ANNOTATIONS INCLUDE 168 N. C.

NORTH CAROLINA REPORTS

VOL. 54

CASES IN EQUITY ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FROM DECEMBER TERM, 1853
TO AUGUST TERM, 1854
BOTH INCLUSIVE

BY HAMILTON C. JONES
(VOL. I, EQ.)

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

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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, 1853

ROBERT CAFFEY, ADM'R, etc., *against* JAS. C. DAVIS AND OTHERS.

Upon a direction in a will to emancipate a female slave, either immediately or at a future time, after a temporary enjoyment of another, the issue of such female slave must, when nothing to the contrary appears in the will, follow the condition of the mother and be emancipated also.

CAUSE removed from the Court of Equity of GUILFORD, Fall Term, 1853.

James Davis, by his last will and testament, made in 1831, devised and bequeathed, among a variety of other dispositions (not relevant to the questions treated of by the Court), as follows:

"I also give to her (his wife Sophia) ten head of the first (choice) of my hogs, five head of sheep, first choice, and one negro girl, named Nelly, and one mulatto man, named Nehemiah. I give them to my wife during her natural life, or widowhood; then to my son Michael C. Davis, to him, his heirs, forever, except Nelly and Nehemiah, to be free, if they can comply with the requisition of the law of this State, and if they can't comply with the law to be free, and Michael C. Davis should die, without any heirs of his own body, Nehemiah and Nelly may choose their own homes, where they like to live, and (2) is to be sold privately at the valuation of two men." In a subsequent clause this will proceeds: "and all the rest of my property to be sold, and the balance of estate unwilled, to be equally divided between my wife Sophia Davis and my son John Davis, and my daughter Jane Caffey and my son Michael Caffey Davis." James Davis died in 1837.

After the execution of the will of James Davis, and previous to his death, the woman Nelly bore the slave Wright, and after his death and during the life of Sophia she bore the boy Alvis. Sophia died in 1848.

Sophia Davis, the widow of the testator in the above will, executed her will in 1845, and disposed, as follows:

"I give and bequeath to my grandson James Caffey Davis, the only son of my son Michael Caffey Davis, deceased, one negro boy named *Wright,* and one negro boy named *Alvis,* on condition, that if Nehemiah and Nelly, their father and mother, comply with the laws of this State, and goes free, it is my will, they should go with them, and not be kept back on the account of their age, and if not, then these negroes, Wright and Alvis, must stay with their father and mother, and not be hired out, and if not, they must have the same chance of their father and mother in choosing homes, and be sold to the same person at the valuation of the same two men, that value their father and mother, according to my husband's (James Davis, deceased) will, and if James Caffey Davis dies, not having no heir of his own body, and these negroes can't comply with the requisitions of the laws of this State, and choose their homes and is valued. The money on conditions, if James C. Davis leaves no child of his own, if he does, it is theirs, if not, it must go to the use of my children; it is my will, they never shall be parted from their parents, for I do not believe in negro slavery; but if I had it in
(3) my power, I would set them all free." After some pious and charitable reflections, the will proceeds with a prayer, "that *no one will try to stop her poor negroes";* and again says, "she wishes *to clear her skirts* of them." Sophia Davis died in the year 1849.

After the death of James Davis, the slave Wright was sold by his executor, and bought by his son, Michael C. Davis, who sold and conveyed him by a bill of sale to the testatrix, in the latter will, of Sophia Davis.

No steps having been taken by the executrix, Sophia, to send off the slaves Nelly and Nehemiah, after her death the plaintiff, as administrator *de bonis non,* with the will annexed, of James Davis, and as the personal representative also of his wife Jane, filed this bill to obtain the advice and instruction of the Court of Equity, as to the rights of these slaves, Nelly, Nehemiah, Wright and Alvis, to their freedom, and as to the mode of raising the means to send them out of the State.

James C. Davis, an infant, Jane Davis, widow of Michael C. Davis, and John Davis, a son, and one of the legatees of James Davis, were made defendants. The answer of James C. Davis was filed by his guardian, Robert Rankin, which admitted the material allegations contained in the will, but insisted, that by a proper construction, none of the slaves were entitled to their liberty under these wills.

There was replication, and the cause was set for hearing on the bill, answer and exhibits, and removed to this Court.

Miller, for plaintiffs.
Morehead, for defendants.

BATTLE, J. The right of the slaves Nehemiah, Nelly and Wright to their freedom appears to us to be unquestionable. The two former are clearly under the express provisions of the will of James Davis, and the latter either under the proper construction of the will or by the express terms of the will of Sophia Davis. The only question in this case is whether the boy Alvis can claim to be emancipated under either will. That question is certainly not without its difficulties, and we have considered it under the various aspects presented by the able arguments of the counsel, and have come to the conclusion that Alvis, upon a just construction of the will of James Davis, must follow the condition of his parents, and has a right to be emancipated with them. The slaves Nehemiah and Nelly were in effect bequeathed by the tes- (5) tator to his widow for life, and then to be free; with a proviso, that if they could not comply with the laws of the State, so as to entitle themselves to freedom, they should belong to the testator's son, Michael Caffey Davis. Had they, at the termination of the life estate, been unable to comply with the condition, their issue or increase would have gone with them into servitude to the remainderman, whether such issue or increase were mentioned in the will or not: differing in this respect from the fruits or profits of any other species of property arising during the life estate. That is too well settled to require the citation of authority for its support. Why then should not the issue go with them into freedom, upon their performance of the condition that was to confer it upon them? Why any more necessity that the testator should mention issue or increase, to give liberty to such increase, than to doom it to slavery? The answer of the defendants' counsel is, that during the life estate the mother was a slave, and that the issue born during that period must also be a slave, according to the maxim *partus sequitur ventrem,* and in support of the proposition he has referred to and relied on a case decided in Kentucky, in 1811, *Ned v. Beal,* 2 Bibb., 298. The question in that case arose upon a bequest by a testator to his wife of certain slaves "to serve in the following manner, and to be free at the following periods: Jude to be free in the year 1804, and Dinah to be free in the year 1806, and in the meantime the above named Jude and Dinah shall be schooled in such a manner as to read a chapter in the Bible." Jude had a child (Ned, the plaintiff in the action) born after the testator's death, and before 1804, and the Court decided in favor of the defendant, who claimed Ned as a slave, upon the ground that he must follow the condition of his mother at the time of his birth, by force of the maxim *partus sequitur ventrem.* Without stop- (6) ping to enquire whether the Court did not misapply the maxim to the disappointment of the intention of the testator in that case, we hold it to be at variance with the *principle* established by this Court

in the cases to which our attention has been called by the plaintiff's counsel. *Campbell v. Street,* 23 N. C., 109, was decided in 1840. The plaintiff, Lydia Campbell, claimed her freedom under the will of John Campbell, of Nansemond County, Virginia, which was as follows:

"My will and desire is, that my negro woman Pender should have her freedom immediately, and her emancipation recorded. My will and desire is, that all the rest of my black people should serve till my youngest child shall be of the age of twenty-one, and for the use of raising my children and young negroes. After my youngest child be of age, my will is, that all my negroes should have their freedom and liberty."

The plaintiff was born of one of the testator's negro women after his death, and before his youngest child came to the age of twenty-one, and the defendant contended that, for that reason, she was a slave. This Court, in the able opinion delivered by *Judge Gaston,* after an argument to show that it was the intention of the testator to emancipate not only all the negroes which he owned at the time of his death, but also their future increase, and that he had power to emancipate the increase, as well as the original stock, proceeded as follows: "The law of Virginia allows emancipation by will, and it is conceded that the emancipation directed in this will, with respect to the original stock, is sanctioned by that law, either as an immediate emancipation, with a condition of a short, temporary service, or as an emancipation, to take effect after that temporary service. If it be the former, the claim of the plaintiff to freedom is necessarily complete; but if it be the latter, then she claims freedom, not as her birthright, but as a gift from her owner. (7) She was in law his property, which he held in her mother."

Wooten v. Becton, 43 N. C., 66, came before the Court at December Term, 1851, upon a bill filed by the executors to obtain a construction of the following clause in the will of Susan Jones:

"I am anxious to reward the meritorious services of the following named slaves with the boon of freedom, namely: Phillis, Esther, Nancy, Patsy, Scott, John, Amy, Pleasant, Fortuna, Mary, West, and Sarah, and all their future increase and issue, etc."

One of the women named in the will had a child born in the lifetime of the testatrix, and several children were born after her death. *Ruffin, C. J.,* delivering the opinion of the Court, said upon this subject: "The children born since the death of the testatrix are within the words of the will, as expressly as those named. With respect to the one born between the making of the will and the death of the testatrix, the rule is not so clear. Were it a disposition, by the way of legacy, to some other person, the Court would feel bound, by previous adjudications, to hold that the child did not pass to the donee of the mother. But the con-

clusion is to the contrary on the direction to emancipate the issue and increase of a female who is emancipated by name in the will. Increase is admitted in the cases to be *per se* an equivocal term, and therefore it is allowed that other things in the will may be looked to, in order to give it a meaning effectuating the actual intention. The supposition is almost inconceivable that one should intend that a child born at any time after the will should remain in servitude, when by the will not only the mother, but her issue and increase are to be emancipated: or that the intention should not have been directly the reverse; that such child should follow the mother and be free also. The purpose of the testatrix plainly denotes, as it seems to the Court, that 'issue and increase' was meant to include all born after the making of the will." (8)

The principle deducible from these cases appears to be that, upon a direction in a will to emancipate a female slave, either immediately or at a future time, after a temporary enjoyment by another, the issue of such female slave, as an incident to and fruit of the mother, must, when nothing to the contrary appears in the will, follow the condition of the mother and be emancipated also. Applying this principle to the case before us, we must say that the supposition is almost inconceivable, that the testator should have intended that his only slaves, Nehemiah and Nelly, who had intermarried and had one child before his death, should be emancipated and sent out of the State, leaving their children here in servitude. Just the reverse must, we think, be necessarily inferred to have been his intention, not only from this consideration, but from the absurdity which must follow any other construction. It is very clear that the testator did not intend that any other legatee named in his will except his son, Michael Caffey Davis, should take Nehemiah and Nelly, in case they could not be set free after his wife's death. Now, if the said slaves should entitle themselves to freedom by complying with the laws of the State, so that the legatee above named could not take them, we do not see how he could take their issue, which is but an incident to or a part of them. If he could not take the principal, it is difficult to maintain the position that he would take the incident, when it was not expressly given to him. We acknowledge the rule that the incident follows the principal, and that the incident may, in express terms or by necessary implication, be separated from the principal; but we hesitate to recognize a rule by which one can take an incident not expressly given to him, while the principal itself is expressly given away from him. The result of the argument would be that the issue of Nehemiah and Nelly were undisposed of by this clause of the will, and of course fell into the residue, and were to be sold and divided among certain legatees therein named, of whom his wife was one.

In other words, the wife would take the issue during life, under (9)

one clause of the will, and after her death, take a portion of the proceeds of the sale of such issue, under another clause of the same will. This construction is, from its absurdity, entirely inadmissible. The only other construction is the one which we adopt, that it must necessarily be inferred to have been the intention of the testator that the issue of Nehemiah and Nelly should be emancipated with their parents, at the death of the widow.

This decision prevents the question of election, raised in the argument upon the will of Sophia Davis, from coming before us, and therefore we abstain from expressing any opinion upon it.

All the slaves were, according to the opinion above expressed, entitled to their freedom at the death of the testator's widow, Sophia Davis, and we think they ought not to be prejudiced by the delay of the administrator, with the will annexed, in procuring their emancipation according to law. The administrator must therefore appropriate such of their hires or profits, since the time he has received or might have received them, to the purpose of emancipating and carrying them out of the State. We think he has no right to take any other funds out of the estates, either of James or Sophia Davis, for those purposes, because the wills of both, so far from giving such funds, seem rather to imply that the slaves must provide the means of securing their emancipation out of their own resources.

A reference must be made to the clerk for taking the necessary accounts, and the cause will be retained for further directions upon the coming in of the report.

Cited: Cromartie v. Robison, 55 N. C., 220; *Leary v. Nash,* 56 N. C., 358; *Myers v. Williams,* 58 N. C., 367.

(10)

THE AMERICAN BIBLE SOCIETY AND OTHERS *against* THE EXECUTORS OF JANET HOLLISTER AND OTHERS.

The Supreme Court will not entertain a bill of review (begun here) to review a final decree of this Court.

The bill is filed in this Court for the purpose of reviewing a decree of this Court, heretofore made in the case of Taylor and Taylor, executors of Hollister, against the American Bible Society and others, reported in 42 N. C., 201. The plaintiffs were defendants in that case, and the plaintiffs in that case, with some who were defendants, are made defendants in this case. The bill sets out the pleadings and proceedings in that case, together with the final decree, and avers "that said decree

hath been duly enrolled among the records of said Supreme Court, all which appears by the record of the proceedings in the said cause now remaining in the rolls of the office of the said Supreme Court, which said decree your orators humbly insist is erroneous and ought to be reviewed and set aside," and then assigns errors.

Upon the filing of the bill, copies and *subpœnas* issued, some of the defendants answered, and others put in a demurrer.

Moore, for plaintiffs.
J. H. Bryan, for defendants.

PEARSON, J. The decrees of this Court are not enrolled, strictly speaking, but are recorded, which is allowed to have the same effect. Judge Story says: "In the State Courts of the United States all decrees in Equity are matters of record, and are deemed to be enrolled as of the term of the Court at which they are passed, whether actually enrolled or not." Story's Eq. Pl., sec. 403. Accordingly, there (11) are several bills of review among the decisions of this Court, which bills are filed in the Courts of Equity below, to review decisions of these Courts, and brought to this Court by appeal, in which it is held that the passing and recording a final decree has the effect of enrollment and presents a case for a bill of review. So the bill under consideration is applicable to the case presented by it. But the plaintiffs are met *in limine* by the objection that a bill cannot be filed and have its origin in this Court, because of its limited jurisdiction.

It appears that this is the first bill of the kind that has ever been filed in this Court. The case is a new one, and we have given it much consideration. This Court is one of limited jurisdiction, and derives its powers from the statute by which it was created. So the question depends upon the construction of that statute. It should, however, not be considered as isolated and standing alone, but as forming a part of a system established by the Legislature for the administration of the law.

The Revised Statutes, ch. 32, sec. 1, entitled an act concerning Courts of Equity, provides as follows: "Each Superior Court of Law within the State shall also be and act as a Court of Equity for the same county, and possess all the *powers and authority* within the same that the Court of Chancery, which was formerly held in this State under the colonial government, *used and exercised,* and that are *properly and rightfully incident* to such a Court, agreeably to the laws of this State." And in sec. 2, as follows: "Such Court, in all equity proceedings, shall be styled and called *The Court of Equity* for the county in which it is held." And in sec. 17: "No bill of review, or petition for rehearing, shall lie or be allowed upon a final decree in any of the *Courts of Equity*

within this State but within five years," etc. In Rev. Stat., ch. 33, sec. 6, entitled an act concerning the Supreme Court, it is pro-
(12) vided, that "the Court shall have power to *hear and determine* all questions at law brought before it by appeal from a Superior Court, and to *hear and determine all cases of Equity brought before it by appeal* from a Court of Equity, or removed there by the parties thereto; and in every case such Court *may render* such sentence, judgment and decree as, on *inspection of the whole record,* it shall appear to them ought in law *to be rendered thereon;* and shall have *original* and exclusive jurisdiction in repealing letters patent, and shall also have power to issue writs of *certiorari, scire facias, habeas corpus, mandamus,* and all other writs which may be *proper* and necessary for the exercise of *its jurisdiction,* and agreeable to the principles and usages of law: and it may, in its own discretion, make the writs of execution, which it may issue, returnable either to the said Court, or to the Supreme Court," etc., "provided, that, in criminal cases, the decision of the Supreme Court shall be certified to the Superior Court, which Court shall proceed to judgment."

Thus it is seen that *the Courts of Equity* for the several counties have original and general jurisdiction, and the statute confers upon them the *powers and authorities* that were formerly exercised by the Chancellor, and that are *properly and rightfully* incident to such a Court. The statute assumes that to entertain a bill of review is a power properly and rightfully incident to such a Court, and limits the time to five years, instead of twenty years, as it was formerly.

Whereas the Supreme Court has no original jurisdiction, except to repeal letters patent, and its jurisdiction is limited and expressly confined to the power to hear and *determine* questions of law upon appeal, and cases in equity brought before it by appeal or removal: no incidental power or authority is conferred, save only that of issuing such
(13) writs and other process as is necessary and proper for the exercise of the limited jurisdiction given to it, that is, to hear and determine cases brought before it by appeal or removal.

So the question is narrowed to this: What is meant by the power to "hear and determine" a case? Both of the words have a fixed meaning, and beyond all question a case is heard and determined when a final decree has been passed and entered upon the records of the Court. The case is then ended, the parties are dismissed, and the Court has fully discharged its functions so far as their case is concerned.

It is said that a bill of review is not, strictly speaking, an original bill, but is treated of in the books as a bill in the nature of an original bill, being an incident to some former suit. To call a bill of review an incident to a former suit requires some latitude of expression; but it is

sufficient for us to say, when a case has been heard and determined, this Court is *functus officio* as to the case itself, and all its incidents.

Sec. 17, ch. 32, is expressly confined to *Courts of Equity* (which means the Courts below). It is from the act of 1828, which was ten years after the Supreme Court was established. This shows that, in the opinion of the Legislature, a bill of review could not originate in the Supreme Court. If such a bill can be allowed, there is no limitation short of twenty years. We are, therefore, brought to the conclusion, from a consideration of the statute, that a bill of review cannot be filed in this Court; but if the words of the statute were less plain and unequivocal, our conclusion would derive support from other considerations.

1. Bills of review owe their origin to the famous ordinance of *Lord Bacon,* which treats the power to entertain such bills as an incident to the jurisdiction of the Chancellor. Such bills are of two (14) kinds, one for error of law, like the bill before us; and the other upon new proofs that have come to light after the decision was made. Suppose a bill of the latter kind was filed in this Court; answer is put in, replications taken, and commissions. So, in effect, a case originates in this Court. This is certainly not proper. It must be brought here by appeal or removal. Both kinds of bills of review stand on the same footing, and if we entertain one, as a matter of course we must entertain the other.

2. No bill of review, of either kind, has ever been filed in this Court, but there are many petitions to rehear. We are certain that, but for a settled conviction on the part both of the Judges and of the profession that this Court will not entertain such a bill, it would have been attempted in the course of thirty-six years. Indeed in *Ward v. Stowe,* 17 N. C., 509, the Court say: "The inquiries presented are exceedingly unpleasant. There is no doubt but that the decision in *Stowe v. Ward,* 10 N. C., 604, directing a partition of the land *per capita,* was right, and the decision in *S. c.,* 12 N. C., 67, reversing the former decree, upon a petition to rehear, and directing a partition *per stirpes,* was erroneous." It is clear that if the Court could have entertained a bill of review, that erroneous decree would have been reversed.

