves to the equity confessed by the answer.

In the case under consideration, there is *no equity confessed by the answer,* and there is no ground of exception to the answer. It is full as to all matters within the knowledge and information of the defendant, and if it had been excepted to, the Master would have (39) reported against the exceptions; and as the plaintiff was not able to maintain his exceptions, "the injunction is gone"—it is *ipso facto* dissolved, on the Master's reporting the answer sufficient. Drewry on Injunctions, cited *supra.*

The interlocutory order dissolving the injunction is affirmed.

PER CURIAM. Decree below affirmed.

Cited: Lloyd v. Heath, post, 41; *Wright v. Grist, post,* 206; *Thompson v. Williams,* 54 N. C., 178; *Ashe v. Johnson,* 55 N. C., 154; *Brothers v. Harrill, Ib.,* 210; *Peterson v. Matthis,* 56 N. C., 32; *Futrill v. Futrill,* 58 N. C., 64; *Capehart v. Mhoon, Ib.,* 180; *Mims v. McLean,* 59 N. C., 203; *Jones v. McKenzie, Ib.,* 206; *Parker v. Grammer,* 62 N. C., 30; *Key v. Dobson, Ib.,* 171; *Williams v. Moore, Ib.,* 212; *Heilig v. Stokes,* 63 N. C., 615; *Galloway v. Jenkins, Ib.,* 165; *Walker v. Gurley,* 83 N. C., 433; *Mfg. Co. v. McElwee,* 94 N. C., 429; *Cobb v. Clegg,* 137 N. C., 159, 160, 161; *Zieger v. Stephenson,* 153 N. C., 530; *Person v. Person,* 154 N. C., 454.

HENRY S. LLOYD v. R. R. HEATH and others.

On a motion to dissolve an injunction of a special nature, as to stay waste, and the like, where the injury would be irreparable, the bill will be read as an affidavit to contradict the answer.

This was an appeal from an interlocutory order of the Court of Equity of MARTIN, of Fall Term, 1852, made in the cause by his Honor Judge SETTLE, dissolving the injunction which had been granted therein.

The plaintiff owns a large tract of land in "Quitsney pocosin," and valuable only for the timber. He alleges that the defendants have trespassed on his land, and have cut thereon a large quantity of valuable timber; that he has instituted an action at law for the trespass, which is still pending; that the defendants have now on hand 200,000 shingles got off his land; that they are in doubtful circumstances, if not insolvent; and he therefore fears they will not be able to pay the damages which he expects to recover in his action at law. The prayer is, that the defendants be restrained from further trespassing, and be also

restrained from selling the shingles, until the question of title to the land where the shingles were got, is decided.

The defendants say they have a right to get shingles on the Taylor grant, which adjoins the plaintiff's land; but that the part of the Taylor grant where they have been getting shingles, is at least one-half (40) mile from plaintiff's land. They say further, they have a license to get timber on the lands of one Bond, which also adjoins the plaintiff's land; but they are certain they have not crossed the line, because they have had the lines run by one Phelps, a competent surveyor; and "the plaintiff, being informed that the lines were to be run, said that he would be satisfied with the running, and would be willing to asquiesce in the result thereof." They do not, however, aver that the plaintiff had notice of the time when the lines were to be run, or that he took any part in making the survey. They thereupon aver broadly, that *they have not cut a tree, or got any timber on the plaintiff's land.* In regard to the allegation of insolvency, they simply say, "they are perfectly able to pay any damages which it is possible for the plaintiff to recover in his suit at law."

Moore, with whom was *Biggs,* for the plaintiff.

PEARSON, J., after stating the case as above set forth, proceeded:— His Honor dissolved the injunction, we suppose, on the ground that the plaintiff's "equity was denied" by the averment that the *"defendants had not cut a tree, or got any timber on the plaintiff's land;"* and that, in regard to the allegation of insolvency, the answer was full, because, if the plaintiff had sustained no damage, it was a matter of in- (41) difference whether the defendant were solvent or insolvent.

His Honor fell into error by not adverting to the distinction, which we have attempted to point out in *Capehart v. Mhoon, ante* 30, between injunctions to stay the collection of money on a judgment recovered at law, and injunctions to stay waste, or injuries in the nature of waste, where the damages are irreparable. In the one, the injunction is dissolved, as a matter of course, upon the coming in of the answer, unless the equity is confessed; or, according to our practice, unless the answer is defective in not responding to a material allegation, or is unfair or evasive, so that exceptions to it would be sustained. In the other, a different rule is acted on, and inasmuch as to dissolve the injunction would be to allow the injury to be done (and in the forcible words of one of the Chancellors, "a tree that is cut down, cannot be made to grow again") where the plaintiff fails to elicit from the defendant a discovery, which admits the allegations of the bill, the bill is allowed to be read as an affidavit on the part of the plaintiff. And if,

upon the whole case, the matter is left doubtful, the injunction will be continued until the hearing, so as to give the plaintiff a chance to support his allegation by proof, before a thing, the consequence of which is irreparable, is allowed to be done.

"For the purpose of opposing a motion to dissolve the common injunction, affidavits are never allowed to be read to contradict the answer. A distinction was however adopted at a very early period, in regard to injunctions restraining certain wrongful acts of a special nature, as distinguished from the common injunction for staying proceedings at law." "And it may be stated to be, at the present day, the settled practice to permit affidavits to be read in opposition to the answer, at certain stages of the proceedings, in cases of *waste, and of injuries in the nature of waste;* for the mischief is irreparable; the timber, if cut, cannot be set up again:—in other words, the mischief, if permitted, cannot be retrieved." Drewry on Injunctions, 429. In accordance with this principle, which is a very plain and just one, it was held in *McDaniel v. Stoker,* 40 N. C., 274, and *Griffin v. Carter, Ibid.,* 413, that upon a motion to dissolve an order restraining the defendant from running slaves out of the State, the bill might be read (42) as an affidavit; and as it appeared, "taking the whole together," that the question was doubtful, inasmuch as the slaves were within the control of the court, they should be kept so, until the matter was decided at the hearing. For, if the injunction was dissolved, the slaves would be carried to parts unknown, and the injury to the plaintiff, if he succeeded at the hearing, would then be irreparable. So in *Purnell v. Daniel,* 43 N. C., 9, a motion to dissolve an injunction restraining the defendant from cutting a ditch, was refused, although the defendant denied the plaintiff's whole quity, and the plaintiff had no proof whatever; but the Court allowed the bill to be read as an affidavit, and it appearing that it was a case of disputed boundary, the motion was refused—so as to give the plaintiff a chance to prove his allegations at the hearing. For if the defendant had been allowed to cut the ditch, the damage would have been done, and the plaintiff's proof at the hearing could not *undo it*—in other words, the mischief, if allowed to be done, could not be retrieved. In *Reed v. Kinnamon, Ibid.,* 18, the principle of allowing the bill to be read as an affidavit, in opposition to the answer, was extended to the case of an injunction restraining the defendant from suing out a writ of possession, after a recovery in ejectment. The application of the rule to such a case was doubtful, because of the judgment at law; but the Court extended the rule so as include that case, on account of its very peculiar circumstances. An old man who had been living at a place for more than forty years, was about to be turned out of "house and home"—all of the associations of

his life were to be broken up—and the motion to dissolve was pressed, simply on the ground that the answer did not admit an allegation which was not charged to be within the knowledge of the defendant. Under these circumstances, the Court considered that the damage would be irreparable—that if he was turned out of possession, and should at the hearing establish his right, he could not be put *in statu quo;* and upon that ground the bill was was allowed to be read as an affidavit, in opposition to the answer, and the Court refused to allow him to be turned out of possession, until he had an opportunity of proving his allegations at the hearing.

As was said in *Purnell v. Daniel,* "Here then is a case of dis-
(43) puted boundary—how can we decide it without proof?" Are the defendants to be allowed to go on and cut timber before the dispute is decided, merely because they are of the opinion that the line of plaintiff has not been crossed? Are they to be allowed to sell the shingles which, it may be, were taken off the plaintiff's land, upon the averment that they have done the plaintiff no damage, and are therefore perfectly able to pay all he can recover in his action at law? Certainly not. The bill, taken as an affidavit of the plaintiff, shows that he believes that he has been trespassed upon; he has instituted an action at law to try the question; and as the shingles are now under the control of this Court, the fund will be protected until the dispute about the boundary is decided. As little as the defendants could have done, would have been to accompany their answer with an offer to give bond and surety for the value of the shingles, if allowed to sell them, upon a suggestion that the shingles may be injured by the weather, if not disposed of; but no offer of the kind is made—the defendants content themselves with a general averment that they are able to pay all that the plaintiff can recover.

The injunction ought to have been continued until the hearing, and the order for its dissolution must be reversed. This opinion will be certified.

PER CURIAM. Decree below reversed.

Cited: Wright v. Grist, post, 206; *McNeely v. Steele, post,* 244; *Thompson v. Williams,* 54 N. C., 178; *Wilson v. Mace,* 55 N. C., 7; *Ashe v. Johnson, Ib.,* 154; *Brothers v. Harrell, Ib.,* 210; *Peterson v. Mathis,* 56 N. C., 32; *Gause v. Perkins, Ib.,* 181; *Swindall v. Bradley, Ib.,* 356; *Key v. Dobson,* 62 N. C., 171; *Williams v. Moore, Ib.,* 212; *Person v. Person,* 154 N. C., 454.

BENJAMIN JOHNSON v. JOHN LEE & M. S. CRAWLEY.

A purchaser at sheriff's sale, takes subject to the equities which the estate is liable to in the hands of the debtor.

Where A conveyed land to B by deed of bargain and sale, which was never registered, and took B's note for the purchase money; and B afterwards becoming embarrassed, undertook to reconvey the land to A by a writing on the back of the deed, but through ignorance or mistake of the draftsman, the same was ineffectual to pass the legal title, and A at the same time delivered back to him his note:—*Held*, that A would be entitled to relief as against B in this Court, on the ground of mistake, and, therefore, that his equity is paramount to one claiming as purchaser at sheriff's sale, to satisfy executions against B.

CAUSE removed from the Court of Equity at HALIFAX, at Fall Term, 1852. The facts of the case are sufficiently stated (44) in the opinion delivered by this Court.

Moore, for the plaintiff.
No counsel for the defendants.

PEARSON, J. In November, 1847, the defendant, Lee, sold to the other defendant, Crawley, the land mentioned in the pleadings, for $650; and Lee executed to Crawley a deed of bargain and sale for the land, taking from Crawley two notes for $325 each—one payable on 25 December, 1847—the other on 25 December, 1848, to secure the purchase money. Under this deed, which *has not been registered*, Crawley went into possession, and rented out the land for 1848 and 1849.

On 7 May, 1849, Crawley handed back the deed to Lee with the following endorsement:—"Know all men by these presents, that I, M. S. Crawley, have this 7 May, 1849, conveyed, and do by these presents relinquish the within deed to John Lee, to him and his heirs forever.

"Witness—EZRA LEE. M. S. CRAWLEY."

Crawley was very much indebted, and on the same day executed a deed of trust, by which all of his other property was conveyed to secure certain creditors. On 8 May, 1849, several judgments were taken against Crawley by creditors not secured, before a single justice; and executions issued and were levied on the land, and returned to May Term of Halifax County Court. Regular proceedings were thereupon had, and the plaintiff became the purchaser of the land, and took the sheriff's deed therefor.

The plaintiff alleges, that before the executions were levied, the defendant, Crawley, being utterly insolvent, combined with the other defendant, who is his father-in-law, to defraud his creditors, and par-

ticularly the creditors who were about to have their executions levied on the land, and fraudulently surrendered to the defendant Lee the deed of bargain and sale (which had not been registered), who took and now conceals it, and will not produce it in order that it may be registered.

The prayer is, that the deed, if in existence, may be produced,
(45) in order to have it registered; and if it has been destroyed, that the defendants be decreed to convey to the plaintiff, and for an account of the profits.

The defendants aver that Crawley, finding himself unable to pay all of his debts, and not having paid either of the notes given to secure the purchase money for the land, it was agreed between him and the other defendant, Lee, that if Lee would give up to him the said notes, he would convey the land back to Lee; and in pursuance of this agreement, before the land was levied on, to wit, on 7 May, Lee did hand back to Crawley the two notes aforesaid, as a consideration for the reconveyance of the land; and Crawley handed back to Lee the deed of bargain and sale, with the endorsement above set out, supposing that as the deed had not been registered, that would be effectual to revest the title; and they produce the deed, with the endorsement thereon.

It is established by the proofs, that nothing had been paid on either of the notes, and that Lee handed them back to Crawley on the same day that Crawley handed back to him the deed—which was on the day before the levies were made; and of this the plaintiff had express notice before he purchased.

We agree with Mr. Moore, that a deed of bargain and sale operates to raise the use, and the legal title is passed by the Statute of Uses the instant the deed is delivered; so that registration is not necessary in order to pass the title, but is only required to make the deed competent as evidence.

We agree with him also, that the fact of handing back the deed before registration does not revest the title; and that the endorsements made on it in this instance, did not have the effect of a reconveyance.

So, in this Court, the plaintiff stands in the same plight and condition, as if the deed had been registered; and the only effect of its not being registered is to give the plaintiff a right to come into this Court. The question then is, have the defendants an equity? Would the defendant Lee be entitled, in this Court, to call on the plaintiff for a conveyance, supposing he had obtained the legal title by the sheriff's deed?

A purchaser at sheriff's sale, takes subject to all the equities that the estate was liable to, in the hands of the debtor; for he takes only that
which the debtor has a right to sell; therefore, the plaintiff, is
(46) subject to any equity that Lee had against Crawley, the debtor.

The allegation of fraud, the ground upon which the bill rests, is put out of the case by the proofs. There is no doubt that Crawley had never paid one cent of the purchase money, and surely there could be no fraud in his agreeing, *before there was a levy,* to let Lee have back the land in satisfaction of the debt due as the price of the land. As he was about to fail, common honesty required him to do it. An interesting question is here suggested: A debtor, before any creditor obtains a lien, makes a parol agreement to convey land in satisfaction of a debt; before the conveyance is executed, another creditor obtains a lien, and the land is sold by the sheriff; the agreement was *bona fide*—the debtor admits it, and refuses to take advantage of the Statute of Frauds—can the purchaser at sheriff's sale do so? We pass by this question. We also pass by the question, whether the endorsement on the deed, although not effectual as a conveyance, is not a note or memorandum of the agreement, signed by the party to be charged therewith, sufficient to satisfy the Statute of Frauds;—and put the equity of the defendant, Lee, on the broad ground, that he executed his part of the agreement by giving up to Crawley the two notes, and Crawley attempted to execute his part and to reconvey the land, but in consequence of mistake or ignorance in the draftsman, the means used did not carry the intention into effect. Here is a plain ground of relief, not by the specific performance of an executory contract, but by relieving against a mistake in the execution of a contract. This equity would be good against Crawley, and is, therefore, good against the plaintiff who stands in his shoes. The bill must be dismissed, with costs.

PER CURIAM. Bill dismissed.

Cited: Hicks v. Skinner, 71 N. C., 540; *Burgin v. Burgin,* 82 N. C., 201.

JAMES E. WILLIAMSON v. CLEMENT H. JORDAN.

The Act of 1762 (Rev. Stat., ch. 54, sec. 1), allowing a father to appoint a testamentary guardian for his children, does not embrace grandchildren.

CAUSE set for hearing upon the bill and answer at PERSON Court of Equity. Fall Term, 1852, and by consent transmitted (47) to the Supreme Court.

John W. Williams, late of Person County, died some time in the early part of 1852, having previously made and published his last will and testament, which was duly admitted to probate, and the defendant, one of the executors therein named, took out letters testamentary, and assumed all the duties pertaining to his office. The testator, after giving

several slaves and other property to his grandchildren, who were the children of the plaintiff by his marriage with a daughter of the testator, adds the following clause:—"And I appoint my wife, Mary E. Williams, my executrix, and Dr. James E. Williamson, my executor, of this my last will and testament, and I request that the latter will become guardian of both my children and his own." The bill was filed by the plaintiff to compel the defendant to deliver to him the slaves bequeathed to his children, claiming said slaves as their testamentary guardian. The defendant, by his answer, admitted all the material allegations of the bill, and expressed his readiness to deliver the said slaves to any person duly authorized to receive them; but declined delivering them to the plaintiff, for the reason that he had been advised that the testator had no power to appoint a guardian for his grandchildren.

Norwood for the plaintiff.
E. G. Reade for the defendant.

BATTLE, J., after stating the case as above: The claim of the plaintiff to be the guardian of his children, by virtue of the testamentary appointment of their grandfather, is founded, we presume, upon the Acts of 1762 (1 Rev. Stat., ch. 54, sec. 1). That Statute enacts, "that where any person hath or shall have any child or children, under the age of twenty-one years, and not married, it shall be lawful for the father of such child or children, &c.," by deed executed in his lifetime, or by his last will and testament, to appoint a guardian for such child or children. Our Act is very nearly a literal copy of the Statute Charles II, ch. 24, and must receive the same construction. In England, it is well settled that none but a father—not even a mother or other
(48) person standing *in loco parentis*—can appoint a guardian under the Statute of Charles. Macpherson on Infants, 82 (25 Law Lib.),—1 Bl. Com., 462, in the notes to Chitty or Wend. Ed.—3 Atk., 519. The words of the Act are plain, and we have no right to extend them by construction. Upon an analagous principle, the power to appoint among children, will not authorize an appointment to grandchildren. *Rankin v. Hoyle,* 41 N. C., 161, Sug. on Pow., ch. 9, sec. 5, page 501 (2 Law Lib., 253). The bill must be dismissed, with costs.

PER CURIAM. Bill dismissed.

Cited: Camp v. Pitman, 90 N. C., 617.

JAMES D. CAFFEY and wife, and others, v. CORNELIUS KELLY and wife, Isabella.

The husband, by marriage, acquires title to his wife's personal property, not claimed adversely by any other person, whether he reduces the same into his possession or not; and her being tenant in common thereof with another, makes no difference.

As where, after marriage, certain slaves, the property of the wife, remained at the house of her mother, with whom the parties lived, as she did at the time of marriage, and were understood to belong to her and her brother—though the husband did not exercise any acts of ownership over them, nor take them away on removing to another residence, where, shortly, afterwards, he died:—*Held*, that he acquired title thereto by virtue of his marital right.

CAUSE removed from the Court of Equity of GUILFORD, at Fall Term, 1852.

James McNeely died intestate in the early part of the year 1849, leaving surviving him, a widow, the *feme* defendant, since intermarried with the other defendant, and two children, the *feme* plaintiffs. His widow administered on his estate, and this bill is filed for a settlement of her accounts as administratrix. The principal questions raised by the pleadings, calling for a decree of this Court, and on which proofs were taken upon the plaintiff's replication to the answer, were substantially the following. It appears, that at the time of the defendant Isabella's marriage with her intestate, she owned an undivided half of two slaves (Sarah, aged about five years, and Thompson about five months, as a tenant in common with her brother, William (49) Mitchell, which slaves they had acquired by gift from their father; and she and her then husband went to live with her mother, Mrs. Mitchell, in whose possession were the said slaves, as well also a quantity of furniture belonging to the defendant, Isabella. Whilst living with Mrs. Mitchell, it does not appear that the intestate ever exercised any positive acts of ownership over the said slaves, nor that he set up any claim to them by virtue of his marriage; but they were simply understood in the family to be the property of the said Isabella and William as tenants in common. Nor does it appear that he asserted any ownership or control over the furniture there, which was his wife's. The intestate died within about three months after his marriage—having, a short time before his death, removed to a house of his own; and on removing, he did not carry with him the said slaves, or either of them, nor the said furniture. The bill alleges that the defendant's intestate, by virtue of his marriage, and acts of ownership exercised by him over the said property, acquired title thereto; and prays that the defendants may be held to account for the same as part of his estate,

which had not been done by them in their inventory and accounts rendered.

The answer denies that the intestate ever reduced said property into possession, or claimed or exercised control over the same, and insists upon the title of the defendant Isabella, by right of survivorship. Proofs were taken also upon the question of the defendants' liability to account for certain bonds made to the defendant, Isabella, before her said marriage with the intestate, but this point was yielded by the plaintiffs' counsel in this Court.

Miller for the plaintiffs.

No Counsel appeared for the defendants in this Court.

BATTLE, J. There can be no doubt that the negro girl Sarah and the boy Thompson became the property of the defendant Isabella's intestate by his intermarriage with her. They were at the house of the said defendant's mother, with whom she lived at the time of her marriage, were not claimed adversely by her mother or any other
(50) person, and, therefore, became the property of her husband *jure marito,* whether he ever took them home or not. *Pettijohn v. Beasley,* 15 N. C., 512, and *Stephens v. Doak,* 37 N. C., 348, cited by the plaintiffs' counsel, show that the wife's being tenant in common with another person, of the said slaves, made no difference. The household furniture which the said Isabella had at her mother's, at the time of her said marriage, became also the property of her husband, for which she, as his administratrix, is bound to account as part of his estate. But the notes which she held, payable to herself, having never been collected by her husband, survived to her; and it is now admitted by the plaintiffs' counsel that she is not bound to account for them.

The plaintiffs are entitled to an account from the defendants, of the administration of the intestate by the defendant Isabella, for which a reference must be made to the Clerk, if the parties desire it.

PER CURIAM. Decreed accordingly.

Cited: Benbow v. Moore, 114 N. C., 273; *Fowler v. McLaughlin,* 131 N. C., 210.

DEMPSEY SOWELL v. SAMUEL BARRETT

In a bill filed to redeem property, conveyed to the defendant by a deed absolute on its face, a Court of Equity will not relieve the plaintiff, upon mere proof of the parties' declarations. There must be proof of fraud, ignorance or mistake, or of facts inconsistent with the idea of an absolute purchase.

SOWELL *v.* BARRETT.

CAUSE removed from the Court of Equity for MOORE, at Fall Term, 1852.

In his bill, filed 22 November, 1850, the plaintiff states, that early in 1847, he was much involved in debt, and addicted to intemperate habits, which greatly impaired his mind, "though his recollection of the business transactions in which he was engaged is very distinct." That whilst thus distressed by pecuniary embarrassments, the defendant, who is his near relative, in affluent circumstances, and a shrewd manager, professed to feel great sympathy in his condition; that on some few occasions, theretofore, the defendant had advanced him money; and that on 25 January, 1847, he called on and obtained from de- (51) fendant a loan of $383, which, together with sums previously borrowed from him, amounted to $500; and to secure the payment thereof, he conveyed to William Barrett a tract of land worth $350, and a slave named Jack, worth $550 to $600, in trust, for the benefit of the defendant—the deed stipulating that the property was to remain in the plaintiff's possession for one year, at the end of which time it was to be sold, in the event the debt secured was not paid. That he rented the land for that year, and the defendant received the profits, promising to account for the same in their final settlement. That the said slave, being in the possession of plaintiff, was seized and put in jail, under executions issuing from a Justice of the Peace, for $181.35; and that, on 1 May, 1847, whilst the said slave was in jail, and the plaintiff "was much confused and excited with liquor, and busily engaged in preparing for the funeral of an aged lady that had been a member of his family, the defendant came to his house—stated that said property was liable to the satisfaction of the said executions—and advised your orator, excited with liquor, confused with business, and bewildered in intellect as he was, to execute to him instruments purporting to be an absolute bill of sale for said Jack and tract of land, &c." That he then stated to the defendant, that the negro, Jack, was a favorite servant, and that "he would not consent to sell him absolutely; but if defendant would allow your orator to redeem the boy and the land when he got able to do so, and would pay said executions, your orator would execute the instruments proposed." That the defendant agreed that he might redeem the said property at any time within ten years, and such was the understanding between them when he executed said deeds. He admits that the defendant, in 1849 or 1850, paid off the said Justice's executions, $181.35, which sum, added to the said sum of $500, constituted the whole amount of his indebtedness to him.

The plaintiff further states that in 1847, the defendant assumed the payment of a debt due by him to one Ritter, and that to secure himself therein, the defendant "cause him to convey to him by deeds pur-

(52) porting to be absolute, but with the express understanding that your orator might redeem, a large amount of personal and real property, of value much greater than the debt assumed, &c.," and in May, 1848, he did redeem the same—though, before he was permitted by defendant so to do, the defendant claimed $50 for his trouble, and services rendered, which he paid. That this conduct on the part of the defendant first awakened his suspicions of him, and before he paid the said $50, he required defendant to admit, before a witness, his right to redeem the boy Jack and the land aforesaid, upon his payment of the debt due, to wit, $681.35. That acting on this understanding, he sought a purchaser for said land, and finally bargained to sell the same to one Cole for $350—intending to apply the purchase money towards the payment of his debt to the defendant.

That since that time the defendant has on sundry occasions and to different persons, admitted his right to redeem said property, and on 26 September, 1850, he tendered to the defendant the whole amount of his debt, and demanded a reconveyance of the said land and negro—and that the defendant refused to comply with his demand. The prayer is for a redemption of the property, and for an account.

The defendant, in his answer, admits that the plaintiff was, in 1847, addicted to intemperate habits, and much involved in debt; and that, being willing to assist him, he had from time to time loaned him small amounts, and afterwards, as charged in the bill, the sum of $383, amounting, in all, to $500; and that, for the purpose of securing the same, he took a deed of trust, as alleged, in which it was stipulated that the property conveyed should remain in plaintiff's possession for the year. That he received the profits of the land for that year; and further, that the negro, Jack, while so in plaintiff's possession, was seized under execution and put in jail. That being alarmed at the course things were taking, and fearing he would be deprived of the security for his debt, he proposed that if plaintiff would make him an absolute title to said land and slave, he would pay off the said executions, and that he would send another negro in place of Jack, to assist him in working his crop—and that the plaintiff readily and gladly assented to the proposition.

(53) The defendant further states, that the said negro, Jack, was and is a cripple, and would not at the time have sold for cash for more than $400—that he did not desire to purchase said property at the price mentioned—and that he did so, not because he considered it a bargain, but to save himself from apprehended loss. And the defendant avers, that his said purchase was entirely unconditional, and he does not believe that the plaintiff, at the time, had any wish to have the property back, but considered it well sold; nor would he, in his sober moments, ever have thought of its redemption, except from the extra-

ordinary rise which has recently taken place in this species of property. He further avers that no advantage was taken of the plaintiff in procuring the conveyances for said property, but they were by him freely executed. It is true, he states, the transaction took place about the time of the funeral of an aged woman (a pauper at the poor-house, kept by plaintiff), but the bargain took place in the forenoon, when the plaintiff was sober and had full knowledge of what he was doing.

The defendant also admits, that in 1847, he agreed, at the instance of plaintiff, to assume a debt of his to one Ritter of $400 to $500: and to secure himself, took a conveyance of property, absolute on its face, but under an agreement with the plaintiff that he should have the use and benefit thereof—a portion of which property was under incumbrance—in raising which, the defendant was at much trouble and expense, and on account whereof he received $50, which was a reasonable charge. He further admits that he may have told plaintiff at some times that he might have back negro Jack and the land, upon the repayment of the money due him; and for a long time he would have gladly got back his money and interest for the said property; but he positively denies that after his payment of the said justices' judgments, he was under any legal liability to do so. He admits also the sale of the land to Cole for $350, but says the same was made without any reference to the plaintiff, who, so far as he knows, had no agency in the matter.

The plaintiff replied to the answer, and proofs were taken, the general result of which will appear in the opinion delivered in this Court.

Kelly for the plaintiff.
Strange for the defendant. (54)

PEARSON, J. Since *Streator v. Jones,* 10 N. C., 423, there has been a uniform current of decisions, by which these two principles are established in reference to bills which seek to correct a deed, absolute on its face, into a mortgage or security for a debt: 1. It must be alleged, and of course proven, that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage; 2, the intention must be established, not merely by proof of declarations, but by proof of facts circumstances, *dehors* the deed, inconsistent with the idea of an absolute purchase. Otherwise, titles evidenced by solemn deeds would be, at all times, exposed to the "slippery memory of witnesses." These principles are fully discussed in *Kelly v. Bryan,* 41 N. C., 283, and it is useless to elaborate them again.

The plaintiff has failed in both particulars. He gives no satisfactory account of the fact that the deed is absolute on its face; and he proves no facts and circumstanecs *dehors* the deed, inconsistent with the idea of

an absolute purchase. It is true he proves *declarations* of the defendant, which renders it highly probable that there was some understanding between the parties, that the defendant would take back his money and reconvey the negro: but this does not bring the case within the two principles above announced.

It was suggested upon the argument, that as the defendant at the time the deed was executed, stood towards the plaintiff in the relation of a creditor, whose debt was secured by a deed of trust, the case fell within the rule which prohibits one occupying a confidential relation from dealing with one under his influence, unless he could take the *onus of proving* that no advantage was obtained, and no undue influence exerted or brought to bear.

The case does not come within that principle. The property was in the hands of a trustee whose duty it was to act as the agent of both the creditor and debtor, and to see that it brought a fair price, if it became necessary to sell. The trustee, therefore, could not have bought of the debtor, because, as it was his duty *to sell,* he was not at liberty *to buy.* But the creditor was under no such disability; for it (55) was not his duty to sell, and there was nothing growing out of the relation in which he stood to the debtor, to prevent him dealing with the debtor, and making a bargain by which, upon the advance of a further sum of money, the deed of trust was cancelled, and an absolute deed executed—and the plaintiff must stand or fall upon his being able to bring the case within the two principles applicable to bills of this kind, although it may be that the fact of there having been a prior deed of trust securing the larger part of the purchase money, would be allowed some weight when only a slight matter was necessary to "kick the beam." *Kemp v. Earp,* 42 N. C., 170.

PER CURIAM. Bill dismissed with costs.

Cited: Brown v. Carson, post, 274; *Yates v. Cole,* 54 N. C., 114; *Clement v. Clement, Ib.,* 185; *Glisson v. Hill,* 55 N. C., 259; *Bonham v. Craig,* 80 N. C., 227-8-9; *Sandlin v. Kearney,* 154 N. C., 605.

THOMAS FULFORD and others v. WILLIAM HANCOCK, Administrator of Sabra Shackleford.

Where the testator bequeathed the residue of his estate to be divided between a son and two daughters, the son to have *half a part,* and the daughters the remainder:—*Held,* that the word "part" means *share,* and the son therefore takes one-sixth.

FULFORD *v.* HANCOCK.

CAUSE removed from the Court of Equity for CARTERET, at Spring Term, 1852.

Stephen Fulford died in the year 1824, having previously made and published his last will and testament, in which he devised as follows:

"I will and bequeath unto my beloved wife, Louisa, the house and plantation during her widowhood, and after her death, to my son, Thomas Fulford, and all the back lands included. Also my will and desire is, that my wife, Louisa, is to have Quake and Perry, also Peg and her children, during widowhood; and after her death, my will is, that my son, Thomas Fulford, is to have my chest, buffet and desk, and a mahogany table, also half a dozen of flat back chairs; the remainder of my furniture and all property to be divided betwixt my two daughters and son, Sabra Shackleford, Abigail Simpson, her heirs or assigns; my son, Thomas Fulford, to have half a part, and my two daughters above mentioned, the remainder."

The will was duly proved by the plaintiff, Thomas Fulford, the executor therein appointed, who qualified as such, and assented to the legacies therein given. Louisa Fulford, the widow, died in the year 1850, as also did Sabra Shackleford, the intestate of the defendant. The bill was filed by Thomas Fulford and Ziba Simpson and his wife Abigail, against the defendant, as the administrator of Sabra Shackleford, alleging that the plaintiff, Thomas, had purchased the interest of the other plaintiffs in a part of the slaves and their increase, given to the said Louisa for life, and praying for a partition of said slaves between himself and the defendant, as the administrator of the said Sabra. In said partition, he claimed to have three-fourths of said slaves assigned to him, to wit, one-half in his own right, and one-fourth by virtue of the assignment from Simpson and his wife; and he alleged that upon a petition in the County Court for partition of a portion of the slaves given by the same clause of the will of his testator, the slaves were divided between himself and his two sisters in those proportions. The defendant filed his answer, in which he admitted all the material facts stated in the bill, but contended that upon a proper construction of the will of Stephen Fulford, the plaintiff, Thomas, was entitled to only one-sixth or two-twelfths of the said slaves in his own right, and five-twelfths under his purchase from Simpson; and that he was entitled in right of his intestate to the remaining five-twelfths; and he insisted that the construction must be made upon the will itself, and not by any thing which had been done by the parties.

(56)

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

J. W., with whom was *J. H. Bryan* for the plaintiffs.
Donnell for the defendant.

BATTLE, J., after stating the case as above, proceeded: The only difficulty between the parties arises from that clause of the will which gives the "remainder of the furniture and all property" to be divided between the two daughters and son, the son "to have half a part," and the two daughters the "remainder." The counsel for the plaintiffs contends that the obvious meaning is to give the son one-half
(57) of the property there referred to, leaving the other half to be equally divided between the two sisters. He contends further, that such meaning is made more manifest by the intent of the testator, apparent from other parts of the will, to give the son much the larger portion of the property; and also by the parties themselves having put that construction upon the clause, when they divided the other slaves.

The defendant's counsel objects to this construction, and contends that the testator, having in the previous part of his will given his son the greater part of his estate, intended that his daughters should have larger shares in the residue; and to that end declares that his son shall have half a part; that is, half of a third part, or one-sixth part of the said residue, and his two daughters shall take the remainder. He insists, also, that the construction must be made upon the will itself, and cannot be affected by any thing done by the parties. We agree with the defendant's counsel, that the acts of the parties in relation to the other slaves, can have no effect in determining the construction of the will. The intention of the testator must be ascertained by what he has said in his will, and not by what other persons may have done after his death. The aid which each party seeks to derive from the other provisions in the will, seems to be about equal. It is almost, if not quite, as probable that the testator intended to make the portions of his daughters more nearly equal to that of his son, as that he intended to continue his preference for his son, in this disposition of the residue. We are then driven to look to the clause itself for its interpretation, and from that, we think, the son was intended to take only one-sixth part of the residue. The word "part," in its connection, evidently means share. It is often so used in common parlance, and that is one of the meanings given to it in dictionaries of high authority. Now substitute "share" for "part," and the intent seems plain. The property is to be divided between the two daughters and son. If nothing more is said, the part or share of each is evidently one-third of the whole. The son is to have half a share. A share is a third of the whole: half a share must therefore be half of one third—that is, one-sixth part of the whole. The testator does not then say that the daugh-

ters are to have whole shares, for that would have left a small portion undisposed of; but he gives them the remainder—all (58) that his son did not take. He thus, too, obviates the difficulty that might otherwise have arisen upon the supposition that the son was to have half as much as each of the daughters. The decree must be for a partition according to the rule above expressed. The costs must be paid out of the fund.

PER CURIAM. Decree accordingly.

HEMAN H. ROBINSON, Administrator, v. DAVID LEWIS.

If, by matter appearing on the face of the pleadings, the plaintiff either has no equity or his remedy therefor is barred by force of a public Statute, the objection is valid at the hearing—though not insisted on by plea or demurrer, nor relied on in the answer.

As—where the time of performance specified in a mortgage of personalty was the 15th day of August, 1848, a bill for redemption, filed 17th day of August, 1850, was dismissed, under the Act of 1830 (Rev. Stat., ch. 65, sec. 19).

CAUSE removed from the Court of Equity for BLADEN, at Fall Term, 1852.

Allen N. Treadwell, the plaintiff's intestate, on 6 March, 1847, conveyed to the defendant a negro slave, for the consideration of $600: as expressed in the deed, which was in the ordinary form of an absolute bill of sale, with the following conditions annexed:—"that if the said Allen N. Treadwell, his executors, &c., do pay to the said David Lewis, his executors, &c., the sum of $600, with interest from 15 August, 1846, on or before 15 August, 1848, then the said David Lewis binds himself to deliver up the negro man to said Treadwell, his executors, &c., and to account for the said negro's hire from 1 March, 1847, at the rate of $125 per year," &c.

The bill was filed by the plaintiff, as administrator of Treadwell, on 17 August, 1850. It is alleged that the said conveyance was a mortgage and so intended by the parties, and that the sum of money mentioned therein was tendered to the defendant; and the prayer is, to redeem the slave. The defendant in his answer denied that the instrument was in fact, or intended to be a mortgage, but that it was a contract for a resale of the slave; and that the plaintiff not hav- (59) ing performed the conditions thereof, he insisted upon his title to the slave as absolute. There was a replication to the answer, and proofs taken upon the points raised by the pleadings, which, as the cause was decided at the hearing upon other grounds, it is unnecessary to state here more fully.

No counsel for the plaintiff.
Strange for the defendant.

PEARSON, J. The allegation that the deed of the plaintiff's intestate, executed 6 March, 1847, by which the slave is conveyed to the defendant, is a mortgage, we think established. Upon its face, the deed purports to be a mortgage—a debt of $600 is set out—day of payment is given until 15 August, 1848, with interest from 15 August, 1846, on the $600—and the parties agree on the rate of hire to be allowed for the services of the slaves, provided the money and interest are paid. This stamps upon the deed the character of mortgage. The evidence, instead of rebutting the *prima facie* presumption of a mortgage, tends to confirm it.

But supposing it to be a mortgage, there is on the face of the bill a fatal objection to the plaintiff's right of redemption. The time of performance, specified in the mortgage, is 15 August, 1848. The bill is filed on 17 August, 1850. So the plaintiff has "failed to perform the condition," and "has omitted to file his bill to redeem, for the space of two years after the forfeiture;" and he is "held and deemed forever barred of all claim in equity to the property aforesaid." Rev. Stat., ch. 65, sec. 19. It is true he fell short only *two days,* but the Statute has no proviso; and although it may seem hard, we cannot help it—*sic lex ita scripta est.* If two days over the time were allowed, then ten, twenty days would be insisted on, and there would be no end to the violation of the Statute. So we must act on the rule, "a miss is as much as a mile," or defeat the object of the Statute, which was to restrict the equity of redemption in personal property to two years—that species of property being transitory and shifting—and not allow an indefinite time
(60) to redeem, as is the case in regard to real property, until foreclosure or presumption of satisfaction. In this case, the mortgagor died a few days before the forfeiture, and the plaintiff did not administer upon his estate until some nine months afterwards, and he tendered the money a few days before 17 August, 1850; but there is no saving clause in the Statute.

It is said, the benefit of this Statute ought to have been insisted upon by plea, and at all events, there ought to have been a demurrer, or the matter should have been relied on in the answer; and that it cannot be started and relied on for the first time at the hearing. We have, after much consideration, arrived at the conclusion that the objection is fatal, although taken for the first time at the hearing; and the bill must be dismissed.

The question may be looked at in two points of view. 1. Before the Statute, the Courts of Equity allowed an indefinite time for redemption,

both as to personal and real property. The Statute says in regard to personal property—this right or equity of redemption shall be restricted to two years, after forfeiture. Upon the face of the bill, therefore, taken in connection with the Statute, of which the Court *is bound to take notice,* the plaintiff, at the time he filed his bill, had no right or equity of redemption; and it follows, as a matter of course, that upon the hearing the Court, not being able to declare that he has an equity, must dismiss the bill, on precisely the same ground that in a Court of law judgment will be arrested (although the objection has not been taken either by plea or demurrer) if, upon the face of the declaration, it appears that the plaintiff has no cause of action. For no Court will give judgment or make a decree, if it appear on the face of the proceedings, that the plaintiff is not entitled to it according to law.

2. Viewed as a statute of limitations, there is no reason why the objection, appearing on the face of the bill, may not be taken advantage of at the hearing. It was at one time the received opinion, that the Statute of Limitations, or objections in analogy to it, lapse of time, &c., could only be taken advantage of *by plea,* as well in Courts of Equity as in Courts of Law. It was afterwards settled, that as a plea in equity was a special answer, put in to avoid a general one, there was no reason why the objection, based on the Statute of limitations, (61) might not be relied on in the general, as well as the special answer (or plea). It was then suggested, suppose the matter appears on the face of the bill, what use is there for a plea? why not allow the defendant to take the objection by demurrer? The question was yielded; and ever since the case of *Hardy v. Reeves,* 4 Ves., 466, it has been considered that the Statute of Limitation, or objections in analogy to it, may be taken advantage of by demurrer, if the bill is so framed as to bring the case within the objection, and there is no allegation to take it out of the operation of the Statute, or rule of Courts of Equity, in analogy to a Statute operating at law.

That advantage might be taken of a Statute of Limitations by demurrer, if the bill is so framed as to bring it within the objection, was settled long before it was admitted that advantage could be taken of the lapse of time, by demurrer—*Hovenden v. Annesly,* 2 Sch. & Lef., 630; and, as late as 1826, in *Nesbit v. Brown,* 16 N. C., 30, we find HENDERSON, Judge, insisting that lapse of time is not cause for demurrer, and that it should have been insisted on by the plea or in the answer, for the reason that the plaintiff would then have been prepared to repel it: and TAYLOR, Chief Justice, puts his opinion on the ground that the objection was not relied upon in the answer, *nor was it insisted on at the hearing*—both Judges, however, agreeing, that acording to the late English decisions, recognized by this Court in *Falls v. Torrance,* 11 N.

C., 412, a statute of limitations, or an objection in analogy to it, might be made by demurrer, if it was apparent on the face of the bill. Yielding to the common sense view of the question, if the objection is apparent on the face of the bill, as the Court is bound to take notice of a public Statute, how can it make a decree in defiance of what is apparent? If any matter existed to relieve the case from the bar of the Statute, or from the effect of the lapse of time—such as infancy; coverture, want of intellect—the plaintiff, seeing the case as set out was within the bar, ought to set out these facts so that they might be put in issue, and to require a plea, (the office of which is to bring forward some new matter), when the the objection appearing on the bill is absurd. 1 Daniel, Ch. Prac., 622, and notes.

Assume, then, that when, upon the face of the bill, the case
(62) is barred by a statute of limitations, the statute need not be pleaded, but the objection may be made on demurrer, then the question is, suppose there is no plea nor demurrer, and the matter is not relied on in the answer:—can it be taken advantage of at the hearing? We ask why not?—inasmuch as the Court, when about to give its decree, is bound to look at the whole record, and from that it appears the plaintiff's suit is barred by a statute, which the Court is bound to take notice of? It is admitted, at this day, that there is no occasion for a plea, inasmuch as the matter appears from the plaintiff's own showing. The office of a demurrer in equity is merely to avoid an answer. If the defendant is willing to answer, and does answer, there can be no use for a demurrer. So, there is no use for a plea and no use for a demurrer, when the party is willing to answer. Then the question is, must the answer pray to have the same benefit of it, as if specially pleaded, or made the ground of demurrer? Certainly not. If it was not necessary to plead or demur directly, it cannot be necessary to do so indirectly. There is no occasion for this formula, except where the matter would not otherwise be brought to the notice of the Court, or is a matter of form which the party may waive, and is presumed to waive, unless he insists on it by plea or demurrer, or in his answer, as a substitute for plea or demurrer: *e. g.*, disability in the plaintiff to sue, as being an outlaw or an alien enemy—multifariousness, by whch the defendants or some of them may be unnecessarily put to inconvenience.

If the matter appears on the face of the proceedings, and by force of a public Statute, the plaintiff either has no equity or his remedy therefor is barred, how can the Court make a decree in his favor? Adams, in his "Doctrine of Equity," page 264, says "a plea, like a demurrer, is not compulsory on the defendant; and if he has no strong motive for resisting discovery, an answer is generally the safer course." "An objection, which might have been made by demurrer or plea, will in most

cases be equally a bar when insisted on by answer." "In the case of an objection for want of parties, not taken by demurrer or plea, the rule *formerly* was that whether pointed out in the answer or not, such objection was valid at the hearing"—the only difference being as to cost. Here we see that a defect, not for want of necessary (63) but of *proper* parties, although not pointed out by demurrer or plea, or relied on in the answer, was fatal at the hearing (before the New rules, with which we have nothing to do). *A fortiori,* where there is a want of equity, or where the plaintiff's right to insist upon an equity is barred by law, the objection is valid at the hearing, although not insisted on by plea or demurrer, or relied on in the answer —upon the broad ground, that the Court has no power to decree in favor of a plaintiff, who, according to a public statute, either has no equity or is barred from setting up an equity.

The bill must be dismissed, but as the objection was not taken until the hearing, no cost is allowed.

PER CURIAM. Bill dismissed.

Cited: S. c., 55 N. C., 26; *Whitfield v. Hill,* 58 N. C., 322; *Smith v. Morehead,* 59 N. C., 362; *Guthrie v. Bacon,* 107 N. C., 339; *Oldham v. Rieger,* 145 N. C., 258.

HENRY FISHER v. JOB WORTH and others.

The Court will not entertain a bill filed by a creditor for an account of a fund held by a trustee for the payment of debts, unless all the other creditors are made parties, either plaintiffs or defendants. Otherwise, the trustee might be subjected to as many suits as there are creditors—the account taken in the suit of one, being no protection in the suit of others.

CAUSE removed from the Court of Equity for GUILFORD, at Spring Term, 1850.

In 1842, John Beard, by deed conveyed his estate, real and personal, to the defendant Worth, in trust to secure the payment of all his debts —the plaintiff being one of his creditors. In the fall of 1847, the plaintiff filed this bill against the said trustee, and the other three defendants, creditors of Beard, stating that at the time the said deed of trust was executed, Beard was indebted to him in a considerable sum —that he afterwards obtained judgment therefor—and that a writ of *fieri facias* was levied on a portion of the property conveyed by said deed, and sold to satisfy his execution, but that the same was af-

(64) terwards by suit recovered back by the trustees; and that he then issued a writ of *capias ad satisfaciendum* against said Beard, but made no part of his debt thereby. The plaintiff then goes on, by numerous allegations, to charge negligence and fraud in the management of the trust by the trustee, and fraud between him and his co-defendants in regard to the disposition, loss, purchase and sale of the property conveyed. The prayer is for an account of the fund, and the payment of the plaintiff's share as one of the creditors. It appears from the pleadings, that there were several other creditors of Beard, whose debts were secured by the said deed of trust, not made parties to the suit.

The defendants, in their answers, deny the allegations of fraud in the bill, and that of the trustee particularly insists that the bill should be dismissed for the want of parties. The defendants also aver that the plaintiff, after the said deed of trust was executed by Beard, disclaimed all interest under it, denounced it as fraudulent, had executions levied on the property conveyed by it and a sale thereof; and that he was thus bound by his election, and entitled to no share of the fund.

It is deemed unnecessary to state the pleadings further, which are very voluminous, in as much as the cause turned upon a single point in the Court.

Miller, and *J. H. Bryan* for the defendants.
No counsel for the plaintiff in this Court.

PEARSON, J. A debtor executes a deed conveying all of his property to a third person, in trust to sell the property and apply the proceeds to the payment of his creditors. The plaintiff was one of the creditors, and instead of taking benefit under the deed of trust in the first instance, he opposed it and attempted to collect his debt by judgment and execution. Failing in this, he falls back, and now seeks to recover his debt, by claiming under the deed of trust which he had before repudiated. Without deciding whether he is not bound by his election, it is sufficient to say, that he has no right to call for an account and distribution of the trust fund, without making the other creditors who are entitled to share the fund with him parties, either plaintiffs (65) or defendants, so that all may be bound by the account. The trustee should be protected, and the matter of controversy finally disposed of. Otherwise, the trustees might be subjected to as many suits as there are creditors. The account taken in the suit of one,

would be no protection in the suit of another creditor. This is not allowed by the course of proceeding in a Court of Equity.

PER CURIAM. Bill dismissed, with costs.

Cited: Caldwell v. Blackwood, 54 N. C., 276; *Murphy v. Jackson,* 58 N. C., 14.

THE PRESIDENT AND DIRECTORS OF THE NORTH CAROLINA INSTITUTE, &c., of the Deaf and Dumb, v. JOHN W. NORWOOD, Executor of John Kelly.

In a case of latent ambiguity, evidence *dehors* the will or other instrument must be resorted to, to remove the doubt—the question being one of identity, or of fitting the description to the person or thing intended.

In a case of patent ambiguity, the question being one of construction, the instrument must speak for itself.

Where testator bequeathed $6,000 to the "Deaf & Dumb Institution," and no persons of that corporate name could be found, but persons were found, by the corporate name of "President & Directors of the North Carolina Institute for the education of the Deaf & Dumb," who are popularly known by the former name:—*Held,* to be a case of latent ambiguity; and the latter being identified, by extrinsic evidence, as the legatee intended, are entitled to the bequst.

NASH, C. J., *dissentiente.*

CAUSE removed by consent of parties, from the Court of Equity for ORANGE, at Fall Term, 1853. The facts of the case are sufficiently stated in the opinion delivered by this Court.

J. H. Bryan for the plaintiffs. (67)
Iredell for the defendant.

PEARSON, J. In March, 1851, John Kelly, of the county of Orange, died, leaving a will, by which he appoints the defendant his executor, and in which is contained the following clause:

"Item, I give and bequeath to the *Deaf and Dumb Institution,* if it can be secured so that the principal will be secure, and nothing but the interest used; on these conditions, I give six thousand dollars, for the purpose of educating poor mutes, *first of this county,* when their parents is not able to educate them, if these conditions are complied with, I give and bequeath to the institution and their successors in office forever."

The plaintiffs were incorporated by the act of 1848, under the name and title of "the President and Directors of the North Carolina Institute, for the education of the Deaf and Dumb"; and they allege they

are the only institution for the education of the Deaf and Dumb in this State, and are *well and popularly known* as *"The Deaf and Dumb Institution,"* and by such name were known to the testator, and by him intended to be and were designated and described in his will. The prayer is for the payment of the $6,000.

The defendant admits, that before and since the date of the will, the plaintiffs were engaged in the education of the Deaf and Dumb, and are the only institution in the State professing to give such instruction, and having the means and present ability to do it. But he avers there are in several of the States of this Union such institutions, of which one is in the State of Virginia, and was in successful operation at the date of the will. He also admits the plaintiffs were popularly called by the title of "The Deaf and Dumb Institution," but he avers they were also called popularly "The Dead and Dumb Institute," "Deaf and Dumb Asylum," and "Deaf and Dumb School." He
(68) submits to pay under the decree of the Court, but suggests that there may be a deficiency of assets, making an account necessary, in the event of a declaration by the Court in favor of the plaintiffs' right; be he avers he is advised the plaintiffs have no right to the legacy, and that the same is void, for want of certainty in the description of the legatee, and he feels it to be his duty to rely on that ground of defense.

On the argument, our attention was called by the defendant's counsel, to *Taylor v. Bible Society,* 42 N. C., 201; and it was urged that if that decision is not to be overruled, it decides this case. We are satisfied of that fact, but we are also entirely satisfied that the plaintiffs are entitled to the legacy. This makes it necessary to go into an examination of the cases, and to consider the reason of the thing.

There are two principles settled, and in fact admitted on all hands: 1. If there be a *patent* ambiguity in an instrument, the instrument must speak for itself, and evidence *dehors* cannot be resorted to; 2, in cases of *latent* ambiguity, evidence *dehors* is not only competent, but *necessary.* The difficulty grows out of the application of these two principles, so as to say when a particular case falls under the operation of the one or of the other. To remove this difficulty it is necessary to go to the fountain, and trace these two streams down, and thereby avoid confounding them; for although they run close together, there is a plain, marked line between them, which has but seldom been crossed.

The fountain of the first, in the rule as to *patent* ambiguity, is, that it is a *question of construction.* Hence the instrument must speak for itself, and in case of doubt, no evidence *outside* can be called in aid; for the only purpose of construction is to find out *what the in-*

strument means, and that must depend upon *what the instrument says.*

The fountain of the second, in the rule as to *latent* ambiguity, is, that it is a *question of identity*—a fitting of the description to the person or thing, which can only be done by evidence outside or *dehors* the instrument; for how can any instrument identify a person or thing? It can describe, but the identification, the fitting of the description, can only be done by evidence *dehors.*

Trace these two streams from their fountains: 1, a *patent* ambiguity is, when there is some defect in the instrument, so (69) as to call for a construction, in order to find out what it means; *e. g.,* an instrument, in describing the subject to be conveyed, uses language so vague that no subject is indicated, although the Court under the maxim *"ut res majis valeat quam pereat,"* will try to give it a meaning, yet, if on its face it has none, the Court cannot give it one, without *making a will,* which it has no right to do. *Kea v. Robeson,* 40 N. C., 373, is an instance. The donor gave all *that messuage and tenement,* but did not say where it was, or give any further description: (it could only be accounted for by the fact that it was copied from a book of forms and *the blanks* were not filled up), but it was not even intimated that evidence *dehors* could be offered to show that the messuage and tenement intended was the place where the donor lived, (although such no doubt was the fact,) because being a *matter of construction,* the deed must speak for itself. Again, an instrument, in describing the objects of the donor's bounty, uses words so general as to take in an indefinite number of persons, who (not being included within the operation of the Statutes for charitable uses) cannot inform the executor of the intended trust: such trust is void for uncertainty and the defect is *patent* on its face. A gift to the Bishop, "to be disposed of to such objects of benevolence and liberality as he shall most approve of" is void, because of its uncertainty and generality, by reason whereof its execution cannot be enforced. *Morris v. Bishop of Durham,* 9 Ves., 399; 10 *Id.,* 522. So a gift of $1,000 to be applied to "foreign missions and to the poor saints"—"this to be disposed of and applied as my executor *may think the proper objects according to the Scripture,"* was held to be void upon the authority of the above case, because the trust was too general, and could not be enforced. *Bridges v. Pleasants,* 39 N. C., 27. Here the defect was *patent* on the face of the will.