3. There are several cases in which bills filed in the Courts of Equity to reverse their decree have been brought to this Court by appeal. *Gilchrist v. Buie,* 21 N. C., 354; *Waugh v. Mitchell, Ib.,* 510; *Sims v. Thompson,* 16 N. C., 197; *Barnes v. Dickinson, Ib.,* 326. In the last case the bill was filed in the Court of Equity to reverse a decree in this Court on new proof.

4. No reason can be assigned why cases in Equity should be tried a second time in this Court that does not apply, with equal force, to cases

on the law side, and there can be no writ of error, for error in law, in a judgment of this Court.

Bill dismissed with costs.

Cited: Smith v. Cheek, 50 N. C., 213; *Jones v. McLaurin,* 52 N. C., 394; *Robinson v. Lewis,* 55 N. C., 26; *Walton v. Gatlin,* 60 N. C., 316, 323; *Kincaid v. Conly,* 62 N. C., 274; *Farrar v. Staton,* 101 N. C., 82.

(15)

ISAAC WRIGHT *against* HENRY BOWDEN AND LUTHER LOFTIN.

Where a decree rendered in the Court of Equity has not been executed, by the neglect of the parties to proceed under it, and their rights are about to be embarrassed by subsequent events, and it appears that such decree is reasonable and just, a bill to enforce such decree will be entertained, and a new decree made in aid of the former one.

CAUSE removed from the Court of Equity, DUPLIN, Fall Term, 1853, and came on to be heard on demurrer. All the facts and the pleadings necessary to a proper understanding of the question decided are recited in the opinion of the Court.

C. G. Wright, for plaintiff.
Winslow, for defendant.

NASH, C. J. The bill is to execute a decree heretofore made in the Court of Equity for Duplin County. The defendants file a general demurrer, and the cause is transferred by consent to this Court for argument.

The facts of the case as admitted by the demurrer are as follows: The plaintiff was appointed executor of the will of James Wright, deceased, and trustee for his children. The testator died in the year...., and the plaintiff was duly qualified as his executor: the will disposed of both real and personal property among testator's children, one of whom was John Beck Wright. A bill was filed by the present defendants, Daniel Bowden and Loftin, as purchasers of the equitable interest of John B. Wright in certain slaves bequeathed to the complainant in trust for him, and by the other legatees and devisees under the will of James Wright, praying for a determination of the trust and due delivery of the property. John Beck Wright became lunatic, pending the bill, and, by his committee, Robert T. Murphy, was, by a supplemental bill, made a party. At a subsequent term of the Court, by an inter-
(16) locutory order, commissioners were appointed to divide the lands

and slaves among the claimants, and "it is further ordered and decided by the Court, that the part or portion of the real estate allotted to John B. Wright be allotted and set apart, subject to a claim which Isaac Wright, trustee, has against the said John B. Wright, for $231, with interest, etc., the said lien having accrued to said Isaac Wright, he having purchased a claim set up to John B. Wright's interest in said lands, to prevent litigation and the title from being clouded. The report of the commissioners was duly made and returned to the Spring Term, 1851, Duplin Court of Equity, where the following decree was made: "The cause coming on to be heard on the bill, etc., it is ordered by the Court that the report, as returned, be confirmed in all things, and it is ordered and adjudged and decreed that lot No. 1 be assigned to Robert T. Murphy, for the use of John B. Wright, a lunatic, Robert T. Murphy being his guardian or committee, and it is considered by the Court, and it is hereby decreed, that lot No. 1, described by the commissioners in the report to this term, be and remain liable for the sum of $231, with interest from 19 February, 1849, due to Isaac Wright, as appears in the interlocutory order of the last term of this Court. The said lot No. 1 to be and continue responsible for the above mentioned sum until the same is paid." By the same decree Isaac Wright was discharged from his trust. Subsequently thereto John Wright was, by an inquisition *de inquirendo lunatico,* found to be of sound mind, and he sold the defendants, Bowden and Loftin, lot No. 1.

The decree above set forth is still in force, and never has been performed. No part of the money decreed to Isaac Wright has been paid to him. This bill is to execute it.

In a bill to execute a decree, the principle of that decree is its basis, and it seeks merely to carry into effect. Such a bill may be filed where an omission has been made in consequence of all the facts not appearing on the record.—*Hodson v. Ball,* 1 Ph., 181. Or where, (17) owing to the neglect of parties to proceed under it, their rights have become embarrassed by subsequent events, and a new decree is necessary to ascertain them. Mitford, 95. The plaintiff in such a bill cannot impeach the decree. If it goes beyond the execution of it, it is a bill to impeach. The defendant, however, is under no such restriction, and may show that it ought not to be executed. If, however, it can be enforced under the ordinary process, it will be assumed to be correct. But the Court can, in respect of the special application, examine the decree, and, if it be unjust, refuse its aid. Mitford, 97; 2 Dan. C. P., 1407; *Hamilton v. Haughton,* 2 Bligh, 169. As before remarked, the decree sought to be executed by these proceedings is still in force. We have examined it, and see in it nothing unjust or unequitable. The plaintiff, as trustee of John B. Wright, advanced the sum decreed him

for and on account of his *cestui que trust,* to quiet his title to the land in question, and there is certainly no injustice on his part in asking, or the Court in decreeing, the repayment of it. It was necessary for the plaintiff to ask the aid of the Court. New parties had become interested, namely, the defendants Bowden and Loftin, by virtue of their purchase from John B. Wright, after he had been duly declared not to be a lunatic. All these facts are admitted by the demurrer.

Demurrer overruled.

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(18)

WILLIS A. HAMLIN, ADM'R, *against* JAMES MEBANE, EX'R, AND OTHERS.

A delay of nineteen years and eleven months to sue for a legacy consisting in stock, connected with the fact that suit had been brought for other legacies claimed under the same will, and with the further fact that the stock had been sold publicly and the proceeds appropriated by the executor, who claimed as next of kin, authorizes a presumption of satisfaction or abandonment of the claim.

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

John B. Mebane, of the county of Chatham, devised and bequeathed to his daughters, Cornelia and Martha Anne, as follows: "I give and bequeath to my two daughters, Cornelia and Martha Anne Mebane, and their heirs forever, the following property, to be equally divided between them, agreeable to value, whenever either of them shall marry or come of lawful age; that is to say: all my land, with the appurtenances, lying on Hickory Mountain, in the county of Chatham; the whole of my negroes, with their increase until that time (if I mistake not, at this time thirty-two in number); and twelve shares of stock which I hold in the Cape Fear Navigation Company."

John Mebane and Joseph John Alston were named as executors in the will, and qualified. Cornelia married one Charles Hamlin, and died without bearing any children in the lifetime of her said husband Charles Hamlin, and before her sister Martha Anne, who is since dead. A record of the pendency of a suit by the husband of Cornelia against the executors of John B. Mebane, for the recovery of her part of the slaves bequeathed in the will of John B. Mebane (in which there is no allegation of claim for the stock), is filed as an exhibit in the cause. This bill is filed against James Mebane, the executor of John Mebane, and against Rives and Jackson, the executors of Joseph John

(19) Alston (which two, James Mebane and J. J. Alston, were the executors, as above stated, of John B. Mebane), by Willis Hamlin,

administrator of Cornelia, for an account, and for recovery of the twelve shares of Navigation stock, with the accruing dividends and interest on the same.

Mary Anne's share of the stock in question was sold at public auction to the highest bidder, by the executor of John Mebane, and the money collected and appropriated by him, as her next of kin, to his own use.

The defendants in their answer insist, among other things, upon the length of time and the circumstances as evidence that this claim had been paid and satisfied or abandoned.

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

Moore and *G. W. Haywood,* for plaintiff.
Phillips and *J. H. Bryan,* for defendants.

PEARSON, J. The plaintiff's intestate married in April, 1831; the bill was filed March, 1851; so that there has been twenty years, wanting one month, since the ward had a right to demand and it became the duty of the guardian to make a settlement. No explanation is offered for this delay, save that the intestate died some time during the year 1832, and her husband, who is the real plaintiff in this case, did not think proper to become administrator or procure any one to do so.

Surely the administration of justice would be "a trifle" if such an allegation could be passed off as an explanation for a delay of twenty years! A ward in socage, at common law, might bring his action of account against his guardian; but, as the mode of proceeding was dilatory and expensive, the Court of Equity offered a better remedy. A bill in Equity, by a ward against his guardian, is only a substitute for an action of account. The statute of limitations, 1715, bars the action of account after three years, saving the rights of *femes* (20) *covert,* persons *non compos,* etc. The act of 1795 provides: "If any orphan, coming to the age of twenty-one years, does not call on his guardian for a full settlement in three years, the sureties of said guardian shall be discharged; with a proviso for persons imprisoned, beyond sea, and *non compos.* There is no saving in favor of *femes covert,* for a very obvious reason: If the statute did not apply to cases where female orphans married, at least one-half of the number of cases, where the Legislature intended to discharge the sureties, would have been unprovided for.

The act of 1826 declares that all judgments, etc., after ten years, shall be presumed to be paid and satisfied, and all equities of redemption, and other equitable interests, shall, after ten years, be presumed to be satisfied or abandoned. In this statute there is no saving; it seems to

have been intended emphatically as a statute of repose. It is decided that this act does not extend to express trusts, or to claims for legacies or filial portions; and we do not now feel called on to say whether the case of a ward who fails to call his guardian to account is covered by it or not; for we prefer to put this case upon the fact that a delay of twenty years, wanting one month, together with the facts that soon after the marriage of the plaintiff's intestate her husband and the defendant's testator had cross actions in regard to the negroes claimed in her behalf, and that the bill does not mention that any other matter or thing was left unsettled; that soon after the death of John Mebane, in 1839, the defendant, as his representative, sold the twelve shares of stock as belonging to his estate, and that Martha's part of the stock (she dying after her sister) passed by succession to the said John Mebane. The lapse of time and the other facts and circumstances enable the Court to decide this case without going into some very nice points; *e. g.,*
(21) a guardian is bound to account at the age of twenty-one or marriage—the fact of marriage creates a disability; is that to rebut the presumption of a settlement? or does it not, in the nature of things, after so long a time, show that there must have been some arrangement or adjustment of the matters in controversy?

Without reference to a rule of presumption, or to a statute of limitations, we feel satisfied, viewing this as an open question of fact, that there has been a settlement or an abandonment of the claim in regard to the share of the plaintiff's intestate to the twelve shares of stock. There was no occasion for any entry upon the books of the company. The stock stood in the name of John Mebane, who was acting executor of John B. Mebane, and the plaintiff's intestate, or her husband, could abandon or release this claim under the will without a formal entry upon the books of the company, and no entry was called for until 1842, when the defendant, James Mebane, as the executor of John Mebane, sold the stock to Curtis.

Bill dismissed with costs.

Cited: Ward v. Ward, post, 336; *Davis v. Cotton,* 55 N. C., 435; *Hodges v. Council,* 86 N. C., 184-6; *Hall v. Gibbs,* 87 N. C., 6; *Headen v. Womack,* 88 N. C., 470; *Tucker v. Baker,* 94 N. C., 165; *Mull v. Walker,* 100 N. C., 51; *Alston v. Hawkins,* 105 N. C., 9; *Kennedy v. Cromwell,* 108 N. C., 3; *Faggart v. Bost,* 122 N. C., 521; *Norton v. McDevitt, Ib.,* 759; *In re Dupree's Will,* 163 N. C., 259.

THERESA WALLING AND OTHERS *against* ANTHONY BURROUGHS AND OTHERS.

In weighing the testimony of witnesses as to value, damages, etc., it is not necessarily erroneous to take the average of several witnesses who have deposed to different amounts.

CAUSE removed from the Court of Equity of MARTIN, at Fall Term, 1851, and was heard on exceptions to the Master's report, December Term, 1851; *vide* 43 N. C., 60. (22)

The case is stated in the opinion of the Court then delivered, and on the allowance of the exception to the report of the Master, the report was set aside, and the cause was referred back to the Master to state the account between the parties, with instructions to proceed upon the principle, "that the defendants are to be charged with the value of the timber while growing, as a rent of the timber."

In pursuance of the reference, a report was made to December Term, 1853, stating the balance due the plaintiffs, and concluding as follows: "These accounts have been made upon the principle that the defendants were chargeable only with the value of the timber while growing, as a rent for the timber. And that value has been gathered from the average estimate made of the same by John Watts, Finley W. Moore, and George H. Pippin, whose depositions are on file, and the substance of them given in the opinion of the Court. This report was excepted to by the defendants, on account of the mode stated by the Master of arriving at the value of the timber. The cause was again heard upon the exception at this term.

Rodman and *Donnell,* for plaintiffs.
Biggs and *Moore,* for defendants.

BATTLE, J. The defendants except to the principle by which the Master arrived at his result, in charging them with rent for the shingles, staves and ton timber, which they got upon the swamp lands of the plaintiffs. Upon this subject two witnesses were examined for the plaintiffs, and one for the defendants, of whom one for the plaintiffs, Mr. Moore, estimated the rent higher than the other two, whose estimates were the same. The Master took the average of the three, which is objected to by the defendants as being wrong in principle, and they insist that the weight of the testimony ought to have induced (23) the Master to adopt the lower estimate.

This objection we must decide to be unfounded, so far as the principle is concerned, upon the authority of *Morrison v. McLeod,* 37 N. C., 108. There RUFFIN, C. J., says: "The Master's mode of taking an average

cannot be said, we think, to be wrong in every case, as was argued; although it may not be right in every case. It is not liable to the objection urged against it, of being within the principle upon which verdicts have been set aside, where each juror fixed a sum, and the aggregate was divided among their number, and the quotient taken for the damages. For it is the duty of each juror to assess such damages as the evidence demands of his conscience and understanding, and neither more nor less, except so far as his mind may be influenced by the reasoning of his fellows. That, however, is very different from the considerations which may justly influence a juror or a Master in weighing evidence. For, suppose any number of witnesses with equal intelligence and integrity, and equal opportunities of knowing or judging (as far as can be discovered), to appear before a jury to depose to the value of a thing, or to the amount of damages, and to give two different estimates, how can a decision be made without splitting the difference between them? When there is an equal probability that the one is as much too low as the other is too high, is it not safe and reasonable to take the middle point between them? For it is never to be acted on unless there be quite an equality of credit to be given to each witness in every respect. If there be any means of discriminating between them, then the actual weight of each must govern." It seems, then, that the Master did not err in the principle which he adopted. Did he err in not making a proper discrimination between the witnesses? We think not. Mr. Moore, whose estimates were the highest, had a better opportunity (24) of forming a correct judgment than Mr. Pippin, and fully as good as Mr. Watts: in one respect, he had the advantage of both, as he bought a portion of the shingles got by the defendants, and he seems to have been better acquainted with the prices of all the articles in 1848 than they, for they speak principally of prices in 1847, without professing to know what they were in 1848, except that they were somewhat higher than they were the year previous. We cannot, then, say that the opinions of Messrs. Watts and Pippin are more to be relied on than that of the other witness, and we must therefore sustain the decision of the Master, and overrule the defendants' first exception thereto. The second exception being dependent on the first must necessarily fall with it. There being no other exception on either side, the report is in all respects confirmed.

Decree for plaintiffs.

Cited: Pilkington v. Cotton, 55 N. C., 241.

REBECCA WILSON *against* JOSEPH ALLEN, JR., AND SAMUEL C. EDWARDS, ADM'R.

1. Where one is made a party to a bill in Equity, *pro forma*, but has no interest in the questions involved in it, he may be examined as a witness by the adverse party.
2. Where an administrator *de bonis non* of a testator who has no interest under the will is examined in behalf of a legatee, and his deposition read, this is no equitable discharge of the principal defendant, who claims by a deed of gift from the testator, which is attacked for fraud.

THIS cause was removed by consent of parties from the Court of Equity of ROCKINGHAM, at Fall Term, 1853. The matters decided by the Court sufficiently appear from the opinion delivered by his Honor, the *Chief Justice.* (25)

Miller, for plaintiff.
Moore and *Morehead,* for defendants.

NASH, C. J. The plaintiff claims the slaves in question, under the will of her father, Joseph Allen, Sr., and the prayer is that the deeds from her father to the defendant, Joseph Allen, Jr., under which he claims the same slaves, may be called in and cancelled, and he decreed to surrender them to the plaintiff and account for the hires and for general relief. The bill alleges that the deed exhibited by the defendant Allen is a forgery, or, if it was executed by the old man, it was obtained from him by fraud and by practicing on his fears. The first question to dispose of is the one as to the admissibility of the deposition of the other defendant, Edwards, the administrator with the will (26) annexed of Joseph Allen, Sr. The rule is well settled that where a plaintiff in Equity reads in evidence the answer of a defendant, there can be no decree against him. To this rule there is this exception: that when the party has no interest, he may be examined. Edwards has no interest whatever in this controversy, as is manifest from the proceedings; but is made a party *pro forma,* being the representative of the testator: no decree can be had by the plaintiff against him. Adams' Eq., 364-'5. But it is insisted by the defendant Joseph Allen, Jr., that the plaintiff, by his own act, having discharged his codefendant, has discharged him. This is upon the ground that Edwards is primarily answerable to the legatees. It is certainly true that whatever discharges the party primarily accountable will discharge those who are secondarily so: for the reason that the first is answerable over to the second, and it is unreasonable that the claim in the first place should be enforced against him, who, though answerable, will be compelled to institute another suit against him who stands before him, and who is answerable

in the first instance; and equity abhors multiplying suits unnecessarily, but chooses to settle all the disputes between those interested in the subject matter when it can be done, and in its decrees always directs that the decree shall be performed by the party first liable, if he can perform it; and if not, by the party who is subsidiary. When, therefore, one is entitled to a contribution from another, or to an actual indemnity, the latter must be made a party; therefore, a bill cannot be sustained against a surety without joining the principal. Adams' Eq., 319; *Brooks v. Stewart,* 1 Beam., 512. If the party examined is primarily liable, the examination is an equitable release to both parties. *Lewis v. Owen,* 36 N. C., 290; *Burton v. Stamper,* 41 N. C., 14. If he is not answerable to the other defendant, he is discharged, but not his co-defendant.
(27) Adams Eq., 365. The answer of Joseph Allen, as we shall show in the further examination of this case, shows that he has no claim upon Edwards, either personally or as the representative of his father.

A question is raised by the bill, which we will dispose of first. It is charged that at the time the alleged bill of sale for the negroes in controversy was made, if at all, from Joseph Allen, Sr., the old man, from weakness of mind, was not competent to make a contract. The proof does not sustain the allegation. He was old and weakened in mind and body, from age and disease, but the proof does not show that it was to that degree as to render him incompetent to make a contract.

In his answer the defendant Joseph Allen states that, finding, contrary to his advice, his father would become the bail of his brothers Charles and Henry, he determined to settle his accounts with him. His language is: "and fearing the consequences, this defendant *demanded a fair* settlement of accounts with the testator, upon which settlement testator was found indebted to this defendant in the sum of fourteen hundred and twenty-five dollars, for which defendant *insisted* that he should execute a bond and confess a judgment at law upon it, or pay the money; that the bond was executed on 17 Feb. last (1849), and on the same day, but after the execution of the bond, upon reflection, the testator proposed to take up the bond, and in consideration thereof to execute to this defendant a conveyance of the negroes Frank, etc., and at the same time it was stipulated that the testator should live the residue of his days with the defendant, who was to attend him in such a manner as might be suitable to his age and infirmities." The answer also states, "that, to the best of defendant's memory, Samuel Allen and Elijah Allen were present, and possibly others, when the said bill of sale was executed: whether anybody besides the parties to it were present, he does not remem-
(28) ber. And again, it alleges that the sum of fourteen hundred and twenty-five dollars was made up, in the greater part, by the pay-

ments of money made by the defendant at various times for his father, and the residue of the said indebtedness arose from articles for himself and family, such as bacon, etc., and *for services and personal attentions bestowed upon, and to be rendered during the remainder of his life.*" This statement of the answer has some of the strongest badges of fraud upon its face, and *I* should have no hesitation in granting the plaintiff a decree for the negroes, and an account, upon it alone. The alleged bill of sale bears date 17 Feb., 1849, and the answer is sworn 3 Nov., in the same year—eight months. Can it be believed that, in that short time, the defendant had forgotten whether any person was present but the parties? The veil attempted to be thrown around this part of the transaction is too thin to deceive any one. It is evident that no one was present but Samuel Allen, the brother of the defendant. Again, in the statement of the alleged settlement, he is careful not to make any averment of a settlement. Upon this point, if false, an indictment against him could not have been sustained. In the statements he gives us no information as to the bond or the sum alleged to have been found due—whether he retained it or gave it up to his father; and in the absence of such averment, we should be at liberty in such a case as this to presume it had been retained by him. The defendant denies that to obtain the deed he used any influence. Influence is of different kinds, and when used for a nefarious purpose, is equally powerful to control the will. The influence may be of fear, apprehension and importunity. What were his declarations, as stated by himself? He *demanded* a fair settlement of their account, and *insisted* that he should execute a bond, and confess a judgment at law upon it, or pay the money. Was there influence used to work upon the apprehension and fears of the old man, confessed by the answer to be near if not quite eighty years old, broken (29) down by disease and mental torture? In *Twyne's case,* 3d part of Coke's Rep., 81, it was ruled that the deed in that case had signs and marks of fraud; and the third resolution is that it was made in secret, *et dona clandestina sunt semper suspiciosa:* and on the same page, in applying the statute of 13 Eliz. to the case, he advises that where a gift is made in satisfaction of a debt, by one who is indebted to others, "let it be made in a public manner, before the neighbors, and not in private; for secrecy is a mark of fraud." The defendant declares himself unable to say that any one was present beside the parties to the deed, and that his brother Samuel witnessed it. I repeat, then, that the answer is in itself sufficient to set aside the conveyance.

Let us now look into the proofs. The bill of sale has upon it no legal probate. It was admitted to probate upon the proof of the handwriting of the subscribing witness. The act of 1836, ch. 37, sec. 4, declares that where the subscribing witness to a deed conveying slaves is out of the

State, his deposition shall be taken, unless he be dead. Where the subscribing witness is, we are not informed, except that he has left the State, and there is no evidence of his death. As the defendant's whole claim rests upon that deed, we might have been justified in deciding the cause upon that point; but we have not chosen to do so, because a case of such utter baseness required a full examination.

The defendant says that at the time of the alleged settlement his father was indebted to him for money paid, etc. Upon examination of the proofs, we question whether his father owed him anything: or if so, the sum was small. Among the exhibits is a deed of trust, made by the old man 26 May, 1846, to George Simpson, of a tract of land, to secure a debt of $600, as due to Joseph Allen, the defendant. At that
(30) time, then, we have a right to presume that sum to be the amount which the father owed the son. It is not probable that, if the old man owed him in addition thereto the sum of $1,100, it would have been omitted in the trust. The testator died the last day of February, 1849. In the short space of two years and nine months we are called upon to believe that his indebtedness had reached the sum of $1,425. This is not to be believed. The only evidence of subsequent indebtedness are the hundred-dollar note in bank, paid by the defendant, and the two receipts from W. Donnell, a constable, in August, 1846, for $4.94, the other in March, 1847, for $3, contained in the constable's deposition, and paid by the defendant Joseph, and two judgments, amounting to about $500. In July, 1847, two months after the execution of the deed of trust, a contract in writing, and under the seals of the parties, was made between the father and the son, leasing to the latter a tract of land called the Indian town tract, at the yearly rent of $100, and to endure during the life of the old man. At the time of the old man's death in February, the defendant owed him rent for eighteen months, or $150. Again, 18 Sept., 1848, the old man sold and conveyed to the defendant a tract of land lying on the waters of Hogan's Creek, for the sum of one thousand dollars, for $300 of which he was to have a credit of three years, and the balance was consequently due immediately. This was six months before the father's death. These facts are mentioned to show the conclusion to which we have come, that the whole transaction, upon which the defendant relies, is a gross fraud.

We will now turn to an examination of the testimony in the case, and we venture to say that a more disgraceful and unprincipled case never was disclosed in a Court of Equity. The proofs all agree that at the time the alleged settlement took place, Joseph Allen, Sr., was eighty years of age; that he had been in declining health for some time, and
(31) confined to his bed, and though possessed of legal capacity was weak in mind.

In Mr. Edwards' deposition a reference to the bond for $1,425 is contained and identified; it is dated 14 Feb., 1849. On that day, he states, he went to the old man's house, and on his way met the defendant Joseph with the negroes in dispute; and on the same day he understood the other sons, Charles, Henry and Samuel, had taken off the negroes they claimed. He found the old man sitting up in a chair and unable to get to his bed. He called for some of the negroes to help him, and he neither saw nor heard any, and he was obliged to aid him himself. He describes his situation as loathsome in the extreme.

Mary Allen testifies that on the day preceding the night when the old man died Joseph Allen came to the old man's house and told him he had come to get him to confess a judgment. The old man said he was not able to go; he then said: "send my negroes home to wait on me." He wanted Lizzie to put clean clothes on him, for Elisha's wife was not able to wait on him; then said: "Joe, they tell me you have bills of sale for them; if you have, you know you have forged them, you, or any of the rest of them, for they are mine during my lifetime, and then they are Becky Wilson's." Joseph, Jr., replied: "Daddy, you know they are to be refund back." In answer to a question by the defendant, she stated that when the old man was told that his son Joe had taken the negroes off, he said he "must bring them back, he wanted them to wait on him, he had it to do": and he said it at different times.

Elisha Allen testifies that he knew nothing about any settlement or the old man's giving the bond.

The testimony is very voluminous, more than three-fourths of it as to the mental capacity of the old man and the character of the defendant Joseph and the different witnesses: only such portions of it are recited as bear upon the question of fraud.

It will be seen that the bond itself conflicts with an allegation (32) of the answer. The latter states that the bond and bill of sale were given the same day; the bond, on the contrary, bears date 14 Feb., and the deed on the 17th, and the testimony of Mr. Edwards shows that it was on the 14th that he met the defendant carrying off the negroes. The defendant further states that when the deed was executed that Samuel Allen was at his father's, and Elisha Allen also. If this was the fact, why was not the latter called on to witness the settlement of their accounts and the execution of the bond and the bill of sale? Was it not because the defendant knew that his brother Samuel Allen was about to leave the State and that Elisha would remain? Elisha in his deposition states that he knew nothing of any settlement or bill of sale; he was absent from home at the time. Again, it is proven by Mrs. Mary Allen and Elisha that the old man told Joseph, in their presence, the day previous to the night of his death, that if he had any bill of sale for the

negroes he had forged it. And what was his answer? Did he claim the negroes as his, by a purchase from him? No;—his answer was, "Daddy, you know they are to be refund back." It cannot be alleged that he was restrained by any sense of feeling for his aged parent's situation; for when he came he commenced by telling him that he had come to get him to go and confess a judgment.

But it is said that his father then owed him large sums of money—upwards of six hundred dollars. Mr. Thompson's deposition (a witness for the defendant) proves payments by the defendant for his father to the amount of four or five hundred dollars, and Mr. Mann and his wife prove declarations made by the old man that he did owe his son; but neither of them specify any amount. The payments proved by Mr. Thompson were made in the fall of 1846, near three years before the old man died.

Two objections arise as to the correctness of this charge by the
(33) defendant. The first is that, according to the answer of the defendant, they had a full and fair settlement 14 Feb., 1849; but a more effectual one is that of 18 Sept., 1848; the old man sold a tract of land to Joseph for $1,000, upon which he was to have a credit of three years, for $300. Now, from the disclosures of this case, we cannot for a moment believe that, with a valid, honest claim against his father for upwards of $600, he would have paid him $700. It cannot be. A man that can bring an account against a father for *attentions* to him while sick, certainly puts no ordinary value upon money.

We have looked carefully through the testimony on file in favor of the defendant. There is none of it calculated to show that the alleged purchase was a fair and *bona fide* one. We put very little faith in the testimony of either Mr. or Mrs. Mann. That of the former is in direct contradiction with the declarations of the old man, made to the defendant, on the day of his death, that if the latter had a bill of sale for the negroes it was a forgery: and with his orders to send them home, and his promise to do so. On the truth of Nancy Allen's testimony we cannot rely. She went to the place, where the deposition was taken, in the defendant's buggy with him, and states she never told him what she could prove, and *that they had no conversation during the ride about the suit.* She proves rather too much, and by doing so destroys the effect of her testimony. But let all this testimony be true, it does not show that any settlement took place between the father and son, as alleged, inferentially, in the answer of the latter; and admitting that the old man did execute the bill of sale for the slaves in contest, it is clear that it was not obtained for any valuable consideration, or *bona fide;* and believing from the whole testimony that it was fraudulently obtained, we are bound to declare that the defendant Joseph Allen is a trustee for the plain-

tiff, and answerable to her for the hire of the slaves from the (34) death of the old man: and the plaintiff is further entitled to a decree for the conveyance of the slaves to her with all their increase, if any, and there must be a reference to the Master, to take an account of the hires. A transaction more disgusting in its details, more revolting to humanity, and more pregnant with fraud, was never investigated in this Court. Mr. Donnell states that in 1846 the old man owned property to the amount of twelve or fifteen thousand dollars. This, for a man in his station, was a large property, and at the time of his death, in Feb., 1849, his negroes were all gone. He was old and broken down by anxiety and disease, and confined to his bed, and on the last day of his mortal existence, his four sons strip him of his last negro, and leave him in his filth and misery, to die the death of a brute!

We cannot refrain from expressing our disapprobation of the wide range taken in this case, in the examination of character as to the parties and to their relative property, and should a similar case occur, we shall be compelled to refer the depositions to the Master, to strike out all such questions, at the costs of the propounder of them.

On the hearing, many exceptions were taken to the relevancy of questions and answers, and the Court is, as in this case, called on to delay the hearing to dispose of them. Our usual practice has been, when the objections raised presented any difficulty, to reserve them. But we feel the force of the objection to this course, as calling upon the Court to examine testimony which is not competent. What effect it may have upon the mind of the most sound and correct, no man can answer. To remove this difficulty, we have adopted rules which we hope will remedy the evil.

Defendant Edwards is entitled to a decree for his costs. Decree for plaintiff against Joseph Allen, Jr.

PER CURIAM. Decree accordingly.

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(35)

ALVANY, A FREE WOMAN OF COLOR, *against* JOSEPH J. W. POWELL, EXECUTOR OF BENJAMIN DICKEN, AND OTHERS.

1. Where a person, by his will, gave his slaves their freedom, with directions to his executor to remove them from the State, and gives also to those slaves a sum of money, and one of them, a female, accepts the gift, and is preparing to go, but is prevented by her death from doing so, her representative is entitled to recover her share of the money.
2. Removing from the State is not a condition precedent to emancipation, but is a condition subsequent: by the nonperformance of which the newly acquired freedom may be forfeited. And so of the capacity to take property.

3. Where a bequest is made to a female slave of her freedom, and a sum of money, and she dies, her children, whether she was married according to law or not, are entitled to the money thus bequeathed.
4. A bequest of money "to all my negroes that I have or may have at my death" does not give an original share to a child with which one of the female slaves was pregnant at the time of the testator's death.

THIS cause was transmitted from the Court of Equity of EDGECOMBE, Fall Term, 1853, on affidavit of defendant.

Benjamin Dicken, of the county of Edgecombe, died in that county in the year 1851, having made his last will and testament, in which he bequeathed and directed as follows: "It is my will that all the negroes that I have, or may have at my death, shall be free, and for these reasons I give and bequeath to all my negroes that I have, or may have at my death, their freedom freely and cheerfully. My will is that my executor carry or send my negroes to some free State, say, 1st. Indiana, Illinois, or Ohio, or some Western State, or Middle or Eastern State, or St. Domingo, or the British West Indies. I further give and bequeath to my negroes nine thousand dollars, to be raised out of my money matters, say notes, bonds, money, accounts, etc.; and further, I give unto my negroes the three thousand dollars my friend Joseph J. W. Powell is to give for my land, or one-half of the proceeds of the sale of my lands, as the case may be." And the same testator further bequeaths, in
(36) another part of his will, as follows: "Fourth and lastly, all the balance of my money matters, after the payment of my just debts, notes, bonds, money, judgments, accounts, etc., I give unto my poor negroes, to be equally divided among them."

Also, by a codicil to said will, which was duly proved, made just before he died, he bequeathed all the balance and residue of his estate of every nature and kind, not before effectually disposed of, to his slaves.

The slaves mentioned in this will were sent out of the State, according to its requirements and of the laws of the State, except Mariah, the mother of the plaintiff, and one other who fled the country for an offence against the criminal law. Mariah, the plaintiff's mother, in due time intended to go also, and was making the necessary preparation to do so, but was prevented by her death, which occurred in Edgecombe County. She (Mariah) left three children, the plaintiff Alvany, Florence, who has since died in Canada, an infant under age, and John, who was born forty weeks and two days after the death of the testator, and died in August, 1852, in Canada.

Mariah and the defendants Isham and Carey were the children of Lettice, and were born during the time she cohabitated with a slave by the permission of the testator, which slave was recognized by her and her master as her husband, although not married by any form prescribed by law. In like manner, the plaintiff and her sister Florence were born

of Mariah, but at the death of the testator and since, Mariah had no husband, such as is tolerated by masters of female slaves, nor had had for several months previous to that event.

The plaintiff is a resident of Canada, and has a regular guardian of approved character, and in this Court sues by her next friend, Jesse H. Powell. She claims by her bill that the property bequeathed by the will of her late master, in the clauses of the will set forth above, is distributable among all the slaves, including John; or at all (37) events, her present share is to be ascertained by supposing them all entitled and that she is entitled to one-twelfth of all that is bequeathed by the testator to his slaves; that Mariah became entitled, notwithstanding her death, to a share of the estate, inasmuch as she had consented to go beyond the limits of the State, and to receive her freedom in the manner prescribed by the will, and was preparing to go, but was prevented from going by the act of God. She contends that Florence became entitled to a share, for she had removed and became free, and was domiciled in Canada; and that John was also entitled to a share, or one-twelfth. The plaintiff in her bill further contends that, on the death of Mariah, her estate became distributable among her children, and that, on the death of Florence and John, their shares became distributable among their next of kin, and that she, as such, is entitled to the whole of their portions. Mariah having died intestate in this State, before she had acquired a residence elsewhere, plaintiff contends that her estate is distributable according to the law of this State; and that Florence and John having died intestate in Canada, they are, by the law of that Province, regarded as persons born in lawful wedlock, and of next of kin to each other and to the plaintiff; and she further alleges, that, by the law of that country, if they are not regarded as born in lawful wedlock, still, being children of the same mother, they are entitled in the same manner as next of kin proper—it being a law there that bastard children take personal estate from their mother, and from each other, when there are no children born in lawful wedlock. So she claims to be entitled to one share in her own right, and to the shares of her mother Mariah, her sister Florence, and her brother John.

Joseph J. W. Powell, the executor of Benjamin Dicken, David Pender, the administrator of the deceased persons of color, Mariah, Florence and John, and the other persons mentioned in the will (38) as his slaves, that is, Jordan, Willis, Isaac, Ben, Nathan, Carey and Isham, are made defendants. The prayer of the bill is for an account of the assets, and for general relief.

The answer of Powell, the executor, insists that Mariah, having died before she complied with the terms of emancipation, as contained in the will, never had any capacity to take or hold property, and that her rep-

resentative, therefore, cannot recover; and that John was not of the class of persons described in the will as one of his slaves at his death; that John being a bastard, the plaintiff could not demand his share as the next of kin.

Pender, the administrator of Mariah and Florence and John, answered and concurred in the views of the plaintiff, as set forth in her bill and in her behalf. The bill was taken *pro confesso* as to the other defendants.

Replication was taken, and the cause set for hearing on the bill and answers and exhibits, and on affidavit removed to this Court.

Moore, for plaintiff.
No counsel for the defendants.

PEARSON, J. This case presents several new and very interesting questions; but, with the aid of the very full arguments with which we were favored, we have been enabled to arrive at conclusions that seem to be warranted by principle and general reasoning, and evidently meet the justice of the case.

It is the settled policy of our State not to allow negroes to remain here after they are set free; but the reasons upon which this policy is based by no means make it necessary to hold that they have not a capacity to take property until after they have left the State. Their removing is not a condition precedent to emancipation, but is a condition subsequent, by the nonperformance of which they may forfeit their newly acquired freedom. Indeed, a capacity to take, so far from being opposed to the policy above alluded to, is, in most cases, necessary as the means of giving effect to it, and of enabling the negroes with ease and comfort to provide a home for themselves and get to it. The object is to make them go away, so as not to add to the number of free negroes, and the law imposes no restriction and continues no incapacity, except so far as is necessary to accomplish that object. With this saving, the humanity of our laws strikes off his fetters at once, and says, go "enjoy life, liberty and the pursuit of happiness."

(39)

1. We are satisfied that Mariah, at the time of her death, with the restrictions necessary to compel her to leave the State, was, to all intents and purposes, a free woman, and had capacity to take property and transmit it, by succession, to her personal representative.

2. We are also satisfied that the children of Mariah were entitled to call upon her administrator to make distribution among them, as her next of kin, according to the statute of distributions; and we think it clear that all of her children are to be considered distributees, without reference to any peculiar state of things existing at the time they were

begotten. Our law requires no solemnity or form in regard to the marriage of slaves, and whether they "take up" with each other by the express permission of their owners or from a mere impulse of nature, in obedience to the command "multiply and replenish the earth," cannot, in contemplation of law, make any sort of difference. In regard to slaves and free negroes, there is no necessity, growing out of grave considerations of public policy, for the adoption of the stern rule of the common law, "a bastard shall be deemed *nullius filius*"—to have no parent, and not even to be considered the child of the mother who gave it birth. Therefore, we think that John, although the state (40) of things existing about the time of his conception was somewhat equivocal, was entitled to the same share of his mother's estate as the rest of her children.