2. A *latent* ambiguity is when, there being no defect in the description of either the person or thing on the face of the instrument, it becomes necessary to fit the description to the person or thing; in other words, to identify it. Here, (as a matter of course, evidence *dehors* is admissible, because in fact it is necessary, and there

(70) is no getting on without it, in any case; for although the instrument may give the most minute description, it cannot *identify*. That can only be done by proof *dehors: e. g.,* a legacy is given to A. B.; one sues for the legacy, alleging that he is the identical A. B.: this must be decided by proof *dehors;* viz., either the admission of the executor, or the testimony of witnesses. So a devise of a piece of land, beginning at a *"Red Oak"* and thence, etc., how can the identity of the *Red Oak,* the beginning corner, be fixed, except by evidence *dehors?* Again, when there be two persons answering the description, the question of identity becomes more complicated, but it is still a question of identity, and must be decided by evidence *dehors* the instrument: As if two persons allege themselves to be the identical A. B. meant by the testator, or, as is said in the books, as if there be two "Cousin Johns," Again, if one has been commonly and popularly called by two names, the one his true name, or as Coke calls it, his name of Baptism, the other a nick-name, and a legacy is given to him by his nick-name—upon the question of identity, evidence *dehors*—either admissions or other testimony—is not only competent but necessary to show that he is the individual to whom the lagacy is given: As, that he was commonly known by such nick-name, as well as by his true name, and was so usually called by the testator. For instance, a legacy given to *"Le Petit Caporal"* by a veteran of the army of Italy, could have been recovered by Napoleon Bonaparte; and a legacy given some twenty years ago to "Old Hickory," could have been recovered by Andrew Jackson. This sub-division includes the case under consideration; for it is a mere question of identity, which may be shown by admissions or proof that the full name of the plaintiffs was usually not given in common parlance, and that for the sake of brevity, they were generally called and well and popularly known as the "Deaf and Dumb Institution." Again, if a person or thing be named, and if after resorting to proof *dehors,* no such person or thing can be found, the legacy must fail for the want of a person or thing to fit the description, and not because there is any difficulty upon the question of construction. *Barnes v. Simms,* 40 N. C., 392. There was a legacy of two negroes by the name of *Aaron* and *Pike.* The testator had no slaves known by these names, but he had two known by the names
(71) of *Lamon* and *Pite;* but although he had disposed of all of his other slaves and these two remained undisposed of, unless they passed under the names of Aaron and Pike, it was held that could not be allowed in the absence of any proof *dehors,* that *Lamon* was sometimes called *Aaron,* so as to be known by both names; and so, likewise, as to *Pite,* (or Piety), there being no proof that she was ever called *Pike.* The question is treated throughout as one of identity, and not

one of construction; for upon the face of that will, as in the will before us, there was no difficulty. The difficulty arose on the question of identity, and the case was decided on the ground that the subject of the legacy could not be identified, even with the aid of all the evidence *outside of the will* that could be procured.

It is said, admit such to be the law in regard to individuals or natural persons, it is not so in regard to corporations or artificial persons; for every corporation has a name given to it in the charter by which to sue or be sued, grant or take; therefore, it cannot take, unless the legacy be given to it under the name set out in the charter. The readiest reply is, such is the case in regard to any individual. He has a name given to him at his baptism; by which to "sue and be sued, grant or take"; but the question is fixed by the authorities, 10 Rep., 28, *Id.*, 123; *Stafford v. Bolton,* 1 Bos. & P., 41, where C. J. EYRE says—"the case in Brook, ("Misnomer") 73, puts a corporation in the same situation with a natural person as to pleas in abatement for misnomer. It has never since been questioned, that in regard to the name, for the purpose of identification, a natural person and a corporation stand precisely on the same footing—with this exception in favor of corporations:"—a christian name consists in general but of a single word, as John, Robert, whereas the name of a corporation frequently consists of several words; and "the transposition, interpolation, omission, or alteration of some of them may make no essential difference of the sense." Angell & Ames on Corporations, 77.

We now come to *Taylor v. Bible Society,* 42 N. C., 201. From what has been said, it is clear that case was put on the wrong side of the line dividing *patent* and *latent* ambiguities, in questions of construction and questions of identity. A *latent* ambiguity or (72) question of identity was presented in that case, in regard to which evidence *dehors* was not only competent but necessary; and yet such evidence was excluded by putting the case on the wrong side of the line, and classing it under the head of patent ambiguity, or questions of construction.

The two principles which we have before announced, are distinctly stated and admitted in that case—so there is no difficulty about the law. But we held there was error in the application; in other words, the case was put on the wrong side of the line. *Bridges v. Pleasants* and *Barnes v. Simms,* are both cited and relied on; but we have seen, that the one presented a case of *patent* ambiguity, or a matter of construction, the other, a case of *latent* ambiguity, or a matter of identity. A negro is bequeathed by the name of "Aaron." There is no ambiguity in that; no room for construction. But when the negro is called for, none such is to be found: so the difficulty arises *outside* of the will, and the ques-

tion is one of identity. It is thereupon suggested, that a negro named "Lamon" was intended; but it was decided "Lamon" cannot pass, under the name of "Aaron," unless there be proof that he was sometimes called by the latter name, so as to be known by both names—which was not pretended.

A legacy is given to "the Bible Society"—there is no ambiguity in that, no room for construction; but when the legatee is called for, none such is to be found, for there is no corporation having that name. So the difficulty arises *outside* of the will, and the question is one of identity. It is thereupon suggested that a corporation named "the American Bible Society" was intended; and it was admitted that "the American Bible Society" was commonly called and popularly known by the name of "the Bible Society," so as to be known by both names. The rule of law in reference to the two principles above announced, was admitted, and yet there was a misapplication; for the case is classed and decided as one of construction. And it is stated in the opinion—"This case does not present the question of a latent ambiguity—that only arises when several persons or things come completely within the description contained in the will." It is obvious, therefore, that the misapplication is to be attributed to the fact that a *single instance* was taken for the principle. It is clear that the principle or
(73) rule governing cases of *latent* ambiguity or questions of identity must apply, as well when a person or thing is known by two names, as when two persons or things are known by the same name. In fact, as we have seen above, the principle must of necessity apply to all cases where it becomes necessary to show that the person who claims, or the thing claimed, is the identical person or thing; or in the language of C. J. RUFFIN in *Barnes v. Simms,* 40 N. C., 392, "where the description is to be fitted to the person or thing."

We consider it a matter of duty to correct an error as soon as it is discovered. It is certainly the most candid course, and we hope in that way to avoid much confusion and subtle refinement. There is no doubt that the complexity of the law upon several subjects, to be met with in the books, grew out of the fact that the Courts, to avoid overruling previous decisions, had recourse to nice distinctions, too fine for every day use.

The case under consideration is a legacy to "the Deaf and Dumb Institution." There is no ambiguity in that; no room for construction. In looking for the legatee, it turns out there is no such corporation. But it is suggested that a corporation named "The President and Directors of the North Carolina Institute, for the education of the Deaf and Dumb," was the legatee intended; and it is admitted by the executor, that this corporation was commonly called and popularly

known by the name of "The Deaf and Dumb Institution"—in other words, it is known by both names. The case, then, is one of *latent* ambiguity, or of identity; in regard to which the principle or rule of law is entirely settled.

It is said, if a corporation sues by a wrong name, the error is fatal under the general issue; and we are asked, how can a corporation *take* by a wrong name, or any other name than that given to it in its charter? As to the matter of pleading, reference was made to 1 Chitty, 281 and *notes, Brittain v. Newland,* 19 N. C., 363, where it is decided that corporations must sue in their corporate names; and the plaintiff Brittain and others, suing as "The President and Directors of the Buncombe Turnpike Company," were nonsuited, because the true names of the corporation was "The Buncombe Turnpike Company." We reply, if an individual sues by a wrong name, he will be non- (74) suited; for every body, natural as well as corporate, ought to know their own names. So there is no distinction between individuals and corporations in this respect. But there is a marked distinction between a question of pleading, when the plaintiff sues by a wrong name, and cases where gifts, deeds or bonds are executed to individuals or corporations by a wrong name. This distinction was settled in *The Mayor &c. of Lyme Regis,* 10 Rep., 123, and has never since been called in question. The reason of the distinction is a sound practical one. "If the name of a corporation be mistaken in a *writ,* a new writ may be purchased of common right; but if it were fatal in *lease* and *obligations,* the benefit of them would be wholly lost, and therefore, one ought to be supported and not the other." This distinction is recognized in *Mayor of Stafford v. Bolton,* 1 Bos. & P., 41. There the difference between the name used and the true name of the corporation was held to be so slight as to be a mere matter of form, which ought to have been pleaded in abatement; whereas in *Brittain v. Newland,* there was a difference in *substance.*

In all of the cases, it is taken for granted as settled law, that if an individual or corporation, in a will, deed or bond, is described by a *nick-name,* that is a short name, one *nicked* or cut off for the sake of brevity, without conveying any idea of opprobium, and frequently evincing the strong affection or the most perfect familiarity—*e. g.,* the Little Corporal"—"Old Hickory"—"Rough and Ready"—when the question of identity arises, it is competent to show that the individual or corporation whose true name was not used, was nevertheless meant to be indicated by the nick-name or soubriquet. In 10 Rep., 125, Coke says, "God forbid that every curious or nice misnomer, in gifts, leases or grants," by or to corporations, should be defeated; for there "be a sound difference betwixt writs and grants." In this age of progress,

it would be a more especial ground for lamentation. Every thing in these days is made short—names, distances, etc., etc.; and if a corporation cannot entitle itself to a legacy, by showing that it was usually called and known by a *short name,* "Deaf and Dumb Institution," instead of the "President and Directors of the North Carolina
(75) Institute for the Education of the Deaf and Dumb," many charitable gifts will be defeated. By way of showing further the tendency of the present day to shorten names, and that the rules of law must fit the existing state of things, I will mention an instance which falls under my notice every day. A branch of one of the principal banks in our State has a nick or short name on its door—"Bank of Cape Fear"; whereas by law the name of the corporation is "The President, Directors and Company of the Bank of Cape Fear." But will any one say, that that institution is not as well known by the one name as by the other? (in fact more usually known by the short name) —and could it be insisted, that a note payable to the cashier of the branch of the Bank of Cape Fear at Raleigh, could not be sued on, for the reason that there is no such corporation as "the Bank of Cape Fear?"

There is no such corporation as "the Deaf and Dumb Institution"; but there is a corporation as well and perhaps better known by that than by its true name. The purpose of this corporation is to carry out the very charity to which the testator of the defendant has dedicated a portion of his estate. The rules of law as well as of good sense forbid that the charitable intention of the testator should be defeated because he did not know the precise name of the corporation, and had fallen into the common practice of calling it by a *short name.*

The plaintiffs are entitled to the legacy. There must be a reference to state the amount of assets.

PER CURIAM. Decree accordingly.

Cited: Laughter v. Biddy, 46 N. C., 474; *Moses v. Peak,* 48 N. C., 522; *Miller v. Cherry,* 56 N. C., 29; *Murdock v. Anderson,* 57 N. C., 78; *Branch v. Hunter,* 61 N. C., 2; *Kincaid v. Lowe,* 62 N. C., 42; *Phillips v. Hooker, Ib.,* 197; *Robeson v. Lewis,* 64 N. C., 737; *Wharton v. Eborn,* 88 N. C., 346; *McDaniel v. King,* 90 N. C., 603; *Ryan v. Martin,* 91 N. C., 468; *Asheville Div. v. Aston,* 92 N. C., 584; *Horton v. Lee,* 99 N. C., 232; *Blow v. Vaughan,* 105 N. C., 203; *Perry v. Scott,* 109 N. C., 375; *Shaffer v. Hahn,* 111 N. C., 9; *Simmons v. Allison,* 118 N. C., 776; *Tilley v. Ellis,* 119 N. C., 248; *Keith v. Scales,* 124 N. C., 509; *Walker v. Miller* 139 N. C., 453; *Sherrod v. Battle,* 154 N. C., 353; *McLeod v. Jones,* 159 N. C., 76.

BENJAMIN C. WILLIAMS v. CHARLES CHAMBERS and others.

Where a bill is defective in substance, amendments will not be allowed on the hearing in this Court, except by consent of parties; nor will the Court, in such case, except under peculiar circumstances, remand the cause for the purpose of amendment in the Court below.

CAUSE removed from the Court of Equity of MOORE, at Fall Term, 1851. The pleadings and facts necessary to an understanding of the case, as it was considered on the hearing, are sufficiently (76) stated in the opinions delivered by the Court.

The case was argued at a former Term by *Strange, Reid* and *Mendenhall,* for the plaintiff, and by *Winston, W. H. Haywood* and *Horton,* for the defendant; and again at this term by

Strange for the plaintiff, and
Winston for the defendant.

NASH, C. J. The bill was filed in the Court of Equity for Moore county, where the pleadings were made up and the proofs taken; and the cause being regularly set for hearing, has been transferred to this Court. Upon the opening of the case, and hearing the bill and the answers read, the attention of the counsel was called to an objection which extended *in limine* to his bill. It sets forth no title in the plaintiff, and we cannot, in its present form, grant him any relief. A motion is made on the part of the defendant to dismiss the bill, which is met by a counter motion on the part of the plaintiff to amend. Upon this motion two questions are presented: the first, has this Court the power to amend, without the consent of parties? and the second, if it has not, will it send the cause back to the court below to enable the party, if he can get permission there to amend. The rules of practice in a Court of Equity are, to a certain extent, the law of the Court and expressive of its power. Upon this subject, the Clerk of the Court and the gentlemen of the bar in attendance have been consulted; and finding a difference of opinion to exist, we have called in aid the experience of the late Chief Justice RUFFIN, who was here. For many years the presiding officer of the Court, no one is better able to point out its practice. He stated to us that in his experience, this Court never allowed amendments in bills of equity in matters of substance, but by the consent of parties, for the reason that it never was considered to be within its power. We are satisfied it is not within our power to make the amendment asked for, as it is one of substance, and the defendant does not agree to it. This is not a court of original jurisdiction, except in a few cases provided for by the Legislature. Bills are filed in the

court below, and there the causes are prepared for hearing.
(77) When set for hearing, they may be brought here either by an appeal from the court below, or may be removed by the parties. No cause in equity can be removed here, until it is so set for hearing. If such an amendment could be made here, without consent of parties, it would be necessary, according to the course of the court, to get rid of the decree setting the cause for hearing; and the moment that was done, the cause would be out of court here. We are fortified in the conclusion to which we have come, by the Acts of 1822 and 1825, now sonstituting section 14, chapter 33, Revised Statutes. They provide that the Supreme Court shall have power to amend proceedings by making parties, and taking testimony when required. The act constituting the Supreme Court was passed in 1818, and if it has a power inherent in it to make amendments, as has been urged, then the acts referred to were entirely unnecessary. It is evident the Legislature did not so consider the power given; and from the manner in which cases are directed to be brought from the Courts of Equity to this Court for hearing, by the Act of 1818, no amendment affecting the order for the hearing can be allowed here. If it could, a new case might in effect be made in the bill, so as virtually to assume original equity jurisdiction for the Court. Such a course on the part of the Court would be justly regarded by the Legislature and the profession with extreme jealousy, as it would be, in effect, allowing bills to be filed here, and here prepared for hearing.

Can this Court remand a cause for the purpose of amending? This is a discretionary power, and can and may be used by the Court as justice and equity may require. From the same high authority we learn that after a cause is brought on to a hearing, the remanding of equity cases for the purpose of amendment, has been, under the practice of the Court, confined to cases of surprise or of agreement between the parties. Here there is neither; and we should, without hesitation, dismiss the bill but for the answers. They have met the bill upon the title which the plaintiff has relied on in his testimony; to that title the testimony has been directed on both sides, and the parties have gone to a hearing on it. Another reason influences us: we are desirous, as far as we can, of avoiding delay. *Parker v. Leathers,* decided at December Term, 1846, (unreported case), bears us out in the
(78) decree we make.

PEARSON, J. The bill is defective in substance. It introduces the plaintiff as the *only child* of Benjamin W. Williams, dec'd, who died seised and possessed of a very large real and personal estate, leaving him surviving the plaintiff, his only child, and his widow, who is one

of the defendants. It suggests that it is alleged the father of the plaintiff *left a will, but if such is the fact and it is deemed material, the plaintiff holds the defendants to strict proof thereof.* It then avers that one Archibald McBride, who was the father of the widow, under pretence that there was a will in which he was named executor, and from which will the widow dissented, took possession of the whole estate, real and personal, and that by an exorbitant allowance to the widow for a year's provision, by an excessive dower, and by the fact that she was allowed (owing to an impression that in consequence of a large debt, the widow and child "would be left destitute, and that bids made for her would enure to the benefit of the child as well as herself), to buy many valuable negroes, furniture, etc., etc., at prices merely nominal, and by reason of this sacrifice of the personal estate, the defendant Chalmers, who has intermarried with the widow of the plaintiff's father, and who had in the *County of Orange* been appointed guardian for the plaintiff, (leaving the validity of the appointment an open question), was enabled to obtain a decree for the sale of the real estate, at which sale the defendant, Chalmers, purchased several tracts of land for an inadequate price; and by these actings and doings, the plaintiff, who is the *only child of Benjamin W. Williams,* finds that he is poor while his stepmother is rich." The object of this bill and the whole scope of it is, that he, in the character of the only child of his father, may have an account of his father's estate, so as to be informed what has become of it, and to have all the alleged abuses investigated and put right.

During the progress of the hearing, and in fact after the hearing was almost ended, it was suggested to the counsel for the plaintiff, Mr. Strange, that his bill was fatally defective in substance; for if there was a will, about which the plaintiff made a question, and held the defendants to strict proof, then the plaintiff was obliged to make title under the will as legatee or devisee; and *if there was no will, the plaintiff had set out no title;* that the bill was evidently (79) framed on the idea of charging McBride as *Executor de son tort,* but that such a fiction, although adopted in Courts of law to enable *creditors* to get their rights, had never obtained in Courts of Equity in behalf of the next of kin; and that in fact the next of kin had no title except through an administrator, by force of the Statute of Distributions.

Mr. Strange, seeing that upon this view of the case, his bill would necessarily be dismissed, asked leave to amend; and if that should be against the course of the Court, then he asked that the cause might be remanded, to the end that the amendment might be made in the Court below—stating frankly, that in drafting the bill, and while piling up

the circumstances of fraud, he on purpose left it as an open question, whether the father of his client died testate or intestate; and he suggested in support of his motion to amend, that the defendants averred in their answers that the plaintiff's father had left a will, and that all of the proofs were taken on that supposition.

I confess, that at first I was strongly inclined to allow the amendment be made in this Court, although it would have entirely altered the frame of the bill, and introduced the plaintiff in a new character; for I could not see that it was worth while to send the case back to the court below, when it would, as a matter of course, be sent back again to us. But upon consulting Mr. Freeman, the very able an experienced clerk of our Court, who has been acting for upwards of twenty years, he stated that according to the practice of the Court, after a cause was opened on the hearing, no amendment in matter of substance had ever been allowed. The Court then called in aid the experience of the late Chief Justice RUFFIN. He fully supported Mr. Freeman, and stated, that according to the practice of the Court, after a cause is opened on the hearing, if there was a defect in a matter of substance, the bill was dismissed as a matter of course, but without prejudice—the plaintiff paying the costs: that he never had known an amendment of the kind to be allowed, and he knew of but one case in which the Court had departed from the practice of dismissing the bill, and had allowed the plaintiff, *not to amend here,* but to have the cause
(80) remanded, in order to get the amendment made below. He further stated that he opposed that infraction of the practice of the Court *totis viribus,* but the motion to remand was allowed, upon the plaintiff's paying all the costs, as in case the bill had been dismissed: And so we find the entry upon our record, *Parker v. Leathers,* December Term, 1846, to which he referred us.

I am not disposed to violate a practice which is thus shown to have been uniform since the organization of this Court, and voluntarily consent to allow the cause to be remanded, with a view of amendment below—thereby adding another case to that of *Parker v. Leathers.*

As there has never been an amendment in matter of substance allowed here, the Court will not depart from a fixed practice, and the motion to remand is allowed upon the very special circumstances, that all of the defendants aver that the father of the plaintiff left a last will which was duly admitted to probate—the settlements alleged were made with him in the character of legatee and devisee—and, in fact, all the proofs are taken upon that supposition. So that the defendants have aided the plaintiff, as far as they can in setting out his title; but according to the settled practice, a plaintiff must allege and set out a title for

himself, and cannot rely on proofs or admissions. Proof without an allegation is no better than an allegation without proof.

PER CURIAM. Cause remanded, with costs.

Cited: Mallory v. Mallory, post, 84.

ELIZABETH MALLORY v. JOHN MALLORY, Executor of Charles Mallory and others.

A Court of Equity will not entertain a bill for specific performance, in which the material terms of the contract sought to be enforced, are not distinctly set forth.

Hence, a bill brought by the widow against her husband's devisees and representatives for specific performance of an ante-nuptial agreement to settle upon her "a plantation and permanent home for life," must distinctly set forth what land, where situate, the numbers of acres, &c.

In equity, as at law, the proofs must correspond with the allegations of the bill; and the Court will neither allow substantial amendments of the bill to be made on the hearing, in order to meet objectons on account of variance, nor, except under peculiar circumstances, will it remand the cause, with a vew to having such amendments made in the Court below.

CAUSE removed from the Court of Equity for GRANVILLE, at Spring Term, 1852. (81)

This was a bill filed by the plaintiff, as the widow of Charles Mallory, deceased, against the executor and devisees and legatees of the said Charles, for the specific execution of an ante-nuptial marriage contract.

It stated that the plaintiff was a maiden lady of about fifty years of age, boarding at the house of a friend in the county of Orange, and owning ten young and valuable negro slaves, when Charles Mallory, who was then a widower, about sixty-five years old, made proposals of marriage to her; that the said Charles resided on a tract of land which he owned in the county of Granville, about twenty miles from the house of the friend with whom she was boarding; that he had then five children by a former marriage, all of whom were of age and settled in life, having been advanced from time to time by their father; that she at first declined acceding to his proposals, but yielding at last to his importunities and the advice of her friends, she consented to marry him, provided he would make a suitable settlement upon her; that he readily consented to do so, and it was agreed between them, that he should have a deed of settlement prepared, by which "he would assure her in the title to all her slaves, and in their increase, together with the profits and proceeds of their labor absolutely and forever, free from

all control or right in or claim to them, their increase, and the profits of their labor on his part, or that of his children by his former marriage; and that she should continue to command and control the said slaves in all things as though she were single. He further proposed to settle on her by said deed a plantation as a permanent home for her life." The bill then stated, that the said deed of settlement was never prepared by the said Charles; that he made many false excuses why it was not done, and practiced many fraudulent arts and devices to her to induce her to marry him before it was done, solemnly promising that it should be done as soon after their marriage as a suitable per-
(82) son could be procured to draft the instrument; that she, relying upon his solemn promise, did marry him, without the said deed having been prepared, or any writing evidencing the said agreement having been drawn up; that after the marriage, he repeatedly promised to fulfill his said contract by executing a proper deed, or by providing for her to the same extent in his will; all which promises he failed to perform, and that he at last died, leaving a will, which was duly admitted to probate, in which he made a provision for her far short of what she was to have by the said deed of settlement. The prayer of the bill was for a specific execution of the contract thereinbefore set forth. Answers were filed by the defendant, John Mallory, as the executor of the said will, and by the other defendants as devisees and legatees therein named, and who were also the heirs at law and next of kin of the said Charles Mallory.

In all the answers it was positively denied, so far as the defendants had any knowledge, information or belief, that the said Charles ever made any promise to the plaintiff, either before or after his marriage with her, to execute a deed of settlement of any kind; and all the defendants except the executor expressly referred to and relied upon as a defense, the Act making void parol contracts for the sale of land and slaves. A replication was put in to the answers, and much testimony was taken by both parties, after which the cause was set for hearing, and transferred to the Supreme Court.

Moore, for the plaintiff.
Lanier and *Gilliam,* for the defendants.

BATTLE, J., after stating the case as above set forth. This cause was brought on for hearing at the last June Term, and has been heard again at the present term. The main question, whether the contract being by parol, can, under the circumstances of fraud charged in the bill, be specifically executed in this court, has been fully and ably debated by counsel on both sides. The question is a very important one,

and it is a matter of regret that the state of the pleadings and proofs precludes us from considering and deciding it. But it is manifest that the bill cannot be sustained in its present shape. The contract set forth in it, so far as the land is concerned, is entirely too (83) vague and uncertain. It is, that the intended husband was to secure the plaintiff by the deed of settlement "a plantation and permanent home for her life." What plantation? Where situated? How many acres? What value? With regard to these important particulars, the contract is entirely silent; and yet it is one of the first principles of the doctrine of specific performance, that the contract sought to be performed must be certain and clear in all its material terms. 1 Chit. Gen. Prac., 828; 2 Story Eq. Jurisprudence, secs. 751 and 764. It is true that the bill states that the husband, at the time of the marriage, lived on a certain plantation in the county of Granville, which he continued to own during his life, and of which he died seised, and prays that that particular plantation may be conveyed to her for life. But there is nothing in the pleadings to show *that* to have been the plantation which the parties had in contemplation; and if we look into the proofs, instead of finding anything to solve the difficulty, we find uncertainty rendered still more uncertain.

The counsel who argued the case in this court, seeing the force of this objection endeavored to avoid it by abandoning that part of the contract which related to the land, and insisting upon the specific execution of it so far as it related to the slaves. This he contended he had a right to do upon the ground, that the plaintiff was not compelled to insist upon the performance of all that was stipulated in her favor, but might give up such part as she chose; and he relied also upon the application of the maxim *utile per inutile non vitiatur*. Yielding to the counsel that for which he contends, still an insurmountable obstacle is presented by the proofs. The weight of the testimony taken by the plaintiff to establish the terms of the proposed marriage settlement is, that she was to have her property, and he to have his. That is certainly not the contract stated in the bill, and yet in equity, as well as at law, the proofs must correspond with the allegations, and a substantial variance is as fatal in the one as in the other. *Foster v. Jones*, 22 N. C., 201. The counsel, to remove this objection, moved the Court for leave to amend the bill, by striking out that part of the statement of the contract which related to the land, and inserting, that the contract was, that the plaintiff's slaves were to be settled (84) upon her, and that she, in consideration thereof, was to relinquish all claim to any portion of his estate, in the event of her surviving him: And further to amend the prayer by striking out what regards the land and adding, that she submitted to execute a proper re-

lease of her claims to any part of her husband's estate, either under the will or by way of dower or otherwise. The counsel moved further, that if he were not allowed to amend here, the cause might be remanded to the Court below, in order that he might apply for leave to amend there. The amendment proposed is manifestly one of substance, as it will change very materially the frame of the whole bill. The contract to be stated will be essentially different, claiming less for the plaintiff, and conceding something to the husband. Such being the case, we cannot allow the amendment in this court, as we have decided at this term in *Williams v. Chambers, ante,* 15. To the reasons given in the opinions filed in that case, it may not be inappropriate for us to add, that if we yield to this application, (upon the ground urged by the counsel, that it is useless to send the case back, when it will be immediately returned to us), another and another will be made, until the result will be that causes totally unprepared for a hearing will be removed to this court, under the expectation that they can be amended in any manner and to any extent, after they get here. A jurisdiction in effect original, will be thus imperceptibly usurped, which the Legislature has never conferred upon it, and never intended to confer upon it.

The reasons given for the order in *Williams v. Chambers* are conclusive against the allowance of the alternative motion. There is a marked difference between the two cases. In *Williams v. Chambers,* the title which the plaintiff had failed to set out, was aided, as far as it could be, by the answers; and all the proofs were taken upon the supposition that there was no defect in that particular. Here the contract which the plaintiff seeks to enforce is denied out and out. The defendants aid the plaintiff in nothing—mislead her in nothing. She is informed from the beginning that every matter of law and every matter of fact which can be disputed, will be disputed. She cannot say that the defendants have lulled her into a false security, and
(85) claim the indulgence of the Court on that account. With a fair warning that the defendants would contest every debatable question, either of law or fact, she brings on her cause for hearing, and she must abide the usual result of failure.

The uniform practice of the Court, which the nature of its jurisdiction rendered necessary, and which has been acted upon from its organization to the present term, with a solitary exception, and that exception opposed by the late very able Chief Justice, ought not to be departed from, unless under very peculiar circumstances, such as we have shown do not exist in this case.

But it is urged that the only difference in effect, between remanding a cause upon the payment of all costs, with a view to an amendment in the Court below, and dismissing it without prejudice, is in the delay

which the latter course may occasion, and that, therefore, the Court ought rather to adopt the former, in order to expedite the cause.

Without inquiring whether there may not be a more important difference, either to one party or the other, with regard to the answer or the proofs, than that which has been assumed, we cannot be insensible to the advantage of having a settled rule, and to the necessity of adhering to it. Such rule may perhaps sometimes operate more or less harshly; but the very fact that it has so long existed as a rule, is strong evidence in its favor, that its general effect has been beneficial.

The bill must be dismissed with costs, but without prejudice.

PER CURIAM. Bill dismissed with costs.

Cited: *Murdock v. Anderson,* 57 N. C., 78; *Phillips v. Hooker,* 62 N. C., 196.

ALEXANDER J. TROY and wife Maria, and others v. ROBERT E. TROY.

Where a tract of land was given in trust for the sole and separate use of a married woman for life, remainder in trust for her children living at her death, a Court of Equity will not decree a sale thereof, with a view to a re-investment of the proceeds, upon the ground that the land is valuable principally for its timber, and yields no present rents and profits.

In decreeing a sale, the Court will regard the interests of persons most to be affected by its action—particularly when those persons are infants.

THE plaintiffs filed their petition in the Court of Equity for BLADEN, at Spring Term, 1852, praying for the sale of certain (86) lands therein described. The said lands were by Dr. John Smith conveyed by deed, bearing date 3 December, 1850, to the defendant, Robert E. Troy, "in trust for the sole and separate use, benefit and behoof of the said Maria J. Troy, wife of the said Alexander J. Troy, for and during the term of her natural life, and at her death, in trust for the use and benefit of such child or children as she shall have living at the time of her death, or the lawful issue of such and their heirs forever, to be divided amongst them, according to the laws of North Carolina; and in case the said Maria J. Troy shall leave no child or children or issue of such, then in trust for the use and benefit of said Alexander J. Troy and his heirs, provided the said Alexander J. Troy shall survive his said wife; but in case all the children of the said Maria and also her husband the said Alexander should die, and the said Maria should be left surviving, without either issue or husband living, then in trust for the said Maria, her heirs, &c."

The said Alexander and Maria J. Troy have issue three children, who

are infants, and are joined in the petition as plaintiffs by their next friend, their father. The petition states, that said lands are not in a state of cultivation, that they yield no rents, and are principally valuable for the timber thereon, which at present would command a high price; and that a sale of the same would greatly promote the interests of the tenant for life, and also of the ulterior *cestui que trusts*. Accordingly, the prayer is for a sale thereof by the trustee, Robert E. Troy, and a re-investment of the proceeds in other lands or in stocks, to be held upon the same trusts and limitations.

The defendant answers, admitting the material allegations of the petition, and submits to any decree the Court may make in the premises.

At said Spring Term, 1852, there was a reference to the Master to report whether a sale of the said lands would promote the interest of the petitioners; and he recommended a sale in his report which was accompanied by an affidavit of two persons, who state that they are well acquainted with the land, and think that the interests of the petitioners would be advanced by a sale thereof.

Upon which state of the pleadings, the cause was set for hear-
(87) ing, and by consent transmitted to the Supreme Court.

D. Reid for the petitioners.

No counsel for the defendant.

BATTLE, J. There can be no doubt that the trustee has no power to sell the lands conveyed to him by Doctor John Smith in trust for the petitioners. And from the fact that an express power is conferred upon him to sell one or more of the slaves under certain circumstances, it may fairly be inferred that the grantor did not intend that he should ever sell the lands. That a Court of Equity has, in this State, the power to decree a sale of lands held in trust for a feme covert and infants, upon the petition of the feme and the guardian of the infants, we think cannot be questioned, and in a proper case, such a sale will be ordered, and the proceeds directed to be laid out in the purchase of other lands, or perhaps vested in stocks, and settled upon the same trusts. Whether the power of the Court extends to a case like the present, where the trust is for a class of persons, some of whom may, but have not yet, come into existence, it is unnecessary for us to decide; for, admitting such a power, we do not think this a proper case for its application. It is undoubtedly the duty of the Court, when it is called upon to exercise its jurisdiction in directing a sale, to see that the benefit of the persons most interested will be promoted, particularly when those persons are infants. This duty would be still more imperative, if the Court could act where the trust might embrace persons not yet in exist-

ence. Applying this caution to the case before us, we cannot fail to perceive, that though the interests of the tenant for life might be essentially promoted by a change of the property, it is by no means so clear that the benefit would extend to the children. Their benefit was undoubtedly most in the contemplation of the grantor; for the fee is given to them, while a life estate only is given to their mother. The use which she and her husband can make of the lands, may possibly be more restricted than the grantor intended; but that cannot have any influence upon us. The lands are stated in the petition to be valuable principally for the timber growing thereon, and it is certain that the less use which can be made of them by the tenant for life, the more valuable they will be for the remaindermen. That fact was no (88) doubt known to the grantor, and hence it is very probable that he intended these lands as a certain provision for his grandchildren. The reasons ought to be very strong, which should induce us to do any act which might have a tendency to disappoint that intention.

But it may be said, that upon a reference by the Court of Equity for Bladen County, the Master reported that the interests of the infant petitioners would be promoted by the sale of the lands in question. That report is based upon the testimony of two witnesses who give no reasons for their opinion, except that they are acquainted with the lands. We have come to a different conclusion. We think that a sale at present would not be beneficial to the infants; but as a state of things may possibly arise at some future time, when a sale would be greatly to their advantage, we will dismiss the petition without prejudice, but with costs.

PER CURIAM. Petition dismissed.

Cited: *Watson v. Watson,* 56 N. C., 402; *Houston v. Houston,* 62 N. C., 96; *Dodd, ex parte, Ib.,* 99; *Millsaps v. Estes,* 137 N. C., 543.

MARTHA MASON v. JOSHUA HEARNE.

Where A took an absolute deed for a tract of land from B, and then executed an agreement in writing with C, reciting that "he had a deed for C's land," for which he had paid the purchase money, and therein bound himself to make C a deed on her paying back the said purchase money within two years; and it appearing thus, as well as from other facts, that A was to hold the land merely as a security for his debt:—*Held,* that C, upon her payment of the purchase money, was entitled in this Court to a reconveyance of the land from A, and to an account for the rents and profits—the time of payment not being of the essence of the contract.

CAUSE removed from the Court of Equity of STANLY, at Fall Term, 1852.

The plaintiff by her bill, filed 11 February, 1851, alleges that several years since, her father, John Mason, now deceased, contracted with one Henry Davis for the purchase of a small tract of land, at the price of fifty dollars. That her father, in his life-time, paid Davis a part of the said purchase money, to wit, $20; and finding himself unable to pay the balance, transferred his claim to the plaintiff, who states that she then made an arrangement with the defendant, by which it was
(89) agreed that he should pay to Davis $30; and become her surety to him in a note for $5.55, the balance due for the land, which arrangement was carried into effect, and the defendant thereupon took a deed to himself for the land, and executed the following agreement in writing with the plaintiff:

"No. Carolina, Stanly County, 13 Feb'y, 1843.

"Articles of agreement between myself and Martha Mason, I certify that I have a deed for her land to which I paid thirty dollars for the land, on which no lives, 50 acres, which I bind myself to make her a deed for the same, if the said Martha Mason pays me the thirty against 13 February, 1845. J. HEARNE."

Afterwards, from time to time, the plaintiff states that she did work and labor for the defendant to the value of $19.05, (an account whereof is exhibited), and having also taken up her note to Davis, she offered to pay the defendant the sum mentioned in the above agreement, and take a conveyance of the land—which he refused, saying "that it was too late." That she still remained (with her mother) in possession of the land, and the defendant brought ejectment against her and turned her out of possession; and further, that he had sued out a warrant against her for the rent of the premises, and recovered judgment thereon for $25—on which judgment he entered a credit of about $17, for the said labor and services rendered by her; whereas she charges that she was not to pay rent, and that said credit should, according to their agreement, have been applied to the payment for the land. The plaintiff then states, that she afterwards, to wit, in September, 1850, made a formal tender in gold coin to the defendant, of the balance due him under their said agreement, according to the above showing; and that he positively refused to accept the same and execute a deed to her. The prayer is that he be decreed to execute a conveyance and for an account.

The defendant, in his answer, admits that "he purchased the land of Davis"—having before refused to become the plaintiff's surety for the purchase money; and he admits the agreement with her, above set out;

but he avers, that she failed to pay the $30 therein mentioned within two years; and that remaining in possession, she agreed, (90) soon after her father's death, to pay him for the rent of the premises $5 *per annum.* That after her default, he did bring ejectment against her and evicted her; and also that he sued out a warrant and obtained judgment against her for $25, on account of said rent, and credited the same, as charged in the bill, for her work and services rendered—which he insists he had a right to do, under their said agreement.

As to the first alleged tender, he denies that the plaintiff ever offered to pay him, until after the expiration of the two years, the time mentioned in the above contract, and after ejectment brought against her; and he admits, that in September, 1850, he did refuse the tender as charged; and he insists on his right in equity, as well as at law, to hold the land.

Replication was taken to the answer, and the parties took testimony, principally as to the fact of plaintiff's agreement to pay rent, and as to the manner in which her payments to defendant were to be applied.

J. H. Bryan for the plaintiff.

No counsel for the defendant in this Court.

PEARSON, J. The plaintiff is entitled to the relief she asks for. The agreement in writing, signed by the defendant, shows upon its face that the real intention of the parties in the transaction was to create merely a *security;* and for this purpose the legal title was conveyed to the defendant, in trust to secure the repayment of the thirty dollars, with interest, and then in trust to convey to the plaintiff. Such being the intention of the parties, *time is not of the essence of the contract* in this Court; which is the principle upon which the Court allows an equity of redemption, after the estate at law has become absolute, in all cases where the intention was to create *merely a security.*

The defendant faintly denies that the deed to him was intended as a security; and insists upon the fact that his agreement is in the form of a *condition;* and that the condition has not been complied with, by a payment of the money, within the time fixed on. That is true; but in all mortgages, the form is that of an estate to be void upon (91) condition of the payment of money at a fixed day. This Court regards not the form, whenever the real intention was merely to secure the payment of money, and will, upon the ground of *the intention,* relieve against the forfeiture of conditions and penalties. The intention that the conveyance should only operate as a security is conclusively

established, not only upon the face of the agreement, but by all the other facts and circumstances of the transaction.

There must be a reference to the Master. In taking the account, the plaintiff will be entitled to credit for the amount paid by her, and also for the profits of the land since the defendant has been in possession, including the amount collected by him under his claim of rent.

PER CURIAM. Decree accordingly.

Cited: Robinson v. Willoughby, 65 N. C., 522, 524; *Waters v. Crabtree,* 105 N. C., 399; *Watkins v. Williams,* 123 N. C., 173; *Porter v. White,* 128 N. C., 44; *Bunn v. Braswell,* 139 N. C., 140; *Sandlin v. Kearney,* 154 N. C., 604, 605.

OSCAR F. DUDLEY and wife and others v. JOHN WINFIELD, Administrator, etc.

The share of an infant of the proceeds of real estate, sold for partition under a decree of a Court of Equity, descends to the heir, upon the death of the person entitled, unless after arrival at age, he elects to take it as personalty. But the annual interest of such share, to the time of his death, goes to the next of kin.

The Court will take no notice of averments in an answer, which are neither responsive to any allegation in the bill, nor supported by proof.

THE bill was filed by the next of kin of Thomas W. Lilly, deceased, against the defendant as guardian, and afterwards administrator, of the said deceased, for an account and settlement. The defendant, in his answer, submitted to an account; and, upon a reference to the Clerk and Master, he made a report in which he stated the defendant's accounts, both as guardian and administrator. One item of charge was the proceeds of certain lands which had descended to the intestate from his grandfather, and which had been sold for partition while he was an infant, under a decree of the Court of Equity for ANSON, and the price thereof paid to the defendant as guardian. It was stated in the bill, and admitted in the answer that the intestate lived three or
(92) four years after he became of age, but the defendant never settled his guardian accounts with him, nor paid over to him his estate or any part thereof. The reason assigned in the answer, for the defendant's not having done so was, that the intestate "was a man of insane mind, and incapable of making a settlement"; but this was stated in the answer only, and no testimony was offered to prove it. The defendant alleged in his answer that the proceeds of the land, sold under a decree of the Court of Equity, were real estate, and were

claimed by the heirs at law of his intestate, who were different persons from the next of kin. He therefore excepted to the report of the Master: 1, because he had charged the said proceeds in the administration account in favor of the next of kin; 2, because he had charged compound interest thereon; 3, because he had charged simple interest thereon.

After the exceptions were filed, the cause was set for hearing, and, by consent, transmitted to the Supreme Court.

Winston for the plaintiff.
No counsel for the defendant.

BATTLE, J., after stating the case as above: We are of opinion, upon the authority of the case of *Scull v. Jernigan,* 22 N. C., 144, that the first exception must be sustained. In that case, it was decided that the proceeds of land, sold for partition under the Act of 1812 (1 Rev. Stat., ch. 85, sec. 7), to which an infant is entitled, remain real estate until he comes of age and elects to take them as money. That case has been very recently referred to with approbation in *March v. Berrier,* 41 N. C., 524. Its policy has been sanctioned by the Legislature in the Act of 1846, ch. 1, the 10th section of which declares, that all the proceeds of real estate which may be sold for the payment of debts by an executor or administrator, and not required therefor, "shall be considered as real estate, and as such shall be paid over by the executor or administrator to such persons as would be entitled to the land, had it not been sold, or, in case of feme coverts, invested as proceeds of sale made for partition." The construction of the Act of 1812 is thus settled by the highest authority, and it is decisive, in favor of the defendant, of the question presented by the first exception; for (93) it is admitted in the pleadings, that the intestate did not receive from the defendant as his guardian any part of the proceeds of his land which had been sold for partition. He did not, therefore, elect to take them as personal property. We lay no stress upon the statement in the answer, that when the intestate came of age he was a man "of insane mind, and incapable of making a settlement; because it is neither responsive to any allegation in the bill, nor proved.

The second and third exceptions must be overruled, to the extent at least of charging the defendant with the annual interest of the price of the land up to the time of the intestate's death. "The interest 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 his death, belong to the heirs at law." *March v. Berrier, ubi supra.*

The report must be reformed in the particulars herein stated, and it will then be confirmed. The costs must be paid out of the fund.

PER CURIAM. Decree accordingly.

Cited: Jones v. Edwards, 53 N. C., 337; *Bateman v. Latham,* 56 N. C., 38; *Allison v. Robinson,* 78 N. C., 227; *McLean v. Leitch,* 152 N. C., 267.

MEREDITH BARNES and wife Eliza v. ENOCH WARD and others.

Where the step-father becomes guardian to his step-child, he is not entitled to charge for board and other necessaries, furnished his ward antecedently to his appointment as guardian—the infant being incompetent to contract therefor.

Hence, where such guardian procured a *release* from the husband of his ward, soon after his marriage, of all his liability to account for property of the infant converted by him, and the consideration thereof was the alleged indebtedness of the ward for board, etc., before he became guardian, a Court of Equity will restrain him from availing himself of such release in a suit at law by the ward on his guardian bond—the same being without consideration.

CAUSE removed from the Court of Equity for ROBESON, at Spring Term, 1850.

In 1828, the defendant, Enoch Ward, intermarried with the mother of the plaintiff, Eliza, who was then a child. The said Eliza
(94) then owned no property except a woman slave named Sylvia, who afterwards bore a child; and these were sold by the defendant, Ward, who received the price. In 1835, the bill states, that one Rhodes, as the next friend of the feme plaintiff, caused a suit to be instituted against the said Ward, to recover the value of said slaves; and pending the action, in August of that year, he had himself appointed her guardian, and entered into bond with the other defendants as his sureties, and thereby defeated the said action. In September, 1842, the plaintiffs were intermarried; and in 1844, they instituted a suit at law upon the said guardian bond of the defendants, for an account of the value of said Sylvia and child, sold by the said Ward. To this action the defendants pleaded a release by the plaintiffs. The suit was referred to a commissioner to state an account, and is still pending in the Superior Court of Robeson County; and this bill was filed in 1846, for the purpose of restraining the defendants from availing themselves, in said suit at law, of the said release, given by the plaintiff, Meredith Barnes, to the defendant, Enoch Ward, on 6 January, 1843; which the bill alleges was without consideration (except that the plaintiffs received a small hog worth about one dollar and fifty cents), and was obtained

under circumstances of fraud and imposition—the said Meredith alleging, among other things, that he is illiterate and unable to read, and that he signed said paper, after much importunity by the defendant, Ward, and supposing it to be a mere receipt in full of his wife's claim.

Enoch Ward, in his answer, admits that he sold said slaves for the sum of $400, which he says was a fair price. He also admits that the sum of money expressed in said release, to wit, five dollars, was not paid by him; but he denies that the same was fraudulently obtained, and avers that it was given in consequence and in consideration of the feme plaintiff's indebtedness to him, of which she well knew, for board and other necessaries furnished her, from the year 1828, down to the time of her marriage, in 1842; an account whereof (including an item of one hundred and fifty dollars for her wedding dinner), is exhibited with the answer, amounting to $1,247. The other defendants adopt the answer of Ward, and with him they insist that the plaintiff, Meredith, well understood, at the time he executed it, the character of the (95) instrument relied on by them, as a release from the plaintiff's demand at law.

Upon this state of the pleadings, the cause was set for hearing, and by consent of parties transmitted to this Court.

Strange for the plaintiffs.
W. Winslow for the defendants.

NASH, C. J. The bill is filed to restrain the defendants from pleading, or using at law, a release given by the plaintiff Barnes to the defendant Ward. Ward, after he married the mother of Eliza Barnes, and before his appointment as her guardian, took into his possession a negro woman, the property of his ward. This negro he sold, and the action at law is upon the guardian bond to call him to account; and he has pleaded the release in his defense. The equity of the plaintiffs consists in the alleged fact that the release was given without any consideration. This fact would not avail the plaintiffs at law, because the instrument, being under seal, they cannot deny, in that forum, that it was given without consideration—they are estopped to deny it. But a Court of Equity is not so restrained. They may and will look into the consideration, and if they see that it was obtained by fraud or imposition, or by taking undue advantage of the situation of the party executing it, they will either set it aside altogether, or restrain the party holding it, from making use of it at law. The consideration mentioned in the release is five dollars; and the defendant admits no money was paid by him, but alleges that the feme plaintiff, his ward, was indebted to him in a sum much beyond the value of the negro; and to sustain his claim, he sets

forth an account against her, amounting to the sum of $1,247. In April, 1828, the defendant Enoch Ward married the mother of Eliza Barnes, the feme plaintiff, and in August, 1835, he was regularly appointed her guardian. The account exhibited by him against her commences with his marriage, and runs down to the time of the marriage of the plaintiffs, in 1842. From 1828 to 1835, the defendant is entitled to nothing for the board and maintenance of the plaintiff Eliza. It was at one time held, under the construction put upon the Statute 43 Eliz., ch. 2, and others on the same subject, that where a
(96) woman, having children by a former husband, marries a second time, her second husband was bound to maintain the children. 2 Bulst., 346. But this doctrine has been overruled, and it is now settled that a husband is not bound to support the children of his wife by a former husband. *Tubb v. Harrison,* 4 T. R., 118; *Cooper v. Martin,* 4 East., 75; 2 Show., 955. The step-father stands, in that respect, towards his step-child as any other stranger; and if, after the child comes of age, he promises to pay for his maintenance, an action can be maintained, because the step-father was not bound in law to support him:—if he had been, the subsequent promise would have been a *nudum pactum.* The defendant Enoch Ward was, then, under no legal obligation to maintain the plaintiff Eliza, and she was under no legal obligation to serve him. For that portion of the account, then, preceding the appointment of the defendant as the guardian of Eliza, he had no legal claim upon her, as she was under age at the time of her marriage. The answer of Enoch Ward states that Eliza had no property except that negro woman, who was sold by him with her infant for $400, which sum was, as he states, a full price. The law of this State does not suffer a guardian in maintaining his ward, to exceed the annual income from the ward's property. Rev. Stat., ch. 54, sec. 22. A Court of Equity, under peculiar circumstances—as where the infant cannot be entitled to maintenance as a pauper, and from want of bodily health or strength, or from mental imbecility cannot be bound out as the law directs—may apply a *portion* of an infant's property to his maintenance, as a matter of necessity. *Long v. Norcom,* 37 N. C., 354. These remarks are made to show the fraudulent object of the defendant, Enoch Ward, and the oppressive use he made of the advantage he possessed, in procuring the release—considerations which could not be looked into in a Court of law. The answer states that the plaintiff, Eliza, knew she was greatly indebted to him. Doubtless his unfounded claim was not unknown to her; and if any thing were wanting to show the intention of the defendant, it would be made manifest by the last item in the account, which is one hundred and fifty dollars for a marriage dinner, for a girl who it is stated in
(97) the answer had no property, and was a minor. Had the bill

asked for an account, we should have ordered one; but the plaintiffs are content to take it in the action at law, and there is no doubt it will be so taken there as to do justice to all parties, and the defendant will receive all just and legal credits, including the pig. An injunction against proceedings in another Court is an auxiliary writ to restrain parties from proceedings before the ordinary tribunals, where equitable elements are involved in the dispute. The dissolution of the injunction, upon the coming in of the answer, is a question of discretion to the Court, whether on the facts disclosed in the answer, or as it is technically termed, on the equity confessed, the injunction shall be at once dissolved, or whether it shall be continued to the hearing. Here the object of the injunction is to restrain the defendant from pleading, or availing himself of the release executed by the plaintiff, Meredith Barnes, on the ground that it is iniquitous, without consideration, and contrary to equity and good conscience so to use it; and the defendant's answer fully satisfies us upon all these particulars, and that the equity of the plaintiffs is sufficiently confessed. Adams Equity, 196, *Minturn v. Seymour,* 4 Johns., ch. 497.

The cause is before us for final hearing, and the injunction must be made perpetual.

PER CURIAM. Decree accordingly.

Cited: *Mull v. Walker,* 100 N. C., 50; *Bean v. R. R.,* 107 N. C., 747.

THOMAS O. HUNTER and others, Executors, etc., v. HIRAM W. HUSTED and another, Executors, etc.

A widow who dissents from her husband's will, is entitled, under the act of 1836, to the same share of her husband's personal estate as in case of his intestacy.

Therefore, where the testator, by his will, gave to his wife certain slaves and other personal estate, and the executors hired out all the slaves, and the proceeds of those bequeathed to the widow were less in proportion than those of others, and one of the slaves bequeathed to her died:—*Held,* in a bill brought by the representatives of the widow (who dissented), that she was entitled to an account of the estate, as of the *time of settlement,* and not of the death of testator.*

CAUSE set for hearing upon the bill, answer and exhibits; and (98) removed by consent, from the Court of Equity for WAKE, at

*This case was decided at last June Term; and C. J. RUFFIN, dissenting from the majority of the Court, retained the papers to file his opinion; but having afterwards resigned his seat no opinion was filed by him.

REPORTER.

Spring Term, 1852. The pleadings and facts of the case are sufficiently set forth in the opinion delivered by this Court.

The cause was argued at last June Term by the late

W. H. Haywood, Jr., for the plaintiffs, and by
J. H. Bryan for the defendants.

PEARSON, J. The bill is filed by the executors of Elizabeth McLeod, against the executors of John McLeod, for a settlement of his estate, under the direction of a Court of Equity.

John McLeod died in December, 1849, leaving him surviving his widow, Elizabeth McLeod, and no child, nor the descendants of any—having made and published a last will, which was admitted to probate in February, 1850, at which time the widow entered her dissent. The testator had a large personal estate. He bequeathed to his widow certain negroes and other personal estate; he made specific bequests of certain other negroes to different persons; and he left other negroes and property not specifically disposed of, which he directed to be sold, and the proceeds applied to the payment of debts and of sundry pecuniary legacies. The executors have hired out the negroes, and thereby realized a considerable amount. The proceeds of the hires of the negroes, bequeathed to the widow, are less in proportion than those of other negroes; and one of those bequeathed to her has died.

Three questions are made: Does the loss of the value of the negro that has died, fall upon the widow? 2. Is she to lose by the fact, that the negroes bequeathed to her, hired for less in proportion—some of them being chargeable? 3. Is the settlement to be made upon the basis of the value of the negroes at the death of the testator, or at the date of the settlement? These questions depend upon the same principle, and a decision of the first will dispose of the others.

The law gives to a widow the right to dissent from her husband's will, and upon her doing so, she becomes entitled to the same share of his personal estate that she would have been entitled to under the
(99) Statute of distributions, in case of his intestacy; that is, to one-third part, if there be no child, or not more than two, and a child's part, if there be more than two. Rev. Stat., ch. 121, sec. 12. The 13th section provides, that in allotting this share, "it shall be the duty of the Court to allot the same with as little derangement of the provisions of her husband's will as is practicable."

The question is, how far this clause controls and restrains the rights of the widow? She claims, not as a creature of her husband's bounty, but as one having a right secured to her by law. She has an election to take under the will, or to refuse the provision intended for her, and

claim the share that she would have been entitled to under the Statute of distributions; and it seems to us that the most natural and proper construction, by which to make the different sections of the Statute stand together, is, that in case of dissent, the amount of the widow's share is to be ascertained precisely as if the husband had died intestate; that is, in this case, upon the settlement, ascertain the value and amount of the whole personal estate, after the payment of debts, and one-third of that is the amount of the widow's share. But in allotting, viz., *paying over to her,* this share, the above clause comes into operation; and it is the duty of the Court to have her share paid out of such parts of the estate as are not specifically disposed of, if sufficient for that purpose—(in this, will of course be included the property intended to be given to her, but which is not disposed of by the will, in consequence of her dissent, for in respect to her the husband died intestate); and "thus derange as little as practicable the provisions of the will," by not touching specific legacies, if her share can be made up without doing so.

But it is said, the legacy to the widow is a *provision of the will,* which ought to be deranged as little as practicable. It is manifest that the protection given by this clause extends only to such legacies as continue in force under the will, and does not include a legacy intended to be given to the widow, but which she has refused to take under the will, by a right expressly conferred on her in the preceding section. To justify this construction, it will be necessary to add—so as to derange as little as practicable the provisions of the will; *including that intended for the widow,* but which *she has repudiated, nullified and stricken out of the will, as she had a right to do.* (100)

The act of 1791 is prayed in aid of the construction contended for. By it, in case the widow dissented, a jury was to inquire whether the provision made for the widow was equal in value to her distributive share. If so, "she was to be therewith content"; if not, the deficiency was to be made up to her out of the *residuum,* or part of the estate not specifically disposed of. If that fund was insufficient, she had a *scire facias* against the legatees.