3. Although the rights of John are not at all affected by the state of things existing at the time he was begotten, yet *the time of his birth* has a very important bearing; for here the matter does not depend on the forms and ceremonies prescribed by statute, but it grows out of the very nature of things, and there is nothing to relieve him from the application of the general rule (Co. Lit. B., ch. 2, sec. 2, 188, 123, 123b) to make a valid gift, there must be a *donor,* a *donee,* and a *thing given.* Now, in regard to John, at the death of the testator, at which time the gift must take effect, if it takes effect at all, he was not *in esse*: he was not capable of taking, and so, although there was a donor and a thing given, yet, in regard to him, the gift fails, because there was no donee: he did not then exist. We are therefore satisfied that, although John was entitled to a derivative share, yet he was not entitled to an original share.

PER CURIAM. Decree accordingly.

Cited: Howard v. Howard, 51 N. C., 236.

ZACCHEUS SMITH, ADM'R, *against* KITTY KORNEGAY AND OTHERS.

Where a demurrer for the want of parties is sustained, the bill will not be dismissed, but stand over with leave to amend, and be transmitted to the Court below, where the amendment will be made.

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

William Kornegay, Sr., died in 1837, leaving certain slaves to his wife, for life, or during widowhood, with a limitation over, after her death or marriage, to his five children, Nancy, Kitty E., (41)

Thomas, Winefred and William Henry, to be equally divided among them. Nancy married William Houston, is dead, and no administrator has been appointed.

The bill was filed by Zaccheus Smith, administrator of Winefred Kornegay and William Henry Kornegay, against Kitty Kornegay, the widow, Blaney Williams and William Kornegay, alleging that the widow, with the assistance of the two other defendants, were selling the slaves; and praying that a writ of sequestration and injunction might issue against said defendants. The demurrer was filed, set down for argument, and by consent of parties transferred to the Supreme Court.

Winslow and *W. A. Wright,* for plaintiff.
D. Reid, for defendants.

NASH, C. J. The demurrer in this case is for the want of parties. It is a general rule in Equity that all persons interested in the relief sought must be made parties, either plaintiffs or defendants, because a decree is asked for, and not a decision only, and because Equity seeks to arrange all the matter before it, and does not tolerate the splitting up of suits. It is also proper upon another ground connected with the last reason assigned, except in excepted cases, growing out of convenience and necessity. No one is bound by a decree to which he is not a party, but, as stated, the rule admits of exceptions. Thus, when the parties are too numerous, or are out of the jurisdiction of the Court, and that fact is stated in the bill. Adams Eq., 312-323; Calvert on Parties, 17-19.

The bill in this case is defective. It sets forth that William Kornegay, by his will, bequeathed to his widow, the defendant Kitty Kornegay, during her lifetime or widowhood, several negroes, with the re-
(42) mainder to her five children, to wit: Nancy, Kitty, Thomas, Winefred and William Henry; that Nancy married William Houston, and is dead, and no administration upon her estate has been had, and that Kitty is an infant. Neither the personal representative of Nancy Houston nor the infant nor Thomas Kornegay are made parties to the bill, and for this cause the defendants demur. The bill is filed for an injunction to restrain the widow Kitty Kornegay, the holder for life of the slaves, from selling or conveying them out of the State, and for relief. To the relief sought, the personal representative of Mrs. Houston and of Thomas Kornegay, and the infant Kitty, are necessary parties, because they are interested in the subject which the decree may affect, and because their claims are concurrent with those of the plaintiff, which, if not bound by the decree, may be litigated afterwards. Adams Eq., 314. The demurrer must be sustained, but as it is filed for the want of parties, the bill will not be dismissed, but stand over with leave to amend and be

transmitted to the Court below, when the amendment will be made upon such terms as may seem to it proper. *Gordon v. Holland,* 38 N. C., 362.

It is objected, however, that the Court cannot remand the cause, because it is not an appeal from an interlocutory order. The act of '48, ch. 30, provides that when a case in a Court of Equity is set down for hearing, upon any plea or demurrer, the Court shall have power, on sufficient cause shown on affidavit, to order it, before a hearing, to be removed into the Supreme Court. Iredell's Digested Manual, 147.

The act is loosely drawn: a plea or demurrer is not set down for hearing, but for argument, and in such cases the argument is on the plea or demurrer. The course, as before stated, is not to dismiss a bill upon such a demurrer, but to hold it over for amendment. Where is that to be made? Not here; for persons made parties, if defendants, must answer, or have a right to do so, and answers cannot be filed (43) here, for the cause must be set for hearing before our jurisdiction arises, except in cases of interlocutory order. In the Court below the amendment must be made, and upon such terms as may appear proper. Before the act of '48, where a demurrer was filed it could be brought here only upon an appeal after argument. That act, authorizing the removal, places it, when so removed, upon the same footing with an appeal, and we have seen that in the latter case, upon such a demurrer as this, if sustained, the cause must be remanded for amendment. Soon after the passage of the act of '48, it received a construction by this Court, upon this particular point, which is in accordance with the view above expressed. *Hart v. Roper,* 41 N. C., 349. If the bill had not prayed for relief, no amendment by making parties would have been necessary (Adams Eq., 312; *Tuscot v. Smith,* 1 McCord, 301-3), for the reason that each remainderman has the right to protect the property from waste or injury by an application to Chancery. More especially does this principle apply to the grievance complained of here—the removal of slaves by a tenant for life. These removals always take place fraudulently, often secretly and suddenly. If a remainderman was compelled to make all who are jointly interested with him parties, cases might and would often occur in which irreparable mischief might be done before the remedy could be applied.

In such a case as this, any one of the owners in remainder may file a bill to protect the property, for it is manifestly for the benefit of all. The plaintiffs will pay the costs of the suit.

PER CURIAM. Decree accordingly.

Cited: *Love v. Wilson, post,* 341.

(44)

WM. H. POINDEXTER AND ANNE ELIZA HIS WIFE AND MARY A. HUGHES *against* ISAAC N. GIBSON, EXECUTOR, AND OTHERS.

1. Where a fund is given for two purposes, one for the support and education of children, and the other for their better advancement in life upon their arriving at age, and where it does not appear from the will that if the former purpose should become unnecessary as to one or more of the children that the latter purpose should fail also, the division must be equal without regard to inequalities in previous expenditures.
2. Where an executor claims for attorneys' fees and other expenses, in defending a suit against the estate, they will be allowed, provided the defence ought to have been made, and that inquiry was directed to be made by the Master.

CAUSE removed from the Court of Equity of STOKES, Fall Term, 1853.

Isaac Nelson, of the County of Stokes, 4 July, 1820, executed his last will and testament, in which, after specific bequests of slaves to each of his five children, and after devising his real estate to his three sons, bequeaths and directs as follows: "It is my will, that my just debts be paid out of the debts owing to me; after raising my children, and giving them a good English education, together with the interest arising thereon, to be equally divided between all my children, at their coming of lawful age. And further, it is my will, that all my stock of all kinds, together with my household furniture, plantation, tools and all the remainder of my property, not named or otherwise disposed of, be sold by my executors, hereafter named, on a reasonable credit, and the money arising therefrom, to be equally divided amongst all my children (naming them) when they shall arrive at lawful age." Nine years after the making of this will the testator died, and Jeremiah Gibson, the testator of the defendant, Isaac N. Gibson, the executor therein named, qualified and proceeded during his life to execute this trust. Having made his last will and testament, he died in the year ——, before the provisions of the will, as contained in the foregoing extract, were carried into
(45) effect. The defendant, Isaac N. Gibson, qualified as the executor of his father, Jeremiah, and this bill is brought against him by the two daughters and their husbands, praying an account and settlement of the fund arising under the clause of the will above recited.

All the children of Isaac Nelson, the testator, were under the age of twenty-one, and but partially educated at the time of the making of his will. The plaintiff, Anne Eliza, however, finished her education, and was married to the plaintiff, William H. Poindexter, before he died, and the other female plaintiff, Mary S., was educated before his death, and was married to William R. Hughes shortly thereafter. The sons of the testator, Joseph B., Albert F. and Constantine H., were but partially educated at the time of his death; and a heavy claim having been put in

suit against the estate, which threatened to absorb this whole fund, the executor declined, towards the latter years of their minority, to apply this money towards their education, but it was furnished and paid for these years out of other estate belonging to them.

The answer of the executor discloses the fact that he has expended some of this fund in the payment of debts, of which there is a statement, and that he was at large expense in the way of attorneys' fees and court expenses in defending a suit brought against the estate by one John C. Blum, which was finally compromised at a much less sum than was originally demanded, but which sum he also paid out of these assets. He insists that these expenses ought to be allowed him. The other defendants insist that the intention of the testator was to distribute this fund among those only of his children who were under age and remained to be educated at the time of his death. Or, at all events, that the fund could not be distributed until the youngest child became of age, and then only such portion of it as remained after the reasonable expenses (46) of each for board, education, etc., were deducted.

There was replication to the answers, and exhibits filed, and the cause set for hearing, and removed by consent to this Court.

Miller, for plaintiffs.
Morehead, for defendants.

BATTLE, J. The plaintiffs, if they ever were entitled to the legacies which they claim, are not barred by the lapse of time, because the fund out of which they are to be paid could not be ascertained until the adjustment of the debt due John C. Blum, Clerk and Master, against the estate of the testator and others, in 1846 or 1847.

All the reasonable and proper expenses incurred by the executor, in defending the suit brought to recover that debt, ought to be allowed, if, upon enquiry, it should be found that any defence ought to have been made at all. The only question, then, presented for our determination is whether, upon a proper construction of the will of the testator, the *feme* plaintiffs were, at his death, or when they respectively came of age (if they were not so at the time of his death), entitled to any share of the fund which he had specifically appropriated, first, to the support, maintenance and education of his children, and then to be equally divided among them "at their coming of lawful age." At the time when the will was written and published the children were all young and stood in need of what was thus provided for them. But being of different ages, had their father then died, they would each have required a different amount to be expended upon him or her for the purposes mentioned, until he or she should reach the age of maturity. In that re-

spect, perfect equality could not well be attained, and the testator did not attempt it. In the events which happened, the testator lived nine
(47) years after the date of his will, and his daughters had completed their education, and one of them had married a short time before, and the other married just after his death. The sons had also, during that period of nine years, been supported by their father, and partially educated at his expense; but, as their education was not then finished, they now contend that they were entitled to the whole fund, to the exclusion of their sisters.

Their claim is not, we think, supported by a fair and just interpretation of the will. The fund was given for two purposes; one, for the support and education of all the children, and the other, for their better advancement in life after arriving at age. The latter purpose was as much in the contemplation of the testator as the former, and there is no condition or proviso in the will by which, if the former should be rendered unnecessary as to any one or more of the children, the latter should fail also. The division was to be equal, without any regard to inequalities in previous expenditures for maintenance and education. The share of each female plaintiff was, as we think, to be assigned when she came of age, because that was the time when it would be needed for the second purpose above mentioned, and no other time is fixed upon in the will. That such was the intention of the testator, as to the time of division, may be inferred also from the last clause of the will, where the residuary fund is given, on nearly the same terms, to be equally divided among all the children by name, and no plausible reason can be assigned why each should not have his or her share as he or she should arrive at full age. The main difficulty in the way of this construction arises from the smallness of the fund and its insufficiency of accomplishing the purpose of supporting and educating all the children; but we do not know what it would have been had the testator died soon after the making of his will, and his *intention,* which is to govern the construction, cannot be held to change with the varying state of his affairs. The construction
(48) contended for by the defendants, too, would defeat entirely one purpose of the bequest to the *feme* plaintiffs, and would operate unequally among the defendants themselves; each, as he came of age, losing all interest in the fund, until the youngest should arrive at that period; or had elder sons been supported and educated altogether out of that fund, it would have been exhausted before the youngest could receive his portion of it. This would not be either reasonable or just, and the postponement of the division until the youngest child shall come of age is admissible only when expressly required by the words of the will, as in *Gwyther v. Taylor,* 38 N. C., 323.

In *Armstrong v. Baker,* 41 N. C., 553, where a testator devised as fol-

lows: "It is my will and desire, that my whole estate, real and personal, except such as may be necessary to dispose of to pay my just debts, to remain together as joint stock of my beloved wife and children, and my farm continued under the management of my executor for their support and education, and that each one, if a son, shall receive his distributive share, when he arrives at the age of twenty-one; and if a daughter, when she arrives at the same age, or marries, always reserving my house lot as a residence for my infant children, and my beloved wife, during her natural life, or widowhood." It was held, that upon the marriage of the widow, during the non-age of the children, she was entitled to a share, and to have it withdrawn from the joint stock. But subsequently, upon the death of one of the infant children, that his administrator had no right to withdraw the share of such child, nor a ratable part of the profits, until he would, had he lived, have attained the age of twenty-one. *Petway v. Baker,* 44 N. C., 268.

Our conclusion, then, is that the female plaintiffs were entitled to their respective shares of the fund in question at the death of their father, if they were then of full age, or as they respectively came of age afterwards if they were not then of full age. They are entitled (49) to an account for the purpose of ascertaining the amount of the fund, in the taking of which the executor is to be allowed the sum he paid on the debt to John C. Blum, and the reasonable charges and expenses incurred in the defence of the suit brought to recover the said debt, if such defence ought to have been made—as to which the plaintiffs may have an inquiry if they desire it. The cause will be retained for further direction upon the coming in of the report.

Decree accordingly.

WILLIAM THIGPEN *against* JOAB P. PITT, LEWIS BELCHER AND REBECCA BELCHER, HIS WIFE.

Where a debtor makes a conveyance of land with intent to defeat his creditors, and they proceed to have the land sold, treating the conveyance as void, under the statute 13 Elizabeth, one who becomes a purchaser and takes a sheriff's deed has no right to call on a Court of Equity to have the fraudulent deed brought in and cancelled, upon the ground of removing a cloud from his title.

APPEAL from the Court of Equity of PITT, heard before *Bailey, J.,* Spring Term, 1853.

Joab P. Pitt, owning a large number of slaves, for a good consideration, duly executed to his children, Rebecca Pitt and several others, a deed of gift, conveying to them the slaves Ephraim, Charity, Betty, Jane, Dallas, and thirty-nine others, whose names are set forth in the convey-

ance, reserving to himself a life estate in these slaves, unless he
(50) might please to put his children in possession thereof before his death, which deed of conveyance was duly proven and registered. The daughter, Rebecca, above mentioned, in 1834, intermarried with the defendant, Lewis Belcher, and soon thereafter the father, Joab P. Pitt, put into the possession of his son-in-law, Belcher, the five slaves above-named, as his wife, Rebecca's, share of the forty-four slaves embraced in the conveyance above stated, which he, Belcher, thenceforth used and treated as his own property. The defendant Belcher carried on the business of merchandising from this time up to the year 1850, about which last period he became insolvent. On 5 Feb., 1850, the defendant Belcher made a deed of conveyance in fee-simple to his father-in-law, Joab P. Pitt, for a tract of land containing about two hundred and forty acres, including the dwelling house, etc., which is particularly designated in the deed; the consideration expressed in this deed is three thousand dollars, which is acknowledged therein to have been paid. No money was in fact paid by Pitt to Belcher for this land, or secured to be paid, and the only payment alleged was a deed of conveyance of the same date for the five slaves above spoken of, from Joab P. Pitt, to the defendant, Lewis Belcher; the consideration mentioned in this conveyance of the slaves is 3,000, and is expressed therein to be paid. On the same day Joab P. Pitt, the father, in consideration of natural love and affection, made a deed for the land thus conveyed to his daughter Rebecca Belcher, the other defendant in this cause.

Lewis Belcher, being indebted to the plaintiff upon dealings through the four or five preceding years, on 9 January, 1850, gave his bond for a balance of $591.43, upon which a judgment was taken, at May Term, 1850, of Edgecombe County Court, and a *fieri facias* issuing thereupon, was placed in the hands of the sheriff of Pitt. At the same term of this County Court, one Redmon Dupree, another creditor of Belcher,
(51) obtained a judgment for his debt, and a similar execution, issuing upon the same, was likewise placed in the hands of the sheriff of Pitt County. These two executions were levied upon the land that had been thus conveyed from Belcher to Pitt, and from Pitt to his daughter Rebecca (Mrs. Belcher), and being exposed to public sale, was bought by the plaintiff, and a deed made to him by the sheriff for the same, which is the land in controversy. The fact of Belcher's embarrassed condition was known to Pitt, the father-in-law, at the time of the conveyances in February, 1850.

The bill alleges that the deeds made by Belcher to Pitt, and from Pitt to his daughter Rebecca, were fraudulent and void as to him; that the conveyance of the slaves, as consideration for this first deed, amounted to nothing, for that, according to a proper construction, the defendant Pitt

had no interest in them, but that by any construction that might be put on it, he had but a life estate in them, which, considering his great age, was not worth more than $500.

The defendants answer and deny the fraudulent intent; they say that, by a proper construction of the deed of Pitt for the slaves to his children a life estate was reserved to him, and a contingent interest besides, which they value together at $2,200—fully, as they say, equal to the value of the land conveyed to Pitt by Belcher.

Joab Pitt, and Lewis Belcher and his wife Rebecca, are made defendants. Replication was taken to the answer, and proofs, on the various points raised in the pleadings, are filed in the cause; but these, from the view of the matter taken by the Court, are unnecessary to be set forth.

The prayer of the bill is that the deeds from Lewis Belcher to Joab Pitt, and from him to his daughter Rebecca, may be declared void and may be decreed to be surrendered for cancellation, or that Rebecca Belcher may be declared a trustee and account to the plaintiff for the overplus in the value of the land in question, after deducting what (52) may have been really paid for the land by her father, and a general prayer for relief.

Upon the hearing of the cause below, his Honor declared the deeds above set forth fraudulent and void, and ordered that the same be surrendered to the Clerk and Master for cancellation, and that Belcher and his wife Rebecca make a deed in fee-simple of all the interest they might have in the premises; also, that the defendants Belcher and his wife surrender possession of the land in question to the plaintiff, and that the Clerk and Master enquire as to the profits, etc., from which decree the defendants appealed to this Court.

Biggs, for plaintiff.
Moore and *Rodman,* for defendant.

PEARSON, J. The decree has a contradiction upon its face. It declares that the plaintiff, "by his purchase and sheriff's deed, has a valid legal title," and then orders the defendants Belcher and wife "to execute a deed conveying the land to the plaintiff in fee- (55) simple." If the plaintiff has the title, upon what ground can he come into a Court of Equity and ask for that which he already has? So his prayer for a conveyance is inconsistent with the allegations in the bill. Suppose it to be true that the deed from Belcher to Pitt is fraudulent and void as to creditors; and that the judgment and other proceedings, under which the plaintiff purchased and obtained the sheriff's deed, are all regular; then, according to the plaintiff's own allegations, he has the title, and the Court cannot give him that for

which he asks, because he has it already. A purchaser of a trust estate, under the act of 1812, which gives him the legal as well as the trust estate, might just as well apply to a Court of Equity for a conveyance from the trustee; or a bargainee, with a deed enrolled, according to 27 Henry VIII, might as well come into this Court, and pray to have a conveyance from the bargainor. These statutes, *proprio vigore,* pass the title, and supersede all necessity for applying to Equity.

Upon the second argument, Mr. Biggs conceded this point, and he also very properly abandoned the alternative prayer that the defendant Rebecca might be declared a trustee for the plaintiff of any balance of the value of the land, "if it shall be found that the defendant Pitt and the said Rebecca are entitled to any interest therein," for then it is a mixed trust, not liable to be sold at execution sale, under the act of 1812, and so the plaintiff would take nothing. *Page v. Goodman,* 43 N. C., 16; *Gowing v. Rich,* 23 N. C., 553. The case is thus narrowed down to this question: A debtor makes a conveyance of land, with intent to defeat his creditors; they proceed to have the land sold, treating the conveyance as void, under 13 Elizabeth; the plaintiff becomes the purchaser, and takes the sheriff's deed—has he a right to have the fraudulent deed cancelled, upon the ground of removing a cloud from his title?

(56)

This is a new question, and we thought it proper to have the benefit of a second argument. Mr. Biggs has applied himself to the subject with his accustomed diligence, during the last six months, but he has failed to satisfy us that there is such an equity in favor of his client. Upon the argument of general principles, it was clear that the matter was too heavy for him to carry, and too weak to carry him; and, taking the entire range of the English Reports, and all of the United States, his diligence has only enabled him to find a *single case* in which a Court of Equity has ever entertained such a bill. That case will be noticed below. We will here, however, make this general remark: Considering the infinite number of sales that have been made by sheriffs, and how very desirable it would be, in all cases, for purchasers at such sales to have "the cloud" removed from their title, the fact that but a single case can be found in which the aid of a Court of Equity has been invoked for that purpose proves, almost conclusively, of itself that there is no such jurisdiction.

We will premise also, that, in this case the purchaser happened to be one of the creditors at whose instance the land was sold. That circumstance does not vary the question. The relation of creditor terminated by the sale, which satisfied the debt so far as this property is concerned, and he now sues in his character of purchaser, and of course the questions are the same as if any other person had become the purchaser.

Although a remedy at law is given to creditors by 13 Elizabeth, Equity still has jurisdiction to protect them against the fraud of debtors. Story Eq. Jur., 370, says: "These cases of interposition in favor of creditors being founded upon the provisions of positive statutes, the question was made at an early day whether they were exclusively cognizable at law, or could be carried into effect also at (57) Equity?" The jurisdiction of Courts of Equity is now firmly established, for it extends to fraud, whether provided against by statute or not. Indeed, the remedial justice of a Court of Equity, in many cases arising under the statutes, is the only effectual one which can be administered; as that of Courts of Law must often fail from the want of adequate powers to reach or redress the mischief. 1 Fontblanque, 276, says: "Although regularly, for cases within the statute, relief must be had at law, yet if goods are given to defeat creditors, in such a case, as the gift is not avoidable by the statute, the party may be relieved here; for this Court determined concerning charities and frauds long before any statute made concerning the same."

In cases not within the operation of the statute, a resort to Equity is the creditor's only remedy; for instance, if a debtor buys property, with an intent to defraud his creditor, and has the title made to a third person, the statute does not apply, for to make the deed void, would put the title back in the original vendor, and relief must be had in Equity. *Gowing v. Rich,* 23 N. C., 553.

In cases within the operation of the statute, Equity exercises a concurrent jurisdiction on two grounds: 1st. Before the statute, Equity relieved creditors by putting out of their way fraudulent conveyances of debtors. The necessity of resorting to Equity in all cases was found to be inconvenient and expensive, and the object of the statute was to give creditors the same remedy, by enabling them to avoid such conveyances by a direct proceeding at law. After some hesitation, it was settled that the remedy given by the statute was cumulative, and did not oust the jurisdiction before exercised by Courts of Equity; it being a rule not to decline jurisdiction because a statute provides a like remedy at law, unless it be expressly taken away.

2d. The remedy provided by the statute declared the conveyance void: still, the question of fraud or no fraud remaining (58) open at the time of the sale, the property, in consequence thereof, was not apt to bring its full value; so the jurisdiction in Equity might still be beneficially exerted, for by it a creditor who had a judgment and execution so as to have a lien could obtain a decree declaring the fraud and putting the deed out of the way, and thus the property could be brought fairly into the market and bring its value—whereby the creditor would be entirely relieved from the effects of the fraud which

the debtor had attempted to practice upon him. Creditors, therefore, have an election either to proceed under the statute and have the property sold under execution and applied to the satisfaction of their debts, or to ask for the relief which is given in Equity.

Our inquiry is: suppose the creditor elects to proceed under the statute, and has the property sold and applied to the satisfaction of his debt, is there any ground upon which the purchaser can apply to a Court of Equity to have the fraudulent deed cancelled?

Admit the allegation of fraud, and the effect of the application is to bring into Equity a dry question of law. As to the regularity of the judgment and levy, and other proceedings under which the plaintiff purchased, the points presented are often very interesting, but obviously of such a nature as are fit to be decided by a Court of Law.

The question is, upon what peculiar ground can a purchaser at sheriff's sale force upon a Court of Equity the decision of a pure legal question? Neither of the grounds upon which a concurrent jurisdiction is assumed in favor of *creditors* has any application to the case of a purchaser at sheriff's sale. There is no intimation in the books that such a jurisdiction was exercised before the statute. Clearly, there is no necessity for it, in order to make the property sell for a fair price, for the sale has already been consummated and the purchaser will (59) hold the property, whether it sold for little or much; so the Equity cannot be put upon the ground of making the debtor's property go as far as it can in paying his debts. The rule must be general in its application: Suppose a creditor, by reason of a fraudulent deed, and the sale being forbid, buys for $10 property worth $10,000; has he the same footing in a Court of Equity as if he had, in the first place, filed a bill in behalf of himself and the other creditors, in order to have the cloud removed whereby $10,000 instead of $10 would have been raised for the payment of the debts? If so, will any creditor hereafter apply until the property has been bought by him for little or nothing? Equality is equity, and this Court seeks to encourage any mode by which the property of a debtor is ratably distributed among his creditors, and will leave to his remedy at law one who disregards that rule.

What ground can be suggested in support of such a jurisdiction? It is said fraud is involved, and in all matters of fraud Equity has concurrent, and in some, exclusive jurisdiction. Without stopping to inquire into the correctness of this proposition, so broadly expressed, it is sufficient to say no fraud was practiced upon the purchaser. A fraud was aimed at the creditor; he avoided it by means of a statute; and not until it is so avoided does the purchaser appear upon the scene of action. Indeed he acquires his title upon the assumption

that the conveyance of the debtor had been nullified by the proceeding of the creditor. It is a strange idea for the purchaser to stop short in a proceeding which had been thus far at law and turn around and come into a Court of Equity upon the ground that a fraud had been attempted to be practiced upon another person, and the idea becomes absurd when we consider that he comes into Equity and asks to have that done which a statute has already done.

Again, it is said that a purchaser at sheriff's sale represents both the debtor and creditor, and has the rights of both. This is a general proposition which is sometimes used for the purpose of illustration, but is calculated to mislead when adopted as the ground (60) from which to deduce a proposition of law. The debtor has no right; for, as against him, the deed, although fraudulent, is valid.

The right of the creditor is exhausted by his proceeding under the statute, and having the property applied to the satisfaction of his debt; so the purchaser must derive his right from a sale made by the sheriff, in pursuance of a statute which declares the fraudulent deed void as to creditors, and authorizes them to have the property sold.

Again, it is said that although the deed is void, yet its existence "casts a cloud" on the title of the purchaser, and he has an equity to have it removed. It cannot fail to occur to every one that this complaint about the "cloud" comes with an ill grace from the purchaser. The effect of it is to injure the creditor by causing the property to sell at an undervalue. The matter is, however, disposed of so far as he is concerned. He has sold the property and received the price, and is therewith content. What right has the purchaser to complain? He bought the property with the cloud on it. It may be, that in consequence thereof, he was able to get it at an undervalue. Having thus taken the benefit of the cloud, or, at all events, having taken upon himself the risk, what equity has he to have the cloud removed? A high sense of morality would induce him to accompany his prayer with an offer to pay the real value of the property to the creditors, because they were the persons injured by the cloud, and consequently ought to be the persons benefited by its removal. But a Court of Equity does not attempt to enforce this refined morality, because it reaches too far for practical purposes. Apart, however, from this consideration, the case of a purchaser at sheriff's sale does not come within the application of the principle by which a Court of Equity, in particular cases, decrees a deed to be canceled for the purpose (as it [is] sometimes fancifully expressed) of removing a cloud (61) from the title. With regard to deeds which are void at law, but which are voidable in equity, because unduly obtained, we are at present not concerned. The application of the doctrine of cancellation to deeds, which may be avoided at law, is very limited. If the party is not in a

situation to sue in a Court of Equity, he contents himself by perpetuating the evidence, to be used afterwards at law, if occasion should make it necessary. To induce the Court to go farther and to grant relief by having the deed canceled, as a general rule, two things must concur: the person asking relief must be the party directly injured by the deed, and the title apart from the deed must be admittedly in him and not liable to dispute. This rule is a deduction from a consideration of the cases and the reason of the thing. So that the case will be confined solely to matters bearing upon the deed complained of. For, if his title must be passed on, the case will present a dry question of law. And without these restrictions, all questions of legal title would be drawn into Courts of Equity. For the sake of illustration: A alleges that B, by fraud, deduce, or some other illegal means, has obtained a deed from him, which, although void and of no legal effect, is calculated to cast doubt upon his title. Here both requisites concur: he is the party injured; his title apart from the deed is admitted, and he may ask the interference of a Court of Equity to have the deed canceled and the "cloud removed"; jurisdiction being assumed upon the ground that the ends of justice are not met by a judgment in ejectment, owing to its want of conclusiveness, or by perpetuating the testimony, and the party is entitled to be *relieved entirely from the effect of the deed so obtained, and to be placed in statu quo,* which can only be done by putting the deed out of existence; for, although in no danger from its direct effect, he is injured consequentially by the doubt cast upon his title.

So, as we have seen above, a creditor who has obtained a judg-
(62) ment and execution, finding that the property of his debtor, which is subject to execution, has been fraudulently conveyed, is not obliged to proceed under 13 Elizabeth, but may ask the interference of a Court of Equity, to have the fraud declared and the deed canceled, so that the property may be sold for its value. Here both requisites concur: the creditor is the party injured, and, apart from this deed, his judgment and execution, without question, entitle him to have the property of his debtor sold for the satisfaction of the debt. The Court uniformly refuse to entertain a bill, unless the creditor has a judgment, and has issued execution. For debt, or no debt, is a question of law, and the Courts will not try it, unless where it arises in some case where it has jurisdiction under a well established head of equity, as in a creditor's bill for an account.

In regard to a subsequent purchaser of land for value, under 27 Elizabeth, there may be some doubt as to the application of the doctrine of cancellation. If his contract is executory, he clearly has relief, by a bill, for a specific performance. *Buckle v. Mitchell,* 18 Ves., 100; Adams Eq., 146. But if he has obtained a conveyance, his title is valid at law,

and he cannot ask for the title, because he already has it by force of the statute, and if he asks to have the fraudulent deed canceled, the difficulty is, that in respect to the two requisites, he occupies a middle ground. The fraud was aimed at him, but his title is liable to dispute, and it must be passed on before the Court can deal with the fraudulent deed. This presents a dry question of law, and interposes an obstacle to the exercise of the jurisdiction. But however this may be, in regard to a purchaser at sheriff's sale, it is clear that the doctrine does not apply. His case has neither of the requisites. The fraud was not aimed at him. His title is liable to dispute, and must be passed on. So the Court cannot take jurisdiction without undertaking, in the first instance, to adjudicate a question of legal title—sometimes a very difficult (63) one, as in a sale upon a constable's levy; and this assumption would virtually supersede the action of ejectment, as a mode of trying title; for, carried out to its consequences, it leads to this: any one in possession, whether he has been let in, or has recovered in ejectment, may file a bill alleging that he has title, but that another pretends to have it, which pretension casts a doubt on his, and ask the Court to decide which of the two has the better title; and in case his proves to be so, that the deed of the other may be canceled: putting his right to the relief on the ground that the judgment in ejectment, not being conclusive, leaves a cloud upon his title. This is precisely the case of a purchaser at sheriff's sale. He alleges that he has acquired a title, but that the donee of the debtor pretends to have it, and asks the Court to decide between them, upon the ground that the action of ejectment is not an effectual and adequate remedy. This is a novel attempt to extend the jurisdiction of equity, and have it to try and dispose of a pure, legal question.

The action of ejectment has been heretofore considered the appropriate mode of trying a title. The fact of the judgment not being conclusive has its advantages, for it is frequently desirable to have such questions tried a second and even a third time, and the disadvantage is not often felt practically; for, in that action, the plaintiff must recover on the strength of his own title, and the party in possession need show no title until his adversary has shown a title in himself, good against the world, so far as it then appears to the Court; and when it is felt, the party has his remedy by "a bill of peace"—"a jurisdiction growing out of a defect in the action of ejectment, because, from its peculiar nature, it is not conclusive: thus originating a necessity for the interference of a Court of Equity, to put a stop to litigation which is useless and purely vexatious"; Adams Eq., 202; Mit., 143. But this intention to harass must be made manifest by frequent actions. This (64) is as far as Courts of Equity have ever gone, and in so doing, they do not profess to try the title, but declare that the title having been es-

tablished by repeated decisions at law, further litigation is vexatious. A Court of Equity never decides a question of legal title, except when it arises incidentally, and stands in the way of the decision of a cause in which it has jurisdiction upon some other distinct ground, as in a bill for a specific performance by the vendor if the vendee objects to the title. If the purchaser at sheriff's sale is let into possession, he may have the evidence perpetuated, or in a proper case, he may have a bill of peace: but the doctrine of cancellation cannot be let in so as to sustain his case. So much on principle and general reasoning.

By way of authority, Mr. Biggs referred to *Henderson v. Hoke,* 21 N. C., 119. That was a bill by a purchaser at sheriff's sale, for the purpose of having a deed *re-executed,* to the end that it might be registered, and the equity is put upon the ground that, by the fraudulent destruction of the deed before registration, the plaintiff could not in an action at law make out his chain of title. So *Ayres v. Wright,* 43 N. C., 230. A man had obtained credit by showing a deed from his mother-in-law to him, and by making a deed of trust upon the property: after the sale the good lady got back her deed and refused to allow it to be registered. Of course a Court of Equity would protect the purchaser from such a palpable fraud aimed at him. These cases do not bear upon the point, but *Frakes v. Brown,* Black., 295, is a case directly in point. It is evident the attention of the learned Judges was not directed to the question. They, as well as the gentlemen of the bar, seem to have taken the question of jurisdiction for granted. And upon consideration of the case, and looking into the cases decided at the same term, it is clear
(65) they hold that a purchaser at a sheriff's sale has a remedy by action of ejectment; and it occurred to us that possibly the application of Equity in that case grew out of the fact that there might have been some doubt as to whether the widow, before alimony decreed, was a creditor under 13 Elizabeth. The conveyance being made after a *fiat* in the cause restraining the husband from making a conveyance, suggested the resort to Equity. Let this be as it may, we certainly do not feel authorized, upon the strength of a single case, to open a new head of Equity jurisprudence, for which there seems to be no necessity—in support of which there is no consideration of equity, and against which there is a strong public policy—because it is always best to hold out inducements to creditors to have the title declared before the sale, so as to let the property sell for a fair price and pay off the debts as far as it will reach.

PER CURIAM. Bill dismissed with costs.

NASH, C. J. (*dissentiente*). I do not agree with my brethren in this case. To me their opinion appears to be a departure from principle.

The jurisdiction of a Court of Equity, in matters of fraud, is not questioned. That the case before us discloses a gross case of fraud, between the elder Pitt and his children, will not be denied, and the plaintiff, one of the creditors intended to be defrauded, prosecuted his claim to judgment, had the execution levied on the property so conveyed, and became himself the purchaser. The bill is filed to call in and have canceled the deed made to the defendant Pitt. The power of a Court, in the cancellation of deeds fraudulently obtained, is recognized by every writer on equity jurisprudence, and is not now disputed; but my brethren deny that it applies to a case like this—of a purchaser at a sher- (66) iff's sale.

Justice Story, in his treatise on Equity Jurisprudence, sec. 698, observes that the question has often arisen how far Courts of Equity ought to interfere to decree deeds or other solemn instruments to be delivered up and canceled which are utterly void and not merely voidable. The doubt rested upon the principle, that a Court of Equity will not interfere in a case where a Court of Law can give full and adequate relief. In sec. 700, he states, whatever doubts or difficulties may have been entertained formerly upon this subject, they seem by the most modern decisions to be put to rest, and the jurisdiction is now maintained in its fullest extent; and he further remarks that the decisions are founded on the principles of equity being not merely remedial, but also preventive of injustice. If an instrument ought not to be used or enforced, it is against conscience to retain it, as he can do so only for some improper purpose. If it be a deed purporting to convey lands and other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud. *Honeywood v. Dimmsdale,* 17 Ves., 111; *Pierce v. Webb,* 3 Bro. C. R. and Mr. Betts' note, and the authorities cited by Justice Story. The principle is that the paper, while it exists, is always liable to be improperly used, and may be so used at such a distance of time that the proper evidence to repel it may have been lost. *St. John v. St. John,* 11 Ves., 535; *Hamilton v. Cummings,* 1 John C. R., 524. In the language of Lord Eldon (17 Ves., 111): "I conclude that there is a jurisdiction in this Court to order a deed forming a cloud upon the title to be delivered up, *though that deed is void at law,* more especially where the deed is not upon its face void. The first question presented by this case is, does the conveyance made by old Mr. Pitt form such a cloud upon the title of the plaintiff to the premises in question as to bring his case within the general principle? If so, is there anything in the case of the plaintiff to take it out of the operation? As to the first: (67) the conveyance from Belcher to the father, and from him to his daughter, being to defraud his (Belcher's) creditors, is void both in law and in equity, but its fraudulent character does not appear upon its face

—there all is apparently fair—and its objectionable character is manifested by extrinsic circumstances dependent upon parol evidence, and is susceptible of being used by the grantee at any time, in opposition to the title under which the plaintiff claims. It is then a cloud.

The second point is the important one upon which, with great deference, I differ with my brethren. To me it appears perfectly plain that the plaintiff is entitled to the aid of this Court. It is not denied that any one of the creditors of Belcher, at the time the conveyance was made to Pitt, and from Pitt to his daughter, could have maintained a bill for the relief here sought; but it is insisted that a purchaser at the execution cannot. *First,* because no case can be found in the English Reports of such a bill. I have been able to find no such case, and the learned counsel for the plaintiff has produced none. It is always gratifying to me, in the discharge of my official duties, to find in those able Reports cases which investigate principles contested before the Court, and when they decide a question, I am ever inclined to take them as my guides. But, though the absence of authority is often a good reason for not establishing a precedent, it has never been considered as imperative, and there is good reason why purchasers in England should not resort to chancery when they can get at law a redress which, though not complete, may be satisfactory. The delays and expenses of a chancery suit there may well dispose a person, having a case examinable in both Courts, to pause before throwing himself into the latter. But the absence of au-
(68) thority can only throw us back upon our own resources, as to the principle and reason of the case. Upon this point, however, I am not without authority to sustain my opinion. Our attention was drawn to the case of *Frakes v. Brown,* 2 Black., 295. The substance of that case is: a Mrs. Jones obtained a divorce from her husband Reuben Jones, and a decree for $500 as alimony. An execution to raise the money was issued and duly levied on the land in question, as the property of Jones, the husband, and the plaintiff became the purchaser. During the pendency of the suit for the divorce, Jones, the husband, to evade any recovery for alimony, fraudulently conveyed the land to Frakes. The bill was to set aside the conveyance to him as fraudulent and void, and the Court sustained the bill, though demurred to, and so decreed. I have always understood that the decisions of the Supreme Court of Indiana are of high authority in her sister States.