The provisions of this Act are omitted in the Statute of 1836, and in lieu thereof, the clause above recited is inserted; and it seems to a majority of the Court, that the construction contended for, so far from being aided, is directly excluded and put out of the question by the fact, that the Act of 1791 is omitted in the Revised Statutes.

The Act of 1784 gave the widow a right to dissent, and entitled her to a distributive share, without any restraint. The Act of 1791 restrained the right, by compelling her to keep what was given to her, and providing a way to ascertain the deficiency, and how it should be made up. This was found to be very inconvenient, and gave rise to

much litigation. Juries were disposed to favor widows, and in many cases it was impossible for a jury or a Court to fix on a rule or principle by which to be governed. For instance, negroes, including breeding women, are given to the wife during her widowhood, with a limitation over. If they had been given to her for life, there is no rule or principle by which to ascertain the value of her estate; and when the contingency of marriage is thrown in, the question is "at sea." But the legatee having the limitation over has a vested right, and the matter could not be made certain, by giving the widow the entire estate.

These considerations induced the Legislature of 1836, in revising the Statutes, to omit the Act of 1791, and to adopt a middle course which is said to be the safest, and while retaining the general provisions of the Act of 1784, the Act of 1791 is omitted, and the clause above recited is inserted; and according to the construction which this Court puts upon the whole Statute, the amount of the widow's share is to be ascertained, as in case of intestacy, according to the Act of 1784; but it is to be paid over to her in a way so as to derange the rights of specific
(101) legatees under the will as little as practicable.

The construction adopted by this Court conforms to the words and meaning of the Act of 1836, and avoids the inconvenience and litigation that would necessarily result from the other construction contended for. In the case above put, of a legacy to the wife during her widowhood, of slaves, the Act of 1836 points out no mode by which the value of such estate is to be ascertained, or how the deficiency is to be made up. In fact the value of such an estate cannot be ascertained in any mode; and so the construction by which she is compelled to take the negroes, notwithstanding her express refusal to do so, cannot be reduced to practice. It will not do to say, let the entire estate be allotted to her—a value can be put on it; for that would wholly derange the specific legacy limited over. So, if the legacy intended to be given to the widow should, after her dissent, turn out to be of more value than her distributive share, the construction contended for would give room to suppose, that she was entitled to take it in spite of her election and express refusal on record. So, if one or all of the negroes, intended to be given to the widow, should, before the estate could be settled consistently with the rights of creditors, die or become diseased, and she, notwithstanding her dissent, was obliged to take them dead or alive, the payment of the share to which by law she was entitled, could be made by the value of a negro *who was then dead,* although she never was the owner of this negro, and had, by her dissent, expressly refused to become the owner.

This construction of the statute of 1836 decides the questions made. The widow is not to be charged, on settlement, with the value of a negro

now dead, given to her by a will to which she entered her dissent. She is not to lose by the fact that the negroes were hired out, and that those which she had refused to accept produced a less sum in proportion than the others, by way of hire; and the amount of the estate, after paying debts, is to be ascertained, as of the time of settlement.

The ground upon which there was a turpentine distillery, was held upon a lease for years; and the idea that this was not a part of the personal estate, was properly abandoned.

PER CURIAM. Decree accordingly.

Cited: Jones v. Jones, 44 N. C., 178; *Credle v. Credle, Ib.,* 228; *Johnson v. Chapman,* 54 N. C., 131; *Worth v. McNeill,* 57 N. C., 276; *Harrell v. Davenport,* 58 N. C., 9; *Arrington v. Dortch,* 77 N. C., 370.

(102)

DAVID GREEN and others v. HARDY B. LANE and others.

However the general rule may be, both here and in England, as to whether a will and codicil, when admitted to probate as one instrument, must be so construed, yet this Court will not, in determining the particular case before it, overlook the fact that the testator calls the second paper a codicil, and that the bill and answer so designate it.

Where a testator by his will directed his slaves, consisting of a mother and her children of various ages, to be removed in as short a time as practicable, and with the intent to a permanent settlement in some State or country where emancipation was unrestricted, and there to be entirely emancipated, and also made provision for their subsistence and education; and eight years thereafter, made a codicil and republished his will, and gave to trustees a house and lot in New Bern and certain personal property, including household furniture, and a cow and calf, upon trust that they should permit the mother to *use, occupy and enjoy* the same during her life, and at her death, to surrender up the estate to the other slaves: —*Held,* first that this provision indicated a change of mind of the testator, and his intention that the mother should reside on the lot—so as to revoke the provision of the will for her removal; and secondly, that as the testator had thus evidenced a disposition to evade the law as to the mother, it ought to appear by the codicil, that he wished the fate of the children to be different from hers, or it must be presumed he intended that they also should remain.

THIS cause was removed from the Court of Equity for CRAVEN, at Spring Term, 1851; and came on at this term, upon a petition to rehear the decretal order made therein, at December Term, 1851, of this Court. The following is the case, as stated by Chief Justice RUFFIN, in delivering the former opinion of the Court—(43 N. C., 70):

"William S. Morris, of New Bern, made his will on 15 March, 1831, and therein appointed the defendant Lane the executor, and gave to his executor all his estate, except a negro woman named Patsy, and her

three children, Harriet, Albert and Freeman, in trust for the following purposes: First, to sell the same and collect the proceeds and other monies due to the testator. And, secondly, that as soon after my decease as practicable, and at all events within a year thereafter, my executor remove beyond the limits of this State, and with the intent of a permanent residence, to some State or county, where emancipation is unrestricted by law, the said Patsy, Harriet, Albert and Freeman, and there cause them to be entirely emancipated. Thirdly, that my executor shall apply one-half of my money, debts due me, and the pro-
(103) ceeds of sales before directed, as a fund wherewith to effect the removal and emancipation as aforesaid, of the said Patsy, Harriet, Albert and Freeman, and to provide for them, after emancipation, in such manner and form as my executor shall judge best, as the means of their education, improvement and comfortable subsistence." And fourthly, that the other half be applied in certain other legacies.

"By a codicil, dated 30 May, 1838, the testator expressly republished his will which, he says therein, was written by Judge Gaston, and appointed Hardy Whitford and John L. Durand executors; and he 'devised to them, or the survivor of them, my piece of ground, with the improvements, on the west side of Craven Street, between, &c., and also my household and kitchen furniture, my cow and calf, and ten shares of the capital stock of the Merchants' Bank of New Bern; to hold said real estate in fee simple, and said personal property absolutely, in trust nevertheless to permit my woman Patsy, to use, occupy and enjoy the said piece of ground and improvements, and said furniture, and cow and calf, and to have the dividends of said Bank stock, during the natural life of said Patsy, and after her decease, in trust to surrender up said real or personal estate to Harriet, Albert and Freeman, the children of said Patsy, to be held by them in alsolute property. *Item,* I desire my executors or the survivors of them to sell the lots, Nos. 83 and 67, in the town of New Bern, at public auction; and of the proceeds of the sale I give unto William Henry Morris, son of said Harriet, and grandson of my woman Patsy, one thousand dollars'—giving the residue of such proceeds to certain other persons.

"The testator died in 1848, and Lane and Durand, the only surviving executors, proved the will. The bill was filed against them in 1850, by the legatees named in the will, other than the negroes, and by the heirs and next of kin of the testator for an account, and payment of the legacies, and the distribution of the surplus undisposed of; and praying that the disposition for the emancipation of the slaves and for provisions for them, may be declared unlawful and void, and that a trust in regard to the real estate may be held to result to the heirs, and of the personal estate to the next of kin.

"The answer of the executors and trustees states, that the boy Albert died before the testator; and that 'in the year 1828, the (104) testator carried the slaves Harriet and Freeman to the State of Pennsylvania, and there caused proceedings to be had for their emancipation, and did, according to the laws of Pennsylvania in such cases provided, emancipate and set free, as he was there advised, the said slaves, and then returned with them to his former residence in this State; and that from thence until his death the said Freeman and Harriet were in his possession and use: And that, being advised after his return that the said proceedings were irregular and contrary to the policy of the laws of this State, and that said emancipation was void here, and would probably be so declared at his death, the testator, under the advice of Judge Gaston, executed his will in 1831, and subsequently thereto, the boy William Henry was born, who is mentioned in the codicil, as the child of said Harriet.' The answer submits whether under these facts Freeman and Harriet were not duly emancipated, and whether, therefore, William Henry was not free by birth.

"The answer further states 'that within the year after the testator's death, and before the filing of the bill, the defendants removed the negroes Patsy, Harriet and Freeman to the State of Pennsylvania, with the intent of a permanent residence in that State—the same being a State in which emancipation is unrestricted, and there caused them, the said Patsy, Harriet and Freeman, to be entirely emancipated. And in that they say they did as they were advised, and as they believed in the faithful discharge of the trust reposed in them by their testator, it was their duty to do; and that if any other thing remains or is necessary to perfect the execution of said trust, they are willing and ready under the order and direction of the Court, to perform the same.' The answer then states the application of part of the funds of the estate to the removal and subsistence of the three negroes, Patsy, Harriet and Freeman, and the payment of two years' rent of the house and lot to Patsy."

Moore for the rehearing.
J. H. Bryan and *Miller contra.*

BATTLE, J. This is a petition to rehear a decretal order made (112) in this cause, at the December Term, 1851, of this Court. The parts of the decree complained of, are those wherein the Court declares, "that the codicil to the will of 1831, set forth in the pleadings, and exhibited in the cause, operated so as to revoke such of the provisions of the will providing for the emancipation of the slaves, as might have been lawfully carried into execution, inasmuch as it provided for their residence in this State, in a condition and state contrary to our laws and

policy; and thereupon adjudges that the negroes Patsy, Harriet, Freeman and William Henry Morris, were still slaves, and belonged to the estate of said testator, and with their increase, if any, were to be accounted for by the defendants as executors": And wherein the Court further declares, "that the said bequests for the emancipation of the said slaves being void, they belonged to the plaintiffs, who are the next of kin; and that the devise and bequests of property of every kind, both real and personal, in said will to said slaves, or in trust for their benefit,

(113) were void, and resulted to the said heirs at law and next of kin of said testator, and that the same, with the profits and interest accrued and accruing thereon, were to be accounted for by these defendants, as trustees, to and with the said plaintiffs."

The questions raised upon the petition to rehear have been elaborately argued before us by the counsel on both sides. We have given to the arguments a full and mature consideration, but yet without being able to discover in the decretal order any error of which the petitioners have a right to complain. A will is an instrument by which a person makes a disposition of his property, to take effect after his decease; and which is, in its own nature, ambulatory and revocable during his life. Jarman on Wills, 11. A codicil is a supplement to a will, or an addition made by the testator, and annexed to, and to be taken as a part of, a testament—being for its explanation, or alteration, or to make some addition to, or substraction from, the former disposition of the testator. 2 Black. Com. 500; Williams Ex'rs. 8. In the construction of wills, the leading and controlling object is to ascertain the intention of the testator; and in order to accomplish this purpose, technicalities may be disregarded, and irregularities of form overlooked. The same rule applies to a codicil, so far as the construction is confined to itself; but so far as it affects the will to which it is a supplement, the rule is, that it may vary, by adding to, or taking from the will, but it is not wholly to supplant it. Jarman on Wills, 160. In the construction of wills, it is said too, that there is a difference between inconsistent provisions when found in the body of the will itself, and when found in the will and codicil, arising from the fact that in the former case, both provisions have operation from one and the same act of publication, while in the case of the will and codicil, the provisions contained in the codicil necessarily modify or revoke those inserted in the will. But it is contended for the petitioners, that here the will and codicil were proved as a will only; that the decision of the probate Court is conclusive, as to that fact upon the Court, of construction; and that, therefore, they are to be construed as one instrument. However this may be in England,

or in other cases in this State, as to which we do not determine, we do not see how we can, in this case, overlook the fact that the testator himself calls the second instrument a codicil; the bill states it to be a codicil, and the defendants in their answer admit that it is so. (114) But, notwithstanding this, we agree with the counsel that the plain intent, apparent in the will, that the slaves should be sent abroad to be emancipated, ought not to be defeated by any doubtful intent, that they should reside in this State, to be extracted from the codicil. We agree with him further, that where two intents appear in the same instrument, one lawful and the other unlawful, the former is to be adopted. But we cannot apply the rule to a case, where the intention, if a plain one, is contained in an instrument whose office it is to vary a former one. We agree still further with the counsel, that a testator is to be presumed to know the law of the country; but we cannot say that, if so knowing it, he manifestly attempts to evade it, his unlawful attempt is to be overlooked, for the purpose of carrying out a previously expressed lawful intention. Such a rule would have saved the Court from the disagreeable necessity of deciding the cases of *Haywood v. Craven,* 4 N. C., 360; *Pendleton v. Blount,* 21 N. C., 491; *Lemmonds v. Peoples,* 41 N. C., 137; and *Sorrey v. Bright,* 21 N. C., 113; all which were attempts to set slaves free, in evasion of the settled policy and laws of the State.

With these admissions, we proceed to the inquiry whether the codicil, in the case under consideration, discloses a clear, plain, unmistakable intention of the testator, that his slaves should, notwithstanding his declared purpose to emancipate them, continue to reside in this State. The counsel for the petitioners contends that he does not; that the only term used by him, which creates any difficulty, is the word "occupy," and that word does not necessarily mean what is technically called a *possessio pedis.* We think the counsel has succeeded in showing, that it is barely possible the testator might have intended the slaves to reside abroad, while enjoying the benefit of the property devised and bequeathed to them. He certainly has not succeeded beyond showing such a possibility. But we do not consider that to be the rule for ascertaining a testator's intentions. Ordinary words found in a will are to be taken in their ordinary acceptation. Technical terms are to be understood in their technical sense, unless the context shows that the testator used them in a different sense. Here the testator gives a certain (115) piece of ground, with the improvements, in the town of New Bern, his household and kitchen furniture, and his cow and calf, and ten shares of stock in the Merchants' Bank of New Bern, to the petition-

ers, to be held in trust "to permit his woman Patsy to use, occupy and enjoy the said piece of ground and said furniture, and cow and calf, and to have the dividends of the said Bank Stock, during the natural life of the said Patsy," &c. He then directs certain other lots to be sold by his executors, and of the proceeds of the sale, he bequeathed to William Henry Morris, a son of Harriet, and grandson of Patsy, one thousand dollars. We ask seriously, whether one man out of a hundred would suppose that Patsy, a woman, was intended by the testator to reside in Pennsylvania, or any of the other free States, and yet "use, occupy and enjoy a house and lot, household and kitchen furniture, and a cow and calf, situated in the town of New Bern in this State." We answer confidently, that he would not. Nor will it help the construction, to say that the trustees were bound to sell the cow and calf, for the reason that they were given to Patsy for life only, with remainder over to her children. We cannot presume that the testator intended a sale; because, if so, we cannot see why he did not expressly direct it, as he did with regard to the lots out of which William Henry Morris's legacy was to be paid, and as he did with regard to all his estate in his will. We are bound, therefore, to declare our opinion to be, that the testator intended Patsy to reside in the town of New Bern, and there to occupy the house and lot, and use and enjoy the furniture, and the cow and calf.

But the counsel for the petitioners contends that, supposing this to be the proper construction with regard to Patsy, it does not apply to her children, Harriet and Freeman, and her grandchild William Henry Morris.

If the clauses in the codicil, relating to the children, had been separate and distinct from those which apply to their mother, we might perhaps be justified in putting a construction upon it more favorable to them. We admit that the terms employed by the testator do not so necessarily imply a residence in this State, as in the case of the
(116) mother. But neither the will nor codicil any where shows an intention that they should be separated from their mother, and we think, that as the testator has evinced a disposition to evade the law of the State in relation to her, there ought something to appear in the codicil, that he wished their fate to be different from hers. In the absence of any such intention disclosed by either instrument, we feel bound to hold that the testator meant that the children should reside with their mother, in the town of New Bern. That being so, the result is, that the bequest for emancipation has failed, and the slaves mentioned in the pleadings, together with the property devised and bequeathed in trust for them, belong to the heirs at law and next of kin, and the petitioners must account for them accordingly.

We must declare that there is no error in the decretal order in the matters alleged, and the petition must be dismissed with costs.

PER CURIAM. Petition dismissed.

Cited: Joiner v. Joiner, 55 N. C., 71; *Feimster v. Tucker,* 58 N. C., 72; *Gossell v. Weatherly, Ib.,* 52.

HENRY D. TURNER v. NELSON B. HUGHES.

Upon a reference to the Master, the parties should be prepared to exhibit their accounts—not as scattered through many books, but brought together, each furnishing his own statement, and presenting the books as he may contend the entries do or ought to appear. The Court will not, therefore, require the Master, to whom partnership accounts are referred, to examine the books of the firm running through many years, though tendered to him by the parties for that purpose.

It is not good cause of exception to the Master's report, that he admitted as evidence summary statements of the accounts between the parties, as prepared from the books (including the Bank books) of the firm, by a person who made them up as the agent of the parties, and in their presence, at the time of the dissolution of the firm.

The rules of practice in cases of reference, stated by NASH, C. J.

CAUSE removed from the Court of Equity for WAKE at Spring Term, 1848. The cause was heard upon exceptions to the Master's report, which are sufficiently stated in the opinion delivered by the Court.

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

NASH, C. J. The bill is filed to settle the accounts of the firm (117) of the parties, which ran through a period of fifteen years. A reference was made to the Clerk and Master to state the accounts. The Master made his report to this term, and both parties have filed exceptions. Those of the defendant were principally urged and insisted on. The first exception filed by the defendant strikes at the report *in limine* and, if allowed, sends it back to the Master. It is, "that the Master has not himself examined the books of the firm, although tendered to him, even so far as to ascertain the amount and nature of the debts remaining due to the firm, or of its liabilities, or of the amount received by each partner out of the funds of the firm for his own use, nor in other matters reported on; but as to all, has relied upon the summary statements made by one to whom the accounts had not been referred, and who was not acting as the deputy, nor under the authority of the Master of the Court, at the time he prepared the said summaries."

In his report, the Master states that he "repeatedly called upon the counsel of the parties to exhibit before him the state of the books, to be made as each might contend the entries did or ought to appear—at the same time informing them that he should make out no accounts of the kind for either party." Upon inquiring of the Master, we find such has been his practice in his office, where the accounts have run through many years, and the books containing them numerous. The practice is founded in reason; and no case exemplifying its correctness more fully could present itself, than the one we are considering. The business of the firm was the sale of books, stationery and fancy articles. The copartnership has existed fifteen years; and the report states, that the accounts the Master was required to state, ran through thirty-five folio volumes, and that it would have taken him six or nine months, as he was informed and believes, to have performed the duty. Now when it is recollected that as *Clerk and Master* he cannot be allowed by the Court more than $50 for taking an account, it is manifestly unjust to require of the Master to wade through books requiring such labor. Besides, it would require too much of the time of the Master. The practice works no hardship to the parties. If they (118) mutually desire a decision of the controversy, they can employ a commissioner who, for a proper consideration, can perform the work. If they do not so choose, but for any cause prefer going before the Master, they must be prepared to exhibit their accounts; not as scattered through many books, but brought together in one account, as either claims, each furnishing his own account, and presenting the state of the books, as each may contend the entries did or ought to appear. By pursuing this course, more complete justice can be done, the cause expedited, and much delay avoided. The refusal of the Master to examine the books, *as required* by the parties, was in accordance with the practice of the office heretofore observed, and we feel no disposition to interfere with it.

The second ground alleged in the first exception is in this case untenable. It is true Mr. Whiting, the gentleman who furnished the summaries, was not the person to whom the accounts were referred. But at the time he examined the books, he was the agent of the parties for that purpose; and according to his deposition, the books were examined by him in their presence, and the summaries made at the dissolution of the firm, in 1845. The deposition of Mr. Whiting is exhibited as the testimony upon which the summaries were admitted by the Master, as evidence in the cause. We think there was no error in this particular.

The first exception is overruled.

The second exception is overruled. The parties having refused to furnish to the Master such a statement, as by the practice in his office

he had a right to require, he had a right to resort to such testimony as was within his power, to show what was the true statement of the accounts between the parties.

The third exception is substantially embraced in the first. It is founded on the alleged duty of the Master to examine the books. We have declared it was not the duty of the Master so to do, under the circumstances disclosed in the report, and which are not denied. It would be sufficient in examining this exception to stop here; but it is as well to state, that however correct in the abstract, the first and second reasons assigned in support of the exception may be, they do not apply to this case. The rule only applies to cases where the books are not only open to the inspection of both parties, but both parties must be so situated that they can have a daily inspection of them; and cannot apply, when one of the parties is so situated that he cannot have an in- (119) spection of them when the entries are made, or in such convenient time thereafter, as that the entry may be deemed fresh, and fix him with notice. When both parties are enabled by their situation to see the daily entries, if they choose, the books must be presumed to speak the truth. In this case, the plaintiff Turner, in a short time after the copartnership was formed, removed to New York, where he managed a branch of the business; and the business here was under the sole control of the defendant Hughes. The third reason goes back to the supposed neglect of the Master, in not examining the books. This exception is overruled.

It is further objected on the part of the defendant that the Master did not examine the bank books, and that they were no evidence, of themselves, of their being correct. Mr. Whiting, the agent employed by the parties for that purpose, testified that he did examine them, and that they were correct, and the private bank books of the firm, kept by the defendant, were in evidence before the Master, and the same reason which exempted the Master from examining the books of the firm, extended to those of the banks.

The Master reports that the plaintiff made the statements as required, and established their correctness by the testimony of Mr. Whiting; and that he further exhibited two statements marked D and C, and proved that the books were erroneous in the items therein set forth; and submitted a statement marked B, founded on that statement; that the clerk refused to correct the books (it being objected to by the defendant's counsel), unless directed by the Court. He further states that if corrected as required it will increase the assets of the firm, and thereby the indebtedness of the defendant to the plaintiff, to the amount of $5,264.72. The plaintiff excepts to the report of the Master in this particular. We think the exception is good and is sustained, and that

the Master must correct his report in that particular before the Court, as he states he can do.

The second and third exceptions of the plaintiff are disposed of in answering the first.

It is much to be desired that rules should be adopted, regulating the practice in the Courts of Equity below, and in this Court. Much (120) delay in the transaction of the business of this Court would be thereby avoided, and more certainty in the administration of equity cases be secured. We are fully apprised of the difficulties under which our brethren of the bar labor, in preparing their equity cases on the circuit; but we think their labors would be lightened by the adoption of rules by which their practice is to be governed. We do not, however, propose to adopt them at this time, because it would operate a surprise upon parties to causes now existing, and might thereby work a wrong. But we are disposed hereafter to adopt some rule by which the Clerks and Masters below may be governed, in taking accounts referred to them. Regularly, when a reference is made to a Master, the Court provides for a full investigation of the matter, by a direction that the parties shall produce, on oath, all documents in their favor, when the nature of the case requires it, and shall be examined on interrogatories as the Master shall direct. The Master proceeds by issuing notices, directing the parties concerned to attend before him at the time mentioned. It is the duty of the parties then to lay before him written narratives, called statements of facts, of the circumstances on which they rely, which must be supported by the requisite and proper testimony. After the evidence is all in, the Master issues notice for preparing the report, and he acts upon the evidence as it then stands, no additional evidence being receivable. At this stage of the proceedings, and whilst the report is still in draft, it is the duty of any dissatisfied party to lay before him written objections, specifying the points in which he considers it erroneous. If that be not done, exceptions, which are the mode of contesting it before the Court, will not be heard. These objections, being in writing, are turned into exceptions to the report. Adam Equity, 381, 2, 3 (in margin). These rules we do not, at this time, extend to the Clerks and Masters of the Courts of Equity below; but only to the Master of this Court, for his future conduct in taking accounts—at the time recognizing as proper and correct the rule of practice set forth in answering the first exception in this case. The Master's report being reformed before us in Court, is in all things confirmed.

PER CURIAM. Decree accordingly.

(121)

WILLIAM OWEN, Administrator, &c., v. PETER OWEN and wife and others.

Where a testator, by one clause of his will, directed that on the *marriage* of his widow, she should have a child's part of his personal property, and by another clause, directed that on her *marriage or death*, all the property he had given to her, with all his slaves, should be divided between his children: *Held* that the latter clause did not defeat the clear and express provision made in the former, but referred to a division on her death, and the former to a division on her marriage; and that notwithstanding the verbal repugnancy, she was entitled, on her marriage, to a child's part.

Where the bequest was to nine children, with a provision that if any of them should die without lawful issue of their body them surviving, their part should be equally divided between the other children, and several of them died with issue: *Held* that only the original shares passed by the will to the survivors, and that the portions accruing to them by the death of their brothers and sisters, became their absolute property, distributable on their death, among their next of kin.

Where a testator, in providing for his children, gave to one of his daughters enough of his estate to make her share equal to those of his children, counting as a part of her share, *what she might get from a grandfather*, and the grandfather was living at the time fixed for distribution, and had given nothing to the daughter: *Held*, that she was entitled to a full share of the father's estate, without regard to what she might thereafter receive from the grandfather; and that the Court will not postpone the time for distribution, in order to ascertain what might be given by the grandfather.

CAUSE removed from the Court of Equity for DAVIDSON, at Spring Term, 1852.

The bill was filed by the plaintiff, as the administrator *de bonis non, cum testamento annexo* of Alfred Smith, to obtain a construction of his will. All the legatees who were living, and the representatives of those who were dead, were made parties. The clauses of the will upon which the difficulties arose, were as follows:

"I leave in the hands and care of my beloved wife, during her natural life or widowhood, to be managed as she may think best for the use of her and my children, all the negroes which I now own or possess, to be kept by her at home as long as they conduct themselves in an orderly manner; but should any of the negroes become unruly or disobedient, they are to be hired out by my executors, the proceeds to go into my estate."

"I give to my daughter Rachel, wife of Obadiah Goss, the sum of one hundred dollars, to be paid to her when there is sufficient money in the hands of my executors, to pay this and all the legatees under this will. My will and desire is that if my beloved wife should marry, (122) that she is to have one-third of my land during her natural life, and to have an equal or child's part of all my personal property. I mean the one-third of the tract of land on which I now live."

"I request and desire my wife, as my children who are now at home should marry or settle to themselves, to let each of them have the use and possession of one negro apiece, and such other property as they may need, and which she can spare, to enable them to commence housekeeping—the property taken by each child to be accounted for in a final settlement of my estate, at the death or marriage of my beloved wife."

"My will and desire is, that at the marriage or death of my beloved wife, all the property I have willed to her (land excepted), with all the negroes, be divided between all my children who are now at home, and when they all get as much as I have given my daughter Rachel, counting what Leonard Goss has and may give her, then she, Rachel, shall share equal in the balance of my estate with all my children now at home; but should the portion which I have left Rachel, with what she may get from her grandfather, Leonard Goss, then she is to be made equal with my other daughters out of my estate."

"I will that my executors sell four hundred and fifty bushels of corn, one hundred bushels of wheat, and all the crop of cotton now growing (except for family use), either at public or private sale, together with all my outstanding notes; after the payment of all my just debts and the legacies in this will, the balance, if any, to be divided between my wife and all my children, share and share alike. My will and desire is that should any of my children now at home die without lawful issue of their body them surviving, their part to be equally divided between the balance of my children now at home with me."

In other parts of his will the testator gave to his wife, during her life or widowhood, several articles of personal property, to each of his sons certain parcels of land, and to each of his four daughters, Ellen, Nancy, Mary Ann, and Martha, seven hundred dollars. The bill stated that besides his daughter Rachel, who was married and living with her husband, separate from her father, he had four sons, to wit: James,
(123) Alfred, Burgess L., and Casper G. Smith, and four daughters, to wit: Ellen, Nancy, Mary Ann, and Martha, all of whom were living at home with their father, both at the time when his will was made, and at his death; that after the death of the testator, his daughter Ellen had married the defendant Peter F. Owen, and then died, and her husband had administered upon her estate; that four of the other children had died intestate, to wit: Burgess and Casper, upon whose estates the plaintiff had administered, and Alfred and Nancy, of whom the defendant, Peter F. Owen, had become administrator; and that the widow, on the 3d day of September, 1851, intermarried with the defendant, Peter Owen. The bill then stated that upon the marriage of the testator's widow the plaintiff had sold the perishable property which had been given to her during her life or widowhood, and was ready to divide

the proceeds, and also the negroes, among the legatees, but that difficulties had arisen in the construction of the will, upon which the plaintiff prayed the advice of the Court.

First, the widow insisted that she was entitled to a child's part in the division; and also that she was entitled, as one of the next of kin, to a share of the estates of the children who had died; and particularly to the accrued shares of those who died after the first. The children on the other hand insisted that by her marriage she had forfeited all claims to any part of the personal estate.

Secondly, Rachel Goss insisted that as her grandfather had given her nothing as yet, she was entitled to receive from the estate six hundred dollars to make her share equal with her four sisters, to whom legacies of seven hundred dollars each were given; and that upon a proper construction of the whole will she was entitled to a share of the estate of all the children who had died; and particularly to the accrued shares of those who died after the first. The other children contended that she was not entitled to anything until it should be ascertained what she might receive from her grandfather, Leonard Goss; and some of them contended that no division could take place at all until that should be ascertained. The other children contended further that she could not claim any part of the estate of the decedents, because she did not live at home.

The bill stated further that the defendant, Peter F. Owen, had sold one of the negroes for six hundred and twenty-five dollars, (124) and had received the price, for which he ought to account.

The answers admitted the facts stated in the bill, set up their respective claims as therein set forth, and submitted to such decree as the Court might make. The answer of the defendant, Peter F. Owen, admitted that he had sold the slave as charged, said he had done it with the consent of all the family, and was ready and willing to account for the proceeds. The case was set for hearing upon the bill and answer, and transmitted to the Supreme Court.

No counsel for the plaintiff in this court; and

The case was submitted without argument by *Miller* and *Busbee* for the defendants.

BATTLE, J., after stating the case above, proceeded: We are called upon to decide upon the questions presented by the pleadings, without the aid of an argument. It is possible that, under such circumstances we may have mistaken what the testator intended should be done with the personal estate in the events which have happened. The will is not very perspicuous, and some of the sections appear, at first view, to be contra-

dictory to others. But applying to it those rules which have long been established for the construction of instruments of this kind, we think that we can approximate to, if we do not exactly fix upon, the wishes of the testator.

All admit that the fundamental rule in the construction of wills is to ascertain the intention of the maker; and for that purpose all the parts of the will are to be taken in view, and effect is to be given as far as possible to every clause. What is wanting or obscure in one section or paragraph, is to be supplied by what is clearly expressed in another, so as to give to the whole instrument a uniform, consistent interpretation throughout all its parts. Thus, where the testator in the will before us directs in one section as follows, "at the marriage or death of my wife all the property I have willed to her; with all the negroes, be divided between all my children who are now at home," etc., without giv-
(125) ing her any share thereof, it is evident that he was thinking only of a division to be made at her death; but that can not defeat the clear and express provision made in a previous clause, that if she married she was to have a child's part. We hold, therefore, that she is entitled to a child's part of the fund, after deducting six hundred dollars for Rachel, as hereinafter expressed; that is, to one-tenth part thereof, there having been nine children, including Rachel Goss, who were living at the testator's death. We can see no pretence for her claim to the original shares which, upon the death of some of the children who lived at home, went to the survivors; but she is clearly entitled as one of the next of kin of her deceased children, to a share of the accrued shares of those who died after the first—*McKay v. Hendon,* 7. N. C., 21; 1 Jarman on Wills, 620, and the cases there cited.

There is more difficulty in deciding upon the claim of Rachel Goss. The testator seemed to think that her grandfather would provide for her to some extent and he intended that what he himself might give her should depend upon that provision. But he clearly fixed upon an event which was to be the period when the division between his widow and the children should take place; and we can not find a sufficient indication in the will that he wished such division to be postponed for a longer period, to await the uncertainty of the grandfather's providing for Rachel. He doubtless thought the old man would die and leave something to his granddaughter before his wife should either marry or die. In this he was mistaken, and he has not provided against the mistake. We hold, therefore, that the marriage of the widow was the time for the division, and that Rachel, not having received anything from her grandfather, is entitled in the first place to six hundred dollars, in order to make her equal with her four sisters, and then she is entitled to a child's share of the whole remaining fund. She was not living at

home and can not claim any of the original shares of the deceased children; but she is entitled, as one of the next of kin of her deceased brother and sisters, to a share of the accrued shares of those who died after the first.

All the other children who are living, and the representatives of those who are dead, are entitled each to one-tenth part of the whole fund, after deducting therefrom the six hundred dollars for Rachel. That sum is to be deducted before the division in order to effectu- (126) ate the manifest intention of the testator, to make the division of his personal property equal among his widow and all his children, in the events which have occurred—the seven hundred dollars given to each of his daughters, being in lieu of a provision in land, such as he had made to his sons.

All the children, other than Rachel, who are living, are entitled to the original shares of those who are dead, and to their respective parts of the accrued shares as next of kin, as specified above, in relation to the widow and Rachel.

In this opinion we have treated all the legacies as vested, as the parties seem to have done. We think that upon a proper construction of the whole will they are so vested, though the division is directed to be made *at* the marriage of the widow. The words *when, if,* or *at,* applied to a legacy generally, makes it contingent, "unless there be some other expression to explain them, or some provision in the context to control them." We think there are many expressions in this will to control the meaning of the word *at.* The property is given to the wife during her life or widowhood. At her death or marriage it was to be divided between her and her children. The shares of the children were, therefore, vested remainders, to be enjoyed in possession upon either of the events which might determine the particular estate. See *Guyther v. Taylor,* 38 N. C., 323.

It must be referred to the clerk to take all proper accounts, etc. In the final division which is to be made, according to the principles expressed in this opinion, the defendant, Peter F. Owen, is to be charged with the price of the negro sold by him, with interest thereon from the time he received the money. All the costs will be paid out of the fund.

PER CURIAM. Decree accordingly.

Cited: Winder v. Smith, 47 N. C., 331; *Cheeves v. Bell,* 54 N. C., 236; *McQueen v. McQueen,* 55 N. C., 19, 20; *Page v. Foust,* 89 N. C., 449.

(127)

WILLIAM J. SMITH, Administrator, *de bonis non* and others, v. JOHN E. FORTESCUE and others.

When an administrator, under the Act of 1846, sold land, of his intestate's estate, to obtain assets to pay the debts, and transferred by endorsement the bond of the purchaser, receiving therefor a quantity of corn from the endorsee, who had notice that the corn given for the bond was for the individual use of the administrator:—*Held*, in a bill brought by the administrator *de bonis non* of the intestate, and the sureties of the former administrator, that the endorsee is liable to account for the bond.

CAUSE removed from the Court of Equity for HYDE, at Fall Term, 1852.

The bill is filed to follow the assets of the estate of Benjamin Russell, who dies in the year 1847. Upon the death of said Benjamin Russell, administration upon his estate was by the proper authorities granted to Charles B. Russell, who entered into bond with the plaintiffs as his sureties. In order to obtain assets to discharge the debts of his intestate, he filed a petition in the County Court of Hyde for a sale of the real estate; and such proceedings were thereupon had, that a decree was regularly made, and the land sold on a credit, in January, 1848. At the sale, the defendant Warner became the purchaser, at the price of three hundred and twenty-five dollars and fifty cents. To secure the payment, he executed his note to Charles B. Russell, with the defendant Slade as surety. This note was, upon its face, made payable to Charles B. Russell, as administrator of Benjamin Russell. The said Charles B. Russell, in the spring thereafter, contracted with the defendant, Fortescue, for the purchase of a quantity of corn, and in part payment therefor, transferred by endorsement the Warner note to him, which was subsequently paid to him by the principal and the surety. The bill charges that the defendant, Fortescue, had full notice, before he delivered the corn or received the note, that the latter was the property of the estate of Benjamin Russell, and that the said Charles B. Russell was purchasing the corn for himself. In 1849, Charles B. Russell died intestate and insolvent, and administration *de bonis non* on the estate of Benjamin Russell was granted to the plaintiff
(128) Smith; and letters of administration on the estate of said Charles B. Russell were granted to the defendant, Willord. Fortescue, in his answer, denies that at the time he sold the corn and took the transfer of the note, he knew that Charles Russell was purchasing it for his own use. Upon this question—the plaintiffs having taken replication to the answer—the parties proceeded to take proofs; and the cause having been set for hearing, was removed to this Court.

Donnell for the plaintiffs.
Shaw for the defendant Fortescue.

NASH, C. J., after stating the case as above: It is abundantly proved by the depositions on file, that the defendant, Fortescue, did know that Charles B. Russell purchased the corn of him for his own use. In the first place, his denial is evasive. His statement is, that "Charles Russell kept a country store and traded for corn and again sold it, generally at an advance by retail, or shipped it to a northern port with a view to profit expected from such sales, and for money; that *he did not inquire of him,* and does not know, whether said Russell bought said corn for his own use, or to raise money on it to pay the debts of the said Benjamin Russell's estate," etc. This statement is sufficiently suspicious to deprive it of all weight as an answer to the plaintiff's interrogatory. Weakened as it is by the terms in which it is clothed, that when Fortescue was talking of selling the corn to Russell, he told the deponent that William J. Smith had forwarned or begged him not to take the Warner note, and that he had promised him he would not; but that afterwards Fortescue told him he had concluded to take it, as he was getting a better price for his corn—*that Russell had offered him his own note, but he was afraid of it, and that Russell was compelled to have the money to pay in Bank.* Mr. May proves, that before the corn was sold, he heard the plaintiff tell Fortescue not to take the Warner note, and that Russell would use the funds for his own purpose. An executor and an administrator have the legal title to the property of him they represent, and may sell and dispose (129) of it so as to convey the title that is in him, and a purchaser will acquire a valid title, unless he knows that the trustee is violating his trust;—as that he is using the fund for his own purposes, to pay his own debt. Nor is it necessary that the purchaser should have an actual knowledge of the particular fraud intended. If anything appears calculated to excite his attention, the party is considered in Equity as having knowledge of all that the inquiry would have disclosed. *McLeod v. Drummond,* 17 Ves., 159; *Exum v. Bowden,* 39 N. C., 281; *Wilson v. Doster,* 42 N. C., 231. It was the duty of Fortescue to have made the necessary inquiry—he made none, as he states himself, and with the evident intent to evade its effect, and with the knowledge that Charles B. Russell wanted to raise money by the sale of the corn to pay his debt in Bank.

To sum up the case, as far as the defendant Fortescue is concerned—here is a man dealing with an administrator for the funds of the estate, with full knowledge of that fact—for not only is he informed of it, but upon its face the note is payable to Russell, as administrator—he

is put upon his guard not to take it, that the administrator is using it for his own purposes;—the case is too plain to occasion a moment's hesitation in saying, we are entirely satisfied that he did know that Russell was abusing his trust—that he wanted the money which the corn would bring, not to pay any debt due by the estate of Benjamin, but to pay in Bank on his own debt. He was, in the transaction, a *particeps criminis* of a gross fraud.

The bill is dismissed as to Warner and Slade, with costs as to Warner, but none as to Slade, as he does not answer. They had a right to take up the note, by paying its contents to any legal holder; and as to Willord also, the bill states that his intestate died insolvent—he therefore has no assets.

There must be a decree against Fortescue for the amount of the note, with interest from the time it fell due, and he must pay the costs of this suit.

PER CURIAM. Decree accordingly.

Cited: *Dancy v. Duncan,* 96 N. C., 117.

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(130)

CHARLES McDOWELL and another v. A. H. SIMMS and others.

In sales at public auction, there must be good faith on both sides; and as soon as the purchaser finds out there has been by-bidding, he must take his election to rescind or abide by the contract.

As, where at a sale by auction of land (sold as containing a gold mine), a by-bidder was secretly employed by the vendors to run up the land, and the vendees did not bring their bill for a rescission of the contract until twelve months or more, after they had knowledge of that fact, and in the meantime, or a portion thereof, continued to work and explore the land: —*Held,* that this was too long a delay in notifying the vendors of their wish to annul the contract.

AT August Term, 1849, of this Court, the interlocutory order which had theretofore been granted in the cause in the Court below, dissolving the plaintiffs' injunction, was affirmed (41 N. C., 278); and the plaintiffs having retained their bill as an original, and amended the same, and replied to the answer, the cause was, by consent, removed to this Court, from the Court of Equity for Burke County, at Spring Term, 1851.

The plaintiffs originally filed their bill on 21 January, 1848; and heirs at law of Littleton Simms, and Thomas Jefferson, (who is not an heir), are made parties defendants.

The plaintiffs state, that in the month of May, 1848, the defendants

being seised and possessed of a tract of land situate in Rutherford County, containing one hundred and fifty acres, advertised and exposed the same for sale at public auction, when they became the purchasers, at the price of two thousand and eight dollars; for which sum they gave their bonds, payable in one and two years, and at the same time took from the vendors their obligation to make title, when the purchase money was paid. That said bonds for the purchase money were, at the instance of those who conducted the sale, and for what purpose the plaintiffs do not know, made payable to Thomas Jefferson and A. H. Simms, two of the defendants, as administrators of said Littleton Simms, deceased.

The plaintiffs then charge that at the time the said land was advertised for sale, the defendants, and others acting as their agents, represented the same as containing a valuable gold mine; and (131) that one of the defendants, Cowan, often urged one of the plaintiffs, McDowell, to attend the sale, assuring him that the land was worth ten thousand dollars and more, and that he would purchase it himself, if he were able—and that a portion of the low ground would yield two dwts. of gold to the hand.

The further charge, that on said day of sale, the defendant, Jefferson, and some of the other defendants attended, and employed divers persons, among others one *Preston Long,* to puff up said land as containing a rich deposit gold mine; that said *Long* did accordingly represent it as such; and furthermore, that he was secretly employed by the defendants and their agents, to act as a by-bidder at the sale, and to run up the property greatly beyond its value—which he did. That from the connection of said *Long* with the defendants (being son-in-law of one of them), and from his intimate acquaintance with the tract of land, his bidding was well calculated to exert, and did exert, a great influence on their minds and the minds of others desiring to purchase; and that but for these causes, the land would have sold for but comparatively a trifle.

That they reside some twenty-five or thirty miles from the land, and were entirely unacquainted with its capabilities; that they desired it only for mining purposes, as was well known to the defendants who sold it; that they were induced to purchase solely from the fraudulent representations of the defendants and their said agent *Long;* and that the defendants and their agents well knew of the real value of said land, and concealed the fact from them. And they charge that the said tract of land is probably not worth more than four or five hundred dollars.

They further state that after diligently searching the said land, and operating thereon, at great expense, for several months, they found it entirely valueless for mining purposes, and abandoned the same in

despair; and that it is worth but little more for agricultural purposes. That they have frequently tendered the land back to the defendants, and with a view to avoid a lawsuit, have tendered a sum more than the value of the land, to induce them to rescind the said contract—

which the defendants, have refused, especially the defendant
(132) Jefferson, who, they allege, is to receive a large sum for his

services in effecting the said sale; and they suggest that it was in contemplation of this, their right to have the contract rescinded, that their said bonds were drawn payable to himself and A. H. Simms, as administrators.

In their amended bill, filed at Fall Term, 1849, the plaintiffs further state that the facts of puffing and by-bidding as above alleged, were wholly unknown and unsuspected by them at the time of their said purchase, and until long thereafter, when they had expended large sums of money on the land, and abandoned it as valueless. And they say that since they discovered the said alleged fraud, they have not worked on said land or claimed it, or authorized any one to occupy it as theirs, otherwise than to consent that it might be rented or worked by consent of the defendants, and to be accounted for to the party on whom the ownership might be thrown by the decision of this Court. And the prayer is for a recission of the said contract.

The defendants, in their answer, admit that *Preston Long* was employed by them to bid for the said land, to run it up to as much as two thousand dollars; but they aver that their sole purpose was to prevent a sacrifice thereof. And they further aver their belief, that the plaintiffs were aware of this fact, or at least had sufficient means of ascertaining the same, as well whilst the bidding was going on, as after the sale, and before they executed their bonds for the purchase money. That it was generally known that said *Long* had not the means himself to purchase the property, and that one of the defendants, Cowan, his father-in-law, publicly declared on the day of the sale, that the same shall not be sacrificed; and they still further aver, that on said day of sale the plaintiff, McDowell, was told "that the defendants intended to make the land bring more than it was worth," or words to that effect, and that the plaintiff's informant refused, on account of this alleged fact, to join them in their purchase, as he had designed doing.

The defendants further state, that the plaintiffs were familiar with the section of the country in which said land is located, and that one of them owned gold mines in the vicinity, and a tract of land adjoining

the one in dispute, which had been rich and productive of gold;
(133) and further, that the plaintiffs are persons of great skill and

experience in mining, and not likely to be imposed upon in relation thereto.

They further insist, that at the time of said sale to plaintiffs, they honestly believed that said land was of great value as containing gold, and worth much more than the sum for which it sold; that a part of it had been worked for a short time, with profit; and they are still of opinion, that it might be made profitable, if properly worked and attended to. And they deny that there was any understanding or agreement between themselves or with others, either before or at the sale, to puff or run up the land, otherwise than to prevent its sacrifice as aforesaid; or that they, or any of them, or their agents, made any false and fraudulent representations in the premises, to mislead the plaintiffs or others. And they say that the said *Preston Long* ceased bidding for and on their behalf, when the price reached nineteen hundred and fifty dollars; after which the competition was between the plaintiffs and one *George Taylor,* who was a stranger to them, and with whose bidding they had no connection. They further state that said land is worth a thousand dollars or more as a farm.

They also deny that the defendant, Jefferson, was to receive any sum whatever from the other defendants for his services in selling the land; and the said Jefferson and A. H. Simms, also deny that in taking the plaintiffs' bonds payable to themselves as administrators, they designed to procure any advantage thereby—they having intended to take them as the *agents* of the heirs; and they say that they mentioned the mistake to plaintiffs, when they discovered it some time afterwards.

The defendants further insist, that the plaintiffs continued to explore and work the said mine, after they had knowledge of the fact of *Long's* bidding for the defendants as aforesaid, or after they had received such information on the subject, as would have put them on inquiry, if they, in truth, objected to said bidding as fraudulent and deceptive. For they say that the plaintiffs' overseer, one Weaver, boarded with one of the defendants about three months, whilst superintending the said mine—that he had knowledge of that fact, the subject having been frequently mentioned in his hearing and known to the neighborhood—and that the plaintiffs several times visited the mine, (134) whilst he was engaged in their employment there as aforesaid.

Many depositions were read at the hearing, the tendency and effect of which will be found in the opinion delivered by the Court.

The cause was argued at a former term at Morganton, by the late

James Iredell and *N. W. Woodfin,* for the plaintiffs, and by *Avery* and *Guion,* for the defendants.

NASH, C. J. This case is now before us for a final hearing. At August Term, 1849, 41 N. C., 278, the interlocutory order, dissolving the injunction which had been granted to stay the collection of the money due upon the bonds, given by the plaintiffs for the purchase money of the land, was affirmed. The original bill sought to set aside the contract, upon the grounds: first, that the defendants committed a fraud upon the plaintiffs in the sale, by representing that the land contained a valuable gold mine; and secondly, because by-bidders or puffers were employed by the defendants, without the knowledge of the plaintiffs, to run up the land, whereby they were induced to bid for it a price far beyond its value. In their answers, the defendants deny the first ground of fraud; and the evidence in the cause does not sustain the allegations of the bill. Upon the second charge, the defendants admit that they did employ *Preston Long* to bid for them, without any intent to defraud the persons who were disposed to bid, but simply to prevent the land from being sacrificed. There is some contrariety of opinion on this question in the English Common Law Courts and those of Chancery. In *Bexwell v. Christie,* Cow., 395, Lord MANSFIELD declared—"It was a fraud upon the sale and upon the public," to employ a puffer or by-bidder to run up the property, upon the principle that good faith ought to be the basis of all dealings between man and man. That case was followed by *Howard v. Castle,* 6 T. R., 643. That was an action on the case to recover damages for a refusal on the part of the defendant to complete a sale—there having been a resale in consequence of such refusal. On the trial, it was shown that (135) the defendant, after he had bid off the property at the sale, discovered that he was the only real bidder—all the others having been puffers employed by the plaintiff. The defendant, upon making this discovery, *immediately* refused to comply with the contract. Lord KENYON expressed in warm terms his admiration of the noble principles of morality and justice, announced by Lord MANSFIELD, and winds up by saying—"he met the question fairly, and made a precedent which I am happy to follow." ASHURST, Justice, in a single sentence, expresses his opinion:—"If one person is induced to bid at an auction sale, without exercising his own judgment, and that by the owner himself, the parties do not meet on equal terms." This of course said in reference to the case then before the Court. On the other hand, Lord ROSSELYN, in *Conolly v. Parsons,* 3 Ves. Jr., 625, *in note,* declares that it was no objection to a sale by auction, that by-bidders were employed, and expresses his disapprobation of both the cases at law referred to; and in reference to the latter, says, "it must have turned upon the fact that there was no real bidder, and *the person refused instantly.*" Judge PEARSON, in delivering the opinion of the Court on the former argu-

ment, observes, upon the above authorities—"we are not called upon 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." When the case went back to the Court of Equity, the plaintiffs, by permission of the Court, amended their bill. In it they state, that "at the ime they purchased the mine, and gave their bond, the fact of the by-bidding was entirely unknown and unsuspected by them; and they did not come to the knowledge of it, or have cause to suspect it, until long after the sale." If the plaintiffs had made good their allegation by the proofs, it would have become necessary for the Court to decide whether the facts disclosed in the case of the by-bidding were fraudulent or not; but they have not done so. The only witnesses who speak to this point are Gen. Bynum and James Weaver. The former states, that after the plaintiffs had abandoned the mine, and after the action was brought on the bond, Col. Jefferson, the agent, told him that a by-bidder was employed at the sale; and that he communicated the fact to one of the plaintiffs, Mr. McDowell, a short time before the bill (136) was drawn, but some time before it was filed. Mr. Weaver states that he was the overseer of the plaintiffs in working the Simms mine, and that he commenced working in October, 1845; and that they worked there from five to seven weeks—when the hands were removed to another mine of the plaintiffs, half a mile distant, where he worked six months. That while working on the Simms mine he boarded at the house of A. H. Simms, one of the defendants, who told him that Long was employed as a by-bidder, and that he communicated this fact to Mr. McDowell, either while he was working in the Simms mine, or soon after he went to the Collins mine, or it may have been six months after. The bill was filed 21 January, 1848—for that is the date of the Judge's *fiat* for the injunction. We wish now to ascertain from this testimony, as near as we can, when the plaintiffs received their first information that a by-bidder had been employed. Weaver has given three starting points: The first is, while he was working in the Simms mine. He went there 24 October, 1845, and remained from five to seven weeks, say seven; and let us take the medium time—that will bring us to 29 November, 1845. If he communicated the information at that time, then two years and two months elapsed before the bill was filed. Let us now take the six months —after the removal of the hands to the Collins mine; and there will have passed a year and six months before the plaintiffs complained. This is the shortest time, according to this witness, which passed after the information was communicated to the plaintiff, before they commenced operations. This we think was too long. We are inclined to think it was whilst the witness was working at the Simms

mine that he communicated the information to Mr. McDowell; for he was in the employment of the plaintiffs, and was requested by McDowell to get information from the defendants upon the subject of the sale of the mines. If that was the fact, it makes the case still more conclusive against the plaintiffs on this point. For as they received the information, if they wished to rescind the contract, they ought, without any unnecessary delay, to have communicated to the defendants their wish to do so. Instead of so doing, they still continued to
(137) work the mine and to test its value—"so that, if it turned out not to be rich, they might fall back upon the objection that there was a by-bidder"—as observed by his Honor Judge PEARSON, in delivering the former opinion, above referred to. "There must be good faith on each side, and as soon as a purchaser finds out there has been by-bidding, he must take his election." It is said that the plaintiffs were entitled to take time to ascertain the facts, before they could be required to involve themselves in a lawsuit. That is true; but as soon as they discover the fact of the by-bidding, they must make their election, and notify the vendors of their wish to annul the contract on that ground. By so doing, they put it in the power of the latter to rescind, and thereby enabled themselves to look out for another purchaser; and not, as in this case, keep the property twelve or eighteen months, and then ask for a cancellation. A plaintiff in Equity recovers upon the allegations of his bill; and only when they are supported by sufficient evidence. Here the allegation of the time when they discovered the alleged fraud is too indefinite. "Until long after the sale" conveys no precise idea as to time, and no dates are given; and according to the testimony of Weaver, viewed in any aspect, the plaintiffs delayed too long in making their election.

PER CURIAM. Bill dismissed with costs.

Cited: Pettijohn v. Williams, 55 N. C., 308; *S. c., Ib.,* 356; *Whitaker v. Bond,* 63 N. C., 293; *Stanton v. Hughes,* 97 N. C., 321; *Davis v. Keen,* 142 N. C., 504.

MEMORANDUM.

At the late Session of the General Assembly, the Hon. WILLIAM H. BATTLE, of Orange, was elected a Judge of the Supreme Court, in the place of Hon. THOMAS RUFFIN, Chief Justice, resigned.

At the same session, the Hon. ROMULUS M. SAUNDERS, of Wake, was elected a Judge of the Superior Courts of Law and Equity, to fill the vacancy occasioned by the promotion of Judge BATTLE to the Supreme Court Bench.

At the same session, MATT. W. RANSOM, Esq., of Warren, was elected Attorney General of the State, in the place of WILLIAM EATON, Esq., whose commission had expired.

And at the same session, WILLIAM N. H. SMITH, Esq., of Hertford, was reëlected Solicitor of the First Judicial Circuit; WILLIAM LANDER, Esq., of Lincoln, Solicitor of the Sixth Circuit, in place of DANIEL COLEMAN, Esq., whose commission had expired; and AUGUSTUS W. BURTON, Esq., of Cleveland, Solicitor of the Seventh Circuit, in place of Hon. BURGESS S. GAITHER, whose commission had expired.