It is further objected, that the plaintiff does not come into Court under such circumstances as to entitle him to favorable regard—that, knowing the existence of this cloud, he pressed his claim against his debtor to judgment, and purchased on speculation—that he ought to have filed a creditor's bill, so as to have shared the fund with them all. He certainly might have done so, but I know of no principle in equity which required

him to do so. Mr. Adams, at page 480, says: "One creditor may file his bill, if he pleases, praying payment of his own debt, but the more usual course is for one or more of the creditors to sue for all. Upon this point, therefore, I conclude that the plaintiff could have filed his bill alone for the payment of his debt, without joining the other creditors, upon the principle *vigilantibus non dormientibus servat lex.* It is not denied that a creditor, under such circumstances, may file his bill, not only to subject the property so fraudulently conveyed, but also to call in and have canceled the conveyance forming a cloud upon his title.

In this case the plaintiff was a creditor of Belcher, and is also a (69) purchaser, and it seems strange to me that as soon as he clothes himself with the latter character he bares himself of the former. A purchaser at a sheriff's sale purchases subject to all the equities existing against the defendant and attaching upon the lands sold, and I should think is entitled to all the equities to sustain his title. The purchaser necessarily represents and stands in the shoes of the creditor. *Reed v. Kinnaman,* 43 N. C., 13; *Johnston v. Cawthorn,* 21 N. C., 32. It is true in this case the plaintiff had ceased to be a creditor—by his purchase his debt was paid—but if the doctrine established in the above cases be sound, and by his purchase he was clothed with the equity of the creditor, I repeat I cannot conceive by what principle he is stripped of the former. Suppose he had not been a creditor, but had at the time of the sale been ignorant of the cloud hanging over the title, would the doors of the Court of Chancery be closed against him? I think not. Yet the opinion of my brethren must go that length. Again, suppose the plaintiff, instead of purchasing as he has done, had for a fair price and valuable consideration purchased from the fraudulent donor, his title would have been good, though made with a knowledge of the fraudulent conveyance. *Clawson v. Burgess,* 17 N. C., 13; *Freeman v. Eastman,* 38 N. C., 81; *Buckle v. Mitchell,* 18 Ves., 111. Both of the last cases were upon titles acquired upon voluntary settlements, involving no question of actual fraud; yet the purchaser, for a fair and *bona fide* consideration, was aided in a Court of Equity, and in the latter Sir William Grant observed: "If a settlement were shown to be really fraudulent, in the ordinary acceptance of the word, I presume it would not be contended that the Courts would, out of regard to such settlement, refuse to give the party purchasing, *with* notice, the benefit of his contract." (70)

These cases are cited to show that a purchaser from a fraudulent grantor or donor will be aided by a Court of Equity in protecting his title, although he purchases with full notice of the fraudulent conveyance. And in *Walker, in re,* 1 Atk., 94, and in *Oxley v. Lee, Ib.,* 625, the same principle is declared by *Lord Hardwicke,* where the deed forming the cloud is accompanied with circumstances of fraud. If,

then, a purchaser for a full consideration from a fraudulent donor can ask and receive the aid of a Court of Equity in removing a cloud on his title, though he had full notice at the time of his contract of its existence, I cannot see why a purchaser at an execution sale of the same premises, under a judgment against the same donor, though having notice of the fraudulent conveyance, is not entitled to the same equitable relief. I think, then, that I am justified in concluding that, as a general principle, the purchaser of real estate under an execution sale acquires all the equitable rights of the creditor, the plaintiff in the execution, and is subject to all equities in the hands of others.

It is further said that if the conveyance from Belcher to Pitt, and from him to his daughter, were to defraud, hinder and delay his (Belcher's) creditors, it was valid at law, and that therefore there was no necessity for the plaintiff to come here. He could effectually both defend himself in an ejectment brought by the fraudulent donee and could recover the possession from him. This question is answered by *Lord Hardwicke,* in *Bennet v. Musgrove,* 2 Ves., 51. His language is: "Where a subsequent purchaser, for a valuable consideration, would recover the estate, and set aside or get the better of a fraudulent voluntary conveyance, if that conveyance were fairly made (he is speaking of a voluntary settlement), *without actual fraud,* the Court will say: take your remedy at law." But where the conveyance is attended with actual fraud, though they might go to law by ejectment
(71) and recover the possession, they may come into this Court to set aside the conveyance. Sug. Vendors, 475.

But again, it is said that to allow the plaintiff in this case to come into a Court of Equity to remove this cloud would be to reward him for a course of conduct not just to the other creditors of the defendant; that the premises purchased by him ought to have formed a common fund to be appropriated to their several debts, and that he purchased under this cloud and ought to be content with the title a Court of Law would secure him. It might have been made a joint fund, if the other creditors had chosen to take the necessary measures; but they did not, and it has been shown that the plaintiff was under no obligation, equitable or legal, to take care of them. Nor can I consent to consider the plaintiff in this case as a speculator, any further than every purchaser at a sheriff's sale may be so considered. No man purchases either at public or private sale but for his own benefit, either in the use of the property or on a resale; and in that sense the law encourages the speculation. If there be but one single bid, no matter what proportion it bears to the real value of the property, the sheriff may sell, and the purchaser acquires a good title, if there is no fraud between the officer and the purchaser. Executions are the end and spirit of the law, and it is of

the utmost importance, both to debtors and purchasers, that the rights of each should be protected. While, therefore, the law forbids all illegal combinations to cause the property to sell at an undervalue, it, at the same time, creates a free competition among those disposed to buy. In some respects, the purchaser stands upon higher ground than the creditor. The latter, before he can raise the the question of fraud against a party claiming the property adversely, must reduce his claim against his debtor to a judgment at law, thereby establishing the justice of it. *Hafner v. Irwin,* 26 N. C., 532. A purchaser satisfies (72) the law when he shows a judgment and an execution and a sale under it. He has nothing to do with the creditor's original claim. While, therefore, we guard against the danger of multiplying suits in Equity, it will be well to consider whether we shall not be introducing a greater evil by lessening the confidence of purchasers in titles acquired under execution sales. Will it not, on the contrary, encourage competition at such sales, in giving confidence to bidders, by showing them that they can not only protect themselves at law against the claims of a fraudulent donee, but that equity will aid and assist them in removing the cloud upon the title so created, and not leave them to the casualties of time and loss of evidence? Years might elapse in the case of a female infant, to whom a parent makes a conveyance of property to defraud his creditors, before a purchaser at sheriff's sale might be called on to litigate his title in a Court of Law, Considering the evil pointed out by my brethren, as ensuing upon the establishment of the principle contended for by me, as problematical only, and that attempted to be shown by me as certain, and that the former, if certain, is not to be compared in importance with the latter, I should not have hesitated between the two; but, believing as I do, that the preventive power of a Court of Equity extends to the plaintiff's case, I am compelled, however reluctantly, to dissent from my brethren.

Cited: Nelson v. Hughes, 55 N. C., 39; *Heilig v. Stokes,* 63 N. C., 615; *Southerland v. Harper,* 83 N. C., 204; *Hancock v. Wooten,* 107 N. C., 22.

NICHOLAS W. ARRINGTON, ADM'R OF FREDERICK BATTLE, *against* JAMES S. YARBROUGH AND OTHERS.

A wife who survives her husband is entitled to her equitable choses in action that have not been reduced to possession by her husband, although he may have assigned them by deed *bona fide* and for value.

CAUSE removed from the Court of Equity of FRANKLIN, at Fall Term, 1853.

The bill was filed by the plaintiff, as the administrator of Frederick Battle, alleging that certain questions were raised between his widow and her children, and others claiming under them, that made it unsafe for him to distribute the estate. He alleges, particularly, that the distributive share to which his daughter Mary Ann would be entitled was claimed by James S. Yarbrough, by virtue of an assignment of her late husband, Thomas E. Yarbrough, who had given him notice of his claim, and warned him not to pay the same to Mary Ann, but demanded the same for himself. The bill also alleges that Thomas E. Yarbrough and his wife Mary Ann had been advanced in certain slaves mentioned in the bill, in the lifetime of the intestate, and he prays the advice of the Court, and asks that the several parties may state their titles and interplead with each other, and litigate their opposing claims to the end that justice may be done to each, and the plaintiff saved harmless in distributing the estate of his intestate, and that an account may be taken of his administration.

James S. Yarbrough, and William H. Battle, administrator of Thomas E. Yarbrough, Mary Ann Yarbrough, widow of Thomas E. Yarbrough, Temperance Battle, the widow of Frederick Battle, and the rest of the children of Frederick Battle, were made parties defendant. Subsequently to the commencement of the suit, Mary Ann Yarbrough intermarried with James C. Green, who was made a party defendant with his wife.

(74) The answer of James S. Yarbrough states specifically and at large the nature and consideration of the assignment made to him by Thomas E. Yarbrough, and insists that it was *bona fide* and for value.

Mary Ann Yarbrough (now Green) admits the negroes put into possession of her former husband, Thomas E. Yarbrough, to have been advancements, and submits that the estate of her father shall be allowed for the same out of her share; also, that she and her husband were further advanced in cash, horses, cattle and other articles of personal property, of which she states the value. She denies the equity of the claim set up by James S. Yarbrough, and says that it was either given as security for a very small sum, or was obtained by fraud and imposition, from her husband, or to act as a power of attorney; and as to that not reduced to possession by her husband in his lifetime, she claims the same by survivorship, notwithstanding the assignment of her husband, the said Thomas E.

The answer of W. H. Battle, the administrator of Thomas E. Yarbrough, claims the unrealized part of Mary Ann's distributive share of her father's estate, in his representative character, and insists that the assignment thereof was intended as a mere authority to enable him to

settle with the administrator of the father-in-law. He alleges that the negroes put in the possession of Thomas E. Yarbrough and his wife, though intended at first as advancements, were subsequently divested of that character by being conveyed by deed to the children of Thomas and Mary Yarbrough (which deed is filed), and he insists that the distribution shall therefore take place, with such part subducted from the mass of Frederick' Battle's estate.

The answer of Mrs. Temperance Battle, the widow of Frederick, explains this part of the transaction, and alleges it as intended to cover the property from the creditors of Thomas, and done at his instance and that of his wife Mary Ann, and insists that these (75) negroes shall be treated as advancements and accounted as part of their distributive share.

There was replication and commission, and much proof taken in the cause; but as the view taken of the case renders the consideration of it unnecessary, it is for that reason omitted.

Moore, for plaintiff.
Miller, Lanier and *Winston,* for defendants.

BATTLE, J. It is now a well established principle of Equity that if a married woman become entitled during her coverture to a legacy, or to a distributive share of an intestate's estate, and her husband die without having reduced it into possession, or done anything equivalent thereto, the wife will be entitled to it, and may recover it to her own use. *Garforth v. Bradley,* 2 Ves., Sr., 675; *Carr v. Taylor,* 10 Ves., Jr., 578; *Schuyler v. Hayle,* 5 John's Ch., 196; *Revel v. Revel,* 19 N. C., 272; *Hardie v. Cotton,* 36 N. C., 61; *Poindexter v. Blackburn, Ib.,* 286; *McBryde v. Choate,* 37 N. C., 610; *Rogers v. Bumpass,* 39 N. C., 385; *Weeks v. Weeks,* 40 N. C., 111; *Mardree v. Mardree,* 31 N. C., 295. Should the legacy or distributive share not be paid or delivered over to the purchaser by the executor or administrator, he cannot recover it at law, either in his own name or in the names of himself and wife, but must proceed in the names of himself and wife by a bill in equity, or by a petition in a Court of Law in the nature of a bill in equity, under sec. 5, chap. 64, Rev. Stat., entitled, "An act concerning filial portions, legacies and distributive shares of intestates' estates." If the husband die leaving his wife surviving after bill or petition filed, but before decree, the legacy or distributive share will survive to the (76) wife. *Bond v. Simmons,* 3 Atk., 21; *Adams v. Lavender,* 1 Mc. and Y., 41. Such it seems would be the result if the husband died even after a decree but before it was put in execution. *Nanny v. Martin,* 1 Eq. Ca. Ab., 68; *McCaulay v. Phillips,* 4 Ves., Jr., 15. Notwithstand-

ing the opinion of *Lord Thurlow* to the contrary in *Heygate v. Annesley,* 3 Bro. Ch. Ca., 362. These authorities clearly show that upon the death of Thomas E. Yarbrough, the first husband of the defendant, Mrs. Green, her distributive share in the estate of her deceased father, Frederick Battle, survived to her, unless her right to it was defeated by the assignment, under which the defendant James Yarbrough claims it.

A very important question arises: whether that assignment, supposing it to be *bona fide* and for a valuable consideration, did have that effect. We have considered the subject with much attention, and with an anxious desire to come to a correct conclusion upon it, and an examination of all the cases to which we have access has satisfied us that in England it is now settled, upon principle and authority, that a husband cannot assign, even for value, a greater interest in his wife's equitable choses in action than he has himself; that is, the right to reduce them into possession during the husband's life, subject to the contingency of their surviving to her, should the assignee not have done so in the lifetime of the husband. We are aware that an impression has prevailed in this State that a different rule has been established here. We are aware, further, that the impression alluded to has apparently the sanction of several *dicta* of our Judges; but as neither the industry of the counsel for the assignee nor our own researches have enabled us to find a single adjudicated case in opposition to the English rule, we feel ourselves not only at liberty but bound to adopt it as being more just and better supported by principle than the one for which the (77) counsel contends.

In England the nature and extent of the interest of the husband in his wife's equitable choses in action, and of his power of disposing of them, have for a long time occupied the attention of the Court of Chancery. At first the subject did not seem to have been well understood even by the ablest equity Judges, and hence we find among the earlier and even among some of the later cases conflicting *dicta,* as well as opposing decisions. We do not deem it necessary to review the cases in detail, because it has been so recently and ably done in 3 Bell, Husband and Wife, ch. 2, sec. 3 (67 Law Lib., 62). The doctrine now established is well summed up in Adams Eq., 142: "It has been contended that a husband's assignment of his wife's choses in action should exclude the wife's right by survivorship, on the ground that such an assignment implies a contract to reduce the chose into possession, and is equivalent in equity to such a reduction. This proposition was first overruled in respect to bankruptcy, and it was decided that, whatever might be the right of purchasers for value, the assignees in bankruptcy were entitled to no such equity. It was next overruled

as to all assignments, although for valuable consideration, if the chose were reversionary and therefore incapable of present possession, leaving the question still open whether, if it were capable of immediate possession, or became so during the coverture, the wife should be excluded. The principle is now extended to all cases, and it is held that, although the husband's contract for value may, as between himself and the assignee, be equivalent to a reduction into possession, yet, against the wife, who is no party to the contract, it cannot have that effect." For these positions the author refers to several late cases which we find, so far as we have the books at hand to examine them, to be apposite to the purpose for which they are cited. It is worthy of remark, too, that no cases to the contrary are referred to by the editors (78) (Messrs. Ludlow and Collins) of the second American edition. Indeed, the learned editors have not subjoined any note to the page upon which these propositions are found.

We come now to the examination of cases which are supposed to have established a contrary doctrine in this State. The first in the order of time is *Knight v. Leak,* 19 N. C., 133. That was the case of a *vested legal remainder* in the wife in a slave, which the Court held might be sold by the sheriff under execution against the husband, because he had the right to sell it himself, and thereby completely to transfer it to the purchaser. In arguing, the Court said: We understand the effect of an assignment by the husband of his wife's equitable interest in a chattel, in which she has not the right of immediate enjoyment, to be different, for such assignment would not prejudice her right, should he die before her, and before the period allotted for such enjoyment to take effect. *Homsley v. Lee,* 2 Madd., 16; *Perdew v. Jackson,* 1 Rus., 1; *Honner v. Martin,* 3 Rus., 65. The next is *Poindexter v. Blackburn,* 36 N. C., 286. There a legacy was given to the wife, which had not been received by the husband nor disposed of by him in his lifetime, and the Court decided that it survived to her, saying, "a legacy given to a married woman, or a distributive share falling to her during coverture, and not received by the husband nor disposed of by him in his lifetime, survives to the wife." *Howell v. Howell,* 38 N. C., 522, which came before the Court upon a bill for a writ of sequestration, was the case of a bequest of a female slave to one for life, remainder over to a married woman, and the executor assented to the legacy, and the husband afterwards sold the slave; the Court decided, as they had often done before, that the assent of the executor made the remainder a vested one, and they then go on to show that "Jesse Spurling, the husband, had such an interest in (79) the woman Jude and her children as enabled him to sell and convey them, and that his vendee acquired by his purchase, the transaction being freed from other objections, a complete title; and that Mrs. Spur-

ling (the wife) had no interest in them, and consequently no claim to the aid of this Court. We are not unapprised that in some recent cases in the English Courts of Chancery this doctrine is denied as a principle of equity. Such we consider, however, as the settled law of North Carolina." In *Rogers v. Bumpass,* 39 N. C., 385, the Court decided that where the husband gave his bonds to the administrator of the father of his wife, of whose estate she was a distributee, the bonds being given for certain purchases made at the administrator's sale, and also for money lent to him out of the funds of the estate, there being no agreement that these were to be regarded as payments of the distributive share of the wife, the wife, after the death of her husband, was entitled to recover the whole of her distributive share. In coming to this conclusion, the Court said: "A debt, legacy or distributive share of the wife is under the control of the husband, so far as to enable him to release, assign or receive them. His release extinguishes them, and the collection of the money vests it in him as his absolute property. But if, in his lifetime, he neither releases, conveys nor receives her choses in action, but leaves them outstanding, they belong to the surviving wife." In *Weeks v. Weeks,* 40 N. C., 111, there was an expectant legal interest of the wife, not assigned by the husband in his lifetime, and the Court said: "Although the husband may assign or release his wife's choses in action, or convey them during the coverture, they undoubtedly survive to her or her representative." In *Mardree v. Mardree,* 31 N. C., 295, the Court said: "A distributive share, accruing to the wife during the coverture, does not vest in the husband, but will survive to the wife, unless
(80) received into possession by the husband." They held, however, upon the particular circumstances of the case, that the husband had reduced his wife's distributive share into possession, and consequently that it belonged to him.