JUNE TERM, 1853

AT RALEIGH

M. A. H. McKIEL, Administrator, &c., v. CATHERINE CUTLER.

Under section 47, ch. 31, Rev. Stat., no person can be allowed to sue *in forma pauperis*, in a merely representative character.

THIS was an appeal from an interlocutory order made by BATTLE, J., at the Fall Term, 1852, of the Court of Equity for BEAUFORT, by which his Honor had refused to dispauper the plaintiff.

All the facts necessary to an understanding of the case, sufficiently appear in the opinion delivered by this Court.

Donnell, for the plaintiff.
Rodman, for the defendant.

BATTLE, J. This is an appeal from the interlocutory order of the Court of Equity for the County of Beaufort, refusing to dispauper the plaintiff, suing as the administrator of Bryan Cutler, deceased. An order had been made on the filing of the bill, permitting him to sue *in forma pauperis,* upon his affidavit that the estate of his intestate was insolvent, except as to its interest in the property sued for. (140) Upon the coming in of the answer the motion was made, from the refusal to grant which, the appeal was taken. We think the motion was a proper one and ought to have been allowed.

The permission to sue *in forma pauperis,* was founded upon the provision in section 47, chapter 31, Revised Statutes, which is in the following words: "Every poor person or persons which have or hereafter shall have cause of action or actions against any other person or persons, either in law or equity, shall have at the discretion of any one of the Judges of the Supreme or Superior Courts, a writ or writs at law, or writ of subpœna in equity, according to the nature of their causes, paying no costs on the same, nor giving any security therefor," &c. This enactment was taken from the statute 11 H. VII., ch. 12, and *mutatis mutandis,* is substantially the same. The construction which has been put upon the English statute, may therefore very properly be applied to ours. The authorities referred to by the counsel, very clearly show that it is well settled in England, that no person can sue *in forma pauperis,* in a merely representative character. *Paradise v. Shepherd,* 1 Dick., 136; 1 Daniel, Ch. Prac., 42. And a very good reason may be given for it, to wit, that though the estate in right of which the executor or administrator wishes to sue may be insolvent,

the creditors, legatees or next of kin, for whose benefit the suit is to be brought, may be amply able to give security and pay costs.

The order in this case having been improvidently granted, ought to have been rescinded upon the defendant's motion; and the refusal to do so was erroneous. The interlocutory order must be reversed, and the opinion will be certified as the law directs.

PER CURIAM. Order reversed.

Cited: *Allison v. R. R.*, 129 N. C., 344; *Christian v. R. R.*, 136 N. C., 322, 326.

(141)

THOMAS O. HUNTER and others, Ex'rs, v. HIRAM W. HUSTED and another, Ex'rs, &c.*

The tax imposed upon legacies by the Act of 1846, ch. 72, is to be paid or charged to the legatees or distributees respectively.

NASH, C. J. The clerk has asked the direction of the Court in charging in his account the tax imposed by the Act of 1846, ch. 72, on legacies.

The Court is of opinion that the tax imposed by the Act of 1846, is to be paid by, or charged to, the legatees or distributees respectively. In the second section, which imposes the tax, no provision is made as to how and by whom it is to be paid, but the tax is to be levied and collected upon the value of the personal property bequeathed or subject to distribution. The property itself is to pay the tax. The fourth section however removes the difficulty. When the decedent leaves "no lineal descendants," &c., "the executor or administrator on his final settlement, shall account for and pay to the clerk of the Court of Pleas and Quarter Sessions of his, her or their county, the amount which the estate of his, her or their testator or intestate shall be liable to pay by way of tax under the provisions of this act." This section evidently refers to legacies and distributive shares only, because, in general, executors an administrators have nothing to do with the realty, and are required to account for the tax only on a final settlement. It is the duty of the personal representative in every such case, where a tax is due under this act, before paying over any legacy or distributive share, to exact from the person who is to receive it, or to retain in his hands, out of the legacy or distributive share, a sum sufficient to pay the tax. If he does not, he runs the risk of paying it out of his own property, for he must pay it into the clerk's office of his

*This case is reported with the cases of the last term: See *ante* 97.

county at the time designated. The difficulty has grown out of the wording of the fourth section. The tax is to be paid out of the "estate" of the deceased. That this word was not used in its ordinary and largest sense is evident from the context of the act. The word estate means ordinarily the whole of the property owned by (142) any one, the realty as well as the personalty. Now it cannot be supposed for a moment that the law means that the tax upon a distributive share shall be paid by one heir out of the land descended, or by a devisee. That the tax is not by the act made, or intended to be made a charge upon the estate, is made further manifest by the avowed object of the act. It operates on descents and devises, legacies and distributive shares, only when the recipients are the collateral kinsmen of the deceased. If then the tax was to be paid out of the estate, it would, in many cases, operate to the injury of lineal descendants, and to the children of the deceased. A familiar case will illustrate the principle. Suppose a joint pecuniary fund is bequeathed in equal portions to a child and to a collateral; if the tax is to be paid of the joint fund, it is evident that the child will pay an equal portion of the tax with the collateral. Or suppose a specific legacy to a stranger or a collateral, leaving a residue to descend or to be distributed among his children; in that case, if the tax be upon the estate it will fall upon the children, which is certainly not the intention of the act. The word "estate" is to be understood in relation to the subject matter, which was to throw the tax on collaterals only, and which can be effected only by making each devise, legacy or distributive share pay its own tax. We are confirmed in our opinion by the terms of the first section of the act. It provides that a tax of one per cent. shall be levied and collected upon *all* "real estate descended or devised to collateral kindred," &c., "except *the widow* of the deceased." This shows that each heir or devisee shall pay the tax, except the widow; *she* shall not.

The clerk, in making out his report, will charge each legacy with the tax imposed by the Act of 1846.

PER CURIAM. Ordered accordingly.

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(143)

JOSEPH R. CROOM, Executor, v. WILLIAM H. WHITFIELD and others.

"I give unto my youngest child, W. H. W., the sum of $3,000, to be due and paid when he arrives to twenty-one years of age, out of the proceeds of the sale of my lands"—in a will, creates a vested demonstrative legacy, upon which no interest is due until the child arrives at twenty-one.

A provision that a portion of the sum for which a slave shall be annually hired, shall be given to him is void; and the portion so attempted to be given will fall into the residue.

THIS was a bill filed by the complainant, as executor of the will of William H. Whitfied, deceased, against the legatees and devisees in said will, in order to obtain a construction of certain clauses therein contained, and which are as follows:

"Item 3d.—I give unto my youngest child, William Haywood Whitfield, the sum of three thousand dollars, to be due and paid when he comes to twenty-one years of age, out of the proceeds of the sale of my lands, and one negro girl named *Luizar* and her increase, and three-fourths of the annual hire of my boy Caleb, for his support and maintenance, to him and his heirs forever."

"Item 11th.—It is my will and desire that my boy Caleb be hired out privately to the best advantage, by my friend Joseph R. Croom, or his successor, during the lifetime of the said boy Caleb, and three-fourths of the hire of said boy Caleb be applied as directed in the third item of this will, and the other fourth be given to the boy Caleb annually."

There was also a prayer for direction in case of a deficiency of assets, a statement of which is rendered unnecessary by the opinion of the Court upon the clauses above.

The case was set for hearing at Spring Term, 1853, of the Court of Equity for LENOIR, and was then sent up to this Court by consent of parties.

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

No counsel appeared in this Court for the defendants.

BATTLE, J. There is no difficulty in either of the questions upon which our opinion is desired. The bequest to the testator's youngest child, William Haywood Whitfield, of three thousand dollars, (144) is clearly a demonstrative legacy payable out of the proceeds of the land directed to be sold. It has a preference over the other legacies not specifically charged upon the same fund. It is a vested legacy, because the land is directed by the will to be converted into personalty. But it is not *due and payable* until the legatee shall arrive at the age of twenty-one years. It does not therefore bear interest until that period. As the funds in the hands of the executor, which will remain after the payment of all the other legacies, will be amply sufficient with the aid of the accruing interest, to pay the legacy in question to William H. Whitfield, upon his arrival at full age, it is unnecessary to decide the questions relative to the abatement of the legacies.

In answer to the remaining questions, whether the bequest to the boy Caleb, of one-fourth of his annual hire, is valid, we are bound by an uniform current of decisions to say that it is not, but is a void legacy,

and falls into the residuum. It is the duty of the executor, as such to hire out said boy according to the directions of the will, and apply three-fourths of such hire for the support and maintenance of the legatee, William H. Whitfield, and pay over the remaining fourth to the residuary legatees.

There must be a decree in accordance with this opinion, and the costs paid out of the funds in the hands of the executor.

PER CURIAM. Decree accordingly.

(145)

ABNER THACKER v. L. D. SAUNDERS.

If a parent, at the time of making a deed of gift to a child, retains property sufficient to answer all his debts then existing, the gift is valid.

The bill in this case sought an injunction against the purchaser of a slave, and the facts disclosed by the pleadings and evidence were as follows:

In April, 1849, Mary Anne Thacker made a deed of gift for the slave in controversy to her son, the complainant reserving to herself at the same time a life estate. She was at that time in debt to the amount of about one hundred and fifty dollars; she was about seventy-one years of age, and quite infirm. The slave in question was her only visible property. In 1850, sundry executions against the said Mary Anne Thacker were levied upon this slave, and after due advertisement, he was exposed to public sale. The officer conducting the sale, at first, offered the entire interest in the slave. Upon his doing so, the complainant forbade a sale of more than the life interest of his mother, claiming that after her death the slave belonged to him. The officer then confined his offer to the life interest of Mary Anne Thacker. For that interest the complainant bid a sum more than enough to pay off all the claims in the officer's hands, but the defendant, as the last and highest bidder, became the purchaser.

After the sale, the complainant went to the defendant, who was a negro trader, and told him that he should require him not to carry the slave out of the county. To this the defendant replied that he had bought the slave to sell. Thereupon the complainant filed this bill to enjoin the defendant from removing the slave beyond the limits of the State, and also to obtain a writ of sequestration. His prayer was granted, and the injunction afterwards continued to the hearing. After the fiat was served upon the defendant, he sold the slave to someone living in this State.

The case having been set for hearing, was transmitted to this Court from the Court of Equity of ROCKINGHAM, at the Spring Term, 1853.

(146) *Miller* for the plaintiff.
Morehead for the defendant.

NASH, C. J. The right of the plaintiff to the decree he seeks, is resisted upon the ground, that the deed from his mother under which he claims, was made by her to defraud her creditors and is void under the act of 1840. The defendant has failed to prove any fraud. At the time Mary Anne Thacker made the conveyance to her son, the plaintiff, she was considerably indebted for one in her situation in life, and she could not, by any voluntary conveyance, defeat her creditors of their just rights. The first great principle of moral duty is to be just; and no man can avoid its obligation by any voluntary arrangement of his property, so as to defeat or defraud those who have just claims upon him. Any attempt to do so is unlawful, amounting to fraud; for fraud, in a legal sense, is an act unwaranted by law which operates to the injury of another. *Harman v. Fisher,* Cowp., 117. A parent therefore cannot make a voluntary conveyance of property to his child to the injury of any then existing creditor. While however the law is thus careful of the rights of the creditors, it is not inattentive to the claims of nature. A voluntary settlement by a parent on his child is not *per se* fraudulent; there must be a creditor to defeat, and the intent to defeat.

When therefore a parent makes a gift to his child, he must be careful to retain property sufficient to answer all his debts then existing. If he does, the act is lawful, violating no moral or legal duty. Thus in *Jones v. Young,* 18 N. C., 352, it is declared "The conveyance of the slave by Reuben Jones to the plaintiff being by deed of gift, is not necessarily an act fraudulent and void as to the creditors of the donor, if he had at the time of the gift, and left at the time of his death, other property sufficient to pay all his debts due and owing at the date of the gift." The case of *Arnett v. Wanett,* 28 N. C., 41, sustains the principle, and so does the case of *O'Daniel v. Crawford,* 15 N. C., 197. In the case before us, Mrs. Thacker conveyed the negro in dispute to the plaintiff, reserving a life estate in him. The debts which she then owed amounted to about one hundred and fifty dollars. What was the value
(147) of her life estate is not very clearly proved, the witnesses differing on the subject. But the plaintiff bid for her life interest a sum sufficient to pay what she owed. The debts then due have all been paid out of the sale of the negro Frank, and no creditor of hers existing at the time of the gift has been delayed, hindered or defeated in the collection of his debt. Nor can the presumption of such an intent in general arise in law, when the seller does thus reserve property sufficient to pay his debts. Nor do we in the attending circumstances, see

anything to impeach the transaction on the ground of fraud. The defendant Saunders, by his purchase, acquired nothing but the life interest of Mrs. Thacker. It is very certain the sheriff could sell nothing more than what belonged to her. The defendant Saunders purchased with full notice of the plaintiff's claim, and admits that he is a negro-trader, and alleges that after the fiat in this case was served upon him, he sold the negro Frank to a man whose name he does not mention. Mrs. Thacker is still alive, but the plaintiff is entitled to the aid of the Court in guarding and securing his interest in the slave Frank.

The injunction having been continued to the hearing of the cause, and the cause being before us for final hearing, it is adjudged and decreed that the injunction be made perpetual.

PER CURIAM. Decree accordingly.

Cited: Clement v. Cozart, 112 N. C., 418.

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(148)

DANIEL J. MARROW v. DRURY S. MARROW, Executor, and others.

A testator, leaving a wife and six children, made the following provisions for them by will: "I give and bequeath to my loving wife, as long as she is single after my death, all my property, real, personal and mixed. I wish the negroes kept on the plantation if manageable; if not, I wish my executors to hire them out privately to honest, humane men. My children I wish educated from the proceeds of the plantation and funds in hand. When my eldest son arrives at legal age, I wish him to have a distributive share of the estate, and my other children, when they shall have arrived at the same age, I wish them to have a like share with their eldest brother, provided the estate has retained or accumulated property in the meanwhile. Should my wife marry again, I wish her to have what the laws of her country will allow her, viz.: one-third of the estate. If she remains single till her death, I wish my children to be made equal in their several lots of my estate; and if she marries and deducting her portion, then a like share of the residue:" *Held,*

1. That the children are all entitled to be maintained and educated out of the proceeds of the estate, free of charge, and when they respectively arrive at the age of twenty-one years, they will be entitled to their respective shares, without being required to account for the expenses of their maintenance and education.
2. That the expenses of the maintenance and education of the children are to be paid out of the profits of the plantation, and the interest of the funds on hand.
3. That the term "funds on hand" means cash on hand, and money due the estate by bond, note or other security; and that the children are respectively to receive such an education as is suitable to their estate and condition in life.
4. That the widow is entitled, while she remains single, to all the issues, rents, profits and interest of the estate, so far as the same may be neces-

sary in the first place, for her decent support, and then she is entitled to all that remains after the proper maintenance and education of the children.

5. That the children, until they shall respectively come of age, are entitled to nothing out of the estate but what is necessary for their maintenance and education.

6. Each child on coming of age will be entitled to one-sixth part of the capital of the whole estate, after deducting the widow's dower in the land, and a child's part of the personal property, to wit, one seventh.

7. The share now due to the child who has come of age, is to be alloted to him absolutely, and he cannot hereafter be called upon to refund any part thereof.

8. The executor must permit the widow to retain possession of all the estate, except such part as may from time to time be allotted to the children, as they respectively come of age.

Held, also, That the testator intended that his widow, in case she married again, should have dower in his lands, and a child's part of all the personal estate absolutely.

In construing wills, the Court will confine its opinion to things to which it can give effect by a decree, and will not speculate upon questions in which the parties may never be interested.

THIS cause was removed to this Court from the Court of Equity for GRANVILLE, at Spring Term, 1853.

(149) The case is stated in the opinion of the Court.

Lanier for the plaintiff.

No counsel in this Court for the defendants.

BATTLE, J. Thomas F. Marrow died in 1846, having first duly made and published his last will and testament, which, after his death, was admitted to probate, and Drury S. Marrow, one of the executors therein named, qualified as such, and took upon himself the burden of its execution. The testator, in and by his said last will and testament, devised and bequeathed as follows: "I give and bequeath to my loving wife, as long as she is single after my death, all my property, real, personal and mixed. I wish the negroes kept on the plantation if manageable; if not, I wish my executors to hire them privately to honest, humane men. My children I wish educated from the proceeds of the plantation and funds on hand. When my eldest arrives at legal age I wish him to have a distributive share of the estate, and my other children, when they shall have arrived at the same age, I wish them to have a like share with their eldest brother, provided the estate has retained or accumulated property in the meanwhile. Should my wife marry again, I wish her to have what the laws of her country will allow her, viz., one-third of the estate. If she remains single till her death, I wish my children to be made equal in their several lots of my estate; and if she marries and deducting her portion, then a like share of the residue."

The testator left at his death surviving him his widow, Parthena, and six children, all of whom were then minors, to wit: Daniel J., William D., Thomas F. H., James A., Drury S., and Ann E. Marrow, and was seized and possessed of a valuable estate, consisting of two tracts of land, thirty or forty slaves, cash on hand, debts due him, household and kitchen furniture, stock of divers kinds, farming utensils, etc. After the testator's death Drury S. Marrow, by virtue of his executorship, took into his possession the personal estate, paid the debts and other charges against the estate of the deceased, and kept the slaves together and worked them upon the plantation, with the exception af a few whom he hired out, and two whom he sold for their bad conduct. (150) The executor received from year to year the interest, issues, hires, profits and rents of his testator's estate, and applied the same to the support of his widow and children, and to the education of the latter, for which purposes they were more than sufficient, leaving a considerable surplus to accumulate in his hands.

The bill was filed 28 June, 1853, in the Court of Equity for Granville County, by Daniel J. Marrow, against the executor, the widow and the other children of his father, in which he set forth the facts above stated, and further that he had come to the age of twenty-one years, and he prayed to have the share of the estate, real and personal, to which he was entitled under his father's will, assigned to him. But he alleged that doubts and difficulties had occurred in the construction of said will, upon which the parties interested under it desired to have the advice of the Court.

These doubts and difficulties were set forth in the bill in the following terms:

1. "It is uncertain whether the respective children of the said testator are entitled to be maintained until they respectively arrive at the age of twenty-one years and to be educated out of the said estate free of charge, or, whether the expense of their respective maintenance and education as aforesaid, are to be charged to and accounted for by them respectively, in allotting and paying over to them respectively their respective shares of the said estate.

2. "It is also uncertain, in that part of the said will which directs that the children of the testator shall be educated out of the proceeds of the plantation or funds on hand, whether it means out of the funds on hand, or out of the proceeds or interest of the funds on hand.

3. "It is also uncertain what is the meaning of the expression or term 'funds on hand,' or whether the same mean only cash on hand at the testator's death, or include other, and what other effects; whether the testator's children are to be maintained, as well as educated, out of the proceeds of the plantation and funds on hand, and if educated only,

then in what way, and out of what part or parts of said estate they are to be maintained; and whether, in case what is intended by the expression "funds on hand," should be, or become insufficient with the proceeds of the plantation for the education, or the maintenance and
(151) education of the testator's children, the proceeds arising from the sale of any part of the testator's perishable property or any other, and what other part or parts of the said estate may be applied to that purpose.

4. "It is also uncertain, whether the testator's widow is entitled to the whole of the issues, interest, hires, rents and profits of the said testator's estate during her life or widowhood, or only to be maintained out of the same, and if not to the whole, or to a maintenance only out of the same, then, to what part of the same she is entitled, and whether, in the division of the estate in case she should marry again, she should be charged with and account for the expenses of her maintenance aforesaid.

5. "It is also uncertain, whether the children of the testator are entitled to any part, and what part, of the interest, issues, hires, rents and profits aforesaid, further than to be maintained, or educated and maintained out of the same as aforesaid.

6. "It is also uncertain, whether in case any of the said children should die before arriving at the age of twenty-one years, the real or personal representatives of said child, would be entitled to any and what part or share of the said real and personal estate, or of the said interest, issues, hires, rents and profits of the same, and if not, then whether the said widow would become entitled under said will, in case of her marrying again, to any part of the share of the said real or personal estate to which such child would be entitled, if attaining the age of twenty-one years.

7. "It is also uncertain what share or portion of the said real and personal estate ought to be allotted to the said children respectively, as they respectively become of age, and whether in case a full share of the same should be allotted and paid to one of the said children upon coming of age, such child would be entitled to any and what part of the interest, issues, hires, rents and profits subsequently accruing upon the residue of said real and personal estate, remaining undivided, and whether such child, having received such share, would, in case of the death afterwards of another child under twenty-one years, be entitled to any further part or share of the said real and personal estate.

8. "It is also uncertain whether in case one of the daughters of the said testator should marry under the age of twenty-one years, she
(152) would still be entitled to a maintenance out of the said estate until her arrival at full age.

9. "It is also uncertain what share or portion of the said real and personal estate the said widow would become entitled to, in the event she married again, whether to dower in the whole, or a part only, and what part of the said testator's lands, and to a child's part of the personal estate, or to one-third of the real and personal estate absolutely, and if to a child's part of the personal estate, whether the same is to be estimated with reference to the number of the children living at the testator's death, or to the number living at the time of said widow's marriage.

10. "And it is also uncertain whether the third or a child's part, whichever it may be, to which the said widow would become entitled in the event of her marrying again, would be a third, or a child's part of the estate, if any remaining undivided at the time of such marriage, or would be a third or child's part of the part or parts of the said estate which may have been divided and allotted off to any of the children, as well as the part, if any, that may remain to be divided as aforesaid, and if the latter, then whether the said third or child's part ought to be allotted to her exclusively out of the part, if any, remaining to be divided, or out of that and the part or parts which may have been already divided off and allotted to a child or children.

11. "It is also uncertain whether in case any child should have allotted to him or her a full share of the estate as it stands at the time of such allotment, and the remainder of the said estate should afterwards from any cause become insufficient to afford to the other children a like or equal share, such child would have to refund to the other children, and what proportion.

12. "It is also uncertain whether the said widow is not entitled to the possession, management and control of the whole of the said estate, real and personal, during her life or widowhood, and whether the said executor, by assenting to the legacies of said will, and delivering over the said estate to the said widow as tenant for life, or widowhood, of the same, may not entirely discharge himself from the trusts of the same, and from any responsibility therefor, and whether it is not his duty to do so."

The defendants, Drury S. Marrow, the executor, and Parthena Marrow, the widow, put in separate answers, each admit- (153) ting the facts stated in the bill, and submitting to such decree as the Court might please to make. The other defendants, being minors, answered by a guardian *ad litem,* and prayed that in whatever decree the Court might make, their interest should be protected.

The cause was set for hearing upon bill and answers, and was then, by consent, transmitted to this Court.

This bill was filed before the case of *Tayloe v. Bond, ante* 5, was reported and published, otherwise, we presume it would not have been complicated by suggesting contingencies which may hereafter occur, and

asking the advice of the Court as to what effect such contingencies may have upon the proper construction of the will of the plaintiff's father. We are satisfied, upon further reflection, that the principles announced in the case referred to, are correct, and that when called upon to advise as to the proper construction of a will, or any part of it, we cannot give an opinion upon a state of facts not yet existing, and upon which no present direction or decree can be founded. If this were not so—if this Court were bound to answer every question which an astute and ingenious counsel might ask upon the construction of a will under every possible combination of circumstances which might affect it, we might have and probably would have thrown upon us an amount of business which no human labor could perform. It is surely better for all practical purposes that the Court, even if it had any discretion in the matter, should confine its advice and opinion to things to which it can give effect by its decree, than to waste its time in speculating upon questions in which the parties may never be interested. The propriety of this remark in reference to the present case, will be made strikingly manifest, by adverting to the 8th inquiry, which is, "whether in case one of the daughters of the said testator should marry under the age of twenty-one years, she would still be entitled to a maintenance out of the said estate, until her arrival at full age." Now the testator seems to have had but one daughter, and she, if the children were named in the bill in the order of their births, was his youngest child. She may die in (154) infancy, she may never marry at all, or she may not marry until she arrives at full age, and in either of these events our opinion upon the inquiry as stated, would be of no use whatever, and yet either of these events is just as likely to happen as the one supposed. It will be quite time enough to answer the inquiry when the contingency shall happen, and if the present bill be properly framed to obtain the answer, it may easily be retained for further directions. We say properly framed, because there are questions arising upon the construction of a will, which the executor would have a right to call upon the Court for its advice and directions, which would not be open to a legatee when not interested in them.

With these preliminary remarks as to the extent of our jurisdiction, in solving the doubts and difficulties arising upon the construction of the will now before us, we proceed to answer such of the inquiries as the plaintiff's case requires, though it will be more convenient for us to do it in an order somewhat different from that in which the questions are propounded.

In order to ascertain the share of his father's estate to which the plaintiff is now entitled, it is necessary to consider what are the rights of the widow under the will. It is clear, that the testator meant in the

first place, to make a suitable provision for her. For that purpose, he gives her during widowhood all his property, real, personal and mixed. That clause taken alone, would make her sole and universal devisee and legatee of his whole estate, whilst she should remain single; but there are other clauses in the will which necessarily modify and restrict the operation of this. He intended that his estate, whilst affording an ample support to his widow, should also furnish the means of maintenance and education to his children during their minority, and a suitable outfit in life as they should respectively come to the age of twenty-one years. Until his widow should marry again, he wished the property kept together, remaining in her possession, but managed under the superintendence of his executor. He seemed to think that the proceeds of the plantation and funds on hand, by which we understand the interest of the money due him on bonds, notes and other securities, would be sufficient both for the support of his widow and the mainte- (155) nance and education of his children. He accordingly appropriates such proceeds to that purpose; and out of them, so long as they will afford it, must be paid what is necessary to such maintenance and education, as are proper for children of their condition in life, leaving for the widow at all events, what she may need for her decent support, and then what may remain after the wants of the children are provided for. Had the testator known that his widow would never enter into a second marriage, he would probably have closed his will without adding any thing further; but he supposed such an event at least possible and he went on to provide for it, and it is necessary for us to ascertain what that provision is, for upon it depends the share of the estate which the plaintiff has at present the right to claim. If his widow shall marry again, the testator says that she shall then have what the laws of his country will allow her, viz., one-third of the estate. A doubt is here suggested, whether this clause means that she shall have dower in all his lands, to wit, one-third part thereof for life, and a child's part of all his personal estate absolutely, or one-third of all his estate both real and personal absolutely.

We think clearly that the former is the construction. Whilst his widow should remain single, the testator supposed that she would consider her interest as identical with those of her children; but upon her second marriage, her relation towards them must, at least with regard to property, be in some degree changed. In that event, his evident intent is, that she shall take from his estate, only so much as the law would have given her had he died intestate, or had she dissented from his will, and his mistake in supposing that such part would be one-third of his estate cannot make any difference. If he had meant that she should have one-

third of the whole estate absolutely, he would probably have said so without reference to what the law would allow.

The share to which the plaintiff's mother will be entitled in the event of her second marriage, being thus ascertained and reserved, he will be entitled to a child's part, to wit, one-sixth of the residue. He cannot claim any part of the accumulated profits, because they belong to the widow, nor ought there to be charged against him, what has been expended upon his maintenance and education. The share which (156) will be allotted to him he will take absolutely, without the liability to be called upon to refund the same, or any part of it. That he is not to refund, appears not only from there being no such requisition in the will, as from the clause, that upon the coming of age each child is "to have a like share with their eldest brother, *provided the estate has retained or accumulated property in the meanwhile.*" This clearly implies, that if the estate shall hereafter from any cause be diminished, the shares of the younger children may be less than that assigned to their eldest brother; but if the widow shall not marry again, then their shares may be made equal to the share allotted to the eldest out of the property set apart for her. To see that all the provisions of his will should be carried into effect, the testator has invested his executor with a superintending power over the estate; and the defendant, Drury S. Marrow, having voluntarily come forward and assumed the trust, he cannot now relinquish it while any of its duties remain to be performed.

Having, upon a survey of the will in all its parts, given our exposition of it, we are prepared to answer all the enquiries upon which the plaintiff is now entitled to ask for our advice and direction.

1. The children are all entitled to be maintained and educated out of the profits of the estate, free of charge, and when they respectively arrive at the age of twenty-one years, they will be entitled to their respective shares, without being required to account for the expenses of their maintenance and education.

2. The expenses of the maintenance and education of the children, are to be paid out of the profits of the plantation, and the interest of the funds on hand.

3. By the term, funds on hand, we understand the testator to mean cash on hand, and money due the estate by bond, note or other security. The profits of the plantation, and the interest of the money due the estate, have been hitherto under the prudent management of the executor sufficient for the purposes for which it was designed, and it is unnecessary now to enquire what is to be done should such profits and interest become insufficient for such purposes, as there is no suggestion made as to the probability of such an event. The children are respectively to

receive such an education as is suitable to their estate and condition in life, in the section of country where they reside. There (157) is no suggestion that the education bestowed upon the plaintiff is not a suitable and proper one, and that may perhaps be assumed as a standard for the younger children; but this must be left in some degree to the sound discretion of the executor.

4. The widow is entitled, while she remains single, to all the issues, rents, profits and interest of the estate, so far as the same may be necessary in the first place, for her decent support, and then she is entitled to all that remains after the proper maintenance and education of the children. When she shall make it a practical question by marrying, it will be time enough to inquire what will then be her rights in this respect.

5. The children, until they shall respectively come of age, are entitled to nothing out of the estate but what is necessary for their maintenance and education.

6. The event, upon which this inquiry is predicated, is entirely too contingent to make it necessary for us to decide it.

7. The share to which the plaintiff is now entitled, and to which each of the other children will be entitled upon his or her reaching full age, is one-sixth part of the capital of the whole estate, after deducting the widow's dower in the land, and a child's part of the personal property, to wit, one-seventh part thereof. This deduction must be made to await the contingency of her marrying again. The remaining part of the inquiry is based upon a contingent event, in which the plaintiff has at present no interest.

8. We give the same answer to this inquiry as we did to the sixth.

9. This question is answered in part in our response to previous inquiries, to wit, the fourth and seventh. Her part of the personal estate is to be estimated by the number of children now living. None having died since the testator's death, it is unnecessary to decide whether the number must refer to his death or the present time.

10. This inquiry, so far as it is a practical one, has been already answered.

11. The share now to be allotted to the plaintiff will be allotted to him absolutely, and he cannot hereafter be called upon to refund any part of it. That is all which he has any interest in knowing (158) at present.

12. The executor must permit the widow to retain the possession of all the estate, except such part as may be from time to time allotted to

the children as they respectively come of age; but he cannot now divest himself of the trust which he has assumed.

PER CURIAM. Decree accordingly.

Cited: *Edwards v. Love,* 94 N. C., 370.

SOLOMON ASHBEE and others v. W. H. COWELL and others.

In a case where a sale of land had been made by a Clerk and Master and confirmed by the Court, after the lapse of a year, no allegation of fraud being made, leave to open the biddings upon the ground of inadequacy of price, was refused.

Such objections can in no event be made by motion, but are required to be brought forward by a bill or petition.

THE question before this Court in this case was raised by a motion to re-open biddings for a tract of land, which, having been allowed in the Court below, came up by the appeal of the former purchaser.

The bill praying a sale of the land was filed to Fall Term, 1851, of the Court of Equity of CURRITUCK. The decree at Spring Term, 1853, for re-opening the bidding is as follows: "On evidence filed in this cause at this term and sent herewith, and on Solomon Ashbee, one of the parties hereunto, giving bond and security that if the biddings be opened he will give twenty-three hundred dollars for the premises heretofore purchased under decree of this Court by one Martin J. Leavitt, it is ordered by the Court that the former sale be set aside, and that the Clerk and Master expose the premises to public sale on the terms of the former order; that the bonds or notes given by the former purchaser, said Leavitt, be handed back to him. And it being sug-
(159) gested and shown to the Court that the said Leavitt has the premises in cultivation, and has had possession thereof for some time, that he has made cash and other payments to those entitled, on account of the premises so purchased as aforesaid, and that he has made improvements upon the premises since his purchase, it is ordered by the Court, that the Clerk and Master report the value of the premises for the time of his possession under the sale, and for the present year—the cash and other payments made on account of the premises, and to whom made—the value of the improvements made on the premises since the sale to said Leavitt, to the end that he be charged with a reasonable rent for the time he has had possession and for this year; that he be refunded his cash or other payments, and that he be allowed the value of his improvements on the premises."

The other facts necessary to an understanding of the case, appear in the opinion of the Court.

W. N. H. Smith for the plaintiffs.
Heath for the defendants.

PEARSON, J. At Spring Term, 1852, the Clerk and Master reported a sale of the land to Martin G. Leavitt at the price of (161) $1,800. After the examination of witnesses and argument of counsel. the sale was confirmed. Leavitt went into possession and expended some $600 in repairs and improvements. At Spring Term, 1853, a motion was made to set aside the sale and re-open the biddings, based on a suggestion that the land had been sold for too small a price, and a proposition of Ashbee that he would make an advance in the new biddings of $500. Many affidavits were read, and his Honor thereupon set aside the sale and directed the biddings to be re-opened.

In looking over the affidavits it is left doubtful whether the land did not sell for its value, considering the incumbrance of the widow's dower, and there is room to believe that the present motion and offer to advance the biddings, is to be ascribed to the fact that the value of land in that vicinity has risen considerably since the sale. But to avoid any difficulty about the facts, and to present the question broadly; assume that the land did not sell for as much as it was worth at the time of the sale, by some two or three hundred dollars, and would now sell for $500 or $1,000 more, there is not even a suggestion that any *fraud was practiced* in order to cause the land to sell for less than its value.

We can imagine no ground other than *fraud,* upon which this Court can assume jurisdiction to set aside a sale and open biddings, a year after the sale *has been confirmed,* and after the purchaser has been let into possession and has made outlays in repairs and improvements so that he cannot be put *in statu quo.* If it may be done one year, it may be done two years or five or ten years after the confirmation upon the same principles. The consequence would be that no man of good sense would ever bid at such a sale, for he could never know when (162) to call the land his own.

Any practical mind will see at once that an attempt to make property bring its full value by opening the biddings after the sale has been confirmed, must defeat its own object; because no man will play at a one-sided game He is bound and the Court is loose, and the Court may at any time say to him, there is no fraud imputed to you, but it is ascertained that the land will now sell for more than you gave for it, so you shall be paid for your improvements, *deducting a reasonable rent,* and have back your money, but must give up the land. The cases to be met

with in the English books, where sales have been set aside and the biddings opened, except on the ground of fraud, are very few, and all of them are put on "special circumstances."

If the Court had a right to entertain this matter at all, it certainly could not do so on motion. The parties were out of Court and some formal proceeding was necessary, either bill or petition, in order to give the parties a day in Court, and have the proceeding and issue put in a permanent shape.

The decretal order below is reversed, and the motion to set aside the sale and open the biddings is disallowed with costs.

PER CURIAM. Order reversed.

Cited: Thompson v. Cox, 53 N. C., 314; *Blue v. Blue,* 79 N. C., 71; *Pritchard v. Askew,* 80 N. C., 88; *White, ex parte,* 82 N. C., 380; *Vaughan v. Gooch,* 92 N. C., 529.

HENRY FULLER v. MICHAEL WILLIAMS.

An entry in these words—"No. 535, H. F. enters 100 acres of land on the waters of Uharee adjoining the lands of his own, and runs for complement, January 2d, 1847" is so vague, that until actually surveyed and located, it can give no such notice as will affect any other person who makes an entry, has it surveyed, and takes out a grant.

THIS cause was transmitted to this Court from the Spring Term, 1852, of the Court of Equity of RANDOLPH. The pleadings and (163) facts are sufficiently stated in the opinion delivered by the Court.

Morehead for the plaintiff.
Miller for the defendant.

BATTLE, J. The bill stated that the defendant, on 14 December, 1846, made an entry in the entry taker's office for the county of Randolph, in the words and figures following: "No. 528. Michael Williams enters 50 acres of land on the waters of Uharee, both sides adjoining the lands of Robert Walker, Henry Fuller and his own, and runs for complement, 14 Dec., 1846." That on 2 January, 1847, he, the plaintiff, made an entry in the same office as follows: "No. 535, Henry Fuller enters 100 acres of land on the waters of Uharee adjoining the lands of his own, and runs for complement, 2 January, 1847." The bill then alleged that the defendant, with full knowledge of the location of the plaintiff's entry, changed his location, and on 10 May, 1847, procured a grant from the State for land covering in part that located by

the plaintiff, and for which he obtained a grant on 13 November, 1849. The defendant put in an answer in which he denied that he had changed the location of his entry; denied further that he had any knowledge of the location of the land made by the plaintiff, and insisted that his entry was so vague and indefinite, that he could not show where the land was situated. A replication to the answer was filed, and the parties, after completing their proofs, had the cause set for hearing and transferred to this Court.

An examination of the proofs in this case is unnecessary, for it appears upon the face of the bill that it cannot be sustained. The plaintiff's entry contains a description, so vague, indefinite and uncertain, that until actually surveyed and located, it cannot identify any particular parcel of land, and consequently cannot give such notice as will affect any other person who makes an entry, has it surveyed, and takes out a grant. The defendant's entry was in truth prior to that of the plaintiff, and much more definite; but if it had not been, the recent case of *Munroe v. McCormick,* 41 N. C., 85, is a direct authority against the right of the plaintiff to the relief which he seeks. • In that case, (164) which is founded upon the previous ones of *Harris v. Irving,* 21 N. C., 369, and *Johnson v. Shelton,* 39 N. C., 85, it is said that "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. 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 are not susceptible of being notice to any one, because they have no identity."

"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."

The plaintiff's entry in this case, being too vague to identify any particular piece or parcel of land, and not having been made *certain* by a survey, before the defendant obtained his grant, the bill cannot be sustained, and must be dismissed with costs.

PER CURIAM. Bill dismissed.

Cited: Horton v. Cook, 54 N. C., 273; *Ashley v. Sumner,* 57 N. C., 123; *Perry v. Scott,* 109 N. C., 379; *Fisher v. Owen,* 144 N. C., 653; *Cain v. Downing,* 161 N. C., 596.

JAMES W. DUPREE v. LEWIS B. DUPREE.

A child *in ventre sa mere* cannot take as donee by a common law conveyance. Therefore, where A. executed a deed by which in consideration of natural love and affection, she gave to the "sons of Robert and Rachel Dupree, and to the next of their heirs lawfully begotten of their bodies" a share: *Held*, That a child of Robert and Rachel at that time *in ventre sa mere* took no interest in the slave.

THIS cause was transmitted from the Court of Equity for PITT County at Spring Term, 1852.

The case is sufficiently stated in the opinion of the Court.

Moore (with whom was Winston, Jr.), for plaintiff.

PEARSON, J. On 9 January, 1817, Patience Goff executed a (166) deed by which, in consideration of natural love and affection, she gave and conveyed to her grandchildren, "Washington and Lewis Dupree, sons of Robert and Rachel Dupree, and *to the next of their heirs lawfully begotten of their bodies* (Peggy Ann Dupree only excepted), a slave named Rose." On 9 October, 1817, the plaintiff, who is a child of the said Robert and Rachel Dupree, was born, and by this bill (167) he claims one-third of Rose and her increase.

It is conceded, that no other after-born child of Robert and Rachel Dupree, except the plaintiff, could take under this deed of gift; and his claim is put upon the ground that he was *in ventre sa mere*, at the date of the deed, and was in contemplation of law *in esse*, and capable of acquiring a right of property. For according to the calculation by the ordinary course of nature, he was conceived six days before the date of the deed, and the question is, can an atom, a thing in its mother's womb, six days old, acquire a right of property by a common law conveyance?

Such an idea may be consistent with the refinements of the civil law, or with the doctrine of uses and of executory bequests and executory devises, which is borrowed from the civil law, but is wholly at variance with the plain, direct, and tangible maxims of the common law; and its bare suggestion would have shocked the sages of that practical system of laws, built up by immemorial usage and common custom, and having for its basis certain maxims, all of which rest upon the fundamental principle that property cannot be acquired or lost, except by some open, overt act palpable to the senses, about which there can be no mistake.

Property must at all times have an owner. One person cannot part with the ownership unless there be another person to take it from him. There must be a "grantor and a grantee, and a thing granted." In

considering the application of these maxims, the question may be disencumbered by leaving Washington and Lewis Dupree out of view, and considering the deed of gift as purporting to be made to the plaintiff. For he claims by purchase, as distinguished from descent, succession or distribution, and must make his title clear upon an independent footing, being entitled to no aid from Washington and Lewis, as trustees for him, because there is not the slightest ground for putting them in that relation.

Suppose a case of land, which at common law could only pass by feoffment. To whom, or to what could livery of seizin have been made? Who would have performed the services? Or take the case of a chattel. A gift must be accompanied by *actual delivery*. To whom, or to what could the delivery be made? To a thing six days old in its mother's womb? And yet, unless the right of property passed at (168) the date of the gift, it could not pass at all, unless the donor chose afterwards to make a new gift. It is true that in conveyances to uses and in wills, which are governed by doctrines borrowed from the civil law, a great departure has been made from the maxims of the common law. For instance, a fee may be limited after a fee—a limitation over may be made in a chattel after giving a life estate—a freehold may be made to commence *in futuro*, and a springing, shifting, or contingent use may be made to arise at any time afterwards, provided it be not too remote. For as much as the legal ownership passed to the trustee or the heir at law or executor, that was supposed to satisfy the rule of the common law, which requires that property should, at all times, have an owner; and the use was left to be shifted about according to the intention of the grantor, until it became necessary that the use should draw to itself the legal estate, when it of necessity became fixed. By way of further illustration, a bequest or use limited to the children of A. passes only to such children as A has at the time (and we will suppose a child *in ventre* would be included); but a bequest or use limited to the children of A, after an estate to her for life, remains open, so as to take in all the children she may have at her death. And this class of cases is put on the ground, that by reason of the life estate, it does not become necessary to fix the legal ownership until the death of the taker of the first estate. Again, by way of use or will, a limitation over in a chattel, after a life estate, may be made. This could not be done by a common law conveyance, and can only be done now in regard to slaves by a special statute.

These instances show the difference between the rules applicable to a conveyance at common law, and a conveyance under the doctrine of uses or of wills; and although in the latter, there is a strong inclination, we may almost say a settled rule, to treat an infant *in ventre* as a thing *in*

esse, yet no case can be found, in which *it* was ever so treated in a common law conveyance. Nor can it be so treated, without breaking down the maxims of the common law.

"In respect of the grantee, three things are requisite; that he be a person in being at the time of the grant made (if he be to take immediately); if he is to take by way of remainder, it is not necessary
(169) that he should be in being." But it is necessary that he should come into being during the continuance of the particular estate, or *eo instanti* of its termination. Shep. Touch., 235; Coke Lit., 2, 3; Perkins, sec. 43; Touchstone, ch. 9, no. 4. "By the strict rule of law, if A was tenant for life, remainder to his own eldest son in tail, and A died without issue born, but leaving his wife *enciente* or big with child, and after his death a son was born, this son could not take by virtue of the remainder; for the particular estate determined before there was any person *in esse,* in whom the remainder could vest." To remedy this, the statute 10 and 11, W. 3, allows remainders to vest in children while yet in their mother's womb. 2 Black. Com., 169, and note. That statute is confined to remainders. There is no statute which enables *children while yet in their mother's womb,* to take directly by a deed of gift at common law.

"If a woman be quick with child, and by a potion killeth it in her womb, or if a man beat her, whereby the child dieth in her body, this is a great misprision, but no murder. But if the child be born alive and dieth of the potion or the battery, this is murder, for it is accounted in *rerum natura,* when it is born alive. If a man counsel a woman to kill the child within her womb when it shall be born, and after she is delivered of the child she killeth it, the counsellor is accessory to the murder; and yet at the time of the counsel no murder could be committed of the child *in utero matris,* because it was not *in rerum natura."* 3 Coke Inst., 50. These authorities show conclusively what is the common law upon this subject, and by that this case must be decided.

Mr. Moore cited several authorities. Among others Macpherson on Infants, and the cases there referred to, 25 Law Lib., new series, 565. They only show that in regard to the declaration and limitation of uses, and in regard to legacies, the Courts of Equity and the Ecclesiastical Courts have adopted the rule of the civil law, by which an infant *en ventre* is considered as *born.* Among other instances given by Macpherson:—a man may surrender copyhold land immediately to the use of an infant *in ventre sa mere, "for a surrender is a thing executory and nothing vests before admittance."* This last expression explains that
(170) case. The title of the surrender vests in a third person until the infant is born and becomes capable of taking an estate.

We have no sort of doubt that Mrs. Goff intended all the children of

Robert and Rachel Dupree (Peggy Ann excepted), without reference to the time of their birth, to be participants of her bounty; and the only regret is that she did not call upon a lawyer, who would have drawn a conveyance passing the property to a trustee, by which the uses could have been kept open until the death of Mrs. Dupree, so as to let in all of her children. But she chose to make a common law conveyance directly to the children; and of course no other could take under her deed of gift except those *esse,* or as my lord Coke expresses it, *in rerum natura,* when the right of property passed out of her, to wit, at the date of the deed of gift. The owners were then called for—it was then necessary for them to take the property. The plaintiff could not answer the call, and there is no rule of the common law, by which we can give him another day.

It is unnecessary to notice the other questions.

PER CURIAM. Bill dismissed with costs.

Cited: Gay v. Baker, 58 N. C., 347; *Heath v. Heath,* 114 N. C., 549, 550; *Cooper, Ex parte,* 136 N. C., 132; *Campbell v. Everhart,* 139 N. C., 511; *Cullens v. Cullens,* 161 N. C., 346.

ROBERT R. BRIDGES & JAMES WEDDELL, Executors, v. WILLIAM D. MOYE, JAMES C. ALBRITTON & RICHARD PARKER.

A creditor having sued his deceased debtor's administrator, obtained judgment for so much of his debt as the jury found covered the assets, and for the remainder, judgment was entered for the defendant. Thereupon a bill was filed to recover this balance from certain persons alleged to be fraudulent donees of the debtor: *Held,*

1. That the bill could not be sustained, because the creditor, by his own allegations had a plain remedy at law against the defendants, as *executors de son tort.*
2. That, admitting the creditor's right to come into equity for discovery, or an account, or for the purpose of following the fund, still his bill must be framed according to the course of the Court—making the personal representative of the debtor a party *in that character;* stating that the debtor left no real estate, and showing that the alleged debt has been established by a judgment at law.
3. That the judgment in question, being in favor of the administrator, is not a judgment of the character required.

THE cause was removed to this Court, from the Court of (171) Equity for EDGECOMBE, at Spring Term, 1853.

The pleadings and facts necessary to an understanding of the case, are sufficiently stated in the opinion of the Court.

Rodman and *Moore* for the plaintiffs.
Biggs for the defendants.

PEARSON, J. The plaintiffs allege that one Archibald Parker was indebted to their testator in a large amount—that the debt was contracted in 1829, and in 1841, a note was executed to secure it; that in 1839, 1840 and 1841, Archibald Parker made deeds of gift to the defendants, his son and his two sons-in-law; for several slaves, with intent to avoid the payment of his debts. In 1847 Parker died, and soon after his death the plaintiff sued his administrator, and recovered judgment for $2,327 for his debt, and $653 for his damages; and inasmuch as it was found by the jury that the administrator had assets to the value of $361, and of no further value, it was considered by the Court that the plaintiff should have execution for said sum of $361, which amount has been paid to him, leaving the balance of the debt unpaid. The
(172) prayer is to subject the slaves in the hands of the defendants, as fraudulent donees, to the payment of the debt.

The defendants, Moye and Parker, have arranged the matter so far as they are concerned, and a decree is asked against Albritton. He does not admit the alleged debt; admits that Parker made him deeds of gift for three slaves, but avers that the gifts were not made with an intent to defraud creditors, and that at the date of the gifts, Parker retained property sufficient to pay all of the debts he then owed; and relies on the Statute of Limitations and the lapse of time.

The evidence shows that Parker, at the time he made the deeds of gift, was very much in debt; and it is left doubtful whether he retained property sufficient to pay all of the debts which he then owed, unless a claim which he was prosecuting for a number of slaves be taken into the account. He succeeded in establishing his claim in 1844 and was then able to pay all his debts.

If it was necessary to decide this case upon the facts, a very interesting question would be presented, by the fact of the debtor's subsequent ability to pay. But there is a fatal objection to the bill, and we are relieved from an investigation of the facts.

Assuming the gifts to have been fraudulent, the plaintiff had a plain remedy at law by action of debt against the defendant as executor. For, although there be a rightful administrator, yet as to him the gift is valid, and he cannot be charged by reason thereof with the value as assets. Hence *ex necessitate,* the creditor has a right to treat the donee as executor, and to charge him with the value as assets, upon the ground that he *intermeddled* with property, which, as to creditors, continued to be the property of the deceased debtor. If the plaintiff had brought his

action at law, there would have been no occasion for his coming into this Court.

But admit that notwithstanding the plaintiff had this plain and adequate remedy at law, he may, according to the cases, on the ground of seeking a discovery, or the necessity for an account, or upon the idea of his right to follow the fund, maintain a bill, yet he must do so according to the course of a Court of Equity. Passing by the objection that the personal representative of the debtor is not made a party, *in that character,* and the donee it would seem has a right to insist that (173) he should be made a party, for as the donee is only secondarily liable and may contest the question of assets, the personal representative should be before the Court, so as to be bound by the decree. *Dozier v. Dozier,* 21 N. C., 96.

Passing also by the objection that there is no allegation that the debtor left no real estate out of which the plaintiff's debt could be satisfied, and it would seem that this was a necessary allegation, for the donee who takes from the debtor in his lifetime by a gift valid between the parties, can only be reached in Equity, after it is shown that the donor left no estate, either real or personal, out of which the creditor could have his debt satisfied. We put our decision upon the ground that the plaintiff has failed to establish his debt. Before a creditor can come into a Court of Equity on the mere relation of creditor and debtor, he must establish his debt by a judgment at law; for debt or no debt, is a pure question of law. *Rambaut v. Mayfield,* 8 N. C., 85; *McKay v. Williams,* 21 N. C., 398; *Brown v. Long,* 36 N. C., 192. The only proof of the debt is what the plaintiff calls his judgment against the administrator. So far as there were assets, the administrator was bound and the judgment was conclusive, and has been satisfied; but beyond the amount of assets, the plaintiff has no judgment even against the administrator, and it would be strange indeed, if a third person is bound by that which is no judgment. For as to the excess of the debt over and above the assets ($361), there was judgment in favor of the administrator, that he "go without day." He had no further interest in the question, and so far as he was concerned, the plaintiff was at liberty to say his debt amounted to $100,000, or any other large sum. But he cannot, in any point of view, be considered as having represented the defendant. The gift was valid as between the parties, and as between the defendant and the administrator of the donor. So the defendant has a right paramount to that of the administrator, and it is idle to say that a proceeding which was in effect a judgment *in favor* of the administrator, should have the effect of a judgment against the donee who holds above him, and who was not a party to the proceeding, and who had no opportunity of contesting the matter in any way.

(174) If the plaintiff had taken judgment against the debtor in his lifetime, that would have been *prima facie* evidence of the debt as against the donee, subject to the reply *per fraudem;* for then the creditor takes judgment against a person directly interested in the whole question, and who was the only person that the creditor could sue. The distinction is obvious. Here, the creditor has no judgment (the judgment was in favor of the administrator); the administrator was not at all interested in the question beyond the amount of assets, and the creditor has another person against whom he can bring his action for the purpose of establishing his debt.

If the heir be bound by specialty, a proceeding against the administrator does not at common law bind him, for he has had no opportunity of being heard, and there is no community of interest between him and the personal representative. So, for no purpose, can he be said to represent the heir. It is true, under our statute, a judgment against the personal representative fixes the debt so as to bind the heir; and upon a *scire facias* he has only a right to make up a collateral issue in regard to the assets. This effect however is *by force of the statute,* and furnishes no ground for the position that a proceeding in which there is judgment in favor of the personal representative, that he "go without day and recover his costs" (such is the judgment when the plea of *plene administravit* is fully sustained), is evidence of the debt as against one who is alleged to hold property under a gift void as to creditors, but valid as against the donor and his representatives.

We presume that the counsel was misled by a supposed analogy. But what analogy can there be, between the case of an heir who takes *after* the death of his ancestor, and is by *statute* bound by a judgment against the personal representative, fixing the debt, and that of a donee, who takes *before* the death of a donor, and in regard to whom there is no statute by which a judgment against the personal representative is to be evidence against him? The case of *Dozier v. Dozier,* cited above, which was well argued on both sides, and fully considered, sustains our conclusion; although that case was made to turn on the necessity of making the administrator of the debtor a party.

(175) It is said by Mr. Moore, that but for the difficulty as to the want of a party, the Court in *Dozier v. Dozier,* 21 N. C., 96, inclined to the opinion that a judgment at law fixing the debt was not absolutely indispensable. The Court in that case announces broadly the general rule, that there must be a judgment at law. But in that case, inasmuch as the plaintiff had no cause of action at law against the administrator of his co-executor, for having wasted the assets, and he could only have a decree in Equity, an exception is made, thus proving the general rule. And the exception is, that if the claim is one which

can only be established in a Court of Equity, then of course there need not be a judgment at law.

Mr. Moore also cited the case of *Peeples v. Tatum,* 36 N. C., 414. That case fully sustains our conclusion; although it must be admitted the learned Judge who delivers the opinion, did not advert to the distinction taken to a judgment against the debtor in his lifetime, and a proceeding against an administrator in which there is judgment in favor of the administrator for the want of assets.

The Statute of Limitations has no bearing on the case. But it is worthy of consideration, how far the Act of 1826, which brings down the time of presuming payment of a specialty debt, or the abandonment of an equity of redemption, or any other equitable interest or claim from twenty to ten years, ought to be allowed to affect cases like the present one. If a creditor, knowing that his debtor has made a deed of gift and put property out of his possession into that of the donee, will sleep upon his rights for more than ten years, there may be some ground for the position that public policy requires that the donee, and those claiming under him, and *those who have been dealing* and giving credit to him, as the owner of property which, during all that time he has had in possession as the *ostensible* owner, should not be disturbed by a creditor of the donor who has been guilty of such gross negligence. The question concerns not the donee alone, but his creditors, those who may have trusted him on the faith of this property.

PER CURIAM. Bill dismissed with costs.

Cited: *Brittain v. Quiett,* 54 N. C., 330; *Osborne v. Wilkes,* 108 N. C., 676.

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(176)

ISAAC JOYNER v. MARY DENNY, DRURY VINCENT, & WILLIE WILLIAMS, Adm'r of Mary, late wife of DRURY VINCENT.

The assignee of one against whose marital rights a fraud has been committed, has a right to the protection of a Court of Equity, when the assignment was made for value.

Where a bill was filed against husband, the administrator of his deceased wife, and the donee of the wife by ante-nuptial gift, alleging that the gift was a fraud upon the marital rights of the husband, and therefore a fraud upon his assignee for value: *Held,* That the husband could not be said to be primarily liable to the assignee, and consequently that the reading of his deposition by the complainant was no release of the other parties.

THE bill in this case was filed to Spring Term, 1850, of the Court of Equity for PITT. Having been set for hearing, upon the bill, answer and proofs, it was, at Spring Term, 1852, transferred to this Court.

The bill alleged that on and a long time before 6 August, 1829, Mary Denny, deceased, was possessed in absolute property of a negro girl named Nancy; that on that day and for some time before, a marriage had been contemplated between the deceased and the defendant, Drury Vincent, who seeing the deceased in possession of Nancy, had good reason to believe her the property of the deceased; that on or about the day mentioned above, the marriage took place, and that thereupon the defendant, Drury, took Nancy into his possession and retained her there until about 5 December, 1843, when he sold her to the complainant for $310, and that the complainant has held her ever since. The bill further shows, that on the said 6 August, 1829, whilst the said marriage was in contemplation, but before it was performed, the said Mary Denny, deceased, without the knowledge or consent of the said Drury, and with a view of deceiving him in his just expectations of acquiring the slave Nancy, executed a deed of gift, conveying her and a small piece of land to Mary Denny, her niece, the consideration recited being natural love and affection, to have the same to her own benefit in case the donor died without an heir, otherwise the gift to be void; that the donee was an infant, and the deed went into possession of Thomas Hooker, the subscribing witness, who is now dead, and that its existence was pur-
(177) posely concealed from said Drury, and that at the time of the purchase made by the complainant, he had no notice of said deed or of any claim adverse to that of said Drury; that the wife never had a child, and died about January, 1849, and that defendant, Willie Williams, is her administrator; that the said Mary Denny, the defendant, has brought suit against him for said slave, Nancy, and that the suit is still depending. The bill then prays for an injunction against the suit, that the deed of gift shall be declared void, &c.

The answer of the defendant, Mary Denny, admits the marriage mentioned in the will; admits the making of the gift, but is ignorant of the length of time by which it preceded the marriage, the defendant having been at that time of so tender an age that she had but little personal knowledge of what took place; it avers, however, an information and belief that it was all done with the consent of the defendant, Drury. The answer further denies any intended concealment of the deed of gift, and denies that either the defendant, Drury, or the complainant was ignorant of its existence; it admits the institution of the suit at law; that the wife, Mary, is dead, and that the defendant, Williams, is her administrator.

The answer of Willie Williams admits that he is administrator of Mary Vincent, deceased, and says that for the other matters alleged in the complainant's bill, he has no personal knowledge of them, but is informed and believes them to be true.

The deposition of Drury Vincent, the other defendant, proves his total ignorance at the time, of the gift made by his intended wife to the defendant, Mary; that he kept Nancy in his possession from his marriage until the sale to the complainant; that he heard for the first time of the said gift, several years after his marriage, but that he never believed it, because his wife denied it, saying there had been such a paper, but it was destroyed, and that Nancy was his to do what he pleased with; that he was courting his late wife some four or five months before his marriage, but was engaged only three or four days previously; that his wife never had a child, and that excepting the land and negro, mention in the deed of gift, his wife's only property at the time of marriage was a bed and a sow.

Several other depositions were taken.

Sarah Hooker, the widow of the subscribing witness to the (178) deed of gift, proved that it was made only a short time before the marriage, and after the defendant, Drury, had commenced his courtship. She also proved that some ten or more years after the marriage, Mary Denny, the deceased, came to her to get the deed to destroy it; that she could not find it then, but promised the deceased to get it and destroy it; that she never was able to find it.

The other testimony was not important.

Moore and *Rodman* for the plaintiff.

Donnell for the defendant, Mary Denny.

PEARSON, J. The allegations of the bill are proven, and the plaintiff is entitled to the decree he asks for, unless the objections taken in reference to the defendant, Vincent, are sustained. *Tisdale v. Bailey,* 41 N. C., 358; *Strong v. Menzies, id.,* 544.

Mr. Donnell insisted that the right to complain of the fraud on his *jus mariti,* was personal to the defendant, Vincent, and could not be assigned, so as to give plaintiff a right to maintain this bill. He assumed that a creditor of Vincent who bought this interest at an execution sale, could not sue, and inferred that a purchaser from Vincent could not sue. The cases are not similar. The former could not sue, because he acquired no right by his purchase at execution sale, inasmuch as the interest of the debtor was not subject to execution. But *non constat,* that the debtor himself could not in equity assign his right. It was an interest that would pass to his personal representative. *Strong v. Menzies;* and although by the strict rule of the common law, he could not assign it, because it was a chose in action, and the legal title was in the donee of his wife, yet it is common learning, that such assignments, when for value, are supported by Courts of Equity.

Mr. Donnell further insisted, that Vincent was not a competent witness, notwithstanding the plaintiff had released him from all liability; and moreover, that as he was primarily liable, the plaintiff by reading his deposition, had released the other defendants who are only
(179) secondarily liable. After the release, the witness was certainly not interested, and was of course competent. The other proposition has no application. Vincent was not primarily liable. In fact he was not liable at all, except so far as he had incurred a collateral liability *at law* by reason of his express warranty; and from this, the plaintiff had released him. There was no such relation between him and the other defendants as would enable them to screen themselves behind him. He did not participate in the fraud. In truth the fraud was practiced on him, and the rule above alluded to only applies, when the parties participate in the fraud, and one is considered primarily liable, because more directly involved in a breach of trust to the plaintiff. As where a trustee fraudulently sells the trust fund, or an administrator wastes the assets; in such cases, although all who participate in the fraud are liable to the party injured, it is held, that the trustee or administrator should stand in the front rank, and be required, in the first place, to make compensation if he is able to do so. This is only to prevent circuity, because of his liability over to his co-defendants. But here the defendant, Vincent, so far from having committed a fraud and being liable over, was the original victim of the fraud.

PER CURIAM. Decree accordingly.

JAMES M. JESSUP, Executor, v. ELIZABETH ANN JESSUP and others.

In a will, the words "I give to my wife all the property I got with her," will pass all the property received by the testator in consequence of his marriage, whether at the very time of the marriage, or afterwards.

THIS bill was filed at Spring Term, 1853, of the Court of Equity for CUMBERLAND, by the plaintiff, to obtain a construction of his testator's will. At the same Term the cause was set for hearing upon bill and answer, and transmitted to this Court.

No statement is required beyond what appears in the opinion.

(180) *Banks* for the plaintiff.
D. Reid for the defendants.

PEARSON, J. The will of Isaac Jessup contains this clause: Item—"I give to my wife three negroes, Fortune, Penny and Sam, one gray horse, one hundred dollars in money, *and all the property I got with*

her." He then gives specifically his other negroes to his children, and the sixth item is in these words: "It is my will, that all my property whatever, not otherwise disposed of in this my last will, shall be sold, and the money, together with what I now have on hand and what will be collected from notes, shall be equally divided between," &c.

The wife of the testator was the daughter of one Jones, who died about two years before the testator, leaving a will, by which he gives to his "son-in-law, Isaac Jessup, a negro, named Jack." He also gives to two other sons-in-law a negro, and to his son-in-law, John Plummer, he gives five dollars; but he gives other property "to his daughter, Susan, the wife of Plummer, for her sole and separate use and behoof." The question is, does Jack pass to the widow by the words "all the property I got with her," or does he fall under the residuary clause? We are of opinion that it was the intention of the testator to give Jack to his wife. The word *with* does not necessarily mean "at the same time," and is frequently used in the sense of the instrument or means by which a thing is done: *e. g.,* I strike with a stick—I pull down the limb of a tree with a hook—I get property with my wife, *i. e.,* by means of, as a consequence of our marriage.

If a father-in-law puts a slave into the possession of a son-in-law, or makes him a deed of gift, and dies intestate, can the son-in-law claim a share of the estate in right of his wife, without bringing the slave into hotchpot? He "got" the slave in consequence of, by means of his marriage, that is, with his wife, and whether it was at the *very time* of the marriage or afterwards, can make no difference in law. Should property be given or bequeathed to a wife, when by act of law it passes *eo instanti* to the husband, unless the words limit it to the separate use and maintenance of the wife? It is to all intents and purposes property "got with his wife."

That it was the intention of the testator to give the slave, Jack, to his wife, is put beyond all question by the fact, that all (181) of his other slaves are specifically bequeathed; and Jack is not disposed of, unless he passes under the words "the property I got with her"; and is left to fall under the residuary clause, which, from the context and the manner of its introduction, was evidently intended to cover the *small matters* not before expressly disposed of.

We think the widow is entitled to Jack; but the cost of this application for a construction of the will, must be paid out of the funds of the estate, as it was for the interest of all of the parties to have the question definitely settled.

PER CURIAM. Decree accordingly.

Cited: Redding v. Allen, 56 N. C., 369.

DECOURCY, LAFOURCADE & CO. v. CHARLES BARR and others.

The authority of commissioners appointed in other of the United States, to take the acknowledgments of makers of deeds, is confined to such deeds as are made by non-residents of this State.

By PEARSON, J. If a mortgage is given to secure a debt due by note "as by reference to said note will appear," the amount not being set out; or if it secures a specified debt, "and other large sums;" *Quere*, whether under the registration laws of North Carolina it would be valid?

The various provisions of the Rev. Stat., ch. 37, with regard to authority of commissioners in the other States, and in foreign countries, distinguished and explained, by PEARSON, J., *arguendo*.

THE bill in this cause was filed at Spring Term, 1852, of the Court of Equity for NEW HANOVER. At Spring Term, 1853, the cause was set for hearing upon the bill, answer and proofs, and transmitted to this Court.

D. Reid for the plaintiffs.

(182) *W. A. Wright contra.*

PEARSON, J. The defendant, Barr, executed three mortgages. The first and second to the other defendants, and the third to the plaintiffs, who seek to avoid the second and to redeem the first mortgage, and for an account and decree of foreclosure.

The second mortgage recites that it was made by Charles Barr, of the *town of Wilmington, county of New Hanover, and State of North Carolina*, to John D. W. Hooks & Co., of the City of New York. The following certificates are annexed:

"State, City and County of New York.

"I, John Bissell, Commissioner for the State, and resident in New York, appointed by the Governor of the State of North Carolina, under the laws, and commissioned under the great seal of the State, duly affirmed and qualified to take testimony and acknowledgments, &c,, &c., to be used and recorded in that State, do by this instrument, given under my hand and official seal, certify that on 10 October, 1850, before me in the State of New York, personally appeared Charles Barr, signer and sealer of the annexed instrument, and acknowledged the same to be his act and deed, for the uses and purposes therein set forth

JOHN BISSELL,
"Commissioner for North Carolina."

"State of North Carolina: } County Court Clerk's Office,
"New Hanover County. } 4 November, 1850.

"The execution of this deed is duly proved by the certificate of John Bissell, Commissioner for North Carolina. Let it be registered.

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"*Teste* L. H. Martin, *Clerk*,
By J. E. Pine, *Dep. Clerk.*"

"Received and registered,
4 November, 1850. D. E. Bunting, Reg'r."

The plaintiffs insist that this deed has not been duly proven and registered, and is therefore inoperative as to them; for that John Bissell had no authority as commissioner, to take the acknowledgment of Barr. And the question as presented, is the authority of the commissioner confined to deeds executed by *non-residents,* or does it also extend to deeds executed by a resident of this State, who happens to be in another State, and there executes and acknowledges a deed?

The authority of the commissioners is confined to deeds executed by non-residents. The Act of 1827 (Rev. Stat., ch. 37, sec. 5), provides that deeds, &c., "for land in this State, executed by any person or persons *residing in any of the United States other than this State,* or in any of the territories, or in the District of Columbia," may be acknowledged or proven before some one of the Judges of supreme jurisdiction, &c.; and the deed and certificate being exhibited in the Court of Pleas and Quarter Sessions, or to some one of the Judges of the Supreme or of the Superior Courts of this State, shall be ordered to be registered with the certificates thereunto annexed, &c. The Act of 1830 (Rev. Stat., ch. 21, sec. 2), provides that the Governor may appoint commissioners in any of the other States, District of Columbia, or territories, who shall have authority to take the acknowledgment or proof of deeds, &c., for land in this State, and such an acknowledgment or proof certified by the commissioner, shall have the same force and effect, and be as good and available in law for all purposes, as if the same had been done before some one of the Judges of supreme jurisdiction, &c., *in any other State, &c.*

The probate of any deed for land in this State, may be taken by the Court of Pleas and Quarter Sessions of the county where the land lies, or by one of the Judges of the Supreme or Superior Courts of this State. This is the general law. By the Act of 1784 (Rev. (184) Stat., ch. 37, sec. 4), the Court of Pleas and Quarter Sessions of the county in which the land lies, may direct a *dedimus* to two or more commissioners in the State where the subscribing witness or grantor resides, empowering them to take the proof or acknowledgment of the

deed, whereupon the deed, *dedimus* and certificate shall be registered, &c. This exception to the general law was made, because when the grantor or subscribing witness were non-residents, it was inconvenient for them to come to our State. For the same reason, the 19th section provides, "where it is represented to the Court or Judge, that a feme covert is so aged or infirm that she cannot travel, or is a resident of another *country,* (misprinted in the Revised Statutes, *county. Pierce v. Wanett,* 32 N. C., 449), a *dedimus* may issue to two or more commissmissioners, to take her private examination. The 11th section prescribing the form of the *dedimus,* "it being represented, that she is not an inhabitant of our State." The exception is obviously confined to non-residents. It was found however that it did not go far enough to meet the inconvenience in regard to non-residents; because it was necessary to apply for a *dedimus* in each case. To remedy this, the Act of 1827 allowed "deeds executed by any person or persons, *residing in any of the United States other than this State,"* to be acknowledged on the proof thereof taken, before any Judge of supreme jurisdiction. Here again, the exception by its very terms, is confined to *non-residents.* Even this, did not answer the purpose. For to say nothing of the fact that the Judges of other States are under no obligation to act as commissioners of our Courts, the result was, that scarcely one deed out of ten was properly certified, owing, no doubt, to the fact that the mode of authentication differs in some particulars in almost every State. This suggested the Act of 1830, by which the Governor is to appoint some fit person in the other States, a commissioner for North Carolina, whose authority and jurisdiction are put on the same footing with that before given to the Judge of supreme jurisdiction in the other States. It is clear, the purpose of the statute was to provide a general commissioner, so as to avoid the necessity of a special commission in each case when the
(185) grantor or witness resided in another State; consequently the commissioner has no authority to take the acknowledgment or proof of deeds, except such as are executed by non-residents. If a citizen of this State can go to New York, execute a deed there, and acknowledge it before a commissioner, upon the same construction, a deed executed by a citizen of this State may be taken to New York and acknowled before a commissioner. In other words, a commissioner has the same jurisdiction as a Judge, or the County Courts of our own State; whereas the statute, in so many words, puts him on a footing with the Judges of supreme jurisdiction in any other State except our own.

Mr. Wright called our attention to the fact, that sections 6 and 7, chapter 37, in reference to *deeds executed in foreign countries,* confers power to take acknowledgment or proof of such deeds upon the consul, chief magistrate, &c., and insisted that putting all the sections together,

the *place where* the deed was executed, gives jurisdiction to the commissioner without reference to the residence of the maker of the deed. The several sections of this statute, obviously do not turn upon the same principle. This Court is not called upon to say which principle should have governed. We can only say, that the place where the *maker of the deed resides,* is the principle acted upon by the Legislature in all the sections having reference to deeds executed by persons residing in this State, or in other States in the United States, District of Columbia, &c.

Again, Mr. Wright says, this deed was spread upon the record, and for all useful purposes had the same notoriety as if duly acknowledged or proven, so that the objection is technical. The reply is, the plaintiffs do not seek to make gain, but to seize a plank in a shipwreck, and may in consequence stand on legal rights, and insist that where a thing is not done in due form, it is not done at all in contemplation of law. Mr. Wright says further, the clerk of New Hanover County Court certifies that our deed is duly proven; he has full power under the statute to pass upon that question in regard to mortgages and deeds of trust, so the matter is *res judicata* and must be taken as true, until set aside or reversed in some direct proceeding. Whether the clerk has full power may admit of some question; but assuming it, *"He certified* (186) *the deed is duly proven by the certificate of the commissioner."* The statute requires the certificate of the commissioner to be annexed to the deed and to be registered with it. Of course as to the validity of the certificate is left open.

We admit fully the maxim *res judicata pro veritate accipitur,* and the maxim, *omnia presumuntur bene gesta,* &c., which means in English, where a tribunal, court, judge, commissioner or clerk is empowered by law to decide a question, the decision is to be taken as true, and every presumption is to be made in support of it, unless rebutted by something appearing on the face of the proceeding. For when a tribunal is entrusted by law to decide a question, it is presumed to have the ability and integrity necessary to enable it to do so. These maxims, however, apply only where the case is within the jurisdiction conferred, and the matter is properly constituted before the tribunal which undertakes to adjudicate it.

We have seen that the jurisdiction of the commissioner is confined to deeds executed by persons who reside out of this State. As his jurisdiction is a limited one, it might be insisted with much force, that his certificate should set forth all the matters necessary to show that it was conferred in the case under consideration; that is, it ought to have set forth that the maker of the deed was a citizen of the State of New York. But suppose, that although it might have been proper, still it was not absolutely necessary for the certificate to set forth all the facts giving

jurisdiction; it is certainly competent to show from the face of the deed, that in point of fact the commissioner had no authority to take the acknowledgment, for it recites the fact that the maker is a citizen of North Carolina. It is settled, that where the certificate does not set out the facts necessary to confer jurisdiction, but states generally that "the deed was duly proven," a want of jurisdiction may be shown from the deed itself. *Smith v. Castrix,* 27 N. C., 518. It would be strange if an attempt to support an usurpation by means of a falsehood, could not be met by proof. We do not apply this language to the present case. For we assume the commissioner to have acted under the belief (although he was mistaken), that he had authority to take the (187) acknowledgment; and the clerk also acted under the belief (although he was also mistaken), that the deed was duly proven by the certificate of the commissioner; and we use this language simply for the purpose of announcing the general proposition, that where there is a defect of jurisdiction, the maxims above stated do not apply, and a want of jurisdiction may be shown *aliunde.* It must be declared to be the opinion of this Court, that the second mortgage is not valid, as against the plaintiff, because not duly registered

Mr. Reid for the plaintiffs, insisted that the first mortgage was also void as to creditors, because, besides the $2,000 then due, an attempt is made to secure any amount that might be due for goods to be furnished from time to time *thereafter.* This objection is not open to the plaintiffs, for their mortgage is taken expressly subject to the first mortgage, which is recited to be a security for the sum of $2,000. No reference is made to future advances. This presents a very interesting question. Is not the first mortgage inpoerative and of no effect in regard to the amount due for these future advances, by reason of our registration laws? The object of these laws is to give notoriety as to the *existence and extent* of mortgages and deeds of trust. *Gregory v. Perkins,* 15 N. C., 50; *Halcombe v. Ray,* 23 N. C., 340; *Cannon v. Peebles,* 24 N. C., 449. Suppose a mortgage is given to secure a debt due by note, "as by reference to said note will appear," the amount not being set out. Would registration of such mortgage give notice of the extent to which the debtor's property was bound, or show the value of the equity of redemption? Would not the registration laws be evaded? Suppose a mortgage secures a debt of $2,000, and *other large sums,* that may be hereafter contracted for. What purpose does the registration answer in reference to the latter? As this question may be presented, upon exceptions to the Master's report, we do not now express a decided opinion, and merely suggest it is a matter worthy of future consideration, with a view of having the order for an account so stated as to have distin-

guished the items for goods furnished after the execution of the first mortgage.

PER CURIAM. Decree accordingly.

Cited: Todd v. Outlaw, 79 N. C., 237; *Lawrence v. Hodges,* 92 N. C., 682; *Buggy Co. v. Pegram,* 102 N. C., 543; *White v. Connelly,* 105 N. C., 71; *Duke v. Markham, Ib.,* 138; *Perry v. Bragg,* 111 N. C., 164; *Long v. Crews,* 113 N. C., 257; *Williams v. Kerr, Ib.,* 309; *Barrett v. Barrett,* 120 N. C., 129; *Bernhardt v. Brown,* 122 N. C. 591; *Smith v. Fuller,* 152 N. C., 13.

(188)

JOHN H. ANTHONY v. RICHARD H. SMITH, Executor of Whitmel Anthony.

A testator bequeathed to his debtor the bond which constituted the debt. After the making of the will, he, for the convenience of other creditors, caused the debtor to renew the bond, adding to the principal the interest that had accrued: *Held,* that the renewal was no ademption of the legacy.

THIS cause was removed to this Court from the Court of Equity for HALIFAX. And as the original papers were sent down, soon after the case was decided, the Reporter has not been able to make any statement of the facts and pleadings. Those however, it is believed, sufficiently appear in the opinion delivered in this Court, for the understanding the points decided.

Moore, for the plaintiff.
Whitaker, for the defendant.

BATTLE, J. The plaintiff states in his bill, that the sealed note executed by him to the defendant's testator for $1,694.11, on 30 January, 1850, is the same debt, with the interest thereon, bequeathed to him by the testator; that the testator did not intend by taking a new note for the amount of the principal and interest the debt to revoke the legacy, and he contends that in law it is not revoked or adeemed. The demurrer admits the facts, and we are called on to decide whether the plaintiff has deduced the proper legal conclusion from therein.

Upon the authorities there may seem to be some conflict of judicial opinion, but the weight of them is, we think, on the side of the plaintiff, and is supported by reason and principle. In *Dingwell v. Askew,* 1 Cox., 427, it is stated that previously to the marriage of the testatrix, stock was vested in trustees to her separate use for life, then to the issue of the marriage, afterwards, according to her appointment by will,

notwithstanding the marriage; and in default of appointment to the testatrix absolutely. She executed her power, survived her husband, and then took a transfer of the stock from the trustees into her own name, and died without having made any other disposition of it.
(189) The question was, whether the transfer was an ademption of the bequest, and it was held by Lord KENYON, then master of the Rolls, that it was not. The case of *Blackwell v. Child,* 1 Ambl., 260, was in effect as follows: Samuel Child and B. and W. Blackwell were partners in the banking business, under articles made in the year 1843. S. Child after reciting in his will that he had reserved to himself by the articles, nine in twelve parts of the profits to arise by banking in his house, at Temple Bar, London, did, in pursuance of the power also reserved thereby, dispose of such nine parts in manner following:—one-ninth part to B. Blackwell and W. Blackwell, in addition to the shares to which they were entitled under the articles, as a recompense for the trouble they should incur in carrying on the banking business for the benefit of his wife and children; another ninth part to his wife; three-ninths to his eldest son, and the remaining four-ninths to his two youngest sons. The articles of 1743 expired after the date of the will, and and Child entered into new articles with B. Blackwell and W. Blackwell, at the end of a year afterwards, by which the business was divided into twenty-four parts or shares, and fourteen of them were declared to belong to Child, seven to B. Blackwell, and three to W. Blackwell. There was a provision in the articles of 1743, that if any of the partners died during the partnership under those or any future articles, the shares of the persons so dying should belong to their executors. There were also secret, or what are called side articles entered into by them, but no new ones were made when the parties entered into the last articles. Upon a question whether the second articles were an ademption of Child's will, Lord HARDWICK determined that they were not, observing that although the fund was altered and differently arranged, it was in fact subsisting at Child's death; and his Lordship said, "that where a person in trade makes a provision out of his share for his family, and afterwards renews the partnership by which perhaps his interest is varied, yet it is not a revocation; if it were, it would occasion great confusion." In *Pulsford v. Hunter,* 3 Bro. Ch. Cas., 416, W. Richards, by a codicil of December, 1779, after giving two small annuities, bequeathed as follows: "This is an account of value now in my possession, and out of which the said yearly sums are to be paid; bank notes
(190) to the amount of £190; cash £10, 10s.; ditto in the bank of Mr. Drummond £2,476, 5s., £2,676, 15s.; the interest of the remaining part to be applied for the use and education of my grandchildren till they arrive at the age of twenty-one, and the principal to be then

equally divided amongst them," &c. It appeared that Richards had no cash in possession at his death; but that he was possessed of two bank notes amounting to £30; also that Hunter, in January, 1799, and at Richards' request, left with Messrs. Drummond two navy bills, the property of Richards, to the amount of £2,462, 5s. 4d., and that in August, 1790, Government discharged the navy bills and interest, with seventeen Exchequer bills of £100 each, and with £921 1s. cash, making a total of £2,621, 1s., which Exchequer bills remained in the hands of Messrs. Drummond in the name of Hunter, and the £921, 1s. placed to his account; that in September, 1780, Hunter drew a draft on the Messrs. Drummond for £21, 1s. in favor of the testator which was paid; and he afterwards took out the remainder of the same and bought nine other exchequer bills of £100 each, and left them with the Messrs. Drummond in his own name, which made up twenty-six Exchequer bills; that afterwards sixteen of the Exchequer bills were deposited with the Messrs Drummond at the testator's request, in his testator's own name; and the remaining ten bills were paid to Hunter and another person in satisfaction of a debt of £1,000; and it appeared that the testator never had any property in the hands of the Messrs. Drummond except as before stated. It was one of the questions, whether as at the time of the bequest the property in the possession of the Messrs. Drummond was navy bills, and had been subsequently altered in the manner before mentioned, the legacy was not adeemed; or whether the grandchildren were entitled to the sixteen Exchequer bills remaining in the hands of the Messrs. Drummond at the death of the testator? Lord THURLOW decided in their favor, observing that the question in these cases was, whether the specification of the thing bequeathed, remained the same at the testator's death as it was at the time of the bequest.

An attentive examination of these, together with other cases on the same subject, will show that the true principal to be extracted from them is, that when the thing bequeathed is annihilated and (191) gone at the death of the testator, or so completely changed at that time that it cannot be identified, then the legacy must fail; but if it remains *substantially* the same as it was at the time when the will was made, then the legacy is not adeemed: (See Roper on Legacies, 238, *et seq.*, where most of the cases are collected, and the principles upon which they were decided pointed out and explained). Let us now apply this principal to the case before us. The bequest of the defendant's testator to his brother, the plaintiff, was in effect the whole debt, including the interest, which the plaintiff owed him. It does not merely describe the note by which the debt was secured, but it proceeds to declare: "and I do hereby release him and his heirs from all obligations to me as appears by said note, and all interest accruing on said note." Could any language

have been used to express more clearly and fully that the testator intended to forgive his brother the debt which he owed him? Did the subsequent transactions betwen the parties destroy the debt, or so change it that it could not be known to be the same? If it had been collected by the testator, there is no doubt that the legacy would be lost; but instead of being collected it was only renewed, and renewed only because other creditors of the plaintiff desired a new deed of trust to be executed. It was the same debt, principal and interest, secured by a new note. The new security does not annihilate, but preserves the *substance* of the thing given, to wit, the debt. Such certainly appears to be the opinion of Lord HARDWICK, where he said in the case of *Blackwell v. Child,* before cited, "I think it is a specific legacy of quantity bequeathed out of a certain body; and if the body be subsisting at the death of the testator, the legacy shall be paid out of it. It was said to be like the novation of a debt, which does not destroy the legacy of the debt." Novation, says Bailey in his Dictionary, is a term in the civil law signifying "an entering into a new obligation to take off a former."

We think that we have succeeded in showing that both authority and principle are on the side of the plaintiff, which entitled him to have the demurrer overruled.

PER CURIAM. Demurrer overruled.

Cited: Hyman v. Devereux, 63 N. C., 627; *Cole v. Covington,* 86 N. C., 299; *Starbuck v. Starbuck,* 93 N. C., 185.

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(192)

JOHN A. AVERETT, Admr. etc., of Isaac Lipsey, deceased, v. GEO. J. WARD and the heirs at law of Isaac Lipsey, deceased.

The personal representative of a deceased mortgagor is not a necessary party to a bill filed for a foreclosure of a mortgage of land.

Where a bill by its prayer submits to a sale of the land mortgaged, a sale is usually ordered, as most convenient for both parties.

THE bill in this cause was filed at Fall Term, 1844, of the Court of Equity for ONSLOW. It alleged that one Richard Ward, in 1823, had made a mortgage of certain parcels of land, describing them, lying in Onslow County, to the plaintiff's intestate, for the purpose of securing to the said intestate a debt evidenced by a bond of the same date payable twenty years thereafter; that the mortgagor remained in possession until his death and then devised the land to the defendant George J. Ward, who is still in possession. It then charges that the debt is still due, and prays for an account, and a decree for payment of what shall be

found due by a short day, or in default thereof, that the land be sold, and that the heirs of the plaintiff's intestate, &c., be decreed to make title, &c.

The answer of George J. Ward admits "that the bond and mortgage mentioned in complainant's bill bear the signature of his father, the late Richard Ward, but this defendant has been informed, and believes, that the said signatures were obtained by fraud and imposition practiced upon the said Richard Ward while in a state of intoxication," &c.

No other allegations are material to the understanding of the opinion of this Court.

At Spring Term, 1832, the cause was set for hearing on the bill, answer and proofs, and transmitted to the Supreme Court.

J. H. Bryan, for the plaintiff.
J. W. Bryan, for the defendant, Ward.

NASH, C. J. The bill is filed by a mortgagee to foreclose an equity of redemption, or for the sale of the premises. The statements of the bill and those of the answer show a clear original right to (195) the relief sought. The answer, however, insists upon the length of time which elapsed since the execution of the mortgage deed, and also upon the alleged drunkenness of the mortgagor at the time of the execution of the mortgage deed. If this latter defense had been so stated in the answer as to amount to a defense, it is entirely unsupported by any proof. As to the first, it cannot avail the defendant. The bond given to secure the money mentioned in the mortgage did not fall due until 1843, and the bill was filed in 1846.

The principal defense relied on however, is the alleged want of parties. It is insisted that the personal representative of Richard Ward ought to be a party. The answer is, there is no relief prayed against the personal estate. The prayer is for a foreclosure in the ordinary way, but the plaintiff submits to a sale of the land itself, if the Court thinks proper so to decree. In a case of mortgage, in discharging the debt, the most convenient course for both parties is primarily to have the land itself sold, giving to the debtor any surplus that may remain; and this rule is acted upon in this State. *Ingram v. Smith,* 41 N. C., 97. And in most of the States of the Union, where the aid of a Court of Equity is asked, and even in England where the rule does not exist, there are some cases in which its propriety is recognized; as where the mortgage is of land, and which by the local law is subject to sale. Story's Eq., ss. 1025, 1026. Cook on Mortgages, 521. In this State, the personal representative of the mortgagor may be made a party, but is not a necessary one. *Worthington v. Lee,* 2 Bland, 684. The land

mortgaged is primarily liable to pay the mortgaged debt, and the personal property of the deceased is liable to the heir in exoneration of it. Adams, 585. There must be a decree for the sale of the land in question, and the case is referred to the Master to ascertain what is due in principal and interest upon the bond of 25 August, 1823.

PER CURIAM. Decree accordingly.

Cited: Ferguson v. Haas, 62 N. C., 115; *Hyman v. Devereux,* 63 N. C., 628; *Mebane v. Mebane,* 80 N. C., 38; *Isler v. Koonce,* 83 N. C., 58; *Fraser v. Boon,* 96 N. C., 329; *McGowan v. Davenport,* 134 N. C., 533, 537; *Bradburn v. Roberts,* 148 N. C., 218.

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(196)

PETER MAY, Administrator, &c., v. MARY B. SMITH, HARMAN PAUL and SARAH PAUL, his wife.

An executor cannot join in the same bill a claim for a debt due to him individually, with one for a debt due to him in his representative capacity.

The bill stated "That he (the plaintiff) was the owner of a tract of land, which he authorized the deceased (his intestate) to sell, which he did to A., and took in payment the bond of B. with the endorsement of A. This the deceased also endorsed and delivered to the defendant S. P.", and claimed the bond as belonging to the plaintiff individually, upon the ground that the lands was his: *Held,*

1. That if the plaintiff sued individually, the representative of the deceased should have been made a party to the bill; and that it is no answer to this objection, that the plaintiff is also the representative of the deceased.
2. In order to render the defendant S. P. liable to the plaintiff, in case he sued as administrator, it was necessary he should have averred a want of assets.

THE bill in this case was filed to the Fall Term, 1847, of the Court of Equity of ANSON. It alleged that one Reading Anderson of whom the complainant was administrator, had been doing business for the complainant for several years previously to his death in 1846. Among other transactions it stated the following:—That the complainant was seised of a tract of land in Anson County which he wished to sell, and authorized the said Reading to sell it, who did sell it to a Mr. McKorkle, and took in payment a bond on Joseph Blair with an endorsement of McKorkle, and that the said Reading afterwards delivered that bond to the defendant, Sarah Paul, with an endorsement to her, or to some one in trust for her, and that since the death of Reading Anderson, the defendant Sarah having possession thereof, has received from the obligor a part of the money due on it, and delivered the bond to Blair to be cancelled, who has destroyed it, and has given to the said Sarah,

or to some other person as trustee for her, a new bond for the residue of the money. The bill then charges that the defendant Sarah, at the time of the endorsement to her, and at the time of the partial payment and the substitution of the new bond, knew for what consideration the bond had been endorsed to the deceased; and that the other defendants were active instruments in procuring the endorsement to be made to the defendant Sarah, with the understanding that there was (197) to be a division of the money arising therefrom among all of them.

After other statements not necessary to be repeated here, the bill prayed that the defendants "may account with your orator for the assets of the deceased in their hands, or the hands of either of them, and for the money and effects belonging to your orator deposited in their hands by the deceased as is hereinbefore charged, and that your orator may have such other," &c.

The answers of the defendants were filed to Spring Term, 1849, and at Spring Term, 1853, the case was transferred to this Court.

Winston, for the plaintiff.
Dargan and *Kelly* for the defendants.

NASH, C. J. The bill cannot be sustained in its present form. It is filed by Peter May, as the administrator with the will annexed of Reading Anderson, and part of the prayer is, that the defendants may account with the plaintiff for the assets of the deceased in their hands," and another prayer is that the defendants may account "for the effects belonging to *your orator* deposited in their hands by the deceased." Here are two distinct and independent causes of action united. One, to call in and collect the assets of the deceased, and the other, to follow the effects of the plaintiff, effects due to him individually and in his own right. At law, an executor or administrator cannot join a count for a debt due to him individually, with one in his representative capacity. Neither can they be joined in Equity. *Adams Equity,* 2nd edition, 567. *Davon v. Tanning,* 4 Johns. Ch. 199. *Bedsole v. Monroe,* 40 N. C., 315. And the reason assigned is, that different decrees and proceedings might be required; for convenience therefore, the joinder will not be permitted. For this cause the defendants might have demurred. Waiving however this objection, the case has been put in the argument before us, upon the second ground. The bill in the stating part, alleges that the deceased Reading Anderson was the agent of the plaintiff to carry on the business of selling groceries, and that the plaintiff furnished all the capital. It then states "that he (the plaintiff) was the owner of a tract of land, which he authorized the deceased (198)

to sell, which he did to one McKorkle, and took in payment the bond of Joseph Blair with the endorsement of McKorkle, and which he, Anderson, endorsed and delivered to the defendant Mrs. Paul." The bill claims this bond as belonging to the plaintiff individually, upon the ground that the land was his. Upon this ground alone the case has been argued before us. Waiving all remarks upon the suspicious nature of the whole connection between Anderson and the plaintiff in this business, and looking upon the bill *pro hac vice* as filed by Peter May to follow his bond into the hands of Mrs. Paul and her husband Mr. Paul, has the plaintiff entitled himself to a decree? We think not. It is a general principle in Equity, that all persons interested in the subject matter in dispute must be made parties. The bond was by McKorkle, the obligee, endorsed to Anderson, and by him endorsed to Mrs. Paul. By these several endorsements the legal title to the instrument is in the defendant Mr. Paul. In calling him to account for it, his assignor is a necessary party, because the defendant Paul would be entilted to redress out of him. The reason of the general rule above stated is, that a Court of Equity seeks to arrange by one suit all the claims arising out of the same transaction between the parties interested. The defendants then are entitled to have the representative of Reading Anderson before the Court, in order that their respective rights and interests growing out of the transaction may be settled. Another reason is, that the estate of Anderson is primarily answerable, and the defendant's secondarily. If the representative of Anderson was properly before the Court and the plaintiff entitled to a decree, the decree would be that it should be discharged in the first place out of his estate, and if there were no assets, or not sufficient, then by the defendant Paul. *Powell v. Mathis,* 39 N. C., 84; *Murphy v. Moore, Ib.,* 118; *Hoyle v. Moore, Ib.,* 175. It is objected on the part of the plaintiff May, that he is the representative of Anderson, and that he could not make himself a defendant. But who has placed him in that position? It was his own voluntary act, and he must abide the consequence.

(199) It is no sufficient answer to the objection for the want of parties, that one interested is dead, and there is no personal representative; it is the duty of those seeking relief by bill in Equity in a matter in which the deceased person is interested, to procure a representative, and it can therefore be no answer for the plaintiff that he is the representative. *Martin v. McBride,* 38 N. C., 531. Further, he has not averred a want of assets. On the contrary, an inventory has been filed as an exhibit, showing that he has in his hands, of the deceased Anderson's effects, more than the amount of his claims, and out of which he has a right of detainer.

The truth is, the bill is so singularly constructed that no relief can be had under it.

PER CURIAM. Bill dismissed with costs.

MARTIN WOODALL v. JAMES PREVATT.

Where replication is taken to an answer, the defendant cannot use his answer as evidence, but is put to his proof.

A bill to enforce the collection of a bond, must contain an allegation that there was a consideration, either good or valuable.

THE bill in this case was filed to Fall Term, 1852, of the Court of Equity for ROBESON. After the defendant had filed his answer, orders of replication and commission were taken; and at Spring Term, 1853, the cause was set for hearing on the bill and answer, and transmitted to this Court.

The bill stated that on or about 1 August, 1851, the defendant, who is the brother of the plaintiff's wife, executed his promissory note under seal, and delivered the same to the plaintiff's wife, by which he promised to pay the plaintiff one day after date, $250; that afterwards, and before any part of said money had been paid, the defendant fraudulently availing himself of his known influence over the plaintiff's wife, and for the purpose of defrauding the plaintiff, persuaded her to deliver the bond to him, the defendant, and that she did so, without his, the plaintiff's knowledge or consent; that the bond has thus been lost or destroyed, and that the defendant refuses to re-deliver the same, or another for like amount. (200)

The bill then prays that the defendant be compelled to pay the plaintiff the amount of the bond with interest.

The answer admits the making of the bond, but avers that it was made with reference to a certain scheme entered into by the plaintiff, the plaintiff's wife and the defendant, and with the full understanding that if the scheme should fail, the bond should be surrendered to the defendant; that the scheme did fail, and that the defendant duly informed the plaintiff of it, who answered that it was as he expected, and that the defendant then proceeded to the residence of the defendant's wife, who was living separate and apart from the defendant, and that they each surrendered to the other the papers delivered before with reference to the aforesaid undertaking.

Strange for the plaintiff.
Troy for the defendant.

PEARSON, J. The counsel for the defendant, Mr. Troy, was under the impression that he could use the answer as evidence, notwithstanding *replication* had been taken. In this he was mistaken. An answer puts at issue the allegations to which it responds, so as to require more than one witness to prove them. If replication is not taken, every fact set out in the answer is admitted, for the reason, that no issue being made, the defendant has no opportunity of proving the new matter which he alleges. But by a replication, the plaintiff takes issue upon all new matter alleged in the answer, and the defendant is put to his proof.

The case was made to depend upon the sufficiency of the bill; and Mr. Strange, the counsel for the plaintiff, was, in his turn, called upon to support the proposition that a bill to enforce the collection of a bond need not contain an allegation of a consideration, either good or valuable. For the bill before us does not allege any consideration, but avers simply that the defendant executed to the plaintiff a bond for $250, one day after date, etc., and avoids *on purpose* saying, how or why, or under what circumstances the bond was given; and asks a decree for its payment, on the ground that it is lost or destroyed.

A Court of Equity never interferes except when the thing is (201) done and a right is vested, so as to entitle the party to have the right protected unless there be a valuable consideration: *i. e.*, when the one party has been benefited or the other has suffered a loss, for these are the only cases which affect conscience. Exceptions are made under peculiar circumstances, when there is a natural, or as it is termed, a good consideration, and in a few instances of meritorious consideration. But these exceptions prove the general rule. To affect the conscience and entitle a party to the aid of a Court of Equity, there must be an allegation of a consideration. If I give a man a horse, or give him money, the thing is done, and the right of property is vested. But if I promise to give him a horse or to pay him money, and afterwards see proper not to do so, this is no matter which affects conscience unless there be a consideration. It is in the language of the civil law, *nudum pactum*—a *naked* promise. Mr. Strange conceded, the general rule, and assumed the position, that while in law a *seal* imports a valuable consideration which is conclusive in equity, a seal only raises a presumption of a valuable consideration, which may be rebutted. And from thence he inferred that when it is set out in the bill, (as in the one under consideration,) that the note is under seal, the presumption of a valuable consideration makes an express averment of the face unnecessary. The expression that "in law, a seal imports a valuable consideration," which is a very common one, is accurate, provided the meaning is property understood; which is, a seal

gives to an instrument the same validity at law as if there was a consideration. It amounts to, and dispenses with the necessity of the proof of a valuable consideration, because by the rules of the common law, every one is conclusively bound by the solemn act of sealing and delivering a writing *as his deed.* He is thereby estopped, and shall not be heard to say that it did not create a legal obligation. If one seals and delivers a deed of gift of a horse, or a note under seal for the payment of a sum of money, expressing in the face of the writing, that it is not for any valuable or good consideration, but simply on account of friendship, the property passes, and the money may be collected in an action of debt, because a consideration is not necessary to the validity of a deed at common law. *Walker v. Walker,* 35 N. C., 335.

The idea that a seal imports, that is, raises a presumption of the payment of a valuable consideration in a Court of Equity, (202) is not supported by a single case, and it would have been strange if such a case could be found, for the idea is wholly fallacious. A Court of Equity addresses itself to the conscience of the parties, and of course pays no respects to forms, and disregards even the solemn act of sealing and delivering, and looks behind all forms to see if there be a consideration binding the conscience of the parties. What tendency has the mere fact of a seal to prove the payment of a valuable consideration? The inference of the payment of a valuable consideration can be drawn with as much force of reasoning from the fact of the writing, or of the signing, or of the delivery of the paper, as from the fact of its being sealed. But, in truth, neither act raises a presumption of the payment of a valuable consideration, without which a Court of Equity, except under very peculiar circumstances, never interferes, but leaves the party to such relief as can be obtained at law.

Mr. Strange then insisted that the contract was in the present case *executed* and the right vested, so that the plaintiff was entitled to the protection of this Court, without reference to the consideration; and he suggested this case:—One agrees to give his note under seal for $250, payable in six months, as the price of a horse, which is then delivered to him. The contract, says he, is executed—each party has done all that he agreed to do. That is true, and it would make no sort of difference whether the price of the horse was secured by a note with a seal or without a seal; for the first contract is executed, and the vendor has taken a note of the vendee for the payment of the price at a future day. In other words, there is a *second executory* contract. It is not necessary to pursue the idea any further. Suffice it to say, the supposed case has no application. For here, it is only alleged that the defendant executed to the plaintiff a note under seal for $250, and we declare our opinion to be, that a Court of Equity will not aid one

who does not allege, and hold himself ready to prove that the note in reference to which he seeks aid, (although it may be under seal,) was given for a consideration binding upon the conscience of the other party. Our attention was called by Mr. Strange to a class of (203) cases in which it is held, that under a creditor's bill, or a bill by an executor for a settlement under the direction of the Court, one claiming by bond given without consideration, may prove his debt, and the payment will be enforced. This class of cases confirms our conclusion. At law, one claiming by *specialty,* takes priority and excludes simple contract creditors; but equity interferes and postpones such a creditor, *although he has a note under seal,* if it was executed without consideration, until all the real creditors are paid. After that, in a distribution of the fund among volunteers, none of whom have paid any consideration, the rule applies. *Prior est in tempore, potior est in jure.* Of course, one to whom the deceased has promised *by deed,* to pay a certain sum of money in his lifetime, in the absence of any evidence of a change of purpose, stands on higher ground than one, to whom he directs his executor to pay a certain sum of money after his death; neither has paid a consideration and it is a mere question of distribution.

PER CURIAM. Bill dismissed.

Cited: Lamb v. Pigford, 54 N. C., 200; *Longmire v. Herndon,* 72 N. C., 631.

SARAH WRIGHT v. JAMES GRIST and BENJAMIN GRIST.

Where every material allegation of a bill to stay waste is expressly and plainly denied in the answer, the injunction must be dissolved.

The question of a defendant's right to bring an action of *Trespass quare clausum fregit* against the plaintiff, is exclusively a legal one, and cannot be considered in discussing the propriety of dissolving an injunction.

IN this case the complainant's bill, which was filed to Spring Term, 1853, of the Court of Equity of CUMBERLAND, alleged that on 10 December, 1849, she leased to the defendant James R. Grist, until 1 January, 1858, all the pines suitable for making turpentine, that might be found on certain tracts of land belonging to her, and lying in the counties of Cumberland and Robeson; that she excepted from that lease the lands, within the limits specified as including hers, that might belong to other persons having older patents, and pines sufficient to (204) make ten crops of turpentine, and also such pines as were suitable for ton timber; that the defendant James was also to have the privilege of getting barrel timber enough to make barrels for such

turpentine as he might make on the land; and hoop poles enough for such barrels; that he was to pay a certain rent for the pines and a certain sum per hundred for the hoop poles, but was to consume no other wood or timber except for firewood and other incidential purposes. The bill further alleged that the defendant executed his bond with security in the sum of ten thousand dollars, conditioned for the payment of the rent; that the defendant James has with a large force been cutting boxes and cultivating pines since the first of the year 1850, and has made partial payments for the rent of the hundred thousand pines cut by him and his agent the defendant Benjamin, but has not paid all that is due; that the defendants have violated the contract made on 10 December, 1849, and are, as the plaintiff is informed and believes, committing waste, if not in person, by those in their employment, by making tar of the lightwood to the amount of fifty or a hundred barrels, making barrel timber for saving turpentine upon the lands of other persons, and appropriating some of plaintiff's land to their own use; besides that the defendant Benjamin has sued her in trespass for entering upon her own land, and that both defendants are boxing the pines reserved by the lease to the plaintiff; that she had been prevented by the defendants from using the ton timber reserved in the lease, her slaves have been driven from the lands leased to the defendants, and the defendants are endeavoring to embarrass her rights to the land; that she has, after frequent attempts, failed to call the defendants to a settlement for arrears of rent and for the damage she has sustained by the waste they have committed, and that they refuse to dismiss the suit improperly brought against her, The bill then prays for an injunction against the waste and the action of trespass.

The defendants answered severally.

The defendant James R. Grist admitted the lease by the plaintiff, but alleges that of the seventeen thousand acres said to be included within the limits specified in that lease, so much is covered by patents older than that of the plaintiff that he has not been able to procure more than five hundred acres and thirty-nine thousand (205) boxes of that assigned by the lease and that by this breach of faith on the part of the complainant he has been seriously damaged. The answer denies that the defendant ever, either directly or indirectly, made any tar upon the premises leased, or that he used the lightwood; it denies in the same manner the charge of having taken hoop poles or barrel timber for the saving of turpentine not made upon the lands leased, and avers that he has promptly paid to the plaintiff at the end of every year all the rent that was due, and that he owes her nothing. It further insists that the defendant James is and always has been in good credit, and amply able to make satisfaction to the plaintiff for

any wrong he may have done to her; and submits that the plaintiff's claim, as disclosed by the bill, is one properly cognizable in the Courts of law.

The defendant Benjamin makes the same admissions that are contained in the answer of James. He admits that he was the agent of James, and denies his using the lightwood and timber for barrels and poles for hoops as charged by the plaintiff. He also admits that he has instituted a suit of trespass, but alleges that the land to which it has relation, although within the limits specified in the lease, is part of a tract patented previously to that of the plaintiff, and leased to him by the owner. He asserts that he has always been able to satisfy the plaintiff for any damage she may have sustained from him, and claims that the plaintiff's action should have been preferred in a Court of law.

After these answers had come in, a motion was made before his Honor Judge Dick to dissolve the injunction. The motion was disallowed, and the injunction was continued to the hearing. From this order the defendants appealed to this Court.

Strange for the plaintiff.
D. Reid and *Banks* for the defendants.

BATTLE, J. The distinction between the special injunction to stay waste, and the common injunction to enjoin a judgment at law, and the principles upon which our practice is governed in relation (206) to both, are so fully discussed and explained in *Capehart v. Mhoon,* ante 30, and *Lloyd v. Heath,* ante 39, decided, at the last term, and in the cases therein referred to, that it would be useless to advert to them here. It is well settled, that on a motion to dissolve an injunction to stay waste, the bill may be read as an affidavit to contradict the answer, and if upon taking the whole together the question is left in doubt, the injunction will be continued until the hearing. Upon that practice this case must be decided; and the result is, that the injunction must be dissolved. The answer plainly and expressly denies every material allegation of the bill, and that without any equivocation or evasion, while the bill does not state the facts upon which she founds her claim to relief as coming within her own knowledge, but only that she has been informed of, and believes them. How and from whom, she got her information does not appear. It may have been a mere rumor. Upon which then, is most reliance to be placed; such a statement, or the apparently frank and full denial of the defendants in reference to the facts within their own knowledge? We think, a jury empanelled to try such an issue, could not hesitate to find the facts in favor of the defendants, and we, as the triers upon the

motion to dissolve, must find the same way. The other ground upon which it is sought to continue the injunction, to wit, that the defendant, Benjamin, has brought an action of trespass against the plaintiff for entering upon her own land, is untenable. The lease granted to the defendant, James R. Grist, sets forth, that there were lands within its general boundaries to which the plaintiff had no title, and it is not stated, nor pretended, that she wished to acquire the title to them. We cannot, therefore, see the force of the argument that the defendants were constituted her trustees, and as such were not at liberty to buy such lands. If either of them has taken possession of land claimed by her, and brought an action at law against her, the question whether it is her land, is a legal question, and must be decided in a Court of law. This Court would not at the hearing undertake to adjudicate upon it, but would send it to a Court of law for trial. It would be idle therefore, for this Court now to enjoin, what at the hearing it would direct to be done. We see no ground then, upon which the injunction heretofore granted can stand; the motion to dissolve ought to have been allowed, which must be certified to the Court (207) of Equity for Cumberland county. The plaintiff must pay the costs of this Court.

PER CURIAM. Ordered accordingly.

Cited: Thompson v. Williams, 54 N. C., 179; *Person v. Person,* 154 N. C., 454.

DAVID KENDALL, Administrator, &c., and others, v. DAVID H. STOKER and wife, and others.

A. by deed bargained and sold to B. "all of my legacy now due and coming to me from my father J. C.'s estate, viz., one fifth part of all the negroes, viz: Sam, Bob, Edy and Ellick, and all the increase, if there should be any, and all personal estate that is now due, owing or coming to me from said estate, or in any wise appertaining thereunto, or as the case may be, of the legacy that may fall to me." J. C. by his will had left Edy to E. C., and at the time the above deed was made A. was entitled to a distributive share of Edy and her child Ellick, as being part of the estate of E. C.: *Held,* that the words of the deed were broad enough to transfer the title of A. to Edy and her child Ellick, no matter how the title was derived.

THE material facts of this case are to be found in the opinion of the Court and in the case referred to therein.

Strange for the plaintiffs.
Dargan for the defendants.

PEARSON, J. This case was before us in 1848, in the name of *McDaniel v. Stoker,* 40 N. C., 274. Since then, by an amended and supplemental bill, it has been made to assume entirely a new aspect. The former plaintiffs, James Coleman, Jr., and Nancy Rosemon, together with their assignees, Moore and Palmer, have released all their "right and title" to the defendant Stoker, and the bill has been dismissed as to them. But the present plaintiff, David Kendall, has been appointed the administrator *de bonis non* of Eliza Coleman Coleman, and seeks to recover the slave Edy and her child Ellick, on the ground that she was given to his intestate by the will of James Coleman, Sen., in 1811—that the executrix, Elizabeth Coleman, assented to the legacy, and in 1816 Eliza Coleman died intestate, leaving her mother, the said
(208) Elizabeth and her brothers and sisters, Richmond, James, Mary, Nancy and Sally, (the wife of the defendant Stoker,) her distributees—that Elizabeth Coleman, the administratrix of Eliza Coleman, kept Edy and her child until 1842, without rendering any account to the distributees, and then fraudulently and without consideration delivered and transferred the slave to the defendant Stoker, who had married Sally, one of the sisters of Eliza. Richmond P. Coleman, and Mary McDaniel, of whom the plaintiff Kendall claims to be assignee, are also plaintiffs.