From this review of the cases to which our attention was called by the counsel, and some others which we met with ourselves, it manifestly appears that there is not one in which it has been adjudicated that the husband's assignee, for value of his wife's equitable choses, can claim them against the surviving wife. Some of the expressions used by the Court which we have quoted may seem to imply that such was the opinion of the Judge who decided them; but even as *dicta,* they may well be regarded as enunciations of a general rule, without its being deemed necessary to advert to the exception to or modification of it. The cases mainly relied upon by the counsel to establish the position for which he contended were *Knight v. Leak,* 19 N. C., 133, and *Howell v. Howell,* 38 N. C., 522, *supra.* In the first of these the *dictum* shows only what we admit: that the assignment by the husband of his wife's equitable interest in a chattel will not prejudice her right, should he die before

her and *before* the period allotted for such enjoyment to take effect; but it does not pretend to go further and say what would be the rule should the husband die before the wife and *after* the period allotted for her enjoyment to take effect. The propositions are distinct, and have both been decided in favor of the wife in England, and we can see no good reason for holding here that the admission of one of them in favor of the wife necessarily implies the rejection of the other. In the other case, of *Howell v. Howell* we do not know that we understand what the Court meant when they said, "we are not unapprised that in some recent cases in the English Courts of Chancery the doctrine is denied as a principle of equity." What doctrine? And what was intended by the Court when they said, further, "such, however, we consider (81) as the settled law of North Carolina." We certainly can find nothing in what precedes or what follows these sentences to make out more than a mere conjectural *dictum* that the doctrine for which we contend was disavowed.

There are one or two other very recent cases which may seem to militate against the English principles to which we have referred, but which certainly are not adjudications against it, and may, we think, be shown to be consistent with it. In *Allen v. Allen,* 41 N. C., 239, it was held that in this State a wife has no right, either as against her husband or his assignee for value, to have a provision made for her by a Court of Equity out of a distributive share accruing to her during her coverture. And further, that the husband is not at liberty to make a voluntary disposition of such distributive share, even in trust for his wife, so as to prevent it from being liable to his creditors. The first part of the decision, relating to what is called the wife's equity for a settlement, had been made before, in *Bryan v. Bryan,* 16 N. C., 47, and *Lassiter v. Dawson,* 17 N. C., 383. It is admitted to be in opposition to the rule well settled in the English Courts of Chancery and adopted by most of the States of this Union. The policy of our rule is very fully discussed and ably vindicated by the Chief Justice, RUFFIN, who delivered the opinion of the Court in *Allen v. Allen,* and it is not now to be questioned. The doctrine for which we contend is not at all opposed by the latter proposition decided in that case, but is rendered in some degree necessary by the first. We do not deny that the husband, or assignee of the husband in his lifetime, may reduce the wife's equitable choses in action into possession, and thus make them his own: so may the creditors; and to that extent only goes the decision of which we are speaking, as well as the subsequent one in *Barnes v. Pearson,* 41 N. C., 482. The wife cannot resist the attempt of her husband, his assignee for value or his creditor to get possession of the legacy or distributive (82) share accruing to her during coverture and thus deprive her of it.

If the husband die before he succeeds, the wife's right survives to her. What good reason is there why the same result should not follow from his dying before his assignee or his creditor had succeeded in his attempt? Why should the husband be able to transfer to another a greater right or interest than he has himself? We deprive by our rule the wife of her equity for a settlement: why go further and deprive her also of her benefit of the right of survivorship in her own property? It is by no means a consoling answer to tell her that our law provides handsomely for her out of her husband's estate: that may do very well where the husband has anything to leave, but it is but mockery when he dies greatly indebted or insolvent.

Let us ponder for a moment and enquire whether there is any fixed principle of equity which must of necessity operate so harshly against the right of the wife in such cases. In deciding *Honner v. Martin, ubi supra, Lord Lyndhurst* threw out a *dictum* that equity considered the assignment of the husband as amounting to an agreement that he would reduce the property into possession; it likewise considered what the party agreed to do as being actually done, and therefore, when the husband had the power of reducing the property into possession, his assignment of the chose in action would be regarded as a reduction of it into possession. Principles of equity are, or ought to be, founded upon the most refined and exact principles of justice; they ought to be as near as human frailty will permit the very elements of justice itself. Now, we cannot see any justice in the principle that, while the husband cannot himself acquire the wife's equitable choses in action without reducing them into possession, he may by a *mere agreement* in favor
(83) of an assignee for value produce such a result. We cannot see the justice, refined or otherwise, of the Court of Equity not only assisting a purchaser to aid the husband in depriving his wife of her rights, but actually resorting to a sort of magic to do it at once, instantaneously, by a mere agreement to which the wife is no party. We are therefore not surprised to find that such a doctrine could not commend itself to the enlightened mind of *Vice-Chancellor Shadwick* in *Ellison v. Elwin,* 13 Sim., 309; of *Vice-Chancellor Bruce,* in *Ashby v. Ashby,* 1 C. M., 553, and of the judges in the other cases referred to by Mr. Adams. Our conclusion is that the wife's right to her distributive share of an intestate's estate survives to her, if not reduced into possession by the husband or his assignee for value in his lifetime. It must therefore be declared in this case that neither the defendant Yarbrough nor the defendant Battle, as the administrators of Thomas E. Yarbrough, deceased, are entitled to the distributive share of the defendant, Mrs. Green, in her father's estate.

The only question which remains to be considered is: whether the

slaves which were put into the possession of the first husband of Mrs. Green by her father are under the circumstances stated in the pleadings to be charged against her as advancements. From the difficulty which might otherwise have attended this question we are relieved by her fair and candid answer. She admits that they were intended by her father as advancements to her, and she submits that they may be charged against her by the administrator of her father in the distribution of his estate. The plaintiff is entitled to a decree to have an account taken of his administration of his intestate's estate, under the direction of the Court, and that he may settle with the parties entitled to distributive shares in the same, upon the principles above set forth. The costs of the plaintiff will be paid out of the estate of the intestate. (84) The other parties will pay their own costs.

Decree accordingly.

Cited: Brandon v. Medley, post, 316; *Bryan v. Spruill,* 57 N. C., 28; *Harrington v. McLean,* 58 N. C., 137; *Gilmore v. Gilmore, Ib.,* 287; *McLean v. McPhaul,* 59 N. C., 16; *Grissom v. Parish,* 62 N. C., 332; *Moye v. Petway,* 76 N. C., 329; *O'Connor v. Harris,* 81 N. C., 282.

WYATT MOYE AND LOUISA HIS WIFE *against* BENJAMIN MAY.

(Former opinion reaffirmed, *see* 43 N. C., 131.)

This case was heard in this Court at December Term, 1851, and the opinion of the Court then delivered by Mr. Justice PEARSON, and is reported in 43 N. C., 131, and on the petition of defendant's counsel was reheard at this term.

Moore, with whom were *Donnell* and *Rodman,* for plaintiffs.
Biggs, for defendant.

PEARSON, J. The opinion in this case, directing the bill to be dismissed, was delivered at December Term, 1851, 43 N. C., 131, and the petition to rehear was not filed until after June Term, 1852; but a decree has not been signed and passed. If that had been done, the petition to rehear would certainly come too late. Cooper Eq. (96) Pl., 91; Story Eq. Pl., sec. 421. Whether, when the decision is simply that the bill shall be dismissed, a decree to that effect will be considered as drawn, signed, passed and recorded as of the time when the case is decided, so as to preclude a petition to rehear, we will now determine, because the case has been fully argued upon the merits, and as

we are satisfied there is no error, we prefer to put our present decision on that ground.

The opinion under review admits the conclusion of Judge Story, that when there is a change of domicil, the law of the *actual domicil,* and not that of the matrimonial domicil, will govern as to all future acquisitions of movable property, and the decision is put on the ground that there are peculiar circumstances which take the case out of the operation of that general rule. These circumstances are the indebtedness of Speight in this State, and his marriage in this State, whereby, according to our laws, he acquired rights in the property that his wife might afterwards acquire, which he could not relinquish or convey to a trustee for the separate use of his wife, without committing a fraud upon his creditors. For, although they had acquired no specific lien, yet the law protected them against any voluntary conveyance of the debtor, and our inference is "that his adopted State could not by a statute do that for him which he could not do himself, without being guilty of a fraud"; and we conclude that there is no principle in the doctrine of the comity of nations by which this State is called upon to stand by and see her citizens deprived of the right to collect their debts out of property within her jurisdiction, by an act which, if done by the debtor himself, would be deemed fraudulent and void. Nay, more, by which she is called upon to set aside her own laws for the purpose of carrying into operation a statute of another State, having this effect. And we go on to
(97) challenge the production of any authority or any fair reasoning by which such a principle can be established, and the case of *Oliver v. Townes,* 14 Martin, 97, is cited as going farther than our decision in support of the rights of creditors who are citizens, in this: our case was a contest between a creditor and a *volunteer;* that was a contest between a creditor and a *bona fide purchaser for full value.*

Mr. Moore admits that he has not been able to find any authority opposed to our conclusion, and it was apparent from his very learned argument that he had pushed his researches to the extreme. But he assailed our reasoning, and denied that the conclusion was a legitimate deduction from the premises. He also relied upon certain analogies as opposed to our conclusion.

As to the reasoning, he admitted that the debtor could not, without a fraud upon his creditors, relinquish his marital rights in favor of his wife, but he insisted that it did not follow that the State of Mississippi could not do it for him by a general statute, and he took a distinction between the conveyance of the debtor and a statute. The one is the act of an individual, having a particular operation, in fraud of certain persons who are his creditors. The other is the act of a State, having a general operation. He says it is true a citizen of North Carolina

cannot, as against his creditors, relinquish his right to the future acquisitions of his wife, but if North Carolina had in 1839 passed a statute to that effect, its operation would have extended to debts then existing; and if North Carolina could have passed such a law, it follows that the State of Mississippi could do it also. It seems to us this conclusion, in its application to the case under consideration, is *a non sequitur*. Admit that North Carolina could have passed such a law in regard to her own citizens and property within her own limits, does it follow that if she deems it inexpedient to do so the State of Mississippi can do it for her? (98)

North Carolina may pass a law that the estate of a deceased debtor shall be paid to his creditors ratably, without regard to the dignity of their debts. Suppose she passes no such law, but the State of Mississippi does, and a citizen of that State dies, leaving property in this State, how will creditors in this State be paid? *Mr. Moore* is compelled to admit that the administration of the assets will be according to the dignity of the debts, the law of Mississippi to the contrary notwithstanding. This admission sweeps off the whole of his reasoning, and shows the fallacy to consist in not distinguishing between the effect which a statute in Mississippi has in regard to creditors and property in this State, and that which it has in regard to creditors and property in that State.

By way of analogy, *Mr. Moore* put several cases and cited many from the books. Among others, he put this: A citizen of another State, where by law a wife is entitled to the whole of the estate as distributee, dies, leaving a widow there, and leaving children who reside in this State and are indebted to certain of our citizens. Will his administrator here be directed to pay over the property which is in this State to the widow, according to the law of the domicil of the intestate, or will he be directed to pay a part of it to the children here, according to our Statute of Distributions, because, in that way, our citizens who are the creditors of the children may secure their debts? Most unquestionably the widow would be entitled to the whole of the estate. But we are not able to perceive the analogy.

A more apposite case would be this: A citizen of our State becomes indebted here, and removes to a State, where by law, in the event of his death, his widow is entitled to one-half of his estate, in preference to creditors; he dies, leaving his debts here unpaid, and leaving (99) property here; will his administrator here be directed to apply the whole of the assets to the payment of his creditors, or to pay one-half to the widow, leaving debts unpaid?

Certainly there is nothing in the doctrine of the comity of nations that would induce our Courts to give a preference to the widow, in ex-

clusion of our own citizens who are creditors. He also put this case: Suppose a citizen of Mississippi marries a lady there who has a slave in this State; the slave being a chose in possession belongs, by our laws, to the husband. Can his creditors here attach the slave for the debts of the husband, or in case of his death, would his administrator take the slave as assets for the payment of debts?

We are not now called upon to decide this question.

The counsel, throughout the entire argument, seemed to forget that in our case there are certain antecedents. Suppose the man lived here, contracted debts here, married here, and then removed, and the State of Mississippi then passed a statute securing to wives all property that they might become entitled to by "conveyance, gift, inheritance, distribution or otherwise," and the mother of the wife dies in this State, leaving her a negro, and the husband comes here and reduces him into possession, and dies, leaving the slave in this State. There you have our case.

We are entirely satisfied that the administrator of the husband is chargeable with the slave as assets for the payment of debts.

PER CURIAM. The petition to rehear must be dismissed with costs.

Cited: Robinson v. Lewis, 55 N. C., 26.

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(100)

ANSEL A. BARNES AND WIFE *against* WILLIAM R. STRONG.

1. A contract between a father and son, made during the pendency of a suit against the father, whereby the son agrees to defend the suit for the father, in consideration of receiving a part of the property in controversy, in case of success, is void, as coming within the prohibition of the common law against champerty.
2. A specific relief will be granted under a general prayer, when such relief is consistent with the specific relief prayed, and according to the admitted facts in the case.

CAUSE removed from the Court of Equity of ROCKINGHAM, Fall Term, 1853.

An action of detinue was pending in the Superior Court of Law of Rockingham, in the name of John C. Mingus, trustee of A. D. Jones, against one Robert Strong, for the recovery of several slaves. During the pendency of this suit, Robert Strong and his son William R. Strong, the defendant, entered into a contract in writing, of which the following is a copy:

"Memorandum of an agreement made and entered into 25 May, 1848, between Robert Strong on the one part and William R. Strong of the

other part, all of the county of Rockingham and State of North Carolina, to wit: That, whereas, there is now pending a certain suit in the Superior Court of Rockingham, in which A. D. Jones and others are plaintiffs and the said Robert Strong defendant, for the recovery of the following negroes, namely (seven in number), with their increase, and the said Robert Strong, feeling his inability from age and bodily infirmities of paying the attention necessary to defend the said suit successfully, agrees to give the said William R. Strong, for and in consideration of his services in personally attending to the said suit, assisting to make a successful defense, and for the further consideration of five dollars, to him in hand paid, the receipt whereof is hereby acknowledged, one-half of said negroes with their increase, after paying all expenses of said suit; said William R. Strong agrees (101) to pay strict attention to said suit to a successful termination.

In witness whereof, the above mentioned parties have hereunto set their hands and affixed their seals, this day and date above written.

ROBERT STRONG. [SEAL.]
W. R. STRONG. [SEAL.]"

On the same day, very shortly after the execution of this instrument, Robert Strong made and published his last will and testament, and died a short time afterwards. The will was duly proved and recorded. By his will Robert Strong gives to William R. Strong a tract of land of 327 acres, all his furniture, plantation tools, the crop that might be growing at his death, and two negroes, Anderson and Tempe. After giving his daughter Janet Roberts a legacy of fifty dollars, and to his daughter, the plaintiff Mary, a negro girl named Caroline, he directs that the negroes Tab, etc. (fourteen in number, including by name the seven mentioned in the contract which has been recited), with their increase, and all the residue of his estate, shall be sold by his executors; that his debts be collected, and after paying the debts owing by him and the pecuniary legacy of fifty dollars to Mrs. Roberts, the proceeds are to be divided equally between plaintiff Mary Barnes and defendant William R. Strong; the latter, with one Burton, were appointed executors of this will, but only the defendant qualified, the other having renounced. The action of detinue (*Mingus v. Strong*) shortly afterwards, and about the time of Robert Strong's death, was decided against the defendant in the Superior Court of Rockingham; but before execution could be had against him William R. Strong, as executor, filed a bill for an injunction, which was brought to this Court and on the hearing of the cause was made perpetual, by which the contest with Mingus was finally decided in favor of William R. Strong as executor. (102)

The bill alleges that all the property of the testator (excepting

two slaves that had been sold in his lifetime), including the slaves mentioned in the agreement with him, as well as the increase, excepting the girl Caroline, which was delivered to the plaintiff, and all the other property of the testator, is held by the defendant as executor; that the negroes have been hired out and two of them sold by the executor, and the money, as well for those sold by testator as by himself, collected by him. The plaintiff insists that the agreement entered into between Robert Strong and his son William R. Strong is against the policy of the law of North Carolina, and void for *champerty;* and that they are, by the will of their father, entitled to one-half of the residue of the estate, after paying the debts and the pecuniary and specific legacies.

The prayer of the bill is for an account, and that one-half of the residue of the personal estate, after satisfying the legacies to Janet Roberts, may be paid to the plaintiffs, and that the slaves not sold may be sold and the money divided, or the slaves themselves divided equally between plaintiffs and defendant William; also for general relief.

The answer sets forth more distinctly the reasons and considerations upon which the agreement in question was made, the great trouble and expense in defending the lawsuit for his father and the diligence with which he protected the interests of the estate, and he now insists that these facts, with the additional fact that he is the son of Robert Strong, the other contracting party, takes his case out of the rule of law avoiding contracts for champerty. There was much other matter in both the bill and answer, but sufficient is set forth to present the questions upon which the opinion of the Court is based.

There was replication and proofs taken as to the points not involved in the opinion. Cause set for hearing and removed to this Court.

(103) *Miller,* for plaintiffs.
J. T. Morehead, for the defendant.

BATTLE, J. The pleadings in this cause present for consideration a question which has not hitherto, so far as we know, been decided in this State. The question is whether a contract between a father and son, made during the pendency of a suit against the father, where the son agrees to defend the suit for the father, in consideration of receiving a part of the property in controversy in case of success, is void as coming within the prohibition of the common law against maintenance and champerty. We have given to the subject that attention to which its importance, as well as its novelty, requires, and our reflections have brought us to the conclusion that the contract is against the settled policy of the law, and therefore cannot be upheld. Sergeant Hawkins, whose definition of these offenses is adopted, mainly, by all the
(104) later writers on the subject, says that "maintenance is commonly

taken in an ill-sense and in general seemeth to signify an unlawful taking in hand, or upholding of quarrels or sides, to the disturbance or hindrance of common right." Maintenance in a court of justice is "where one officiously intermeddles in a suit depending in any such court which no way belongs to him by assisting either party with money, or otherwise, in the prosecution or defense of any such suit." 1 Hawk. P. C., ch. 27, Tit. Maintenance. "Champerty is the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute or some profit out of it." *Ibid.*, Tit. Champerty. These offenses are of the same nature, the latter being an aggravated species of the former, and are both punishable at common law, as well as forbidden by various statutes. 1 Hawk. P. C., Title Maintenance, sec. 38; Champerty, sec. 1; Roscoe's Cr. Ev., Title Maintenance, etc.; 4 Black. Com., 135.

Champerty being an offense thus prohibited at common law, as well as by statute, any contract or bargain into which it enters as one of the elements must necessarily be void, as being founded upon an illegal consideration. Accordingly, we find that in England the Courts, both of Law and Equity, have refused to give effect to such contracts, and the latter courts have even given relief against instruments which they said savored of champerty. Thus at law it was held that an agreement to communicate such information as should enable a party to recover a sum of money by action and to exert influence for procuring evidence to substantiate the claim, upon condition of receiving a portion of the sum recovered, was illegal. *Stanley v. Jones,* 7 Bing., 369 (20 Eng. C. L., 165). So in Equity, where a bill was filed to set aside an agreement made by a seaman for the sale of his chance of prize money, that eminent Judge, *Sir William Grant,* Master of the Rolls, expressed the opinion that the agreement was void from the beginning as (105) amounting to champerty, viz., the unlawful maintenance of a suit in consideration of a bargain for a part of the thing or some profit out of it. *Stephens v. Bagwell,* 15 Ves., Jr., 139. In a later case, before *Lord Chancellor Eldon,* certain beneficial contracts and conveyances obtained by an attorney from his client during their relation as such and connected with the subject of the suit, being also liable to the charge of champerty, were decreed to stand as a security only for what was actually due. *Wood v. Downes,* 18 Ves., Jr., 76. *Lord Eldon,* in delivering his opinion, referred to the case of *Strachan v. Browden,* 1 Eden., 30, decided by *Lord Nottingham,* in which he set aside a bond given to secure double the amount subscribed to assist a poor man to recover an estate upon condition to have nothing if the suit failed, the Chancellor observing that though not strictly champerty it was very near it.