The defendant Stoker denies that old James Coleman left a will. But he says, admitting that there was a will, and that Edy was given to Eliza Coleman, still the plaintiff Daniel Kendall has no right to recover of him the said Edy and her child, for that in right of his wife he is entitled to one distributive share—that as assignee of Elizabeth Coleman, the mother of Eliza, he is entitled to another distributive share—that as assignee of Moore and Palmer, who were the assignees of James Coleman, Jr., and Nancy Rosemon, he is entitled to two other of the shares. All this the plaintiff admits. And Stoker further alleges that in 1838, for the sum of $125, paid to each of them, Richmond P. Coleman and Mary McDaniel transferred to him all their right and title to the slave Edy and her child, and in this way the title of all of the distributees of Eliza Coleman is vested in him.

The plaintiff David Kendall, does not allege that there are any debts due by his intestate, Eliza Coleman, remaining unpaid, and he puts his right to a decree on the ground that it is necessary in order to make distribution, and admits that Stoker has four of the shares, but avers that he, Kendall, as assignee of Richmond and Mary, is entitled to the other two shares. So the whole question turns on the transfer which Stoker alleges was made to him in 1838, by Richmond and Mary.

Stoker avers that when they made the transfers, the parties did not know, that old James Coleman had left a will, the records of Montgom-

ery having been burnt up; but he alleges they, for value, transferred to him whatever title they had in Edy and her child Ellick, and insists that it can make no difference whether they derived title as distributees of their father, old James Coleman, or as distributees of their sister Eliza, who was entitled to the slaves as a legatee of the said James.

We have examined the deeds executed by Richmond P. Coleman and Mary McDaniel in 1838. These are expressed in nearly (209) the same words. Richmond P. Coleman, for the consideration of $125, to him in hand paid, grants, bargains and sells to David Stoker "all of my legacy now due and coming to me from my father, James Coleman's dec'd estate, viz., one-fifth part of all the negroes, viz: Sam, Bob, *Edy* and *Ellick*, and all the increase, if there should be any, and all personal estate that is now due, owing, or coming to me, or ever hereafter may be due, owing or coming to me from said estate, or in any wise appertaining thereunto, or as the case may be of the legacy that may fall to me." We are satisfied from the proof taken in the case, that James Coleman, Sen., did leave a will, which was duly proven in the County Court of Montgomery, and was destroyed by fire; that by said will, the slave Edy was given to Eliza Coleman, and that Richmond and Mary were entitled to a distributive share in Edy and her child, as next of kin of their sister Eliza, and not directly as next of kin of their father, as the parties seemed to suppose at the time of making the deeds above alluded to. But the deeds use words broad enough to transfer the title of Richmond and Mary in and to the slave Edy and her child Ellick, no matter in what way their title was in fact derived, and a mistake in reference to the mode of deriving title is wholly immaterial.

PER CURIAM. Bill dismissed with costs.

JOSEPH J. WILLIAMS v. THOMAS BURNETT and others.

Where a bill was filed against the heirs of the grantor, alleging that by a mistake the deed conveyed only a life estate to the complainant, instead of a fee simple, and seeking to have that mistake corrected; to which the defendants demurred: *Held*,

1. That the demurrer could not be sustained; because the defendants should have put in a disclaimer of any right to the land so conveyed.
2. That the bill cannot be dismissed on the ground that the complainant has a legal title according to the statements of the bill, as he had a right to come into equity wherever there is an outstanding incumbrance, or a cloud resting on the title, to have the cloud removed.

Held also, That where the bill alleged death of children it was not (210) incumbent on the complainant to allege further that they died without leaving children of their own, as there is no rule of law or equity which presumes the birth of children.

The bill stated that the grantor at his death "left many children, all of whom are dead but *the defendants* A., B.," &c., and prayed "that to the end therefore that the *defendants*," &c., and prayed process against "*the defendants*": *Held*, that these expressions obviated the objection that there were no parties defendant to the bill.

THE bill in this case was filed to Spring Term, 1852, of the Court of Equity for MARTIN. A demurrer to it was put in by the defendants; and at Spring Term, 1853, the cause was set for hearing, and transmitted to this Court.

The material allegations of the bill were, that in 1827, one Eli Burnet of Martin County, conveyed certain lands to the complainant and one W. S. Rayner, *forever,* in trust to secure his creditors, and that several years thereafter a part thereof was sold for the purposes of the trust; that after the death of said Eli, his administrator filed a bill against the trustees for an account and settlement and that under these proceedings the rest of the land was sold, and purchased by the complainant; that the Clerk and Master, intended to sell, and the complainant intended to buy the fee simple in these lands, but that owing to the defect in the above mentioned deed in trust he obtained only a life estate; that the deed in trust was drawn by the complainant, and that the defect in question is attributable to his unskilfulness, as Burnett intended to convey the fee simple; "that the said Eli left as his heirs at law many children, all of whom are dead except the defendants, Thomas Burnett, who resides in Florida, George Burnett, Simmons Burnett, Sally Savage, a widow, Felicia Burnett and Abby Burnett, who reside in this county." The bill then prays "to the end therefore that the defendants on their corporal oaths full, true," &c.; "that the defendants be decreed to convey unto your orator all the right, &c., which descended upon them," &c. "May it please your Honor to issue a writ of subpœna to the defendants," &c.

Moore, for the plaintiff.
Biggs, for the defendants.

NASH, C. J. The demurrer cannot be sustained. The de-
(211) fendants demur, because the plaintiff has not made by his bill such a case as entitles him to any discovery or relief, and that any discovery from the defendants, cannot avail the plaintiff for any of the purposes for which a discovery is sought, nor entitle the complainant to the relief he seeks.

The bill states that the plaintiff claims the land in question, under a sale made by the Clerk and Master of the Court of Equity of Martin, by virtue of a decree of said Court, and that in the deed of trust executed by the said Eli Burnett, the word heirs in the limitation of the

estate to him was accidentally omitted, whereby only a life estate was conveyed. When the Clerk and Master sold, he intended as well to sell, as the said Eli in his conveyance intended and expected to purchase, a fee simple in the land. That in consequence of this mistake, he fears the title in fee has descended to the defendants, who are the heirs of Eli Burnett, who owned the land, and who is now dead; and the defendants were parties to the proceedings under which the Master sold. The bill asks that the mistake may be rectified. The demurrer admits the facts set forth in the bill.

The deed under which the plaintiff claims, conveyed but a life estate to him, and upon the death of Eli Burnett, the fee de- (212) scended to the defendants, his heirs. If the defendants did not intend to avail themselves of the accidental omission of the word heirs in the conveyance to the plaintiff, they ought to have disclaimed all title. If the plaintiff in a bill in Equity untruly states that the defendant has an interest in the matter in dispute, the latter may put in a disclaimer of any right. If this be done all controversy is at an end, and the bill may be dismissed as to him, or a decree made against him according to the interest disclaimed and the security of the plaintiff may require. This the defendant has not done, but he has chosen to demur; and as a demurrer is an admission of the facts properly set forth in the bill, and as they in this stage of the pleadings, show a clear equity, the demurrer cannot, for the causes set forth in it, be sustained. Adams on Eq., Ludlow & Collins' ed., 604. Nor is a sufficient cause to dismiss the bill, that he has a legal title according to the statements of the bill. He has a right, if there be an outstanding incumbrance, or a cloud resting on the title, to come into a Court of Equity to have the cloud removed.

Other causes of demurrer have been assigned, *ore tenus,* on the argument here. The first of these is for the want of parties. The bill alleges, "that Eli Burnett at his death left as his heirs at law many children, all of whom are dead intestate, except Thomas Burnett," &c. It is said that the children that are dead may have left children, and that they ought to have been made parties. If such were the fact that they did leave issue, which were within the jurisdiction of the Court, they certainly ought to have been made parties. But there is nothing to show that such was the case, and we are not apprised of any rule of law or equity which presumes the birth of children. If the deceased children left no children, then the other defendants who are their brothers and sisters, are their heirs at law.

The second ground assigned is, that there are no persons made parties defendant by the bill. The bill after setting out the death of Eli Burnett, states that he left "many children," all of whom are dead *but the*

defendants, Thomas Burnett, who resides in the State of Florida, George Burnett, Sally Savage, a widow, Felicia Burnett and
(213) Abby Burnett, who all reside in this county." The bill then prays "that to the end therefore, that the defendants on their corporal oaths, full, true and perfect answers make," &c. It then prays process *against the defendants.* The bill is certainly not drawn with that attention to established rules and forms so desirable in proceedings in a Court of Equity; but it is sufficiently so, to avoid the objection urged.

Our attention has been drawn in the argument to *Hoyle v. Moore,* 39 N. C., 175. We think that case very clearly distinguishable from this. In that, the bill prayed "that the proper parties may be made defendants," &c.—"that the clerk may be ordered to issue the State's writ of subpœna to the proper defendant," in no part of it does it set forth the names of the defendants, but the Court is called on to direct the clerk to find out who are to be made defendants. The case before us is different. It does set forth, by name, who are the heirs at law of Eli Burnett, alleges that they are the *defendants,* and prays process against the defendants, who are the persons whose names are set forth in a preceding part of the bill, and who are there called defendants.

PER CURIAM. Demurrer overruled.

Cited: Airs v. Billops, 57 N. C., 19; *Ferguson v. Haas,* 62 N. C., 115.

FREDERICK JOHNSON, Jr., v. DAVID CHAPMAN, Ex'r of FREDERICK JOHNSON, Sr., and others.

Where there is opportunity for sexual intercourse between a man and his wife, it is presumed it did take place unless the contrary be shown, provided there be issue; and if the intercourse might have occurred at a time when by the course of nature, the husband might have been the father, the child is deemed his.

The declarations of a husband to his wife are not competent to prove one of her children illegitimate.

Section 16 of the Act of 1836, ch. 122, is not affected by section 18 of the Act of 1836, ch. 65; nor does any presumption of the abandonment of any claim under it arise within ten years after the suit might have been brought.

In passing upon the question whether an assignment by a party is a bar to his claims, a Court of Equity will look at the adequacy of the consideration, and the other circumstances of the alleged sale.

FREDERICK JOHNSON, Sen., died in 1819, leaving a will, which
(214) was duly admitted to probate in the County Court of CRAVEN, and David Chapman, one of the defendants, is surviving execu-

tor thereof. The testator, by his said will, gave in different proportions the whole of his estate, real and personal, to his wife Penelope and his two daughters, Sally and Mary, his only children. At the time of his death, his said wife was *enciente,* and a few months thereafter she gave birth to the plaintiff, Frederick Johnson, Jun. The widow dissented from her said husband's will and soon afterwards intermarried with Stephen Chapman, who died intestate, and the defendant Jacob Schenck, administered on his estate. Mary intermarried with the defendant Frederick Bryan, and Sarah with Hilen Godley, who died intestate, and Henry Harding, another of the defendants, administered on his estate.

The plaintiff in his bill alleges that the said testator died seised and possessed of a large estate, real and personal, including a number of slaves which have greatly increased, of the value, number and names whereof he is ignorant, and also a valuable tract of land. That he has been informed that the defendants, Frederick Bryan and wife, and Sally Godley, have sold their interest and estate in said land to the defendant Church Chapman; and that as to the personal estate, the defendants, or some of them, have the same in their possession. And the plaintiff alleges that as a child, born after the death of his father, he is by the Act of Assembly entitled to a distributive share of the personal estate, and that he is entitled to one-third of the real estate. He further states, that he has grown up in extreme poverty—in ignorance of his rights—that he has been unadvised and unbefriended in regard thereto, and especially, that the defendant David Chapman, executor of his father's will, though he was well advised thereof, paid over the shares of the said Penelope, Mary and Sally; whereas he knew it was his duty, under the Act of Assembly, to have called upon the legatees and the plaintiff by bill or petition to litigate their respective claims, and ascertain the same, and apportion the shares which the legatees should severally contribute—which the said David Chapman failed to do. The prayer is for a discovery and account of the (215) personal estate, and for a division of the real estate or conveyance of one-third thereof to the plaintiff.

The defendants, in their answer, deny that the plaintiff is the child of Frederick Johnson, Sen., and aver that he is the child of Stephen Chapman, with whom his mother lived in notorious adultery, and whom she married shortly after the testator's death. That this fact was well known to the testator and by him and the plaintiff's mother openly admitted. And David Chapman, the executor, avers that this fact "furnished him with ample reason for omitting to make or have made any claim on behalf of the plaintiff"; and the defendants deny

that the plaintiff has any right or claim whatever to the estate of the testator.

The defendants admit that the testator owned a considerable estate, and they set out the division of the negroes between the widow (who dissented from the will) and the legatees, the names of the negroes, and their increase.

Bryan answers that he has been in the exclusive possession of the slaves he acquired by his marriage with Mary in 183—, a period of more than three years before the bringing of the bill; and he relies on the Statute of Limitations as a defense against the plaintiff's claim.

The defendants also admit the sale of the land mentioned in the bill to Church Chapman, who answers and denies that the plaintiff is tenant in common with him, inasmuch as he purchased the share of Godley and wife in 1835, and Bryan and wife in 1837, whose deeds are exhibited, and that he had no notice of the plaintiff'n title or claim of title to the land, before the execution and delivery of said deeds; and he was, therefore, a purchaser for a valuable consideration, without notice. And this defendant further states that he has had the actual and exclusive possession of the said land from the time of his said purchase to the filing of plaintiff's bill, and holding and claiming the same adversely to all the world; and he relies on the Statute of Limitations (ch. 65, Rev. Stat.) as if specially pleaded. He avers that the plaintiff was born in April or May, 1819—that his cause of action, if he had any, accrued more than seven years before the bringing of the bill—and that he was for more than three years before the bringing thereof, under none of the disabilities mentioned in said Act.

(216) The defendants also deny that the plaintiff has been ignorant of his alleged rights, or that he has been unable to prosecute the same, if he had chosen; and they aver that up to a short time before the filing of his bill, he openly admitted that he had no just claim to any part of the estate of Frederick Johnson, Sen., and that the said Stephen Chapman objected to any claim being made by David Chapman, the executor, on the plaintiff's account—insisting that he, Stephen, was his father, and would provide for him. And further, that the plaintiff, so far from making any claim to a share of said estate, did, in 1842, publicly offer his interest therein for the sum of thirty dollars; and in December of that year, did actually and *bona fide* convey the same for the sum of thirty dollars, to one Farnifold Chapman, who, since the filing of this bill, hath conveyed the said interest and shares to the defendant Frederick Bryan.

Harding, the administrator of Hilen Godley, answers that of the estate of his intestate only three slaves came to his hands, which his said intestate received under the will of Frederick Johnson; and these

he sold to pay the debts of the estate. That he has fully administered the estate of the said Hilen Godley, and but for this suit, would have paid over the effects in his hands to the next of kin. That he hath in his possession, of the estate of his intestate, five slaves, with the proceeds of their hire, amounting to one hundred and twenty-five dollars or thereabouts, and that these slaves were derived from the estate of his intestate's father. And, except as herein stated, he pleads expressly, that he has fully administered the estate of his intestate; and he also relies on the Statute of Limitations made for the relief of executors and administrators, (Rev. Stat., ch. 46).

The plaintiff took replication to the answers, and many depositions were read at the hearing, the tenor and effect whereof will be found in the opinion delivered by the Court.

J. H. and *J. W. Bryan,* for the plaintiff.
Donnell, contra.

NASH, C. J. Frederick Johnson, Sen., died in March, 1819, having made a last will and testament, in which he gave the (217) whole of his property to his wife and his two daughters, Mary and Sally, the one now the wife of Frederick Bryan, and the other of Hilen Godley, now dead. His will was made in June, 1818. At the time of his death, his wife was pregnant, and subsequently (218) gave birth to the plaintiff. The bill is filed for an account of the estate, and for a distributive share of the personalty, and for a conveyance of one-third of the realty. In 1803, the Legislature passed an act to authorize after-born children to receive their due proportion of the estate of their father, when he has made no provision for them in his will. The defendants, in their answers, deny that the plaintiff is the child of the testator, Frederick Johnson, and aver that he is a bastard, and the son of Stephen Chapman. It is shown by the evidence, that the testator and his wife lived together in the same house for many years, and up to the time of the death of the former. By presumption of law, then, the plaintiff is his son, being born within two months after his death. The conception took place while the parties were married, and while they lived together; and the rule is now well settled, that where there is opportunity for sexual intercourse between a man and his wife, it is presumed it did take place, unless the contrary be shown, provided there be issue; and if the intercourse might have occurred at a time when, by the course of nature, the husband might have been the father, the child is deemed his. *Morris v. Davis,* 3 Car. & Pay., 215, 278. *S. v. Herman,* 35 N. C., 502. The only evidence upon which the defendants rely to prove the plaintiff to be illegitimate, consists of the

declarations of Frederick Johnson to his wife. This evidence is not competent. Mr. Greenleaf, 2 vol., s. 151, says, the husband and wife are alike incompetent to prove the fact of non-access while they lived together, nor are the declarations of either competent to prove the illegitimacy, though the child was born three months after marriage, and therefore they had separated by mutual consent. *Bowles v. Bingham,* 2 Munf., 442. *Lee's* case, 8 East.; 193. *S. v. Wilson,* 32 N. C., 131. If there be access, nothing but impotence will bastardize the issue. *S. v. Goode,* 32 N. C., 49. *Commonwealth v. Shepard,* 6 Binney, 283. Under the evidence in this case we are bound to declare that the plaintiff is, in law, the son of Frederick Johnson, Sen., the testator.

The defendant, Bryan, says he has been in possession of the negroes set forth in his answer, as his share in right of his wife under (219) the will of said testator, claiming them as his own property, adversely to all the world, for more than three years; and he claims the benefit of the Act of 1820, as if specially pleaded. There is no saving in that statute expressly for any one, but it perfects only such possession of slaves as would have barred an action to recover them, under the Statute of Limitations. The expression in the statute is, such person having such possession "shall be deemed and held to have a good and absolute title to such slave or slaves, *against all persons* whose claim is barred by said statute." In the preceding part of the section, it tells us what possession it intends to ripen, and to what it refers in the clause recited, to wit, a possession which will sustain an action to recover the slaves. This Act of 1820 constitutes section 18, ch. 65, Laws 1836. The 3rd section points out the time within which actions at law shall be brought; but both Acts apply to action at law and legal rights, and have no bearing on this case. Laws 1836, ch. 122, which in section 16 secures to a child, born after the making of the parents's will, a due portion of the estate, when he is not provided for in the will, directs that the infant "may, at any time within two years after the probate of the will, by his next friend or guardian, file a petition, &c."; and the 22nd section provides that should no petition be filed within two years, as prescribed for by this Act, it shall be the duty of the executor or administrator with the will annexed, before he shall pay or deliver the legacies in said will, &c., to call upon the said legatees or devisees, &c., by a bill or petition, &c., to litigate their respective rights, &c." By this section there is no time within which this bill or petition for an interpleader is limited, when brought by the executor, and by its equity it must extend to a bill filed by the child for the same purpose. The object of the petition or bill, directed to be filed by the executor, is to settle the estate and to ascertain and settle the respective rights of the

parties. This bill is pretty much for the same purpose; nor does any presumption of payment or abandonment rise under the Act of 1826. See Rev. Stat. 1836, ch. 65, sec. 14. The plaintiff came of age in May, 1840, and the bill was filed in 1846—six years after any legal payment could have been made to him, or the presumption of an abandonment commenced. Where equity acts in analogy to the com- (220) mon law, time is no bar of itself, but it may furnish evidence of payment, satisfaction or abandonment; but this can have no such effect under ten years after the action ought to have been brought. There is, therefore, no statutory bar to the plaintiff's recovery, nor does any presumption arise against him.

Church Chapman, one of the defendants, alleges that he has purchased from the other defendants, Frederick Bryan and wife, and said Godley and wife, for a valuable consideration, and which has been paid, all their interest in the estate of the said testator, and that he had no notice of the plaintiff's claim at the time he made his purchase; and that, therefore, he is a *bona fide* purchaser, without notice. These purchases were made by him in 1835 and 1837. In a subsequent part of his answer he states that "from the death of the testator, Frederick Johnson, up to a short time before the filing of the bill, it was notoriously and openly admitted by him (the plaintiff) &c., that he was the child of Stephen Chapman, and not of the testator, and that his father, Stephen Chapman, refused and objected to any claim being made by the defendant, David Chapman, on account of the plaintiff, &c. This is a clear admission not only that the claim of the plaintiff was notorious, but also satisfactory evidence that he, the defendant Church, knew it. It is also stated as a proof that the plaintiff knew he had no legal claim, that he sold his interest in 1842, to one Farnifold Chapman for thirty dollars, who since the filing of the bill, to wit, in 1847, sold it to Frederick Bryan, one of the defendants. These statements satisfy the Court that the whole of this business was a combination on the part of the defendants to avail themselves of the destitute state of the plaintiff, and his ignorance, to secure to themselves, whatever interest he might have in the estate of Frederick Johnson, Sen. The most charitable construction that can be put on the answer is, that they did, in truth, believe that the plaintiff was illegitimate, and therefore not entitled to an interest in Frederick Johnson's estate; but that they knew of his claim, there can be no question.

This sale in 1842 by the plaintiff, is relied upon by the defendants as a bar to his recovery. It cannot have that effect. The price is so totally inadequate, and the circumstances under which it was made so suspicious, that a Court of Equity will not enforce it (221) as a bar to the plaintiff's claim.

The defendant, Church Chapman, relies also upon his long possession as barring the plaintiff's claim. The same answer applies to his defense on that ground, as has already been given to that of the other defendants:—being a purchaser with notice, he purchased subject to the claim of the plaintiff.

The answer of Henry Harding, administrator of Hilen Godley, admits that he has in his hands, of the estate of his intestate, five negroes, who came to him as such administrator from the estate of the father of Hilen Godley; that he administered in 1836, and advertised according to law. The assets of Godley are still in his hands, and they are not protected by the statutes of 1715 and 1791, from the claim of the plaintiff to an account of the assets of Frederick Johnson, Sen., or his intestate, which came to his hands.

There must be a decree for the plaintiff, and a reference to the Master of this Court, to take an account of the estate of Frederick Johnson, Sen., as prayed.

PER CURIAM. Decree accordingly.

Cited: S. c., 54 N. C., 130.

WILLIAM F. HILLIARD, Adm'r, v. SHEMUEL KEARNEY and others.

In a will, the words "among my five daughters, A., etc., and if either of them die without an heir, her part to be equally divided amongst her other sisters," refer to a death previously to the death of the testator,

By PEARSON, J., *arguendo:*

1. In expressions like the above, the word heir means child or issue; the quality of surviving is annexed to the original and not to the accrued shares; and only the share of her who dies first survives.
2. Where the intention of a testator is clear, the motive makes no difference; but where the intention is doubtful, and is the question in the case, the motive has an important bearing.
3. In doubtful cases, and interest, whether vested or contingent, ought, if possible, to be construed as absolute or indefeasible in the first instance, rather than defeasible. But if it cannot be construed to be an absolute interest in the first instance, at all events such a construction ought to be put upon the conditional expressions which render it defeasible, as to confine their operation to as early a period as may be, so that it may become an absolute interest as soon as it can fairly be considered to be so.
4. Wherever no intermediate period can be adopted, so as to avoid an

(222) issue between the time of the testator's death and that of the legatees, as the period when the legacies are to become vested, the weight of authority is in favor of the former.

THE bill in this case was filed at Spring Term, 1852, of the Court of Equity of FRANKLIN, by the late William H. Haywood, Esq., for the administrator of Stephen Sparkes, who had married Elizebeth White, against Drucilla White, Shemuel Kearney and Richard W.

Kearney; the last two being trustees under a deed to secure creditors, made by the plaintiff's intestate. Answers having been put in, the cause was set for hearing at Fall Term, 1852, and transmitted to this Court.

The material facts appear in the opinion.

No counsel for the plaintiff.
Lanier for the defendant.

PEARSON, J. In 1775, one Richard White died, leaving a last will and testament by which he gave the land of which he was seised to his five sons, to be equally divided between them, "but if either of them should die without an heir, his share to be divided between his living brothers."

By another clause in his will, he gives his wife for her life, negro women Fanny, Silvy and Lucy, and after her death the said negroes and their increase to be equally divided "among my five daughters, Mary, Sarah, Elizabeth, Drucilla and Nancy, and if either of them die without an heir, her part to be equally divided among her other sisters."

At the death of the testator, his wife and five daughters were all living. The wife died; and then Mary died and the negroes were divided between the four surviving daughters. Afterwards Sarah and Nancy died leaving children. Elizabeth is now also dead, without leaving a child. The question is, who is entitled to the negroes and their increase that fell to her share? Drucilla claims the whole as survivor; the personal representatives of Sarah and Nancy claim a part; and the husband of Elizabeth, her administrator, claims the whole. It is evident that "heir" is not used in its technical sense, as reference is made to the sisters; so it must mean child, as is frequently said in common parlance, one has an "heir born unto him," mean- (223) ing a child, or it may be taken in a larger sense, so as to include grandchildren or any descendant.

Assuming that the words are sufficient to show an intention to make successive survivorships, by annexing the condition not only to the share of the one who should first die without having a child, but to the shares of all, is it settled that only the original shares are subject to the condition, and the accrued shares vest absolutely. *Payne v. Benson,* 3 Atk., 78. *Bergrave v. Whitnick,* 2 Ch., 131; *Perkins v. Micklewaite,* 1 P. W., 274; *Rudge v. Barker,* Ca. Temp. Talbot, 104; *Ex parte West,* 1 Bro. Chan. Ca., 575.

The only question then is, are the words used sufficient to show an intention to make successive survivorships, and annex the condition

to all of the shares, so as to make all defeasible until the deaths of the legatees respectively, or is there some earlier period at which the legacies become absolute?

Six constructions are suggested:—1. All of the shares are defeasible and liable to pass over by successive survivorships, until the death of all of the daughters but one, whose estate then becomes absolute. 2. All of the shares are defeasible and liable to pass over at the death of any daughter without leaving a child, to the surviving sisters or sister, and the representatives of such as may have died, leaving a child, or to such representatives alone, should such last daughter die without leaving a child. 3. All of the legacies are absolute at the death of the testator. 4. All become absolute at the death of the tenant for life. 5. Upon the death of the first daughter without leaving a child, the shares of the others become absolute. 6. Upon the death of all but two, their shares become absolute.

Before discussing these several constructions separately, we state this general proposition bearing upon all of them. Where the intention is clear, the motive of a testator makes no difference; but where the intention is doubtful, and is the question in the case, motive has a most important bearing. Again, a further preposition is so well expressed by Mr. Smith, the annotator on Fearne, in his "Original view of Executory Interests," in the production of which he had the aid of all the modern cases, that it may be well to give it in his own words, (224) with the single remark that we concur in his reasoning and conclusions. Chapter 3, page 89, on the construing an interest to be absolute rather than defeasible—"It would appear to be a general rule deducible from principle and from actual decisions, though not enunciated by authority, that in doubtful cases and interest, whether vested or contingent, ought if possible to be construed as absolute or indefeasible in the first instance rather than defeasible. But if it cannot be construed to be an absolute interest in the first instance, at all events such a construction ought to be put upon the conditional expressions, which render it defeasible, as to confine their operation to as early a period as may be, so that it may become an absolute interest as soon as it can fairly be considered to be so. For, first, this would seem clearly deducible from the well known rule, that conditions are odious and shall be construed strictly, a rule which would appear to apply to those conditions which are termed in a preceding page, mixed conditions, as well as to conditions which are simply destructive. For if it applies to conditions subsequent, which are simply destructive, and upon which an estate is to be defeated, and made to revert to the heir who is favored by the law, it would seem to apply also to those conditions which are both destructive and creative, and upon which an

estate is to be divested, and a new estate is to arise in favor of another person, by way of conditional limitation. 2. The person claiming under a prior limitation, and his children being the primary objects of the grantor's or testator's bounty or consideration, and the persons claiming under the limitation over, being only secondary objects of such bounty or consideration, it is of course reasonable to lean in favor of the primary objects, by construing their interests to be absolute in the first instance, or as nearly as by fair construction, it can be considered to be so, rather than to lean in favor of the secondary objects, by construing the interest of the primary objects to be defeasible. Third. The law favors the free uncontrolled use and enjoyment of property and the power of alienating, whereas the defeasible quality of an interest tends most materially to abridge both."

It is evident that each of the daughters are respectively the primary objects of the testator's bounty, in regard to her original share; and with regard to what might accrue by a share being defeated, (225) the recipients are secondary objects of his bounty. It is also evident, that the primary intention is to give a share of the property itself, and not simply to lend or give the use of it. So far the way is clear. The difficulty is presented by the provision in case of a death without leaving a child. The testator was manifestly *inops consilii,* his intention is not expressed fully and clearly, and this is one of the many cases in which courts are left to grope their way in the dark in search of an intention, when in all probability the testator had not formed any definite intention, or at least had not run it out to all its consequences.

In support of the first construction, the argument is, the testator had a further intention, which was to confine this fund to the daughters; and as upon the death of one of them without a child, the sons would come in under the statute of distributions, the object of the provision was to exclude them, and to give the share of any one of the daughters so dying to her "other sisters." The condition is annexed to the shares of all indiscriminately, to one as well as to another, and to carry out the intention it is necessary that there should be a succession of survivorships, until the death of all of the daughters but one, when the condition must be at an end, inasmuch as there is no further limitation over; so that the intention expressed with legal precision would be in these words, "should any one or more of my daughters die without leaving a child, the share or shares of such as may so die shall go to her surviving sister or sisters." The reply is, first, The words used are in the singular number—"should any one die," etc., *"her* share, etc., her other sisters," and although the condition is annexed to all indiscriminately in the first instance, there is nothing to denote an

intention that it should continue and be ready to defeat the estate of all of the others except the last. The words are satisfied by operating upon the share of the one who died first without a child, and there is nothing to create a succession of survivorships.

Second. No case is to be met with in the books, (stated fully, and not simply put to illustrate a particular position, as that the accrued share is not subject to the condition,) in which a succession of survivorships is allowed, without some words in the plural showing such (226) to be the intention; as "their sisters," or the "share or shares of such as die, etc., to the survivor or survivors."

Third. Favoring a condition, by extending it beyond the words, or at all events beyond a *necessary* implication, is opposed by all analogy. For instance, there is no reason why the accrued shares should not be defeated and pass over, as well as the original shares: indeed, if left to conjecture, we should say it is in all cases the intention to put both on the same footing, yet when the words require a succession of survivorships, the authorities uniformly refuse to extend the condition by implication, and confine it to the very words "the share or shares of those who die, etc.," to wit, the original share or shares, even at the expense of much inconvenience and confusion. *Again,* cross-remainders by implication are not allowed in deeds; originally they were not allowed in wills where there were more than two devisees, "because of the uncertainty and inconvenience." Cro. Jac., 655. I which case Doddridge, J., says: "It was never seen in any book where an estate is limited to divers, that there should be cross-remainders by implication." The modern cases however relax somewhat, and the rule now seems to be that the presumption is in favor of cross-remainders by will between two but when between more than two, the presumption is against them. Such being the case in regard to *remainders,* of course it must be so in regard to executory bequests, because the reasons apply with more force. The latter are *conditions which defeat estates and pass the property to strangers.* The property is of a shifting and transitory nature, whereby the confusion growing out of a separation of the original and accrued shares, in case of four successive survivorships, would be increased tenfold; as would also be the inconvenience resulting from the fact that none of the shares would be absolute until after the death of the legatee, and none of the children of the testator *during their lives would have the ownership* and right of disposition. In the case of slaves, the inconvenience would amount not only to a deprivation of the ownership, but in some instances positively to a *charge.* The interest of money and the increase of stock belongs to the present owner, but the increase of slaves passes over with the principal: so one taking a defeasible estate in a negro woman, instead of a bounty has a

charge, and has to raise young negroes for another, unless so (227) fortunate as to leave a child surviving, and then the absolute ownership comes too late to be enjoyed by the primary object of the testator's bounty.

Fourth. The words used, adopting the construction contended for, in some respects go beyond, and in others fall short of the purpose of confining this fund to the daughters and excluding the sons, which is inconsistent with the assumption that such was the intention. They go beyond it, by putting a greater restraint upon the legacy to each of the daughters, than was necessary to accomplish the object, for the sons would not take under the statute of distributions, as well were a daughter married as when she died leaving a child, and the supposed intention would have been answered by allowing the daughters to have the property subject to the condition that if one or more happened to die without leaving a child, or without having married, it should go to her other sisters or the children of such as were dead, to the exclusion of the sons. *They fall short of it.* The accrued shares are not disposed of, but are left exposed to the claim of the sons. The *original shares* as well as the accrued shares of the surviving daughter, is left exposed to the claim of the sons, if she should happen to die without a child, unless she marries or otherwise disposes of the property; for there is no limitation over to the children of the deceased daughters, and the omission of this limitation over, is the only ground upon which the surviving daughter now claims the whole, and further claims that her estate is now free from the condition, and has become absolute.

Fifth. This construction is totally inconsistent with the admitted facts, that in regard to the original shares, each daughter is the primary object of the testator's bounty, and that it was the primary intention to give the property itself, and not simply to lend or give the use of it. The amount of it is, to give to the proviso the effect of so clogging all the legacies, as to deprive all the daughters save one, of the ownership and right to dispose of the property during their lives, and that one is to be so deprived until the death of all the others. That is, the first takers, the primary objects of the testator's bounty, are all to starve, as far as regards this property, and instead of the property being given, only the use of it is given with a chance (228) of having the absolute property after the donee is dead, when it cannot be enjoyed by her. To whose benefit does this restraint of the ownership enure? To the husbands, not the children (for there is no limitation over to them) of such of the daughters as die leaving children, and to the daughter who happens to live the longest, whether she has a child or not. The motive assigned is not sufficient to support a construction leading to such results. It should be borne in mind,

that this is not a limitation to several children with a condition that if one or more should die under the age of twenty-one, and unmarried, their shares should go to the survivors or survivor, which is a very common limitation in wills, and a very reasonable one, for the ownership is restrained only until the child has discretion or marries, and should be settled in the world. The restraint being a reasonable one, it is probable the testator intended to apply it to all of the children under like circumstances, and the Court might incline, in the absence of express words, to imply a succession of survivorships, from the fact that the same reason was applicable to all. But according to the construction contended for in our case, the restraint is general, and extends to the whole lifetime of all the daughters save one, and even extends to her until all the others are dead. This is unreasonable and inconsistent with the idea of a gift of the property to the first takers, and is therefore improbable, consequently the Court cannot extend it by any implication.

That a father *under the show of a gift* of negroes to a child, should have an intention so to restrain it, as not to give the ownership during the child's whole lifetime, notwithstanding arrival at full age, marriage and birth of a child, is so unnatural that express words should be used to show it. In support of the second construction, the argument is, besides a gift to his daughters the testator had a further intention of giving a preference to such of them as performed the condition, and died leaving a child. To effectuate this intention the Court will imply a succession of limitations over, upon the death of one or more of the daughters without a child, to the others and such as had died leaving children, which is an executory bequest where the person is certain, transmissible to the personal representative, so that the fact (229) that Sarah and Nancy are dead, offers no impediment to the vesting of a part of the share of Elizabeth in their representatives, and of the whole of the share of Drucilla, if she dies without a child. The argument fails, because there are no words showing an intention to give a preference to such of the daughters as died leaving children, except to the extent of making the shares absolute at their deaths. The same considerations which forbid an implication of a succession of survivorships, likewise forbid an implication of a succession of limitations over. It is unnatural and therefore improbable, and consequently cannot be implied, that a father intended to deprive all of his daughters of the ownership of the property which he professes to give them during all of their lives, and to allow all of them to starve, (for the estate does not become absolute upon the birth of a child, as it might die before its mother,) for the mere purpose of giving a preference to such as might have children. There is this further objection:

if the words "other sisters" do not refer to the death of one, so as to be confined to the survivors, and is allowed to take in the others also, there is nothing to exclude such as had died without a child, which is absurd.

Having rejected the first two constructions, it follows that one of the others must be the true one, and as the defendant is entitled to the whole of his wife's share under either, it is not necessary to decide between them; and we might content ourselves by saying that the legacies became absolute at the death of the testator, or, at the death of the widow, or at the death of the first daughter, or, at all events, when all died except two. But it may be proper to discuss them, as it may tend to illustrate what has been said in reference to the others, and to elucidate the whole subject.

An examination of the cases and a consideration of the probable intention of the testator, when it is not clearly expressed, and of the policy of the law, leads to this conclusion: When the estate is defeasible, and no time is fixed on at which it is to become absolute, and the property itself is given and not the mere use of it, *if there be any intermediate period* between the death of the testator and the death of the legatee, at which the estate may fairly be considered absolute, that time will be adopted, for the reason that, while on the one hand testators are not apt to have reference to what may happen between the making of the will and their own death, inasmuch as such an (230) event may be provided for by a codicil or another will; on the other, it is highly improbable that they ever mean, after giving the *property itself,* to make the estate defeasible during the entire lifetime of the legatee, and in effect give merely the interest or use of it, which is inconsistent with the prior gift of the property, and deprives the primary object of bounty of the right ever to exercise full ownership over it—*e. g.,* "A gift to A. if he arrives at the age of twenty-one, but if he dies without leaving a child, the property is to go to B.; the intermediate period is adopted, and the gift is absolute at his age of 21." *Horne v. Pillaus,* 2 M. & K., 22. "A gift of the dividends of stock to a wife for life, and of the stock itself at her death to her two daughters; but if either should die unmarried and without a child, the survivor should take the share of her so dying; and if both should die unmarried and without a child, there shares should go to a son:"—*held,* That the estates of the daughters would have become absolute at the death of the wife; but as she died in the lifetime of the testator, their estates became absolute at his death. *Laffer v. Edwards,* 3 Mad., 210; *Clarke v. Gould,* 7 Sim., 197; *Lejune v. Lejune,* 2 Beav., 701; *Smith's Original* View, 342. *If there be no intermediate period,* and the alternative is, either to adopt the time of the testator's death or the death of the

legatee generally, at some time or other whenever it may happen, as the period at which the estate is to become absolute, the former will be adopted, unless there be words to forbid it, or some consideration to turn the scale in favor of the latter—*e. g.,* A gift to A., but in case of his death to B., the time of the testator's death is adopted as the period at which the bequest to A. becomes absolute. *Hinckley v. Simmons,* 4 Ves., 160; *Cambridge v. Rent,* 8 Ves., 12; *Omany v. Bevan,* 18 Ves., 291; *Crigan v. Barn,* 7 Sim., 40.

A gift to A., but in case he dies leaving a child, then to such child, if he dies without leaving a child then to B., becomes absolute at the death of the testator. *Montague v. Nucilla,* 1 Rus., 165; *Laffar v. Edwards,* and all the cases above cited, support the case put by their reasoning, and it is supported by the very high authority of Mr. Smith, who cites and comments upon all of the cases, and announces (231) this conclusion (page 347): "Even when the gift over is not merely dependant on the simple event of death, but is to take effect in case of the death leaving children," or in case of the person "dying unmarried and without issue," the event will be construed to mean, not a death generally at some time or other, but a death in the testator's lifetime, or at some other particular time, if the *fund or property itself* and not merely the interest or income is given to the person whose death is spoken of; or if it is not to vest till a future period, and the dying may fairly be referred to a dying before that period; or if for any other reason it does not appear that the testator intended to refer to death generally. Putting out of view the policy of the law which favors the absolute enjoyment and right to dispose of property, and admitting for the sake of argument, that no intermediate period can be adopted so as to avoid an issue, between the time of the testator's death and that of the legatees, as the period when the legacies are to become absolute, the weight of the authority is decidedly in favor of the former, and so far from there being anything to make it appear that the testator intended to refer to the death of the legatees generally, the words used and all the circumstances point to his own death. 1. The property itself is given, and not the interest or income or use of it merely, which in the case of negroes is often a charge, and not a bounty.

Second. To deprive all of his daughters of the ownership during all the days of their lives, is inconsistent with the fact of their being the primary objects of his bounty.

Third. No limitation is made to the children of such as have any, and no limitation over is made in case all should die without children, so that no sufficient motive appears for a restraint so sweeping and unlimited.

Fourth. In directing the limitation over upon the death of any one without a child, words in the singular number only are used—*"her"* share is to be divided between *her* other sisters. These words are very appropriate if he had reference to the time of his own death, and intended simply to guard against a lapse by a death in his own lifetime; for it was probable that one might die without a child in his lifetime, but it is not probable that more than one, or all would die before him.

Fifth. If he had said "should one or more die without a child," using the words in the plural, or if he had made the (232) vesting of the legacies depend upon arrival at age and marriage, this would have been appropriate as referring to the death of the legatees generally, or to some period after his death, and would have excluded the idea of a reference to his own death, but he omits to do either.

There is then a gift, a condition, and a limitation over, all expressed in words appropriate to a reference to the testator's own death. No limitation over and no words are used appropriate to a reference to any other period. Why then shall not that period be adopted which explains the whole matter, and makes the restriction upon the gift natural and consistent, in preference to a period in reference to which no appropriate words are used, no limitations such as are common or proper are inserted, and the adoption of which confounds the whole matter, and makes the restriction upon the gift unnatural and inconsistent? This is a much stronger case than any to be met with in the books. Here are five daughters, and unless the testator's death be adopted as the period at which the legacies are to become absolute, no effect can be given to marriage or the birth of a child. Nothing short of death leaving a child can confer the ownership. If the testator's death be not adopted as the period for the legacies to become absolute, the rule laid down by Mr. Smith requires the adoption of the earliest period afterwards, which is not forbidden by the words, or a necessary implication. This period is presented at the death of the tenant for life, or when the first daughter died without a child. The words are then satisfied, and, so far from there being a necessary implication to forbid it, there is a necessary implication requiring it. To avoid the conclusion that the testator was so unreasonable and unnatural as to give property to his daughters and deprive them of the ownership during their whole lifetime, for no other reason that can be suggested except to give the shares of those dying without a child to the sister who happened to live the longest, or to the representatives of those who died leaving a child. As soon as the words are satisfied, the policy of the law requires that the legacies should be considered absolute, and

it will not presume in favor of cross-executory bequests among five, because of the confusion and inconvenience above pointed out. (233) This construction avoids all confusion and much of the inconvenience which would result from having no limit save the death of all but one. It satisfies the words of the will, makes the meaning sensible and intelligent, and accounts for the omission of limitations over. If the period of the death of the testator, and of the death of the widow, and of the death of the daughter who first died without a child are rejected, then the construction which considers the legacies of the two surviving sisters absolute at the death of the third sister, must be the true one for the reasons above given, and for the further reason that the estates cannot be considered defeasible any longer without doing violence to the words of the will. The division is to be among *her other sisters,* these words cannot be applicable when *only two are left,* for, upon the death of one of them there can be no division, nor can the property go to the other sister under the word *sisters.* So it would be necessary to add "surviving sister." This would be a strained construction, which as we have seen, the policy of the law and all analogy furnished by the cases forbid.

The devise to the five sons, although expressed in different words, involves the same question, and furnishes no aid in support of the one construction or the other.

Our attention was called by Mr. Lanier to many cases in our own Court. We have given them a careful consideration. Most of them show that words in the plural were used, so as to leave no room for implication; as his, her, or *their* shares, the *shares of these* so dying to go to the *survivors* or *survivor.* Other cases confine the restriction upon the gift, to arrival at age or marriage. No case was cited where the point was made and attention called to it, in which it is decided that the Court will by implication, make a succession of survivorships, and so extend a construction as to convert a gift into a loan, and reach the inconsistent, unnatural, and improbable conclusion that none of a testator's children to whom he gives slaves are to exercise the right of ownership, except the one who may happen to live the longest, unless some particular purpose is to be effected by the restriction.

Mr. Lanier relied mainly upon the case of *Fortescue v. Satterthwaite,* 23 N. C., 569. The point considered there was the remoteness of the limitation; as it is cited for a different purpose we have exam- (234) ined the original papers. It appears there was a particular purpose, viz., to exclude Polly Satterthwaite, to whom a small legacy is given, and the testator then adds—"It is my wish that she have neither part nor lot in my property besides," and "in case either of the

said children die without heir lawfully begotten, it is my wish that the property belong equally to the children then living, whether *James, Nancy* or *Sally.*"

Cox v. Hogg, 17 N. C., 121, discusses this question and supports our conclusion. There the particular purpose was to exclude Lucy Drew.

It must be declared to be the opinion of this Court, that upon the division, the slaves allotted to Elizabeth vested absolutely.

PER CURIAM. Decree accordingly.

Cited: Webb v. Weeks, 48 N. C., 282; *Biddle v. Hoyt,* 54 N. C., 164, 166; *Fairly v. Priest,* 56 N. C., 24; *Vass v. Freeman, Ib.,* 223; *Jenkins v. Hall,* 57 N. C., 340; *Camp v. Smith,* 68 N. C., 540; *Davis v. Parker,* 69 N. C., 275; *Burton v. Conigland,* 82 N. C., 102; *Murchison v. Whitted,* 87 N. C., 469-70-71; *Price v. Johnson,* 90 N. C., 596; *Taylor v. Maris, Ib.,* 622; *Buchanan v. Buchanan,* 99 N. C., 313-14-15-16-17-18; *Galloway v. Carter,* 100 N. C., 121, 129; *Fields v. Whitfield,* 101 N. C., 309; *Trexler v. Holler,* 107 N. C., 622; *Starnes v. Hill,* 112 N. C., 25; *Kornegay v. Morris,* 122 N. C., 202-3; S. c., 124 N. C., 424; *Sain v. Baker,* 128 N. C., 258; *Gray v. Hawkins,* 133 N. C., 4; *Whitfield v. Garris,* 134 N. C., 30; *Harrell v. Hagan,* 147 N. C., 113; *Campbell v. Cronly,* 150 N. C., 468; *Smith v. Lumber Co.,* 155 N. C., 392; *Dunn v. Hines,* 164 N. C., 120; *Rees v. Williams,* 165 N. C., 207.

AUGUST TERM, 1853

AT MORGANTON

(235)

HIRAM CARLAND and wife v. JAMES W. JONES and RUSSELL JONES and others, heirs at law of THOMAS JONES, and JAMES W. JONES v. HIRAM CARLAND.

A owned two shares out of eleven in a tract of land, and B claimed to own the rest. They entered into a written contract to divide the land so held by them in common; the partition was made, and possession was held by A for several years without its being perfected by a deed. B then filed a bill for a sale of the whole tract, alleging that a share in it belonged to certain infants. A then filed a bill against B for a specific performance of the contract for partition, which B resisted, upon the ground that he had failed to procure all the titles he had expected to at the time of the first contract.

Held, That to do justice to A, the Court would, in the case of the petition for a sale, order the commissioners to make a partition between A and B and the infants, reserving a further consideration of the rights of the infants until the coming in of the report of the commissioners.

CAUSES removed from the Court of Equity for HENDERSON, at Spring Term, 1848.

In 1831 Thomas Jones died intestate, seised and possessed of a tract of land in the pleadings mentioned, and leaving eleven children, to wit, Martha, wife of Hiram Carland, and the defendants in the case first above stated.

Carland and wife, in 1847, filed their bill for a sale of the said land for the purpose of a partition, and in addition to the heirs at law of said Thomas, James W. Jones claiming to have purchased (236) the undivided shares of two of the heirs, is also made a party defendant. Carland alleges that he purchased the shares of eight of the said heirs at law, for which deeds were duly executed by them respectively, except of the share of Henry Lance and wife, and in regard to this share, he says that Russel Jones having purchased the same of the said Henry, and taken his bond for title, afterwards sold it to him and gave his bond for title; but that before any deed was executed Mrs. Lance died, leaving children, minors. The plaintiffs then state that the defendant, James W. Jones, "has taken possession of a portion of said land, which he claims to be equal to two-elevenths thereof, but which is in fact greatly more than two-elevenths"—that he has held and cultivated the same for several years—and with a view to delay any other proceding or bill in this Court for a sale or partition of the land, the said defendant, James W. Jones, about two years ago, filed his petition

in this Court against your orator alone, praying a sale or partition," and the plaintiff states that he was willing that a decree for a sale should be made, as soon as the proper parties were before the Court, but the defendant James W. Jones would not consent thereto, and the plaintiffs then state they believe that the purpose of said James W. is to continue his petition in Court as long as possible, that he may remain in possession and wear out the land as much as possible. The bill prays a decree for a sale of the land, and Carland claims thereof eight of the shares by purchase, and one in right of the feme plaintiff Martha.

The defendant James W. Jones, in his answer, states that several years before the bringing of this bill, he purchased two shares in said land, to wit, those of William and James, and exhibits his titles thereto with his answers. After this purchase, he avers that he and the plaintiff Carland who claimed to own the other nine-elevenths agreed upon a partition, and ran a conditional line by which their parts were respectively allotted to them, and he went into possession of his portion—Carland agreeing in an instrument of writing then executed between them to make title to the said James W. Jones for his said shares and interest, and so to divide and make partition; and after a survey was made and said division line run, the said Carland surrendered the
(237) possession to the defendant, who has since remained in possession and made valuable improvements on the premises. And this defendant further avers that he has, at various times, offered to exchange deeds with Carland, who has refused, alleging that it was not necessary, as he Jones held a bond for title; and that thus each of them having been in possession of their said alloted portions for eight years, the said Carland had never complained until the said James W. Jones "was compelled to file his bill to require the said Carland to consummate the contract relinquishing to him his said share according to their said agrement." And this defendant Jones denies that in the filing or continuing in Court his said bill, his purpose was to occasion delay, but it was to settle and establish his rights under his said contract with Carland. The plaintiffs replied to the answer of Jones, and the parties proceeded to take proofs.

Pending the said bill brought by Carland and wife, and after it was transmitted to the Supreme Court, James W. Jones filed his bill against the said Hiram Carland for a specific performance of the contract between them, referred to in the pleadings of the first suit, and in this bill he sets forth as matter of complaint the various matters averred in his answer to the other bill, alleging the agreement to divide and portion the lands in the proportions stated—the going into possession by the parties—and his remaining so in possession, in ignorance of the fact that mutual deeds should be executed between him and defendant in

order to perfect their titles, until the defendant and wife filed their bill for a sale of the land—that after the lines were run and possession was taken by them, they were of opinion that was sufficient to secure their titles, and accordingly directed a mutual friend who held the agreement to tear off their names—which was done—that he has offered to execute proper conveyances to the defendant, and has applied to him to perform his part of the contract—which he has refused; and that a sale of the property as prayed for by defendant in his said bill will greatly injure him, inasmuch as he has made on his portion improvements of great value, to wit, over one thousand dollars.

Carland answers and admits the execution of the said agreement, but relies on the fact of its cancellation, and insists that the parties stand as if the same never had been executed. He avers that at the time of the execution of said contract, he stated to the plaintiff (238) that three of the said undivided shares belonged to infants, and that the obtaining of their titles was uncertain, though he admits he has since procured the titles of all except the heirs of Lance, and he has no hope or prospect of obtaining theirs: and he insists that said heirs are necessary parties to this bill. And further answering, the defendant insists that the plaintiff, having voluntarily dismissed and abandoned his bill heretofore filed for a partition, and a specific execution of said contract is precluded thereby from again harassing him from time to time with new suits for the same cause, and he pleads the same in bar of the plaintiff's equity in the premises. He then states that it is true that the plaintiff has made improvements to the value alleged—that he has received profits from the land of great value—and that he has himself expended more for improvements in proportion to their respective interests in the premises than the plaintiff.

This cause was set for hearing upon the bill and answer, and transmitted to the Supreme Court for hearing.

J. Baxter, for Jones.
Bynum, and *N. W. Woodfin,* for Carland and wife.

PEARSON, J. These two cases were heard at the same time, as they relate to the same tract of land. We are satisfied from the evidence that Jones and Carland executed a written agreement to make partition of the land—Jones to have two parts out of eleven, and Carland nine parts; that a dividing line was accordingly run, and that the parties have held possession of their respective parts in severalty ever since. At the time of the partition the parties did not execute deeds, and Jones now calls on Carland for a specific performance of the agreement to make partition, and the execution of the necessary title deeds. To this Carland replies that he is not able to perform his part of the contract, for

that he owns only seven parts out of eleven, of the land; that his wife owns one part, and the other part belongs to the heirs at law of Mrs. Lance, who died before he was able to procure the title, although her husband had given bond to make title. The excuse offered by
(239) Carland for not performing his part of the contract comes with a very ill grace, after the parties have acted upon the contract—and been in possession under it for so many years, and made expensive improvements. In *Love v. Camp,* 41 N. C., 209, it was held by this Court that if one entered into a contract to convey land, fraudulently representing himself to be the owner, and received the purchase money, he could only releive himself from a decree for a specific performance by an averment and proof that he had made all reasonable exertions to procure the title, and was unable to do so.

Whether the principle of that case is applicable to the present case, we will not now decide, because it is suggested that by a decree for partition in the case of Carland and wife against Jones and others; the commissioners may in their discretion, and with a due regard to the rights of all of the parties concerned, allot to Jones the two parts of which he is now in possession, or allot them to Carland so as to enable him to comply with his contract and put an end to the controversy with Jones. The report of the Clerk and Master as to whether the interest of the parties requires a sale of the land for partition is not at all satisfactory, and we feel at liberty, therefore, to act upon the suggestion, and order a partition of the land to be made by Commissioners, so as to give Jones two parts, Carland in his own right seven parts, Carland and wife one part, and the heirs of Lance the other part.

The case of *Jones v. Carland,* will be retained for further directions. The commissioners will be directed to accompany their report with a full statement of facts, so as to enable the Court to decide whether any prejudice will be sustained by the heirs of Lance by the order for actual partition.

PER CURIAM. Decree accordingly.

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(240)

JAMES AND AMOS McNEELY v. THOMAS STEELE.

Where an injunction had been obtained against a trustee, forbidding him to sell slaves which were part of the trust fund, upon the ground that the purposes of the trust had been fulfilled; and upon the coming in of the answer the matter was left doubtful whether that allegation was true; the injunction was continued to the hearing.

THIS was an appeal from an interlocutory order, made by his Honor, Judge ELLIS, at IREDELL, on the last Spring Circuit, dissolving the

plaintiff's injunction, which had theretofore been granted in the cause. The following is the case presented by the bill and answer.

In the fall of 1845, the plaintiff, Amos, being about to remove to the State of Tennessee, and being indebted to sundry persons, applied to his brother, the plaintiff James, to become his surety for the payment of all of his said debts, amounting to several hundred dollars; and the said James accordingly did bind himself therefor, as surety for said Amos. James was, however, at this time indebted to his brother, Amos, on two bonds, one for $269, due in 1843, and another for $130.68, due in 1844; and the bill alleges that these two bonds, together with several other bonds and evidence of debt due by other persons to the plaintiff, Amos, "were placed in the hands of the defendant, Steele, as an agent and trustee of the said Amos and James, upon the express understanding and agreement, that whenever your orator, James, paid your orator, Amos, the amount of the said two notes, then the said Thomas Steele should surrender and deliver up to the said James his said two notes"; and the bill alleges, that all the said notes, so due Amos, as well also "a carriage worth $300, and a cupboard worth $15, were placed in the defendant's hands as a security or indemnity for the said James, in his undertaking as surety for his brother, Amos,"—the defendant having no interest therein, but receiving them as agent and trustee for the plaintiffs, and at the same time receiving a tract of land from said Amos, to be sold for the same purposes. After the removal of Amos to the west, the plaintiff, James, states that "for the purpose of sat- (241) isfying the defendant and some of his own creditors, he did, on 16 February, 1846, execute a deed of trust to the said Thomas, for two negro slaves, Zilla and Sam, for the purpose of securing the payment of the said two notes due your orator, Amos, from your orator, James, and likewise for the purpose of securing various other debts, mentioned in said deed of trust, which your orator, James, then owed" (enumerating them); the plaintiff, James, expressly charges that, though the said two notes, due and payable by him to the plaintiff, Amos, "are mentioned and described in the said deed of trust, as debts due to the trustee, Steele, yet in fact and truth they were payable and due to your orator, Amos, and that the defendant, Steele, had no interest therein, save as agent and trustee, as above set forth" to wit, that as soon as "your orator, James, paid the amount of said notes to the said creditors of Amos, in discharge of their said debts, then the defendant, as agent and trustee, was to surrender and deliver up the said two notes to your orator, James."

The plaintiff, James, then alleges that in pursuance of the said agreement with his brother and the defendant, he proceeded to pay off the debts due by Amos, to a larger amount than the said two notes due by

him to Amos; and that he hath since, by the consent and approbation of Amos, called on the defendant to deliver up to him the said two notes, and that he hath also, as agent of the said Amos, called on the defendant for an account and settlement of all the debts and other property entrusted to him as agent, as aforesaid; but though (in 1848 or 1849) he delivered up to him, the plaintiff, James, the note for $269, yet he refuses to surrender the other note for $130.68, and that he so refuses, notwithstanding the plaintiff, Amos, has given to the plaintiff, James, his receipt in full against the said note; and that he likewise refuses to come to a settlement of his accounts with the plaintiffs. And the bill further charges, that the defendant has advertised for sale, the slaves Zilla and Sam, conveyed by said deed of trust, and threatens to sell the same, although, as the plaintiff, James, charges, he has paid off and satisfied all the debts therein named, and has the same in his possession, except the said notes from him to his brother, Amos, which are also satisfied in the manner above set forth; and that he owes the de-
(242) fendant nothing whatever. The prayer is for an injunction against the defendant's selling said slaves, for a reconveyance of the property conveyed in trust by James, for a surrender of the note to the plaintiff, Amos, of $131.68, and for an account.

The defendant in his answer admits that the plaintiff, Amos, shortly before his removal to the west, placed in his hands the said two bonds of James, together with other claims due to the said Amos, and also a carriage and cupboard; but he denies that this property or any part of it was left with him, as trustee or agent, for the purpose of indemnifying the plaintiff, James, as in the bill alleged, or that it was placed in his hands on any trust whatever. On the contrary, the defendant avers, that "he bought the carriage and cupboard from the plaintiff, Amos, and accounted fully and fairly for their value, and that the bonds of James were transferred to him unconditionally, as his absolute property, to cover money advanced to, and debts assumed for, the plaintiff, Amos." And the defendant avers, that he and the plaintiffs being near neighbors and on terms of great intimancy and friendship, and at the time Amos was about leaving the State, the defendant having command of a considerable amount of ready money, the plaintiff, Amos, came to him, and told him that he was obliged to pay certain debts before he could get away, and urged the defendant to take the said two notes of James, and also one on his brother, Silas, for about $...., that he, the defendant, was able to wait with them, and he did not wish them pressed; that to befriend the said Amos, he took the said notes, and in consideration therefor assumed certain debts due by him, amounting to less than the amount of James's and Silas's notes, the balance due whereon he paid to said Amos in money. And the defendant says that

James and Silas were fully cognizant of the fact and nature of this transfer—that the same was for a full consideration, nor was there, until the last twelve or eighteen months, any pretense that they were held by the defendant as agent or in trust. So far from this, as the defendant avers, the bond on said Silas was transferred to one Reed, and has been paid off by him long since; that the bond of $269 due by the plaintiff James was also paid off by him to the defendant some three or four years since, without objection or complaint, or any pretense that he was entitled to have it surrendered for debts paid (243) by him for Amos as charged; and that previously to his payment of said note, the plaintiff James had executed to the defendant two deeds of trust—that mentioned in the bill of complaint, and another of date 8 December, 1845, in both of which the plaintiff "James solemnly recognizes his indebtedness to this defendant by reason of the bonds transferred by plaintiff Amos, and makes provision for the payment of the same." The defendant admits that plaintiff Amos left with him a tract of land, to rent for him, but avers that afterwards, and before the removal of said Amos to the west, he contracted to sell a portion of the same to one Jameson and wife, agreeing to take in part payment some land in Tennessee belonging to Mrs. Jameson; but owing to some delay in procuring the deed of the parties, the said Amos made a deed for the land to the defendant, with instructions to convey to Jameson his part, and the residue to the mother of said Amos; but that the bargain and sale between said Amos and Jameson was consummated before the removal of the former, and that defendant, in his presence and by his sanction conveyed said land to Jameson, and that the said Amos received the purchase money paid; and as to the other part of said land, the same was afterwards sold by the defendant, according to the directions of Amos, and the money received therefor paid over to James. And the defendant denies having received any rents on account of said land.

The defendant admits that he has advertised for sale the slaves Zilla and Sam, and insists that he should have proceeded to sell the same, but for the injunction herein granted—averring that the plaintiff James was about removing out of the State with his property, and that he is entitled to have a sale thereof to satisfy the balance of the debts secured in the said trust and remaining unpaid, to wit, the said note of James for $130.68, and interest thereon, and a balance of a note due one Thomas, to wit, $24. As to the rest of the debts secured by said trust, the defendant admits they have been settled and paid; and as to the receipt given by the plaintiff Amos to James against the note of the latter for $130.68, he avers that the same was by collusion between them to defeat the collection of the same at law. And further answering, as

to the several claims left with the defendant by the plaintiff
(244) Amos as due him, the same were against insolvent persons, and nothing was received thereon with the exception of $55.49, one-half whereof was paid to the plaintiff James in December, 1852, on a full settlement with him of said claims, and the other half was retained by the defendant, under an express agreement with Amos, who regarded the said claims as insolvent, to take that share for his trouble.

Boyden, for the plaintiffs.
Craige, for the defendant.

NASH, C. J. The bill is filed for an account of a trust fund and reconveyance, and to restrain the defendant from selling a couple of slaves, a portion of the trust property. The account and reconveyance are claimed upon the ground that the debts for the payment of which the trust was created have been discharged by the plaintiffs, and the injunction, upon the ground of irreparable mischief to the plaintiff, if the slaves are sold by the defendant. Upon the coming in of the answer the injunction was dissolved by the presiding Judge, and the only question presented to us is as to the correctness of this interlocutory order. The whole equity of this case is covered by that of *Purnell v. Daniel,* 43 N. C., 9. The principle which is to guide us here is so plainly stated there, that we cannot do better than to recite it:—"This, (says my brother PEARSON, in delivering the opinion of the Court,) is not the case of an ordinary or common injunction, in aid of, and secondary to, another equity; but it is the point of the cause. It is to prevent irreparable injury, as is alleged, and to dissolve the injunction decides the case; for to dissolve it allows the act to be done." Again, in *Lloyd v. Heath, ante,* 41, the Court say, "where the plaintiff fails to elicit from the defendant a discovery which admits the allegations of the bill, the bill is allowed to be read as an affidavit on the part of the plaintiff, and if upon the whole case the matter is left in doubt, the injunction will be continued to the hearing, to allow the plaintiff a chance to support his allegations by proof, before a thing the consequence of which is irreparable is allowed to be done." In both
those cases the injunctions were special, restraining acts of a
(245) special nature, and in disposing of them a different rule exists in Courts of Equity from that of dealing with a common injunction to restrain proceedings at law.

In this case the injunction is of the former kind; and to dissolve it is to permit the act to be done which is to produce to the plaintiff an irreparable mischief. The bill charges that the plaintiff, Amos McNeely, being considerably indebted, and about to remove out of the

State, and desirous to secure to his creditors the payment of their debts for which the other plaintiff was surety, placed in the hands of the defendant, Steele, several notes and bonds, and some household furniture, and that James by two deeds of trust, conveyed to the said Steele, a tract of land and two slaves to secure the payment of the debts enumerated in them, with an express stipulation that if the debts so due were paid by the plaintiff by a time specified, the property was all to be reconveyed. The bill then alleges that all the debts so secured have been discharged by the plaintiff. Among the notes placed in the hands of the defendant were two given by James McNeely to the other plaintiff Amos, for money due him, one for $209, and the other for $130.68. In the bill it is alleged that those notes constituted a part of the trust fund, and that the first has been paid, but that the other remains still in the possession of the defendant, and that he threatens to sell the slaves mentioned in the deed to satisfy it. In the answer, the payment of the debts enumerated in the deed of trust is admitted, except as to a note for thirty dollars, and the one on James McNeely; but it denies that the last mentioned note constituted any of the trust fund, and avers that the same was transferred to the defendant in absolute property by Amos McNeely, and was among the debts intended to be secured; and that to discharge it, he had advertised the slaves so conveyed. The pleadings then do not present the case of a common and ordinary injunction "in aid of and secondary to another equity," but it is in itself the point in the case, and to dissolve the injunction, decides it. The real dispute is, in whom is the title and interest in the note for $130.68—a matter which is left in doubt and must be further inquired into: in which case the injunction must be continued to the hearing.

In the interlocutory order dissolving the injunction there is error, and the injunction must be continued to the hearing. This (246) opinion will be certified.

PER CURIAM. Interlocutory order reversed.

Cited. *Ashe v. Johnson,* 55 N. C., 154; *Dupre v. Williams,* 58 N. C., 99.

IN THE MATTER OF RICHARD CHAMPION and others, *ex parte.*

A testator by the first item of his will, made in August, 1847, gave to his wife "all my real estate, consisting of several town lots in Shelby, viz., A etc."; by the second he gave her "all my personal estate of whatever nature," and "my interest in a tract of land lying, etc., whereon John McGuinnis now lives"; he then adds, "I do give all the aforesaid bequests to my wife, her heirs and assigns forever," and afterwards appointed her executrix. In February, 1848, he added a codicil giving a negro woman

with her child, lately purchased, to his wife. In 1851, he contracted to purchase land of the Clerk and Master for $1,875, but died before paying the money, and before he had taken a title:

Held, That under Laws 1844, ch. 83, the wife was entitled to the testator's rights in this land.

Where there is an enumeration with reference to classes, an unenumerated class will not be included in general words preceding the enumeration; otherwise of an unenumerated particular, in an attempted enumeration of the particulars of a class.

UNDER a petition filed in the Court of Equity for CLEVELAND by the heirs at-law of one George Champion for a sale and partition of his real estate, Richard Champion, one of the heirs, became the purchaser of two tracts of land at the price of $1,875, for which sum he gave his bonds to the Clerk and Master; but he died before the same were paid. At Fall Term, 1852, there was a reference to the Master to inquire and report, among other things, "as to who were the heirs of Richard Champion, and whether he devised the said lands (so by him purchased) to any person and to whom, and from whom must the bonds of said Richard Champion be collected. At Spring Term, 1853, the Master filed his report, by which it appears that the said Richard Champion died in February, 1852, leaving a last will and testament duly executed to pass real and personal estate, and dated in August, 1847, in which he devised and bequeathed as follows:—

"I give and devise to my beloved wife Helen Maria Champion
(247) all my real estate, consisting of several town lots in Shelby, viz: Nos. 11 & 12 in the Northwest square of the town of Shelby known," &c.; also No. 24, in the same square, known as the Irby lot, "and also lots Nos. 11, 12 & 21, in the southeast square of the town of Shelby, and also my interest in lot No. 18 in the same square, known as the Ripley lot, and my interest in lot No. 14, in the southwest square known," &c.

"Item 2. I give and devise to my wife all my personal estate of whatever nature; and I will and devise to my wife my interest in a tract of land known as the Nathan Hamrick tract, on which William Hamrick now lives—this tract is only one-half mine—the other half belonging to George Champion, my father. And I also will that my wife have my interest in a tract of land lying on the waters of Sandy Run, it being the tract whereon John McGuinnis now lives, should McGuinnis not pay the amount of money I hold his notes for; but if he does, my wife must make him a deed for the land.

"And I, the said Richard Champion, do give all the aforesaid bequests to my wife, her heirs and assigns forever.

"And lastly, I do ordain and appoint my beloved wife my executrix to execute this my last will and testament."

To which will, in February, 1848, the testator added a codicil as follows:—"Having since the writing of this will purchased a negro girl named Malinda, and child named Julia, which are not included in the body of this will, and as such is the fact, it is my will and desire that my wife Helen M. Champion enjoy them solely as her right and property; and it is my desire that this codicil, together with the will, be fully carried out."

By which foregoing devise, the Master reported his decision to be, that on the payment by said Helen M. Champion of the said bonds made by the devisor, her husband, to the Master, she was entitled to a conveyance of the said two tracts of land, although the same were acquired by the devisor after the date of his said will. The heirs at law of said Richard Champion filed an exception to the report in this particular, and the same coming on to be heard before ELLIS, Judge, at Spring Term, 1853, of said Court, and his Honor being of opinion that the said will of Richard Champion did not devise to (248) Helen, his wife, any other real estate than that therein described and that she was not therefore entitled to the lands acquired by the devisor subsequently to the date of his said will, sustained the exception, and accordingly decreed that the Master execute a conveyance to the heirs at law of Richard Champion, and proceed to collect the said bonds from the executrix, the same being a charge on his personal estate: from which order and decree, Mrs. Champion appealed to the Supreme Court.

Lander and *Busbee,* for the widow and R. Champion.
Guion, for the heirs at law.

PEARSON, J. The first section of the Act of 1844, changes a well settled rule of law, and allows lands, and all interest in real estate to pass by a devise although acquired subsequently to the execution thereof. The second section changes another well settled rule, and provides that no conveyances, after the execution of a devise shall prevent whatever interest the devisor may have at the time of his death, from passing. The third section changes another, and provides that devises shall be construed to speak and take effect as if executed, not at the time of execution, but as if executed immediately upon the death of the devisor, unless a contrary intention shall appear by the will. The fourth section provides that a lapsed or void devise shall be included in the residuary clause; and the fifth section provides that a devise of real estate shall include any real estate which the devisor has power to dispose of.

It is evident from the whole of this statute, that its object was to

give to devises the most ample operation, and to change certain rules of construction which had been adopted by the Courts, but were considered by the Legislature as too technical and stringent, and calculated to defeat rather than carry out the intention of devisors.

The testator, by the first item in his will, gives to his wife "all my real estate, consisting of lots," viz. &c., &c.; by the second item, he gives to his wife "all my personal estate of whatever nature, and
(249) he then gives her his interest in a tract of land on which one Hamrick lives, and in another tract on which one McGuinnis lives, and he adds—"I do give all the aforesaid bequests to my wife, her heirs and assigns forever," "and lastly, I ordain my beloved wife to execute this my last will." The will was executed in August, 1847. In February, 1848, the testator adds a codicil, in which he gives a negro woman and child, that he had purchased after the execution of his will, to his wife, and directs the will and codicil to be fully carried out. In the fall of 1851, he contracted to purchase at the sale of the Clerk and Master two tracts of land at the price of $1,875, for which he gave his notes, and died in February, 1852, before he had paid the purchase money or taken title for the land.

It is evident from the whole will that the testator intended to give his wife everything he owned on the face of the earth. He makes her his universal legatee and devisee, and the suggestion that $1,875 is to be taken from the personal estate in order to pay for this land, and that the land which she is made to pay for is then to go to the brothers and sisters of the husband, as *real estate undisposed of,* is so inconsistent with this general intention manifest upon the face of the will, that no one can hear it without saying there must be some mistake about it.

As the law was understood before the Act of 1844, such would be the result; and the question is, does that Act furnish a remedy so as to prevent the intention of the testator from being defeated?

The first section allows all after acquired real estate to pass, and includes under the term, real estate, all contingent, executory or future interests, so that there is no doubt the interest under the contract, by which he became the purchaser of the land, did pass; for the words used are broad enough to show that he intended to give his wife all of the real estate, unless the devise is restricted by the enumeration of the particular lots, pieces and parcels of land.

The third section provides, that the will shall speak and take effect as if executed immediately before the death of the testator, unless a contrary intention appears. Here no intention to the contrary ap-
pears, and the effect of this section is, to make a will read as if
(250) the testator, at the moment of his death, had said, "I give to my wife all the real estate which I *now* own, consisting of lots in

the town of Shelby, viz., lot, &c., &c.,"; and after enumerating a great many lots and pieces of land, concludes without enumerating the two tracts of land which he had purchased after the execution of the will and codicil; and the omission is fully accounted for and explained by the act of the law itself, which declares that the will shall speak as of the time of the death of the testator, and not as of the time of its execution. It was impossible for these two tracts of land to have been included in the enumeration at the time the will was executed. It therefore, by force of this section of the Act of 1844, is sufficient for these two tracts of land to be included in the words used immediately at the time of his death, "all my estate." Hence there is a mistake in the enumeration of the particulars of a class *ejusdem generis;* and no more forcible instance of the wisdom of this rule, that such a mistake shall not be allowed to defeat a legacy or devise, could possibly be suggested.

Clark v. Hyman, 12 N. C., 382, and *Fraser v. Alexander,* 17 N. C., 348, were cited in the argument as opposed to our conclusion. The distinction between those cases and the present one is this: there the enumeration was in reference to *classes*—here the enumeration is in reference to the *particulars* of a class. If one gives "all of his property, consisting of both personal and perishable," that will not include his land: so if one gives all his property, consisting of lands, stock of any kind, household and kitchen furniture, wagon and farming tools"—that will not include his negroes, especially if he makes another disposition of them in the same will. Otherwise, if one gives all of his land consisting of the following tracts, &c., and all of his negroes, consisting of Peter, Amy, &c., and all of his stock of horses, consisting of, &c., all of his cattle, consisting of, &c. Although he should omit in the enumeration a tract of land, a negro, a horse, or a cow, all would pass under the general words, which include the whole of each class; and the reason of the diversity is this: One may well be supposed to omit by mistake a particular individual of a class, and therefore, the omission shall not hurt, if he uses terms broad enough to include the whole class; but he can hardly be supposed to omit by mistake an entire class, as all of his land, or all of his negroes, (251) if he intended them to pass under the general word "property" or "estate." In our case, however, the cause of the omission of the two tracts of land is, as we have before seen, fully accounted for by the law itself; and consequently, under the rule of law, the mistake shall not hurt.

The interlocutory order of the Court below must be reversed; and it must be declared to be the opinion of this Court, that Helen M. Cham-

pion is entitled to the two tracts of land, mentioned in the pleadings, under the will of her husband.

PER CURIAM. Order below reversed and decree accordingly.

Cited: *Brawley v. Collins,* 88 N. C., 609; *Edwards v. Warren,* 90 N. C., 607; *Capehart v. Burrus,* 122 N. C., 125; *Hines v. Mercer, Ib.,* 75; *Brown v. Hamilton,* 135 N. C., 11.

JAMES MAXWELL v. ROBERT B. WALLACE and others.

Where one, by way of transferring his title to a tract of land, assigned the deed under which he claimed to the purchaser: *Held,* That the contract was within the exception of the Statute of 1819, and therefore could not be rescinded by parol.

One who purchases an absolute estate from a trustee, with notice of the trust, is affected by the same equity which affected the trustee.

CAUSE removed from the Court of Equity for MECKLENBURG, at Spring Term, 1851.

The defendant, Robert B. Wallace, in 1834, purchased the tract of land in controversy, from one Alexander Wallace (and took his deed therefor. In 1837, Robert bargained and sold the land to the defendant, Frederick, who paid the purchase money, $75, and took an assignment from Robert, of Alexander Wallace's deed to him. Frederick sold the land to the plaintiff, and executed his deed for the same; and afterwards, Robert sold to the defendant, Mathew Wallace, and executed a deed to him.

The plaintiff alleges, that after his purchase from Frederick, it was agreed between them and Robert B. Wallace, that the latter should make him a deed in fee simple for the land, as soon as the pur-
(252) chase money was paid to Frederick; that he paid the said purchase money, and thereupon applied to the said Robert for a deed, and that Frederick also applied to him for a good and valid conveyance—which he refused to give; and the plaintiff then charges, that the defendants, Robert and Mathew, his brother, in pursuance of the declared purpose of the former, to defraud Frederick and himself in the premises, and with full knowledge of the equity of the plaintiff and Frederick, had the said deed executed by Robert to Mathew, the consideration whereof, the plaintiff charges, was merely nominal. The prayer is for a conveyance of the premises by the defendants, Robert and Mathew Wallace.

The defendants, Robert and Mathew, in their answer, aver that the

contract between said Robert and Frederick, by which the latter took an assignment of Alexander Wallace's deed, had been rescinded by the parties thereto, before the deed from said Frederick to the plaintiff, or the deed from Robert to Mathew was executed. For, they state, when Frederick (who, they say, did not enter on the premises) was informed that the assignment to him of Alexander Wallace's deed was insufficient to pass the title, it was agreed between him and the defendant, Robert, that the said contract should be rescinded, and that he requested Robert to sell the land, stating that all he wanted was the $75, which he had paid for the land; and the defendant, Robert, states that in pursuance of this understanding and agreement, he offered to sell the land, and offered it to the plaintiff, who at first agreed to give him $144 for it, but that the plaintiff, having learned from him the fact of his having assigned the deed of Alexander Wallace to Frederick, afterwards purchased of Frederick, and said at the time he did so, being warned that he was buying no title, that he would risk it, and that afterwards, he further stated to defendant, Robert, that he would buy of the man who sold the cheapest. And the defendants aver that the plaintiff and Frederick had full notice of the recision of said contract between defendant, Robert, and said Frederick; that the latter fully assented thereto, and directed the land to be sold—and they insist that he thereby abandoned his equity, if any he had, under said assignment. Further answering, they aver that a full and fair price for the land, to wit, the sum of $96, was paid by Mathew, who at the (253) time thought, as did the defendant, Robert, that he was purchasing a good title.

The plaintiff replied to the answer, and many depositions were thereupon taken by the parties; after which the cause was set for hearing and transmitted to this Court.

Hutchinson and *Avery,* for the plaintiff.
Craige, for the defendant.

NASH, C. J. The parties in their bill and answer agree, that the defendant, Frederick, had purchased the tract of land in question, from the defendant, Robert B. Wallace, and paid up the purchase money, and that the latter, by way of conveying the title to Frederick, assigned over to him the deed made to him, Wallace, by Alexander Wallace, under which he claimed, and each party at the time believing such a transfer of the deed was a sufficient conveyance. They further agree that after such sale to Frederick, R. B. Wallace conveyed the land to his brother, Mathew Wallace, one of the defendants. The bill charges, that the plaintiff purchased the land from Frederick, who

conveyed it to him by deed duly executed. This is not denied. It further charges that if Mathew is a purchaser of the land from his brother, he purchased with full notice of the equity of both Frederick and the plaintiff. The answers are, that after the sale by R. B. Wallace, to the defendant, Frederick, and before the sale of the former to the defendant, Mathew Wallace, the contract between the two former was rescinded, and that Frederick directed R. B. Wallace to sell the land and pay him back his money. The defendant, Mathew, denies that at the time he made his purchase, he knew of the equitable title of the defendant, Frederick, or of the plaintiff, but states, "the fact is that he, Mathew Wallace, was informed that the contract was rescinded, as he now alleges the fact to be, and was then informed that the complainant said he would risk the title, though he knew at the time he purchased from Frederick that the contract had been rescinded. Both the defendants rely upon the alleged rescinding of the original contract, and both by their answers admit, for they do not allege the contrary, that the contract of recision was by parol.

The Act of 1819 makes *void* "all contracts to sell or convey (254) lands, tenements or hereditaments, or any interest in or concerning them, unless such contract or some memorandum or note thereof shall be put in writing," &c. By his purchase from R. B. Wallace, and by the assignment by the latter of the deed from Alexander Wallace, Frederick acquired such an interest in the land as brought it within the exceptions of the Act, and it could not be conveyed by him so as to transfer a title either at law or in equity to another, unless by some writing. If, therefore, the rescinding did take place, as alleged by the defendants, it did not alter the relation existing between the parties by the sale. The equitable title of Frederick still remained in him, and he transferred it by a regular deed to the plaintiff. The answer of Mathew Wallace sufficiently shows, that at the time he made his contract, he not only knew of the sale to Frederick, but of the purchase from him by the plaintiff. His allegation, that at that time the contract between his brother and Frederick had been rescinded, cannot alter the relation in which he stood to the transaction. He knew that it was by parol, and was bound to know that under the law, it was void. He was, therefore a purchaser with full knowledge of the equity of the plaintiff. The plaintiff is enitled to the relief he asks.

PER CURIAM. Decree accordingly.

Cited: Lyon v. Akin, 78 N. C., 260; *Heyer v. Beatty,* 83 N. C., 289; *Holmes v. Holmes,* 86 N. C., 208; *Barnes v. McCullers,* 108 N. C., 54.

WILLIAM J. PLUMMER v. The Administrators of HENRY C. OWENS.

In a bill for a specific performance of a contract for the purchase of land, the plaintiff relied upon the following memorandum from the books of the defendants' intestate;—"1841, W. P. to H. C. O., Dr. To 4 loads of Rock, one lot, at one year's credit, $125": *Held*, That the memorandum was too vague and uncertain to take the contract out of the Statute of 1819.

CAUSE removed from the Court of Equity for MECKLENBURG, at June (special) Term, 1852. The pleadings and facts are stated in the opinion delivered by this Court.

Boyden, for the plaintiff. (255)
Wilson, for the defendants.

NASH, C. J. The bill is filed for the specific performance of a contract for the sale and purchase of a tract of land or lot in the town of Charlotte. The lot is described as being lot number 369, in square number 51, in the map or plat of said town. No writings were drawn between the parties at the time the agreement was made, and the defendants, the administrators of H. C. Owens, deceased, with whom it is alleged by the plaintiff that the contract was made, in their answer, deny all personal knowledge of the contract, but state that if any was made, it was by parol, and they claim the benefit of the Act of 1819. In his bill, the plaintiff admits that the contract was not reduced to writing, but insists that Henry C. Owens had made a memorandum of the same in some one of his books of accounts signed by him, or in letters, and the defendants are called on to produce any such memorandum or letters or other papers they have found among his papers. In compliance with this demand, the defendants produce the copy of an account extracted from the books of H. C. Owens, headed "1841, William Plummer to H. C. Owens, Dr. To 4 loads of Rock, one lot, at one year's credit, $125." The account then goes on to charge for putting up a house, and for various building articles. It is admitted that the name of H. C. Owens at the head of the account is in the handwriting of the intestate. The plaintiff took possession of the lot No. 369, and lived on it a year or more when he left it and removed.

It is well settled in this State, that part performance of a parol contract, by taking possession and paying the purchase money and making improvements on land will not take the case out of the Statute of 1819. (*Albea v. Griffin*, 22 N. C., 9). But that there must be some memorandum in writing signed by the party to be charged, to have that effect. The account produced by the defendants would have an-

swered the purpose, if it had been more specific; but it is too vague and uncertain to guide the Court in saying that the lot mentioned in it is the same as the one mentioned in the bill, concerning which the contract was made; nor is there anything in the other items of the account to assist us. All the materials furnished might, for aught (256) disclosed to us, have been put on some other lot, as well as the house mentioned. The only purpose for which this memorandum was called for by the plaintiff was to enable him to get rid of the Act of 1819; and to have that effect, it must speak for itself. We cannot declare that the intestate H. C. Owens did make any writing or memorandum concerning the sale of the lot mentioned in complainant's bill, and therefore the plaintiff is not entitled to a specific performance; but he is entitled to an account for his improvements on the lot. The Act of 1819 is intended to avoid frauds and perjuries, is beneficial in its object, and ought to receive such a construction as will give it efficacy. There must be a reference to the Master to take an account of the value of the plaintiff's improvements.

PER CURIAM. Decree accordingly.

Cited: Carson v. Ray, 52 N. C., 610; *Murdock v. Anderson,* 57 N. C., 78; *Phillips v. Hooker,* 62 N. C., 197; *Fortescue v. Crawford,* 105 N. C., 32; *Hall v. Misenheimer,* 137 N. C., 185; *Bateman v. Hopkins,* 157 N. C., 473.

K. P. WILLIS v. JAMES AND THOMAS J. FORNEY.

A bound himself to B to buy certain lands, and to let B have one-third thereof, provided the latter paid one-third of the price in three years. Afterwards A made a contract with the owner of those lands, and took his bond to make title to them. Subsequently they rescinded the contract; whereupon, after the expiration of three years from the date of the contract between A and B, C purchased the lands in question without notice that B put up any claim to them: *Held,*

1. That B had no equity, upon the pretence of a claim upon A as *owner* of these lands, under the contract above stated, to pursue them into the hands of C.
2. The maxim, "In equity time is not of the essence of a contract," does not apply to bargains like the above.
3. The obligation of A to B was merely personal, and did not attach to the land; the relief of the latter therefore sounds in damages.

CAUSE removed from the Court of Equity of RUTHERFORD, at Spring Term, 1853.

The bill charges, that William and John C. Johnson were the owners of a valuable tract of land, and that plaintiff procured a lease

thereon for "mining purposes," wherein it was stipulated that he should have the privilege of continuing his operations upon said lands in search of gold for twelve months after the sale thereof (257) by the proprietors, in case a sale of the same should be effected before the expiration of plaintiff's term therein; and that afterwards, to wit:—on 5 November, 1844, the defendants Thomas J. Forney and James H. Forney contracted in writing, that they would purchase the lands of the said William and John C. Johnson, and that plaintiff should be entitled to the one undivided third part thereof, upon his paying one-third of the costs of the purchases, provided that plaintiff complied with his part of the contract within three years from the date thereof. The bill further charges that the defendants, shortly thereafter, purchased the lands in question, and held them jointly for some time, but that subsequently the defendant James purchased the interest of the defendant Thomas in said lands, and became the sole owner thereof. That within three years from the date of said contract the plaintiff offered, through his agent W. F. McKesson, to pay to the defendant, James H. Forney, the one-third part of the purchase money for said lands, and demanded a conveyance of the one undivided third part thereof; but that the defendant James refused to accept the money, and denied the right of plaintiff to claim an interest in said lands. The bill further alleges that the name of the defendant James was affixed to the contract by the defendant Thomas as agent of said James, and that defendant Thomas was fully authorized and empowered to execute said contract on behalf of the defendant James, and to sign his name thereto. The prayer of the bill is, that defendant James H. Forney convey to plaintiff the one undivided third part of the lands in controversy.

The defendants answers severally. The defendant Thomas admits the execution of the contract by him on his own behalf, and likewise admits that he affixed the name of the defendant James to said contract, but denies that he had any authority for doing so, or that he was empowered by the defendant James to execute said contract on his behalf. He further states that the lands in question originally constituted one tract, but that the said William and John C. Johnson made partition thereof by parol, and established a conditional line between them, and thereafter claimed and occupied their respective parts of said lands, according to the terms of said parol division. He further states, that shortly after 5 November, 1844, he pur- (258) chased the "William Johnson part" of said land at the sum of $2,500, and executed his individual notes therefor, and said William Johnson executed to him, (the defendant Thomas alone,) a bond for title; that he purchased said lands with a view to mining purposes

only, and finding, after operating thereon in search of gold, that said lands were not valuable as a mine, he concluded to rescind his contract with William Johnson for the purchase thereof, and thereupon surrendered to said William Johnson his bond for title, and said Johnson gave up his (defendant's) notes given for the purchase money, which were then cancelled.

The defendant James H. Forney denies the execution of the contract by him as alleged in the bill, and avers that the defendant Thomas had no authority whatever to sign his name to said contract, or, to contract for him with plaintiff or any one else in any matter relating to the purchase of said lands. He further denies that he had any interest in the original purchase made by the defendant Thomas of the "William Johnson part" of said land, or that he acquired any interest in William Johnson's part of said land until after the original contract on the part of the defendant Thomas for the purchase thereof had been rescinded. He further states, that after the purchase by the defendant Thomas of the "William Johnson part" of said land, he (the defendant James) purchased for his own exclusive use and benefit the "John C. Johnson part" of said land, and gave his individual notes to secure the payment of the purchase money, upon the said John C. Johnson's executing to him a bond for title, and that neither plaintiff nor defendant Thomas were interested in said purchase. He admits, that after he purchased the "John C. Johnson part," but before he acquired any interest in the "William Johnson part" of said lands, the plaintiff claimed an interest therein under the contract alleged in the bill, and offered to pay, through his agent McKesson, the one-third of the purchase money, and that he refused to accept the money, averring at the time that the obligation referred to had no binding force or validity against him. He further states, that after the contract between the defendant Thomas and the said William Johnson
(259) had been rescinded, and the papers relating thereto had been cancelled, he purchased in his own right, and for himself, the said "William Johnson part" of said lands from said Johnson, and now holds the same under a deed of conveyance duly executed.

N. W. Woodfin, for the plaintiff.
Avery and *Bynum,* for the defendant.

PEARSON, J. The plaintiff *has* failed to prove his allegation that the defendant Thomas was authorized by the other defendant James to execute in his own name the contract which the bill seeks to enforce. Consequently, in regard to the land called the "John Johnson part," which was purchased originally by the defendant James, and with

which the other defendant never had any connection or concern, the plaintiff's equity is not established.

In regard to the land called "the William Johnson part," although the defendant James entered into no direct obligation, it remains to be seen whether he has not made himself indirectly liable to the plaintiff's equity.

The defendant Thomas had bound himself to purchase the Johnson land, and to let the plaintiff have one-third part thereof, provided he paid one-third part of the price in three years—in the words of the deed—"but this is to be closed within the term of three years, or said Willis forfeits his interests." Afterwards, the defendant Thomas makes a contract with William Johnson for his part of the land at the price of $2,500, and takes William Johnson's bond to make him a title upon the payment of the purchase money. In a year or two afterwards this contract is rescinded by the parties, because, as the defendant Thomas Forney says, he found, after fair trial, the land was not worth working as a *gold mine,* he had no wish to rent it as a farm, and he was not able to pay for it. After the contract was rescinded, and the notes of the defendant Thomas for the purchase money and the bond of William Johnson for title had been cancelled, and *after the expiration of three years* from the date of the obligation of the defendant Thomas to the plaintiff, the defendant James Forney bought the "William Johnson part of the land" from the said William, at a full price, but with notice that the plaintiff insisted upon his equity (260) growing out of an old "mining lease" that he held on the land, and the obligation of the defendant Thomas, under which he was entitled to the benefit of one-third of the purchase.

The plaintiff insists by force of this obligation, if the defendant Thomas had completed his purchase, he would have held one-third of the land in trust for him. He then infers, that as soon as the defendant Thomas made the contract, an equity arose in his favor which *attached to the* land, put it out of the power of the defendant Thomas and William Johnson to rescind the contract without his consent, and gave him an equity to follow the land in the hands of William Johnson or of any person to whom he might have conveyed, with notice of the plaintiff's claim. In reply to the objection that the defendant James did not purchase the land until after the plaintiff's right as against the defendant Thomas had been lost by the expiration of three years, (the time agreed on,) the plaintiff relies on the maxim, "in equity, time is not of the essence of contract."

In equity, one who makes a contract with the *owner of land* for the purchase thereof, is considered the owner of the equitable estate, and the vendor holds the legal estate only to secure the payment of the

purchase money, subject to which he is a mere trustee for his vendee. The case made by the plaintiff does not come within the operation of this principle of equity; for the plaintiff made no contract with the *owner of the land*—there was no privity between them. The plaintiff incurred no sort of liability to William Johnson, and consequently had no ground to insist that Johnson became a trustee for him, and acted against conscience in rescinding the contract which he had made with the defendant Thomas, when he found he could not pay the purchase money.

Whether the plaintiff has cause of complaint against the defendant Thomas for rescinding the contract will be inquired of below, but it would be a curious result of the application (or rather misapplication) of the principles of equity, if William Johnson, by reason of a contract made with Thomas Forney, *in which the plaintiff was not known and by which he incurred no liability,* had placed himself in the predicament of not being able to rescind the contract and take
(261) back his land, and either keep it himself or sell it to some one else clear of incumbrance.

We are also of opinion that the case made by the plaintiff does not come within the application of the principle that "in equity, time is not of the essence of a contract," the aid of which he is compelled to invoke in order to make out his supposed equity against the defendant James, who did not purchase the "William Johnson part" until after the expiration of *three years* from the date of the obligation entered into by the defendant Thomas. If a creditor has his debts secured by a parol bond or by a mortgage, or if a vendor retains the legal title to secure the purchase money, it is considered in equity that time is immaterial, and the parties are supposed to be willing to let the debt stand upon the security unless judgment is taken on the bond, the mortgage is foreclosed or a specific performance is required. But the principle does not apply to a case where A, being about to purchase land, agrees to let B have one-third of it, provided he will aid in raising the funds to pay the purchase money. In such a case, if the time in which the aid is to be rendered be expressly agreed on, and the party neglects to advance his portion of the purchase money, and thereby puts the burthen of raising *all the funds* upon the other, he cannot, in conscience, insist upon a right to stand off until the struggle is over, and at any time *when he sees proper,* come forward and claim a share. Time is, in such cases, of the essence of the contract, and assistance in raising the purchase money is presumed to have been a principal inducement for allowing a participation in the bargain.

The testimony of Mr. McKesson in reference to his offer to pay the defendant James the amount due from the plaintiff has no bearing,

for it was made before the defendant James had purchased the "William Johnson part," and in regard to the "John Johnson part," we have seen the plaintiff has established no equity.

In regard to the defendant Thomas, his obligation to the plaintiff was merely personal, and did not attach to the land, because, by rescinding the contract with William Johnson, he never acquired *a fund* which the plaintiff can follow in this Court; his relief, therefore, sounds in damages, and if he has a right to recover damages because the defendant Thomas rescinded the contract with William Johnson without the consent of the plaintiff, the remedy is by an action (262) at law. There is no ingredient of equity involved in it.

The bill must be dismissed, but without costs as to the defendant Thomas Forney.

PER CURIAM. Bill dismissed accordingly.

NANCY BAXTER v. WILLIAM COSTIN and wife.

In all transactions between persons standing in the relation of trustee and *cestui que trust*, from which the former derives a benefit, Courts of Equity, to sustain them, require that they should be performed by the latter, with a fair, serious and well informed consideration.

Therefore, where an administrator, who was prosecuting a suit in the name of his intestate, prevailed upon one of the next of kin, an aged lady living in his own family, under the pretence that she was running great risk by the suit, to release to him all her right in the intestate's estate: *Held*, That he should not be permitted to avail himself of it.

WILLIAM S. M. BAXTER, a minor, died intestate, leaving as his only next of kin, the plaintiff, his mother, and the feme defendant, Sarah C., his sister, intermarried with the other defendant, William Costin, who administered on his estate.

The plaintiff alleges, that the defendant hath refused to come to an account with her for her distributive share of her said son's estate, on the ground, as he pretends, that he has her assignment and release, duly executed to him, for all her share and interest in the estate of said intestate; but which assignment and release, though the plaintiff admits she executed it, she alleges was procured from her under circumstances of fraud and imposition. For, she states in her bill, that at the time she executed said instrument and for some time previous thereto, she was residing with the defendant William; that at the time of her executing said paper, he told her that unless she would sign the same, he would be likely to lose a suit which, as administrator, and also in right of his wife, he was then prosecuting against

(263) the estate of William Baxter, Sen., in which suit he expected to recover several thousand dollars, and be subjected to much costs; and that having full confidence in defendant's representations, and under the impression that it was necessary to his success in said suit, she did execute said assignment and release, but, as she insists, without any intention or expectation that it would be set up against her claim to a distributive share of the estate of her son, the defendant's intestate, or that it would be applied any otherwise than to enable him to prosecute his said suit. She further alleges, that at the time she executed said paper, she was entirely ignorant of the condition of said estate, and had been induced by the representations of the defendant, and a misapprehension of the facts and ignorance of her rights, to suppose it was worth but very little; and hence she was the more easily led to sign the said release and assignment, the consideration of which, to wit, five dollars, she says, was not paid, nor any part thereof. The prayer is for a cancellation of the said assignment and release, and for an account.

The defendant in his answer admits that no consideration was paid to the plaintiff for the said assignment. But he states that she had full knowledge of all the facts and circumstances connected with the estate of his intestate, of the moneys received and the probabilities of further recoveries, and of the contents and the legal force and effect of her said assignment and release, which she executed freely and voluntarily. That the plaintiff, for many years after the execution of said paper, and before the filing of the bill, lived with the defendants free of charge, and not until she went to reside at Rutherfordton, did she ever make complaint of the defendant, or call upon him for a settlement as in the bill alleged. That she had repeatedly and oftentimes declared her purpose to give the defendant and his wife her share of the estate of the said intestate, (with the exception of a watch, which she desired to keep in remembrance of him, and which was delivered to her); that she was not in need thereof; that she is a woman of good sense, and was well advised of the circumstances under which the defendant was prosecuting the suit aforesaid—frequently warned him that it might ruin him—and that her said assignment and release was but in accordance with her avowed purpose over and over again
(264) and explicitly expressed. And the defendants expressly deny any fraudulent representations or concealment or suppression of facts from the plaintiff in the premises, and expressly plead the said release, in bar of the plaintiff's equity and her right to an account.

The plaintiff took replication to the answer, and the parties proceeded to take testimony; after which the case was set for hearing, and by consent, transmitted to the Supreme Court.

G. W. Baxter, for the plaintiff.
Gaither, for the defendants.

NASH, C. J. The principle of preventive justice is acknowledged in our Courts of Equity, upon the doctrine that it is better to prevent wrong than to trust to remedying the evil after it is done. Upon this principle rests, in a great measure, the jurisdiction of Chancery, in legal or constructive fraud. Story, 1 Equity Jur., sec. 258, defines constructive fraud to mean such acts or contracts, as, although not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon another, are yet by their tendency to deceive and mislead, or to violate public or private confidence, deemed equally reprehensible with positive fraud, and are, therefore, prohibited, as within the same reason and mischief as if done *malo animo.* Courts of Equity, therefore, do not confine their action to remedying the mischief occasioned by fraud, but extend it to the prevention of it. To do this, they endeavor to suppress the temptations to do wrong, by taking from the parties all legal sanctions for their acts. They do not affect to act as *custodes morum* of the community, by enforcing the rules of strict morality; and to authorize their interference, some relation of trust or confidence must exist between the parties, "which compels the one to make a full discovery to the other, or to abstain from all selfish purposes." The cases coming under the operation of this principle are by writers divided into three classes: 1, where the contract is against public policy; 2, where it arises from some judiciary relation; and 3, where it is a fraud upon the rights of third persons. The case we are considering belongs to the second class, under which is, among others, the relation of guardian and ward, prin- (265) cipal and agent, trustee and *cestui que trust.* In all cases arising under either, the power of the Court arises from the confidence imposed by the relation existing between the parties; and it acts, not upon the idea or proof that there has been actual fraud or imposition, but upon the principle that where confidence is imposed, it must be faithfully acted on and preserved from any suspicion of overreaching, and be always restrained to good faith, and the personal good of the party reposing the confidence. It is, therefore, in every contract arising out of such judiciary relation necessary for the guardian, agent or trustee claiming its benefits, to prove its "perfect fairness." So stringent indeed is the rule, that Lord ELDON, in *Hatch v. Hatch,* 9 Ves., 296, observes—"It is almost impossible that a transaction entered into, in the course of the connection of guardian and ward, trustee and *cestui que trust* purporting to be a bounty for the execution of an antecedent duty, can stand." Equity, however, does not *forbid* a bounty in

such cases, but it will not sanction it, unless *entirely* satisfied that it is spontaneous, and not the impulse of a mind misled by undue kindness, or forced by oppression. Such transactions are, therefore, watched with a jealousy which will defeat most of them when made whilst the connection exists, and the accounts are unsettled. In *Boyd v. Hawkins,* 17 N. C., 195, where these principles are strongly and clearly expressed, as one of the grounds upon which the Court acted, it is stated as a principle, that when at the time of the transaction the *cestui que trust* was ignorant of the value of the property conveyed, the transaction was void. See also *Allen v. Bryan,* 42 N. C., 276. The plaintiff and the defendant Costin stood in the relation to each other of *trustee* and *cestui que trust.* The defendant was the administrator of W. S. Baxter, and his wife and the plaintiff were the next of kin to the deceased. An action had been brought to recover a large debt due the estate, and while in this situation, the transfer alleged by the defendant took place. It was proved by the subscribing witness to the transfer, that the evening before its execution Costin told him that he had a suit with William Baxter, and in order to gain it, he wanted his mother-in-law to assign her interest in that estate;
(266) but that nothing was said about it at the time he witnessed the paper.

The plaintiff, living in the defendant's family, was old, in very moderate circumstances, and dreaded getting into a lawsuit, being unwilling to run any risk of paying costs. She had great confidence in, and affection for, the defendant Costin, who had married her only daughter. The accounts of the estate were unsettled, and she did not know what would be her share, if a recovery were effected against William Baxter. It is precisely one of those cases in which a donation from the *cestui que trust* to the trustee is viewed by a Court of Equity with great suspicion—requiring from a defendant to show "its perfect fairness." Here there is an entire absence of such proof. The repeated declarations of the plaintiff as to her intention of giving her property to the defendants only shows the state of her feelings towards them; but they cannot go the length of satisfying the Court that, poor as she was, she would have been willing to give them so large a sum as her distributive share actually amounted to, and to leave herself so destitute in her old age. It is very likely that Costin himself did not know what it would amount to when the accounts of W. S. Baxter were taken; but he had a general knowledge on the subject, and there is no proof to show that he communicated what he did know to the plaintiff. Without, therefore, imputing to Mr. Costin any fraudulent design at the time the transfer was made, the Court cannot permit it to stand, because we are not satisfied that it was done

by the plaintiff in the language of Lord ELDON, "with a fair, serious and well-informed consideration" of its nature and effect. To sustain it under these circumstances would be to open the door to much fraud and oppression in transactions of this kind.

The plaintiff is entitled to the relief she seeks, and a reference must be had to the Clerk to audit the accounts of the defendant, Costin, as administrator of W. S. Baxter, his intestate.

PER CURIAM. Decree accordingly.

Cited: *McLeod v. Bullard,* 86 N. C., 214; *Cole v. Stokes,* 113 N. C., 274.

(267)

ISAAC LYERLY v. CLAUDIUS B. WHEELER and N. S. A. CHAFFIN.

Where a bill alleged that the plaintiff, a creditor of A, had succeeded in an action of ejectment against him, and that there was a collusion between A and B (who claimed the land under deeds from A void against creditors), by which the plaintiff was to be kept out of possession of the land: *Held,*

1. That the general charge of combination, collusion and fraud, can give the plaintiff no ground to stand upon in a Court of Equity.
2. That the bill cannot be sustained as a "bill of peace," because in such case the plaintiff must establish his rights by repeated actions at law.
3. Nor as an "injunction against destructive trespass," for that case requires a title in the plaintiff, admitted, or proved at law, together with a trespass by the defendant inflicting permanent injury; and not a mere ouster or temporary trespass.
4. If B's claim to the land was under a deed fraudulent against the plaintiff as a creditor of A, the remedy of the latter is by suit at law; for, although Courts of Equity will pass upon questions of fraud of that character, when presented collaterally in a suit already constituted, they will not do so as a matter of distinct and independent jurisdiction, unconnected with any other equitable ingredient.

THIS was an appeal from an interlocutory order of his Honor Judge CALDWELL, dissolving the plaintiff's injunction, at Rowan Court of Equity, Spring, 1853.

In March, 1843, the plaintiff filed a bill against the defendant Wheeler, and at June Term of the Supreme Court, 1848, he obtained a decree for a large sum; upon which execution issued, and the house and lot mentioned in the pleadings was sold, and purchased by the plaintiff, who commenced an action of ejectment against Wheeler, took judgment, and sued out a writ of possession; whereupon Wheeler enjoined the execution of the writ of possession, on the ground that the plaintiff, after his recovery in the ejectment, had leased the house and lot to him. The injunction was dissolved on the coming in of the an-

swer, and the plaintiff again took out a writ of possession, which was not executed at the time this bill was filed.

In April, 1843, the defendant Wheeler executed a deed of trust to one Locke for the house and lot and other property to secure certain debts therein named. In December, 1846, Locke conveyed the house and lot and other property to the other defendant Chaffin, whilst the injunction of Wheeler against the plaintiff was pending. Chaffin commenced an action of ejectment against Wheeler and took judgment by (268) default, and after the injunction was dissolved, and the plaintiff had taken out his writ of possession, Chaffin also took out a writ of possession on his judgment. Locke and Chaffin are brothers-in-law of Wheeler, and Wheeler has been in possession of the premises all the time.

The plaintiff alleges that the deed from Wheeler to Locke was fraudulent and void, and was intended to defeat him and the other creditors of Wheeler; that the deed from Locke to Chaffin was also fraudulent and void, and that there is a combination between the defendants to keep Wheeler in possession, and to deprive the plaintiff of the benefit of his writ of possession—for which reason Chaffin took his judgment in ejectment, and held his writ of possession with a fraudulent understanding that as soon as the plaintiff was put in possession by the sheriff, Chaffin would have the plaintiff put out of possession by force of the writ of possession upon his judgment, and immediately restore Wheeler to the possession. The prayer is for an injunction "restraining Chaffin and his confederates from interrupting the execution of your orator's writ of possession, or of depriving him of the same, by executing their false and fraudulent writ of possession in the name of N. S. A. Chaffin, and that your Honor will decree that your orator will be quieted in his possession under his writ, when obtained thereby;" then there is a prayer for process, and after many interrogations, the bill concludes with a prayer for "all such other and further relief as the nature of his case may require."

The defendants aver that the deed from Wheeler to Locke was *bona fide,* and with the intent to secure the payment of just debts—among others, the debt due as the price of the house and lot. They also aver that the deed from Locke to Chaffin was *bona fide,* and for a full price, in fact more than could have been obtained from anybody else. Chaffin admits that as Wheeler had married his sister, he was willing for them to continue in the possession of the house and lot until he could meet with a good opportunity to make a resale; and he avers that in the meantime he was very anxious to have the conflicting claims of the plaintiff and himself fairly decided by an action at law, but the plaintiff declined doing so, and took a judgment against Wheeler, not

on the strength of title, but on the technical ground of his being a purchaser at sheriff's sale; whereupon he employed counsel to (269) take judgment against Wheeler also in an action of ejectment, and left it to the discretion of his attorney when to take out his writ of possession—which he believes he would have done before the plaintiff's bill was filed, but for his receiving notice of the plaintiff's intention to apply for an injunction. He denies that there was any combination between him and Wheeler, and avers that he acted with a single purpose of protecting his rights under the deed from Locke. Wheeler avers that the plaintiff, after his recovery in ejectment, did rent the house and lot to him, and that he had good ground for his injunction against the plaintiff's writ of possession. He denies that there was any combination between him and Chaffin, or that there was any understanding between them by which Chaffin was to aid him in holding on to the possession; and he says that as the maker of the deed to Locke, under which Chaffin claims, he could make no defense to the action of ejectment, if he had been disposed to do so, but he believes Chaffin has a good title, and that the title of the plaintiff is an unjust one.

Craige for the plaintiff.
Boyden, for the defendants.

PEARSON, J. We might content ourselves with affirming the order dissolving the injunction on the ground that the allegations of the bill are fully answered; but that might tempt the plaintiff to proceed with his bill, in the hope of being able to disprove the answers, and thus costs would be incurred unnecessarily; for which reason we think it best to put our decision on the ground that, according to the plaintiff's own allegations, he does not entitle himself to the interference of a Court of Equity.

A general charge of combination, collusion and fraud, no matter how often intimated, does not give a plaintiff any ground to stand on in a Court of Equity: He must bring his case within some distinct principle or head of equity jurisdiction. Admit that there is a combination between Chaffin and Wheeler, by which the latter is to be allowed to remain in possession as long as he can hold off the plaintiff, and the former is to be ready to interfere and turn the plaintiff out as soon as he shall take possession under his writ, and put Wheeler (270) back into the possession again; and that Chaffin took the judgment in the action of ejectment, in order to have a writ of possession ready for that purpose;—and the question is, does the plaintiff's case fall under the head of any equity jurisdiction? The answer is, it does not,

for two reasons—the plaintiff *has not established his title at law,* and *no irreparable injury is threatened.*

From the special prayer, that the plaintiff may be quieted in his possession, when he obtains it under his writ of possession, and that the defendants may be enjoined from depriving him of such possession by executing their false and fraudulent writ of possession, the idea seems to have been that the plaintiff's case falls either under the head of a "bill of peace" or of "injunction against destructive trespass."

In regard to the former, it is settled, "where the plaintiff has, after *repeated and satisfactory trials,* established his right at law, equity will interfere to suppress future litigation of the right." "However, Courts of Equity will not interfere in such cases, before a trial at law, nor until the right has been satisfactorily established at law. But if the right is satisfactorily established, it is not material what number of trials has taken place, whether *two only,* or more." Story, Equity, sec. 850.

In regard to the latter it is settled, "an injunction will lie for protection of a title *admitted or proved at law,* whenever the act complained of is not a mere ouster or temporary trespass, but is attended with permanent results, destroying or materially altering the estate; as, for example, if a man be pulling down his neighbor's house or the like. If it be a mere *ouster or temporary trespass,* the recovery of the law by an action of ejectment or of damage by an action of trespass are sufficient remedies, and an injunction will not lie." Adams' Equity, 210, and note thereto,—"there must be something particular in the case, so as to bring the injunction under the head of quieting the possession, or preventing irreparable injury," for which *Livingston v. Livingston,* 6 John, ch., 497, is cited.

The plaintiff's proper course, therefore, was to take possession under his writ, and if Chaffin ousted him, the remedy was to bring an action of ejectment against Chaffin, in which the title at law could be
(271) tried. Until the plaintiff does try his title at law, no matter what he may allege as to combination and conspiracy to disturb his possession, and interfere with his enjoyment of the property, equity cannot interfere; for until then he has not shown himself entitled to the possession of the property, and consequently he has nothing for a Court of Equity to protect.

From the general prayer with which the bill concludes, it may be that the plaintiff supposed he had a right to relief in equity upon the ground that the deed from Wheeler to Locke was fraudulent as to creditors, and the deed from Locke to Chaffin was also fraudulent as to creditors; and so both deeds were void under the Statute of Elizabeth. If so, the plaintiff has a clear remedy at law. The real

matter of contention between him and Chaffin is whether the deeds, under which the later claims, are fraudulent as to creditors, that depends upon the intent with which they were executed and is a matter peculiarly fit for the investigation of a jury, It is true, when a question of the kind is presented collaterally in a suit already constituted in a Court of Equity, that Court will either decide it or have it tried at law; but the Court will not take a distinct and independent jurisdiction, unconnected with any other equitable ingredient, in order to try a mere question of fraud against creditors under the Statute of Elizabeth—because it is purely a legal question.

It is proper to add that both defendants fully deny the allegations of fraud in reference to these deeds, and aver that they were executed *bona fide* and challege the plaintiff to a trial of that issue before a jury.

PER CURIAM. Interlocutory order dissolving the injunction affirmed.

Cited: Thompson v. McNair, 62 N. C., 124; *Ragland v. Currin,* 64 N. C., 357; *Levenson v. Elson,* 88 N. C., 185; *Newton v. Brown,* 134 N. C., 445; *Lumber Co. v. Cedar Co.,* 142 N. C., 418.

(272)

NANCY BROWN and others, v. WILLIAM CARSON'S EXECUTORS AND DEVISEE.

In order to correct a deed which is absolute on its face, and to convert it into a security for a debt, it must be alleged and proved that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage; and the intention must be established, by proof not merely of declarations, but of facts, *dehors the deed,* inconsistent with the idea of an absolute purchase.

JAMES BROWN died intestate, and seized of a tract of land, leaving the plaintiff Nancy his widow and the other plaintiffs his heirs at law. The personal estate of the said James being insufficient to pay his debts, his real estate, descended to the plaintiffs, was, in 1833, after regular proceedings had, sold to satisfy executions in the hands of the sheriff; and the land in controversy was, at the sheriff's sale, bid off by the defendant's testator, William Carson, who took a deed therefor.

The plaintiffs allege, that before the sale of said land, they had made an arrangement with one Berryhill to raise the necessary funds for the purchase of the same, and that the said Berryhill and James, one of the heirs of said intestate, attended the said sale—Berryhill carrying with him some $250 in cash, wherewith to purchase the said land for and on behalf of the widow and children, the plaintiffs. But the plaintiffs allege, that before the sale of the

land was made, Carson, the defendant testator, (at whose instance the judgment was obtained under which the land was sold), after understanding from them, the said Berryhill and James Brown, their intention to purchase, and the fact that Berryhill's having the sum of $250 for that purpose, proposed to them that he, Berryhill, should not bid for the land, and that he, Carson, would buy the same, and would give the widow and children, the plaintiffs, the right to redeem the same when it suited their convenience: and this proposition having been assented to, Carson bid off the land at the price of fifty dollars—the same being worth, as the plaintiffs allege, some six hundred or a thousand dollars. And the plaintiffs expressly charge that the said Carson, under said agreement and understanding bid off said land, and that they were to redeem the same, and have a convey-
(273) ance of the title purchased by him, on their payment of said sum of fifty dollars and interest. And they further state, that at the time of said sale and ever since, they have lived on the said tract of land and have cultifated the larger portion of the cleared fields thereof; but that said Carson shortly after his said purchase, took possession of a part of the same, to wit, some thirty-five or forty acres; and they allege that out of the profits thereof he has been fully reimbursed and paid the amount of his said bid and interest thereon, and, indeed, that on a fair account in this behalf, he is indebted to the plaintiffs.

The plaintiffs further allege, that the said Carson, during his life, always recognized their right to a reconveyance of the said land, and that on several occasions when they proposed a settlement of the matter, and to take a deed, he postponed them, but still admitting their right and his said agreement—saying that they would not suffer any injury, as they were living on the land, and cultivating such parts as they needed; and they allege that he recognized and admitted their equity in this behalf even to the hour of his death. The prayer is to have defendants, the executors and devisees of said Carson, declared trustees for the plaintiffs—for a conveyance—and an account.

The defendants answer, and admit the purchase by their testator, but being ignorant of the material facts alleged in the bill, hold the plaintiffs to proof thereof. And they rely on the length of time which has elapsed since the alleged agreement was made, upon the statute of frauds, and statute presumption of the abandonment of the right to redeem.

The plaintiffs replied to the answer, and the parties proceeded to take testimony; after which, the cause was set for hearing, and by consent, transmitted to the Supreme Court for hearing.

Boyden, for the plaintiffs.
Hutchinson and *Avery,* for the defendants.

BATTLE, J. The allegations of the plaintiffs, that after their agent, Berryhill, had gone to the sale of the land in question, having the sum of $250 with which to purchase the land for them, the defendant's testator William Carson proposed that Berryhill should (274) not bid off the land, but permit him to bid it off, is not exactly supported by the testimony. Berryhill, in his deposition, states that a short time before the sale he requested Carson to bid off the land for the benefit of the plaintiffs, and he promised to do so; that he, witness, afterwards attended the sale, carrying with him the sum of two hundred and fifty dollars for the purpose of buying the land for the plaintiffs, should Carson not comply with his promise; but upon getting there and seeing Carson bidding, he remained silent. Another statement of the bill is not proved precisely as alleged, the plaintiffs aver that Carson in his lifetime always recognized their right to redeem the land, while the testimony of the same witness, Berryhill, is that soon after the sale, the plaintiff Nancy asked him if he could let her have the money to redeem the land, and he promised to do so; that in a short time thereafter she came to him again and told him that Carson had refused to let her redeem it, saying to her that she might perhaps get through it, and it would be safer in his hands than hers, but at the same time assuring her that her daughters should never want a home.

We do not decide the case upon these discrepancies between the allegations and the proofs, though we cannot give the plaintiffs the relief which they ask. The bill, in effect, seeks to correct a deed absolute on its face and to hold it as a security for a debt. To do this it must be alleged, and of course proved, that the clause of redemption was omitted by reason of ignorance, mistake, fraud or undue advantage; and the intention must be established, not merely by proof of declarations, but by proof of facts and circumstances *dehors the deed,* inconsistent with the idea of an absolute purchase. *Sowell v. Barrett, ante,* 50. Now, what facts or circumstances, independent of Carson's declaration, are proved in this case to show that he purchased the land in question for the plaintiffs, instead of absolutely and unconditionally for himself? None are relied on except the inadequacy of the price paid, which of itself, is insufficient, and the continued and uninterrupted possession by the plaintiff of the dwelling house and such parts of the land as they wished to cultivate, from the time of the sale until the death of Carson. The latter, indeed, would be a circumstance of the greatest weight, were it not (275)

balanced by the fact that the plaintiff Nancy was entitled to one-third part of said land for life as her dower, and that had Carson attempted to remove her and her children from it, she could have prevented it by filing her petition, and having her dower laid off to her. The circumstances of the plaintiffs' possession is also opposed by the admitted fact, that soon after his purchase Carson took possession of a part of the land and commenced clearing and cultivating it, and so continued to do, up to the time of his death. The possession of the plaintiffs, was not then inconsistent with that of Carson, and the possession of both parties was entirely consistent with the idea of an absolute purchase by Carson for himself.

Under these circumstances we feel constrained to deny to the plaintiffs the relief which they seek, lest by granting it, we should expose titles evidenced by solemn deeds to the "slippery memory of witnesses." *Kelly v. Bryan,* 41 N. C., 283. The bill must be dismissed with costs.

PER CURIAM. Bill dismissed accordingly.

Cited: Clement v. Clement, 54 N. C., 185; *Briggs v. Morris, Ib.,* 195; *Glisson v. Hill,* 55 N. C., 259; *Latham v. McRorie,* 57 N. C., 106; *Briant v. Corpening,* 62 N. C., 326; *Link v. Link,* 90 N. C., 238; *Hinton v. Pritchard,* 107 N. C., 136; *Sprague v. Bond,* 115 N. C., 532; *Porter v. White,* 128 N. C., 44.

E. JENNINGS v. J. and A. J. HARDIN and others.

The interest of a vendee of lands, where the contract rests in articles of conveyance, is not the subject of sale under execution, while the purchase money or any part of it remains unpaid.

CAUSE removed from the Court of Equity of CLEVELAND, at Spring Term, 1853. The allegations of the bill are sufficiently set forth in the opinion delivered by this Court, and the Reporter deems it unnecessary to state the pleadings further, which are very voluminous—the defendants' answer denying any equity in the plaintiff, according to his own showing, upon which point the case turned in this Court.

Lander, for the plaintiff.
G. W. Baxter and *Guion,* for the defendants.

(276) NASH, C. J. In *Frost v. Reynolds,* 39 N. C., 494, it was decided that the interest of a vendee of land where the contract rests in articles of conveyance is not the subject of sale under execu-

tion while the purchase money *or any part of it* remains unpaid; and where a sale does take place of such interest, the purchaser gains no title, nor any right which can enable him to call for a conveyance to his own use. This decision was made in 1847, and the bill in this case was filed in April, 1852. It alleges that the defendant, Carrell, was the owner of a lot in the town of Shelby, in Cleveland County, which he agreed to sell to the defendants, A. J. Hardin and Joseph Hardin, at a price between eight and nine hundred dollars; and to secure the payment thereof, the Hardins executed to Carrell their joint bond, and Carrell executed and delivered to them his bond to make a good and sufficient title to the lot, when the purchase money was paid. The bill states that the Hardins paid to Carrell two hundred and ten dollars upon their bond, and that the plaintiff, at May Term, 1849, of Cleveland Superior Court, obtained a judgment against A. J. Hardin, and that the execution, by his direction, was levied on the interest of said Hardin in said lot, and at the sale he became the purchaser. The interests of the other defendants are shown by the bill, which prays an account and conveyance of one-half of the lot.

At the time when the plaintiff's execution was levied and the sale made, A. J. Hardin had no such interest in the lot as was subject to an execution, and the plaintiff, by his purchase, acquired no right to call for a conveyance of the legal title to himself. The Hardins only held upon Carrell a bond to make them a title when they paid up the purchase money: but a small part of it had been paid at the time of the sale. In the case of *Reynolds, supra,* the Court says there has been no instance in which this interest was held saleable under the Act of 1812, either as a trust or an equity of redemption; nor any principle laid down from which it can be adduced. It is unnecessary to repeat here the reasons which governed their decision in that case, we entirely concur in them; and unless we were disposed to overrule that decision, which we are not, it governs and controls this case.

PER CURIAM. Bill dismissed with costs.

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(277)

E. B. RICE v. WILLIAM RICHARDS and J. COFFIN, Executors of JOHN RICHARDS.

A bond made to a partnership, upon the death of one partner survives to his copartner; therefore any payments thereon made by the obligor to the representative of the deceased partner are made in his own wrong.

THE plaintiff, in 1848, executed his single bond to John and William Richards, partners in trade, for the sum of $225. Shortly thereafter

John died, leaving a will and the defendant Coffin his executor. The plaintiff alleges that the defendant Coffin made application to him for the payment of said land (which was in the hands of William), stating that one-half of the amount was going to him as executor, that William was insolvent, and if he got hold of it, he would not account for the share of the testator; and he accordingly paid the bond to Coffin—of which he states William had notice. William Richards as surviving partner subsequently brought suit on the bond and obtained judgment thereon against the plaintiff; and the prayer of the bill is for an injunction against its collection.

The defendant William answers that as to the payment made by the plaintiff to Coffin, as executor, he believes it was by a fraudulent combination between them to take advantage of him, as the said firm of himself and brother was largely indebted to him, which fact was well known to the plaintiff and Coffin. And he insists on his right as surviving partner to the bond, and that the plaintiff's payment to the executor of John was illegal and gratuitous.

His honor, Judge CALDWELL, at Rowan, on the last Spring Circuit, dissolved the injunction theretofore granted in the cause, and from his order therein the plaintiff appealed to the Supreme Court.

A. H. Caldwell, for the plaintiff.
Craige, for the defendant Richards.

PEARSON, J. The entire legal ownership of the note survived to the defendant William Richards, and the personal representative of the deceased obligee had no right to receive any part of it. The plaintiff, therefore, made the payment in his own wrong.

Whether the personal representative of the deceased obligee
(278) has a right in equity to call upon the survivor for an account, it is not necessary now to decide, because the defendant fully meets and denies all supposed grounds of equity. The order dissolving the injunction is affirmed.

PER CURIAM. Interlocutory order affirmed.

JOSHUA TAYLOR v. JESSE RICKMAN.

Where marriage articles were never mentioned to the intended husband until the parties were on the floor to be married, and having been executed, were kept in the possession of the husband without being registered: *Held,* that one who purchased from the wife the slaves conveyed in those articles, but kept his deed secret from the husband until after the wife's death, a period of more than fifteen years, had no equity against the husband to compel him to carry the articles into effect.

CAUSE removed from the Court of Equity for HENDERSON, at Spring Term, 1853.

The defendant had, some twenty years before the filing of the bill, intermarried with one Rhoda Gadd, who, previous to and at the time of their marriage, owned the two negro slaves and other personal property named in the pleadings; and the parties, being pretty far advanced in life, had no prospect of any issue. The bill alleges that the said Rhoda, previous to her intermarriage with the defendant, proposed to him that a marriage contract should be drawn up, securing to her the separate use and control of her said property, and especially the right to dispose of the said slaves as she might think proper; to which proposition the defendant readily assented, and requested a gentleman present to write the agreement; which was accordingly written and signed by the parties, "giving to her the sole right after marriage, to dispose of her property, and among other things the slaves above described, in such manner as she thought proper, and disclaiming any power in his, Rickman's behalf, to dispose of the same": that this contract was then taken by the defendant for safe keeping, and was to be proved and registered at his instance either in (279) Henderson or Buncombe County, which, from some cause, either through ignorance or to defraud the said Rhoda, he refused to do; and that he still refuses to produce the same. Mrs. Rickman died in 1851 or 1852, and the plaintiff, who is her brother, claims the said slaves by virtue of a deed of gift from her executed in 1835, and exhibited with the bill. The prayer is, that the defendant may be declared to hold said slaves as a trustee for the plaintiff, and enjoined from setting up title thereto in himself, and for general relief.

The defendant answers and denies that he ever made any marriage contract with the said Rhoda Gadd whatever, or agreed in any manner to give her the exclusive use of the said property; and he avers that, under the circumstances, there could have been no inducement on his part to any such contract. For he says that at the time of his marriage, he was the owner of a plantation on Mills River worth about $2,000, that he owed nothing, was of industrious habits—that Rhoda knew all this, and that as to her, she owned no other property of any value except the said two negroes, had no child, nor from her age and infirmities, the prospect of any child, nor the prospect of being enabled by her own labor to provide any part of her support, and that of the negroes. And the defendant further states, that notwithstanding these facts, just at the instant he and Rhoda made their appearance on the floor to be married, and for the first time he ever heard of such a thing, Mrs. Franky Steele, a sister of said Rhoda, remarked there was a marriage contract written by one M. M. Edney, Esq. (the Magistrate,

in readiness for the purpose of solemnizing the rites of marriage); at which remark "this defendant made some hestitation, and expressed his ignorance not only of that particular contract but of everything of that nature, for he really now doubts if he ever heard of a marriage contract before from any quarter, and knowing nothing of its contents, he complained to said Rhoda that any such thing should be spoken of just at that instant for the first time," and that on intimating his intention to leave without consummating the engagement, Rhoda made many apologies for her conduct, insisting "that she had the thing prepared merely to gratify her sister, Mrs. Steele, with whom she was then living," and that Esquire Edney, who prepared it, had (280) told her she need not have it registered, and that it would not, therefore amount to anything; and that "even if this defendant consented to sign it, she had no idea or intention of ever having it registered, but still this defendant has no recollection of seeing any paper writing purporting to be a marriage contract, and states positively that he never learned the contents of any paper writing purporting to be a marriage contract, nor indeed does he remember seeing any paper writing at all on the occasion." He says he remembers that Rhoda did ask him to sign some paper which he and she would keep to themselves, and that no one should take benefit under it, and he admits such paper may have been handed to him for the purpose of determining whether he would put his mark to it or not, and that he may have destroyed such paper, yet he positively denies that he ever intended to execute and deliver the same as his contract on agreement by which the said Rhoda was to have control, of any property whatever. "Not remembering however his ever having seen the paper writing spoken of by said Rhoda, he does not admit that it ever existed, but says possibly it may have been that he did see such paper in her hand, and may have received it into his own hand for the purpose of considering the propositions therein spoken of, when he should find some one in whom he had confidence to explain them; but he positively denies that he ever undertook to execute such agreement, to deliver it to any one or procure its registration. Furthering answering, the defendant avers, that from the day of his said marriage, he heard nothing more of said contract—that he may have thought something of it a few times within a short period after that event, but for many years the affair had passed out of his mind, and he has lived agreeably and contentedly for about twenty years with said Rhoda as his wife—supplied all her wants—maintained her with all the comforts and conveniences of life—she in the meantime in consequence of her state of health and habits, being entirely dependent on him for her support, and unable to make any compensation or return; and that being without

children she greatly indulged said negroes, who, being females and thus indulged, have been almost valueless to him, and that under these circumstances the support of his said wife and negroes has for many years imposed upon him an annual tax at once burdensome and hard. The defendant expressly denies that he has possession of (281) said alleged contract, and says that he was present when a thorough search was made for the same among his papers by his counsel who examined every paper he had, and was unable to find it. Further answering, the defendant states that he is now nearly eighty-four years old, quite infirm both of body and mind; that he is and always has been entirely illiterate, kind and confiding in his disposition, and indulgent to those depending on him; and he avers that the alleged deed of gift, set up by the plaintiff, was a bare fraud upon his rights. For he says that the plaintiff and his wife were quite attentive to him "until 1835, when, through the intervention of their relatives and friends, they procured him to go with one in one direction, while they decoyed his wife in another, under color of a visit to one of their relatives, Mr. Kinsey, and there persuaded her, with promises of secrecy, to execute said deed, and let it be witnessed by a son and another relative of said Kinsey, and registered in Buncombe County, at a distance of twenty miles from this defendant," who, living as he did, retired and in a very obscure section, would never hear of it; and he avers that they succeeded in keeping it a secret from him until after the death of his wife, when, to his surprise, he for the first time heard of it; and then he was enabled to account for the discontinuance of the visits and attentions of the plaintiff after the year 1835.

The defendant, under the circumstances, relies also upon his adverse possession of said slaves, under color of title acquired by his said marriage; and he further insists, that as no benefit is alleged by the plaintiff to have been secured to him under the said marriage contract at the time of the pretended execution thereof, and he not being in contemplation of the parties to be provided for, he is a mere volunteer, and therefore should not be heard in this Court; and the defendant prays the benefit thereof as by special demurrer to the plaintiff's bill.

Many depositions were read at the hearing, the substance and effect of which will be found in the opinion delivered by the Court.

J. Baxter and *Shipp,* for the plaintiff.
J. W. Bynum and *N. W. Woodfin* for the defendant.

PEARSON, J. To entitle the plaintiff to the aid of this Court in (282) carrying into effect the marriage articles executed by the defendant and the sister of the plaintiff, it is necessary for him to allege and

prove that the instrument was executed by the defendant deliberately and without surprise or imposition. The plaintiff makes the allegation, but it is denied by the defendant, who avers that the execution of the instrument was obtained from him both by surprise and imposition, for that the subject was never mentioned to him until the parties were on the floor to be married; that he was surprised, confused, and was in the act of going off without being married, whereupon, being told by the magistrate that the paper would not be valid unless he had it registered, and believing he would afterwards have his election either to have it registered or not, he leaves it to be inferred that he did sign it, and the parties were then married. He kept the paper, and never did have it registered. There is a want of fairness about the answer, particularly in reference to the fact of making his mark to the instrument, which is calculated to prejudice the defendant's case, and can only be accounted for by the fact of his being a weak old man, upwards of eighty years of age.

The plaintiff has failed to prove his allegation.

There are these circumstances worthy of consideration:—1st, Marriage settlements are usually made to provide for the wife and to guard against the husband's going in debt and spending the property, and after the death of the wife to provide for the issue of the marriage. Both these inducements were wanting in this case, the husband was upwards of sixty, and the wife upwards of fifty years of age, so that there was no probability of issue, and the husband was a hard-working steady man, well-to-do in the world. 2d. The wife owned no property but a negro woman and child. She and her children are the subject of this controversy, consequently the allegation that the husband was willing to take this negro girl and raise her and her children for his wife's brothers or sisters ought to be satisfactorily proved, because it was unreasonable in the wife to ask it, and a hard bargain on him. 3d. About two years after the marriage, the wife, without the knowledge of the husband, executed a deed of gift for the negroes to the plaintiff, who was her brother; and it was agreed between them and the (283) witnesses that it should be kept secret, and it did not come to the knowledge of defendant until after her death, a period of some fifteen years. Why this profound secrecy if the matter had been fully understood and agreed upon before the marriage, and why did not the plaintiff, after he had acquired an interest under the marriage agreement, call upon the defendant and insist upon having it registered?

The only direct evidence in relation to the execution of the contract, is that of one Edney, Justice of the Peace, who married the parties; he gives a very short and unsatisfactory account of it—says he went to

Mrs. Steele's, where her sister, the intended wife of the defendant, lived, for the purpose of performing the marriage ceremony, and was requested by Mrs. Steele to draw a marriage contract, which he did, and the parties executed it. He thinks he told the defendant it would not be binding unless it was registered. After it was signed the defendant kept the paper. This evidence, so far from showing that the contract was entered into deliberately, tends to support the averment of the defendant, that he was induced to execute it by surprise and imposition.

There is no direct proof that the subject was ever spoken of before the parties met for the purpose of being married.

The other testimony consists of conversations had with the defendant many years afterwards, when he was so old and imbecile as scarcely to be able to connect his ideas, and is consequently, entitled to no weight.

PER CURIAM. Bill dismissed with costs.

Cited: Poston v. Gillespie, 58 N. C., 262; *Sanderlin v. Robinson,* 59 N. C., 162; *Brinkley v. Brinkley,* 128 N. C., 508, 515.

GILLIAM RUTLEDGE v. JOHN SMITH and others.

A Court of Equity will correct the mistake by which the word "heirs" is omitted in a deed.

The purchaser from an obligor in a bond to make title, buying with notice of obligee's claim, will be considered a trustee for the latter.

By PEARSON, J. Whether in North Carolina, a purchaser from a trustee with power to sell must see to the application of the purchase money, *Quere?*

IN 1826, Joseph Beal, Sr., died seized of a tract of land con- (284) taining about two hundred and ten acres, as set out in the pleadings, and leaving a will by which he devises the same to his wife for life, and after her death, devises to Joseph Beal, Jr., his son, one hundred acres of the land, and directs that the rest of the land (except one acre for the Meeting House) should, after the death of his wife, be sold, and the proceeds of the sale be equally divided among his other children, and he appoints Joseph Beal, Jr., his executor.

In 1831, Joseph Beal, Jr., contracted to sell the land devised to him by his father's will to one Jesse Whitaker, who is made a party defendant, and gave bond to make title, and soon afterwards removed from this State.

In 1835, the widow of Joseph Beal, Sr., died, and thereupon Whita-

ker took possession of the land, claiming under the bond for title; and in 1840, he made a deed of trust to one Anderson, by which he conveyed the whole tract of land and certain personal property in trust to sell and pay a debt due to one Taylor. Anderson sold, and Taylor became the purchaser. Taylor died, leaving one Carson his executor, with power to sell real estate.

In 1843, Carson sold all the interest and estate of his testator in the tract of land to the plaintiff, who, in 1844, took possession of the same, which had, up to that time, been in the possession of Whitaker.

In 1847, Joseph Beal returned to this State, and made sale of the tract of land, and it was purchased by Ijames, who afterwards sold to the defendant Smith, by whom the defendant was ejected.

The plaintiff alleges that in 1843 or 1844, Joseph Beal came back to this State, and clandestinely, or by collusion with Whitaker, obtained possession of his bond for title, and destroyed it. He also alleges that both Ijames and the defendant Smith had full notice of his equity; and that Whitaker not only had an equity to the one hundred acres devised to Joseph Beal, but also to two undivided shares of the rest of the tract, and that having purchased Whitaker's interest and estate in the whole tract, and Whitaker being entitled to one share in right of his wife, and one other share under a deed from one Davis and wife, who is a daughter of Joseph Beal, Sr., he is entitled,
(285) besides the one hundred acres, to two undivided shares of the rest of the land. The plaintiff also alleges that in drawing the deed of trust from Whitaker to Anderson, the word "heirs" was omitted by a mistake of the draftsman. The prayer is that this mistake be corrected, and that there be a partition of the land, and an account of the profits since the plaintiff was evicted.

There was judgment *pro confesso* as to the defendants Whitaker and Beal. The other defendant, Smith, admits that Beal executed the title bond to Whitaker, and says he is informed that it was used by one of Whitaker's daughters in making pasteboard for a bonnet—not being considered of much value, as Whitaker had never paid Beal for the land. And he insists that he is a purchaser for valuable consideration, and without any such knowledge of the plaintiff's claim as would affect him in equity.

The plaintiff replied to the answer, and the parties proceeded to take proofs; after which the cause was set for hearing, and by consent of parties, transmitted to the Supreme Court for hearing.

Mitchell, for the plaintiffs.
Craige, for the defendants.

PEARSON, J. In regard to the question made on account of the omis-

sion of the word "heirs" in the deed of trust, we are entirely satisfied from the context, and from the nature and purposes of the deed, that it was the intention of Whitaker to convey a fee simple, and the omission was an oversight. Consequently, the plaintiff has a plain equity to have the mistake corrected.

We are satisfied from the evidence, and Whitaker's possession and the lapse of time, that the purchase money had been paid by him to Beal, for the one hundred acres; and we are also satisfied that both Ijames and the defendant, Smith, had notice of the plaintiff's claim. Consequently, the plaintiff has a plain equity to consider the defendant Smith as holding the legal title of the one hundred acres in trust for him, and is entitled to a decree for partition, so as to assign to him the one hundred acres devised to Joseph Beal, Jr., which is to be so laid off as not to include the Meeting House; for the exception in the devise, directing "the rest of the land" to be sold, after the death (286) of the wife, shows that the Meeting House lot was not included in the one hundred acres.

In regard to the share of Davis and wife, there is no proof that Whitaker ever bought it. In regard to the share of Whitaker's wife, if the deed of trust contained words sufficient to pass it, an interesting question might be presented, which is still open in our Courts. We have refused to adopt the English doctrines, *cy pres*—equity of the wife to have a settlement—part performance of parol contracts as to land—the lien of the vendor against the purchaser from the vendee for the purchase money. Is the doctrine that a purchaser from a trustee, with power to sell, *must see to the application of the purchase money,* to be adopted? or is it to be rejected upon the ground that it stands on the same principle as the lien of the vendor for the purchase money? This, we say, is an open question, and we are not now at liberty to decide it, because the deed of trust purports to convey the two hundred acres of land, and there are no words sufficient to pass the right of Whitaker and wife to a share of the purchase money of the part of the land, which the executor is directed to sell.

There must be a decree, declaring the plaintiff is entitled to have the one hundred acres of land devised to Joseph Beal, Jr., laid off and conveyed to him by the defendant, Smith—the deed to be approved by the Master; and to an account of the profits since the plaintiff was evicted. And the defendants must pay the costs.

PER CURIAM. Decree accordingly.

Cited: Freeman v. Mebane, 55 N. C., 47; *Vickers v. Leigh,* 104 N. C., 258; *Anderson v. Logan,* 105 N. C., 270; *Barnes v. McCullers,* 108 N. C., 54; *Moore v. Quinn,* 109 N. C., 89.

THOMAS TODD and wife v. WILSON ZACHARY and others.

Some time before 1829, a deed was made conferring a life estate in land upon A and his wife; and about the same time A conveyed this land in fee to B; the wife survived A, and died in 1849: *Held*, that the possession of B did not become adverse to those having the remainder after the life estate, until after the death of A's wife.

Where a deed is made to husband and wife, they are seized of the entirety as one person, and the survivor will take the whole estate.

(287) CAUSE removed from the Court of Equity for YADKIN, at its Fall Term, 1851.

In 1823, William Zachary, Sr., executed to his son, William Zachary, Jr., a deed in fee simple for a tract of land containing 492 acres.

In 1828, the said William Zachary, Sr., and Jemima his wife, executed to the plaintiff Todd and his wife, who was their daughter, a deed in fee simple for 367 acres of land (being the above tract of 492 deducting 125 acres), which is the land mentioned in the pleadings. Soon after the execution of this deed, the plaintiffs moved into the house upon the land where William Zachary and his wife were living, and lived in the same house with them, and they all carried on the farming operations until the death of William Zachary, Sr., in 1849.

William Zachary, Jr., died in 1827, leaving a widow and several children his heirs at law. Afterwards the land was sold by a decree of the Court of Equity for partition, under a bill filed by the heirs of William Zachary, Jr., and was purchased by the defendant, Courts, and one Clingman, under whom the defendants, Hauser and Wilson, claim. After the death of Jemima Zachary, Hauser and Wilson brought an action of ejectment against the plaintiffs, and ejected them.

The plaintiffs allege that William Zachary, Sr., in 1823, when he executed the deed to William Zachary, Jr., was very old and infirm, and much addicted to the intemperate use of ardent spirits, and although capable of making a deed, when not subject to any undue influence, was very easily imposed on by any one who would furnish him with liquor; and they allege that he was procued by his son William to execute the said deed by undue influence—that he furnished him with liquor, and induced him to sign the deed when he was drunk, or so nearly so, as to be an easy prey to any one who would take advantage of his condition; and they aver that the defendants, Courts and Clingman, at the time of their purchase of Hauser and Wilson, had notice of their claim. The plaintiffs further insist, that their long continued possession, for more than twenty years, under color of title, has given them a good title. The prayer is, that Hauser and Wilson be declared

trustees, and for a conveyance and an account of the profits since (288) their eviction.

The defendants deny the allegation that the deed was procured from William Zachary, Sr., by undue influence, or while he was under the effect of ardent spirits. On the contrary, they aver that he was sober, and executed the deed in consideration of money, which William, Jr., had paid for him. By way of information, they aver that William, Jr., executed to William Zachary and his wife Jemima, a deed for the land during their lifetime; and they produce the deed—which was registered in 1829. They aver that under this deed the widow Jemima held possession of the whole of the land until her death in 1849, and the plaintiffs merely lived with her; and they aver that by force of this deed, the widow of William, Jr., was deprived of her dower. In further information, they aver that the plaintiff, Todd, accepted a deed from William, Sr., and William, Jr., for 125 acres, the part of the 492 acres not included in the deed under which the plaintiff set up claim; which deed was executed in 1825, and registered in 1828—under which the plaintiff Todd, had the benefit of the 125 acres; and they do not admit notice of the plaintiffs' claim at the time of their purchase.

The plaintiffs replied to the answer, and, at the hearing, much testimony was read, the force and effect of which will be seen in the opinion delivered by this Court.

Mitchell, for the plaintiffs.
Boyden, for the defendants.

PEARSON, J. In regard to the last point, supposing the plaintiffs at liberty to rely in this Court upon the ground that they had acquired a good title by adverse possession and color, it could not avail them, because the possession is satisfactorily accounted for, by the fact that Jemima Zachary, under the deed of William Zachary, Jr., was entitled to a life estate in the *whole* tract; for after the death of her husband, she took the whole by suvivorship—such being the legal effect of a deed to *husband and wife,* who are seized of the entirety as one person. Of course, then, those claiming under William, Jr., had no right to the possession until after her death. (289)

In regard to the first and main point, the plaintiffs have failed to prove their allegation; and the weight of evidence is on the side of the defendants.

The bill is dismissed, but we cannot give costs, as the plaintiffs sue *in forma pauperis.*

PER CURIAM. Bill dismissed.

Cited: Long v. Barnes, 87 N. C., 334; *Simonton v. Cornelius,* 98 N. C., 436; *Harrison v. Ray,* 108 N. C., 216; *Bruce v. Nicholson,* 109 N. C., 204; *Stamper v. Stamper,* 121 N. C., 254; *Ray v. Long,* 132 N. C., 896.

MOTTS v. CALDWELL.

A Court of Equity will not compel one who has contracted to purchase, to take a doubtful title: *Therefore,* where the plaintiff claimed as a child, under the following clause—"It is also my will and desire, that if any of my children shall die without leaving any children or descendants at the time of their death, or without leaving such born after their death, then it is my will that such property as is hereby given to such child or children be sold by my executors, and equally divided between all my children": *Held,* That, as he had only a determinable fee, he could not enforce a specific performance.

THIS cause was set for hearing upon the bill and answer, and removed from the Court of Equity for LINCOLN, at its Spring Term, 1852. The pleadings and exhibits are stated in the opinion delivered by this Court.*

Guion, for the plaintiff.
Lander, for the defendant.

PEARSON, J. In January, 1850, the parties entered into a contract, by which the plaintiff agreed to sell to the defendant a tract of land, for which the defendant was to give $4,000, secured by notes to be executed on 1 September following, at which time the plaintiff was to execute a good and sufficient deed in fee simple. By the same contract, the plaintiff agreed to sell to the defendant two negroes, for (290) which the defendant was to make payment in cash, on the said 1 September, when the plaintiff was to deliver them and execute title. The bill is for a specific performance. The defendant admits the contract, but avers that some three months after he had entered into it, he was informed that the plaintiff did not have a good title either to the land or negroes, and upon this ground refuses to perform the contract. The plaintiff is unmarried and about twenty-five years of age.

The only question is, whether the plaintiff has a good title? and this depends upon the construction of the will of his father, John M. Motts. By it the land, negroes and money are given to each of his seven children. The land and the two negroes in controversy, are given to the

*This opinion was delivered at August Term, 1852; but upon some accident was not reported.

plaintiff. The will contains this clause: "9th. It is also my will and desire, that if any of my children shall die without leaving any children or descendants *at the time of their death,* or without having such *born after their death,* then it is my will that such property as is hereby given to such child or children, be sold by my executors and equally divided between *all* of my children."

It is very clear that the words "born after their death," were inserted to provide for the case of one or more of the children of the testator dying without a child living, but leaving a wife *enciente;* and the manifest meaning of this clause is, to limit over to the surviving children, all the property given to one who dies without leaving issue living at his death, or having issue born within a few months after his death.

In regard to such limitations over, the rule is, that they must be so made as to take effect (if they take effect at all) within a life or lives in being, and twenty-one years, and a few months for gestation. In the case under consideration, the limitation over, if it takes effect at all, must take effect within a life in being, viz., that of some one of the testator's children, and a few months for gestation: so the limitation is not too remote, and the plaintiff takes a fee determinable upon his death without having issue living at his death, or issue born within a few months thereafter. Consequently, he cannot pass a good and absolute estate, in fee simple.

This is a case of a fee limited upon a fee by way of executory devise. It is settled that the taker of the first fee cannot defeat (291) the second fee by a common recovery or a fine, and it may well be said to be doubtful whether he can bar the second fee by bargain and sale with warranty, which in the event of his dying without having issue at his death, will fall on the persons entitled to the second fee: for in *Spruill v. Leary,* 35 N. C., 225, this Court was divided upon the question, and in *Myers v. Craig,* 44 N. C., 169, the same question, after argument, was held under an *advisari.*

A Court of Equity never compels a purchaser who has bargained for a good title to accept a doubtful one, and depend on covenants and warranties for its support. The plaintiff has not attempted or offered to perfect his title, by proving releases from his brothers and sisters, to whom the second fee is limited over.

PER CURIAM. Bill dismissed, with costs.

Cited: Castleberry v. Maynard, 95 N. C., 284; *Galloway v. Carter,* 100 N. C., 122; *Leach v. Johnson,* 114 N. C., 88; *Woodbury v. King,* 152 N. C., 680.

JOSEPH M. GRAHAM and others, v. JOHN D. GRAHAM'S EX'R.

Where a testator bequeathed to each of several of his children, certain amounts of iron, iron castings and other personal chattels, and then added a clause directing all his "personal property not given away in this will specifically, shall be sold and the money equally divided" among his five daughters and a son, to make them equal with the other children: *It was held*, that the latter clause did not contain a general residuary legacy but a specific one, the effect of which was to make the bequests of the iron, iron castings and other personal chattels, general in the nature of specific instead of general simply; and upon a deficiency of those articles on hand at the death of the testator, the legacies of them must abate among themselves *pro rata*, with a right to be paid out of the general assets of the estate, if any, but not out of the proceeds of the property left to be sold and divided among the five daughters and son.

If a testator direct, that out of a certain property given to one of his daughters, she shall deduct what she may have received in money more than his other daughters, and it appear that they have received unequal sums, she shall deduct only what she may have received more than the daughter who received the next largest sum.

Money legacies are general, and, in case of a deficiency of assets, must abate *pro rata* among themselves and with the residue of the legacies general in the nature of specific, which have not been paid in full out of the specific fund.

If at the death of the testator, one of his daughters be at school, the contract for her schooling is a debt to be paid out of the general assets of the estate; but when the contract terminates, the expenses of her education must be paid out of her share of the property.

THIS was a bill filed by the legatees in the will of John D. (292) Graham, deceased, against the executor, for a settlement of the estate and payment of the legacies respectively. The will was as follows:

Calling to mind the uncertainty of life and the certainty of death, I, John D. Graham, of Lincoln County, North Carolina, do make, ordain and publish this, as my last will and testament.

I request my just debts to be all paid.

I give and devise to my beloved wife Jane, all my home or Little lands, on the Catawba River, during her natural life; but when my youngest son, Robert Clay, comes to be 21 years old, then he is to have one-half of said Little lands until his mother's death, when he is to have the whole of said Little lands or home place. Also all the household and kitchen furniture, crop, provisions, stock, tools and vehicles, which may be on my home place at my death, I give and bequeath to my wife Jane, except 3 horses worth not less than $75 each and 6 cows and calves, to be given to my three youngest daughters. The above gift is made more ample, because I expect and intend my younger children all to live at the home place with my wife.

I give and bequeath to my wife Jane, the following negroes: Ebb,

Haley and her children, Sue and her children, Tal, Dover and Arthur.

I give to my son Robert Clay, the following negroes:—Sarah, wife of old Isaac, Moses, Albert, Vice, Lott, Ephraim, Monroe, George, Gill and Sanco.

I give and bequeath to my daughter Mary Ann, one negro girl named Mary, in addition to the negroes heretofore given. I also give her 8,000 lbs. of iron, and the same quantity of castings.

I have already, by deeds and bills of sale, given my son Charles his full share of my real estate, negroes and other property at the forge.

I give and bequeath to my son Joseph, one-half of all my Furnace land, including one-half of my share in the ore bank and limestone quarry, near King's mountain, also one-half of all the patterns, flasks, tools and stock of cattle, hogs at the Furnace, his saddle-horse, and one wagon and team, and the half of all the household furniture and bedding that I left at the Furnace. I have given Joseph his full share of negroes, and made him a deed of gift to them.

I give and bequeath to my son James Franklin, the other half of all my lands at and around the Furnace, including one-half of my share in the ore bank and limestone quarry, also one-half of all the patterns, flasks, tools and stock of hogs and cattle at the Furnace, (293) one good saddle-horse, one wagon and team, the half of all the household furniture and bedding that I left at the Furnace. I give and bequeath to my son James Franklin, the following negroes:—Isaac the potter, and Pat his wife, Harry, Charity, Milus, Milly, and old Isaac, I give him Julius and two hundred dollars beside to place him equal in division with those that have expended more money than he at school.

I give and bequeath to my son Henry, my half of the Canceller mill lands, and sixteen hundred dollars in money. I give him two horses, worth one hundred dollars each, and one good saddle and bridle. I also give him twenty-eight hundred and fifteen dollars worth of negroes, the value of which to be ascertained by reference to my family book.

I give to my son Alfred A. Hamilton, my Cathy plantation, with all the crop, provisions, stock of all kinds, and everything that may be on that place at my death. I also give him $2,850 worth of negroes, the value to be ascertained by reference to my family book.

I have given my daughter Malvina, her full share of negroes, and she has a deed of gift for them. I give to Malvina, three thousand dollars dollars worth of iron and castings, at 4 cents each and half of each, deducting what she has already received.

I give and bequeath to my daughter Martha, $2,850 worth of negroes, the value to be ascertained by reference to my family book. I also give her $3,000 worth of iron and castings, at 4 cents each and one-half

of each, deducting out what money she has received more than the rest of my daughters.

I give and bequeath to my daughter Eliza P., $2,850 worth of negroes, the value to be ascertained by reference to my family book. I give her one bridle and saddle, $3,000 worth of iron and castings, at 4 cents each and one-half of each.

I give and bequeath the same amount and kinds of property to my daughter Julia, that I have just given to Eliza.

I will and direct that my Iredell plantation, on the Catawba River, near 1,000 acres, be sold, and the money equally divided among all my children by my first wife, who owned about 800 acres of said lands.

I keep a family book, in which I set down and charge each of my children with what I give them; now if any one of them receive any portion of the above legacies between the date of this will and my death, that is to be deducted out of their share.

I will and direct that all my personal property not named and given away in this will specifically shall be sold, and the money equally divided among my five daughters and my son Henry, to make them equal with my other children, who have received somewhat more (294) in land.

In the event of the death of my son Clay before he is twenty-one years old, or in case he dies without lawful children, then my wife is to hold, use and enjoy, the advantages of all the lands and slaves willed to Clay during her life, and after death, then my home place and all the slaves given to Clay are to be sold, and the money equally divided among all my children.

In witness whereof I have, this 10 September, 1845, set my hand and affixed my seal.

signed JNO. D. GRAHAM, (Seal.)

In the presence of us,

JAMES GRAHAM,
SIDNEY X. JOHNSTON, } Signed.
JAMES F. JOHNSTON,

CODICIL TO THE ABOVE WILL.

January 1st, 1846. I, John D. Graham, upon further considerations of the above will and testament, annex the following codicil, (viz:)— As I have received eight negroes from the estate of my first wife, Elizabeth Graham, namely, Adam, Horace, Jacob, Eve, Lithe, and 3 small children, of said woman, and may, on further investigation of said estate receive others, all of which negroes I devise equally among my first wife's children, provided however, that I intend that these negroes

shall, in the first place, or before division, indemnify my estate against a suit now pending in Lincoln Superior Court, the suit of *Falls v.* the *Sheriff* for negroes I have already had, sold and divided in the above will amongst my children. I also hereby constitute and appoint my son Charles C. Graham, and William Johnston, Attorney, my lawful Executors, and hereby revoke all other Wills by me preceding this; in witness whereof I have hereunto set my hand and affixed my seal.

Signed JNO. D. GRAHAM, (Seal.)

In presence of us,
SIDNEY X. JOHNSTON,
JAMES F. JOHNSTON, } Signed.

The defendant filed his answer, in which he set out an account, and expressed his readiness to come to a settlement, but stated that certain difficulties in the construction of the will had arisen, upon which he prayed the instruction of the Court. These difficulties are thus set forth in the answer:—

"*First.* The iron and castings on hand are quite inadequate to meet the several legacies; and some of the complainants con- (295) tend that they should abate partially, and others, that this defendant, out of the residue should purchase other iron and castings to supply the deficiency. The complainant Mrs. Orr contends, that she is entitled to have delivered to her 8,000 lbs. of iron, and the same quantity of castings, without any deduction of the amount paid her by testator, as appears by his family book; and further that she is entitled to priority of payment over the other iron legacies."

"*Secondly.* That out of the iron and casting bequeathed to Martha, 'the testator directs there shall be deducted what *money* she has received more than the rest of my daughters.' The other daughters, as appears by the family book, have received different sums, to wit: Mrs. Orr, $816; Mrs. Young, about $746; Mrs. Rounceville, about $890; Eliza, about $330; and Julia, nothing. This defendant is unable to decide how much should be deducted in this case, as the other daughters have been unequally advanced by the testator."

"*Thirdly.* Another matter that has been the subject of difference is: Do the legacies of money, horses, saddles, etc., take any precedure or not over the legacies of iron and castings?"

"*Fourthly.* Complainant, Eliza, was placed at Greensboro, No. Ca., at School, by testator. Since his death, this defendant has paid her expenses, part incurred before and part since his death, amounting to $216.13; and the parties have differed, as to whether this expense should be borne by the estate, or by complainant Eliza."

"*Fifthly.* The suits referred to in the codicil of said last will and

testament, have been determined, and both favorably to complainants. Notwithstanding, the expenses thereof have been heavy—pay for records, etc., and the several counsels. The difficulty is, whether by said codicil, these expenses should be borne by the general residue fund, or by the negroes mentioned in said codicil."

At the Fall Term, 1851, of the Court of Equity for Lincoln County, the cause was by consent set for hearing and the following opinion declared by his Honor, Judge Manly, directing a decree to be drawn in conformity thereto:

"The case being heard upon the bill, answer and exhibits, the
(296) Court is of opinion, that the iron castings on hand at the testator's death should be divided among the legatees of that species of property, in proportion to their respective legacies. In making this division, such of the legatees as were advanced by the testator after the date of his will, and charged therewith in his family book, should account for the same. If fully advanced, nothing will be due them, if partly, the residue will be the legacy to be paid. If the executor has allotted more to any one of the legatees, than would fall to her share under the division herein described, she should account for it at a just valuation, out of her share of the residue of the other personalty. 2. No deduction should be made from Martha's share of the iron and castings, on account of advancements made to her of money. 3. The legacies of money, horses, saddles, etc., being on hand at the testator's death, should be paid. 4. The contract of the testator for the education of his daughter Eliza, should be discharged out of the estate. If she has been kept at school beyond the period contracted for by her father, it must be paid out of her share of the property. 5. In distributing the slaves mentioned in the codicil, the executor should charge the sums with the expenses of the suits therein mentioned, and sell if necessary, to extinguish said charge. The cost must be paid out of the estate."

At Spring Term, 1853, the following order was made: "Upon the opening of this cause, it doth appear to the Court, that the rights of the parties hath heretofore been declared and the matter of costs left undecided. It is therefore ordered and decreed by the Court, that the cost in this case incurred, be taxed by the Master and paid by defendant out of the estate of his testator; and in default of payment on or before the first day of September next, the clerk issue execution therefor."

From this order the plaintiffs appealed to the Supreme Court.

Johnston, for the plaintiffs.
Boyden and *Guion,* for the defendant.

BATTLE, J. The appeal from the order or decree made in this cause in the Court below was intended as we are informed by the counsel, to obtain the opinion of this Court upon the construction of (297) certain clauses in the will of the late John D. Graham.

The record, as it now stands, does not require us to declare any opinion upon the questions raised by the pleadings, for it is simply an appeal from an order made relative to the cost of the suit. But presuming that the counsel will by consent amend the records, both of the Court below and this Court so that the cause may appear to have been properly before us, we will proceed to give our opinion upon the disputed questions upon which the parties have called for it.

The main difficulty in the construction of the will seems to have arisen from the legacies of the iron and castings. The will appears from its date to have been made and published on 10 September, 1845, and the testator died on 7 January, 1847.—Whether at the time when he made his will the testator had on hand the amount of iron and castings therein bequeathed, does not appear, but when the executor came to settle the estate he ascertained that there was not enough of those articles to satisfy the several legacies of them. In this condition of the estate some of the legatees contended that the legacies abate *pro rata* while others insist that the executor should, out of the residue of the proceeds of the estate, purchase other iron and castings to make up the deficiency.—This is the first difficulty presented to us and its solution depends upon the question whether these legacies are general, specific or general in the nature of specific. A legacy is said to be general when it is so given as not to amount to a bequest of a specific part of a testator's personal estate; as a sum of money *generally* or *out* of the testator's personal estate and the like. 1 Roper on Leg., 256. A specific legacy is defined to be, "the bequest of a particular thing or money specified and distinguished from all other of the same kind as a horse, a piece of plate, money in a purse, stock in the public funds, a security for money, which would immediately vest with the assent of the executor." 1 Roper on Leg., 149. There is also a legacy of quantity *in the nature* of a specific legacy, as of so much money with reference to a particular fund for its payment. This kind of legacy is so far *general* and differs so much in effect from a specific one, that if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets: (298) yet it is so far *specific,* that it will not be liable to abate with the general legacies in case of a deficiency of assets. *Ibid.,* 150. From these definitions of legacies, general, specific, and in the nature of specific, which are well established, it is clear that the several legacies of iron and castings and particularly those of so many dollars worth

of iron and castings are not specific or general in the nature of specific unless they are made so by the next to the last clause in the will. No particular iron and castings are mentioned and no particular fund or parcel of iron and castings is specified out of which they are to be paid. The testator does not say *my* iron and castings, or the iron and castings which I may have on hand at the time of my death. They are like legacies of so many shares of bank stock which are general legacies, even though the testator owns the number of shares named, if he do not call them *my* shares of bank stock. *Davis v. Cain,* 36 N. C., 304. But we are of opinion that these legacies though they would be otherwise general are made general in the nature of specific legacies by the clause of the will above referred to. That clause is in these words: "I will and direct that all my personal property not named and given away in this will specifically shall be sold and the money equally divided among my five daughters and my son Henry to make them equal with my other children who have received somewhat more in land," now under this clause all the iron and castings which the testator owned at the time of his death would have had to be sold, if the legacies of them were not in some sense specific. No person can believe that such was the testator's intention. Such a construction would involve the absurdity of supposing that the testator, who appears to have been a large manufacturer of such articles, wished his iron and castings sold at auction by his executor for whatever they might bring and then repurchased by him at certain price for the legatees. The legacies of horses, bridles and saddles would most of them have been also general but for this clause, and the executor would not have been otherwise authorized to pay them out of such articles as were on hand at the death of the testator.

All the legacies of iron and castings, including that to Mrs. Orr, being thus general in the nature of specific, must be paid out of such of those articles as the testator owned at the time of his death, (299) making no deduction therefrom on account of what the executor calls contracts, due bills, payable in iron and castings, for, as between the legatees, those are debts payable out of the general assets. If there were not enough of those articles to satisfy all the legatees, they must be divided among them in proportion to their respective legacies. The deficiency in these legacies may be made up out of the general assets of the estate, if there be any (1 Rop. on Leg., 150), but they cannot be paid out of the proceeds of the personal property directed to be sold and divided between the testator's five daughters and his son Henry, because that bequest is specific, and not a general residuary legacy. Such was his Honor's opinion in the Court below, and we concur with him. We concur with him further, that in making the

division, such of the legatees as were advanced by their father after the date of his will, and charged therewith in his family book, should account. If fully advanced, nothing more will be due them from that fund; if partially, the residue will be the amount to be paid. If the executor has allotted more to any one of the legatees than would fall to her share under the division above specified, she should account for it at a fair valuation out of her share of the proceeds of the other personalty.

2. The second difficulty arises from that clause of his testator's will, where he directs that out of the iron and castings bequeathed to his daughter Martha, shall be deducted what money she has received more than the rest of his daughters, the rest of the daughters having received unequal sums. Some effect must be given to the clause, but in the absence of any other standard afforded by the testator himself, we think the only deduction to be made is, what she received more than the highest sum given to either of the other daughters. If more than this were deducted, then Martha would receive less than one or more of her sisters, which is not sufficiently expressed, to be declared to have been the wish of the testator.

3. It has already been intimated that our opinion is that some of the legacies of horses, saddles, etc., are general in the nature of specific, and it follows that they must be paid out of articles of the kind on hand at the death of the testator. The money legacies are general, and if there be a deficiency of assets to pay all the general legacies, and the residue of the legacies general in the nature of specific, (300) not paid out of the specific fund, they must abate among themselves *pro rata*. 1 Roper on Leg., 284.

4. His Honor was right in holding that the contract made by the testator for the education of his daughter Eliza, being one of his debts, ought to be discharged out of the general assets of the estate. But if she has been kept at school since the termination of her father's contract, the expenses are a charge upon her share of the property.

5. We are clearly of the opinion that the expenses of the lawsuits mentioned in the codicil, are made a charge upon the slaves therein directed to be divided among certain of his children.

The decree below will therefore be affirmed, except in relation to the amount to be deducted out of Martha's share of iron and castings, and the abatements of the legacies as between the general legacies and the residue of the legacies general in the nature of specific in which particulars it must be reformed. The costs of the cause, both in the Court

below and this Court, must be paid by the executor out of the general assets of the estate.

PER CURIAM. Decree accordingly.

Cited: *Mitchener v. Atkinson,* 62 N. C., 27; *Pigford v. Grady,* 152 N. C., 181.

MEMORANDUM.

At the meeting of the Supreme Court at its December Term, 1853, the Judges advised, that the Equity decisions of the June and August Term previous, should be prepared and published under the superintendence of the undersigned—the Reporter having died before any of them were put to press.

To those of his professional friends who assisted him in this work, he takes this occasion to return his sincere thanks. Nearly all the cases contained in these two numbers, have been prepared for the press since the meeting of the Court in December, which will, it is hoped, sufficiently account for the delay in their appearance.

QUENTIN BUSBEE.

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