In some of our sister States champerty and maintenance have been decided to be offenses at common law, and contracts infected with them have been declared illegal and void. *Burt v. Place,* 6 Cowen, 431, was a case where an agreement to aid in defending a suit, made with one who was not licensed as attorney or counsel, was adjudged illegal and void for maintenance, that being both *malum in se* and prohibited by statute in New York. *Thurston v. Percival* was decided in Massachusetts. At the trial it appeared that the plaintiff, who lived in that State, had been employed as an attorney and counselor by the defendant to aid him in recovering a large sum of money in a suit which was prosecuted in the State of New York. After an expensive litigation the defendant recovered a judgment for $29,734, which was satisfied by a compromise by which he received $20,000. The plaintiff was constantly engaged in forwarding the suit, procuring evidence and corre-
(106) sponding with the defendant's counsel in New York, and he made several journeys to New York to consult with the defendant's counsel there and to attend to the argument of the case, but he did not act as an advocate, not being allowed to do so by the laws of that State. The plaintiff produced in evidence a written agreement made in Massachusetts, by virtue of which he was to receive, for all his services above described, ten per cent upon the sum which should be recovered. This was objected to as being unlawful, and was rejected. The Court held that though the plaintiff might recover, upon a *quantum meruit,* for his services before the agreement was entered into, yet the agreement itself was unlawful; that it came within the description of champerty, which all the ablest writers on criminal law declared to be an offense at common law; and that though it had reference to a suit in the State of New York, the presumption was that it was against the law of that State, in the absence of any proof to the contrary. 1 Pick., 415. This case was referred to with approbation in the subsequent one of *Lathrop v. Bank.,* 9 Metcalf, 489, where it was held that an agreement between the plaintiff and defendant that the plaintiff should prosecute and manage the defendant's suits at law as agent, and receive for his services a certain per cent upon the amount that might be recovered, and that if nothing was recovered his expenses only should be paid, amounted to champerty, and was so far illegal and void that the plaintiff, after obtaining judgment for the defendant, could not maintain an action on it. In delivering their opinion, the Court say: "It was suggested in the argument that the facts here shown do not bring the case strictly within the definition of champerty, as the plaintiff was not to conduct the suit wholly at his expense, but was, in the event of a failure to sustain the action, to be remunerated for his actual expenses. It is true
(107) that some of the elementary books, in defining champerty, say

that the champertor is to carry on the suit at his own expense, as 4 Black. Com., 135; Chitt. Con. (5th Am. Ed.), 675. Other books of equal authority omit this part of the definition, as 1 Hawkins, ch. 27, Tit. Champerty; Co. Litt., 368-b." See further on this subject, 2 Story's Eq. Jur., secs. 1048 and 1049, and the cases referred to in the notes.

From the brief review of the leading cases and authorities on this subject it manifestly appears that champerty is an offense at common law, independently of any statute, not only in England, but in some, if not all, the States of this Union, which derive their unwritten law from the same source. It appears further that every contract or agreement made, into which champerty enters as a consideration, is illegal and void. Hence we conclude that the same doctrine prevails in this State, where it is expressly enacted "that all such parts of the common law as were heretofore in force and use in this State, or so much of the said common law as is not destructive of, or repugnant to, or inconsistent with the freedom and independence of this State, and the form of government therein established, and which has not been otherwise provided for, in the whole or in part, not abrogated, repealed or become obsolete, are hereby declared to be in full force." 1 Rev. Stat., ch. 22.

It is true that this particular point has not yet been expressly decided by our Courts, so far as we can learn from our reports, but in *Falls v. Carpenter,* 21 N. C., 237, where certain assignments of an interest in lands were objected to on the ground of maintenance or champerty, the Court said that they did not come within the objection, without expressing or intimating that the common-law doctrine in relation to those offenses was not in force in this State. See, also, *Martin v. Amos,* 35 N. C., 201, where it was held that a bond with the conditions that the plaintiffs should "break the will" of a deceased person, of whom the obligors were next of kin, or "if (108) they failed to break the will, should pay all the costs of the suit that shall be brought," is void on the ground of maintenance and as being against public justice.

The result of our argument is that the agreement made between the defendant, William R. Strong, and his father during the pendency of the suit for the slaves mentioned in the pleadings, whereby the said defendant was to have one-half of the said slaves in case of a successful defense, was founded upon the consideration of champerty, and is therefore illegal and void, unless the near relationship of the parties prevents the application of the law to their case.

As to the milder offense of maintenance, "it seems to be agreed (says Hawkins' P. C., book 1, ch. 27, sec. 26) that whoever is any way of kin or affinity to either of the parties, so long as the same continues, or

but related to him by being his godfather, may lawfully stand by him at the bar and counsel and assist him and also pray another to be counsel to him; but he cannot justify laying out any of his own money in the cause, unless *he* be either father or son, or heir apparent to the party, or the husband of an heiress." So *Blackstone* says, 4 Com., 135, "A man may maintain the suit of his near kinsman, servant, or poor neighbor, out of charity and compassion, with impunity." It is evident from these authorities, which have been adopted and followed by all the late writers on the criminal law, that persons standing towards each other in the near relation of father and son may maintain and assist each other in their suits by their money, their services and their influence. Such is the dictate of those feelings of affection and regard which the God of nature has placed in the breasts of parent and child, and the common law has wisely abstained from attempting to control them. The question remains: can
(109) that support and assistance which ought to spring from the purest and best feelings of humanity become the subject of traffic?—of bargain and sale? Can a son, before he comes to the aid of his father—perhaps a sick and dying father—when sore pressed by a lawsuit, stipulate for half the fruits of success? We have not as yet been able to find any such exception to the common law of champerty. A son may defend his parent, if forcibly attacked in his person or property, and may repel force by force, yet he cannot strike for revenge, nor, as we conceive, for money or other property. Certainly the father himself could not justify a blow under the plea of *son assault demesne*, where he had hired his adversary to assail him. If the son would not be justified when striking for defense, not under the promptings of natural affection but for reward, his act being unlawful, no agreement between his father and himself, founded upon such consideration, could be sustained. But whether this be so or not, we think there is no doubt that a conveyance from a father to a son of land, while another person was in the adverse possession of it, would not pass the legal title, and from the analogy to this we conceive that a son who bargains for a portion of what may be gained or saved in his father's suit at law, as the price of his assistance, cannot be exempted from the operation of the law against an offense deemed so odious in others.

In taking this view of the common law in relation to champerty, it has not escaped our attention that in the construction of the statute of 28 Edward I, ch. 11, passed for the purpose of increasing the penalties attached to this offense, it was *held*, "that no conveyance or promise thereof relating to lands in suit, made by a father to his son, or by any ancestor to his heir apparent, is within the statute, since it only gives them the greater encouragement to do what by nature they are bound to do." 1 Hawk. P. C., ch. 27, Tit. Cham., sec. 18. This con-

struction necessarily follows from the very words of the exception contained in the last clause of the statute: *"Mes en ces case nest mye ce entender, que home ne poit aver counsaile des countours, et des sages gents pur son donnent ne de ses prochiene amies,"* 2 Coke Inst., 563. *Lord Coke* translated *"de ses prochiene amies"* to mean "of their next blood," and of course it excluded from the penalties of the statute gifts from a father to his son pending the suit. So far from proving our view of the common law to be incorrect, it the rather sustains it by showing that there was a necessity for inserting the exemption in the statute. (110)

But the counsel for the defendant contends that the plaintiffs cannot have the relief which they seek, of having the agreement between the defendant William and his father declared void and removed out of their way, because they have no special prayer to that effect. To this it is successfully replied by the counsel for the plaintiffs that their bill contains a general prayer under which the specific relief may be given, because it is not inconsistent with their special prayer and is sustained by the admitted allegations of the bill. 1 Madd. Ch. Pr., 171; Adams' Eq., 309; Mit. Ch. Pl., 39.

The plaintiffs are entitled to a decree for an account upon the principles set forth in this opinion.

Decree accordingly.

Cited: Green v. Campbell, 55 N. C., 449; *Munday v. Whissenhunt,* 90 N. C., 461; *Ravenal v. Ingram,* 131 N. C., 552; *Council v. Bailey,* 154 N. C., 60.

J. P. YATES AND WIFE *against* MARK COLE AND WIFE AND OTHERS.

A will cannot be corrected by evidence of mistake, so as to strike out the name of one legatee and insert that of another, inadvertently omitted by the drawer or copyer.

BILL transmitted from the Court of Equity of RICHMOND, Fall (111) Term, 1853.

The bill alleges that Daniel McRae, by his last will and testament, bequeathed "to his grandchildren, Margaret Diggs and Lucy Diggs, children of his daughter Catharine, deceased, a negro woman named Becka and her child Westly and their future increase, to them and their heirs forever."

Also, that he bequeathed to his granddaughter, Margaret Diggs, a negro girl by the name of Edy, to her and her heirs, forever.

And to his grandchildren, Celia Diggs and Dudley Diggs, ten dollars each to themselves and their heirs forever.

That the testator had a daughter by the name of Catharine, who had intermarried with John Diggs, and that she and her husband were both dead at the time of the making of said will, leaving them surviving the following children: Margaret, Sarah, Lucy and Dudley; but that they never had any child by the name of *Celia,* and that it was the intention of the testator, as expressed by him before and the time the said will was written, to leave the negro woman Becka, etc., to Margaret Diggs, since intermarried with the defendant Mark Cole, and Sarah Diggs, one of the plaintiffs, since intermarried with the other plaintiff, John P. Yates, and the ten dollars each to Lucy and Dudley Diggs, and not to Celia and Dudley Diggs, and that the testator did not at the time of writing the last will recollect the names of his grandchildren, but that the said names were inserted through "ignorance, surprise or mistake."

That while the person writing the will was engaged in that service the testator professed to have forgot the names of his grandchildren who were then at the house of his son-in-law, Daniel Johnson, declaring his purpose to be to make a provision for them; that the testator stepped to the door and enquired of a servant the names of his grandchildren who were going to school at Daniel Johnson's, and having received
(112) an answer, he dictated to the writer as is set forth in the will, which he set down accordingly. The said Daniel had no grandchild at all by the name of Celia.

The bill prays that the last will and testament of said Daniel McRae may be reformed so as to declare the actual intent of the testator and give and bequeath the negro slaves Becka and Westly and their increase to Margaret and Sarah instead of Margaret and Lucy; also for an account of the hires of the slaves.

The answer of Mark Cole and his wife Margaret was filed and replication was had and proofs taken, but as the opinion of the Court proceeds upon the want of Equity in the plaintiff, it is deemed unnecessary to set them forth. Mark Cole and his wife Margaret, Lucy Diggs and Alexander McRae, the executor, are the defendants. Cause set for hearing and removed to this Court.

Banks and *Kelly,* for plaintiffs.
Winslow and *Strange,* for defendants.

BATTLE, J. The object of the bill is to obtain the aid of a Court of Equity for the purpose of reforming the will of the testator, Daniel McRae, so as to take from the defendant, Lucy Diggs, certain slaves therein bequeathed to her by mistake, as alleged, and give them to the

feme plaintiff, for whom it is said they were intended. This object, if attained at all, must be accomplished by a parol revocation of the bequest of the said Lucy, and then by a nuncupative will giving it to the said *feme* plaintiff. Can this be done? No authority has been produced by the plaintiffs' counsel to show that it can, and we think there is a very strong and decisive reason why it cannot. Adams Equity, 172, after stating the doctrine in relation to the reformation of instruments *inter vivos,* says "that a will cannot be corrected by evidence of mistake so as to supply a clause or word inadvertently omitted by the drawer or copier, for there can be no will without the statutory (113) forms, and the disappointed intention has not those forms." For this he cites *Newburgh v. Newburgh,* 5 Madd. Ch., 364; Jarman Wills, sec. 121; 8 Vin. Abr., 188; Ga. Pl., 1. To the same effect is 1 Story Eq. Jur., sec. 181. Jarman says that *Newburgh v. Newburgh* was carried to the House of Lords and there approved by the unanimous opinion of all the Judges. The reason given why a Court of Equity declines to interfere when called on to reform a will would seem to restrict it to a devise of real estate. But the principle is certainly applicable to the will in this case, though it be but a bequest of personalty. In sec. 13 of the statute concerning wills (1 Rev. Stat., ch. 122) it is enacted that "no will in writing, passing or bequeathing a personal estate of greater value than two hundred dollars, or any clause thereof, shall be revocable otherwise than by some other will or codicil, or other writing declaring the same, or by cancelling," etc., and "no written will passing or bequeathing a personal estate of two hundred dollars or less shall be altered or revoked by a subsequent nuncupative will, except the same be in the lifetime of the testator reduced to writing and read over to him and approved," etc. It is obvious that, with a slight change of the phraseology quoted from Adams and taken substantially from the opinion of the Vice Chancellor in the case of *Newburgh v. Newburgh,* we may say here that the will cannot be corrected by evidence of mistake so as to strike out the name of the legatee and insert that of another inadvertently omitted by the drawer or copyer, for there can be no revocation or alteration of a written will of personalty without the statutory forms, and the disappointed intention has not these forms.

Such would be our conclusion in this case were the evidence of the mistake satisfactory, but it may not be improper for us to declare that were the legal objection removed the testimony of the plaintiffs would be insufficient to entitle them to the relief which they (114) seek.

Without going fully into the subject, it may suffice to say that the testimony to convert a deed, absolute on its face, into a mortgage (an instrument founded on a valuable consideration) must be something

more than mere declarations—must be proof of facts and circumstances *dehors the deed*—inconsistent with the idea of an absolute purchase. See *Sowell v. Barrett,* 45 N. C., 50, and the cases there referred to. The testimony to reform an instrument in favor of a mere volunteer could not, of course, be less.

The bill must be dismissed with costs.

Cited: Lowe v. Carter, 55 N. C., 382.

CORBETT *against* CORBETT.

1. A bequest to R of "negroes, etc., during her widowhood, and a sorrel mare, etc., to dispose of as she may think proper": *Held,* that the latter expression does not apply to the slaves; as to them she did not take an absolute estate.
2. The word "heirs," when used generally, in reference to personal property, means those who take by law or under the Statute of Distribution.
3. A Court of Equity has no jurisdiction in cases of partition, unless the parties are tenants in common.

CAUSE removed from Court of Equity of CASWELL, Fall Term, 1853.

The case as presented by the pleadings is as follows: Joseph Russell, in his last will and testament, bequeathed as follows: "I give to my wife Katy the following negroes: Minerva, Martha and Kate, and all my household and kitchen furniture and farming utensils, *as sees* proper, during her widowhood, and a sorrel mare and colt, and her choice of four head of cow cattle, and all my stock of hogs and sheep, and my crop of corn, wheat and oats, to dispose of as she may think proper." (115) The remainder in the slaves is in a subsequent clause given to "his lawful heirs." The slaves mentioned in the above clause remained in the possession of the widow until her death, together with their increase, except the woman Kate, who, together with four children (born of her since the death of the testator), were several years since sold by the said widow to one Edward Watlington, who at the filing of the bill held them in his possession by virtue of his said purchase. The woman Minerva has had five children, now living; Martha has had four children and Kate has had four. The widow Katy Russell survived her husband many years and died some four months since, having made and published a last will and testament, and her executor, George W. Swepston, took into his possession Minerva and her children, and now has the same. The testator, Joseph Russell, had five children, to wit: Nancy, Judy, Emily, Thomas, William and Joseph (the last being

posthumous). Shortly after the death of the testator Nancy died intestate in Caswell; several years afterwards Thomas died intestate, and more recently William has died intestate—all three without leaving a child or children or the issue of such. Judith intermarried with the plaintiff and died intestate in Caswell County, upon whose estate the plaintiff has administered. He also took out letters of administration upon the estate of Thomas Russell, and the said George W. Swepston administered on the estates of William and Nancy.

The plaintiff insists in his bill that a life estate only was given to the widow Katy by the will of the said Joseph Russell in the said slaves and their increase, with a remainder to his children, and that on the death of his widow the plaintiff, as administrator of his wife, is entitled to one-sixth part of the said slaves; that he is entitled to another sixth as the administrator of Thomas; that upon the deaths of Nancy, Thomas and William, their surviving mother and brother and sisters became equally entitled to their respective shares; that as Nancy and Thomas both died before his wife Judy, he is (116) entitled, as the administrator of his wife, to the one-sixth of the share to which Nancy was entitled, and as administrator of Thomas, to one other sixth part of the said Nancy's share; and again that as administrator of his wife he is entitled to one-fifth part of Thomas' share on said negroes, inclusive of the share of one-sixth of Nancy's interest. He further insists that he is a tenant in common with Emily, Joseph Swepston and Watlington of the said slaves, and is entitled to have a division of the same. Emily Corbitt, Joseph Russell, George W. Swepston and Edward Watlington are made defendants. The prayer is for a sale of the slaves for a division, or for a division according to law, and for general relief.

All the defendants answered. Joseph Russell and Emily Corbitt, his sister, after stating the facts of the case with more minuteness, insist that as William Russell survived Thomas, Nancy and plaintiff's wife Judy, he cannot come in for any part of William's share. The answer alleges that William died in Arkansas in the lifetime of the mother, and that by the laws of that State the mother of said William became entitled alone to his estate, but that if the same is distributable under the laws of North Carolina, the plaintiff (his wife having died before William) could take nothing of that share. They, with Swepston and Watlington, insist that Katy Russell, the widow, under the said clause in the will of Joseph Russell, took an absolute estate in these slaves and their increase. Watlington answers that he purchased the negro Kate and the children mentioned above at a fair price and took a bill of sale from the said Catharine or Katy Russell, believing he had a good title,

as he now believes, and denies that he holds the property as tenant in common with the plaintiff.

Kerr, for the plaintiff.

(117) *Morehead,* for the defendant.

PEARSON, J. We think the property mentioned in the first item is divided into two classes. The three negro women, household, kitchen furniture and farming utensils are given to the wife *during her widowhood.* The mare and colt, stock and crop, are given to her absolutely. In reference to this point there is nothing to control the express limitation, "during her widowhood." The nature of the property will readily suggest the reason for making a difference. The one is of a nature to last some time—the other is perishable. This disposes of the construction contended for by the defendants that the widow took an absolute estate in the negroes, the only property now in controversy.

The plaintiff insisted that under the third item the remainder in the negro woman and their children after the widow's life estate is to be equally divided between the children of the testator or their representatives. The division is to be made, not between all of his children, for whose support he had just provided, but between his *"lawful heirs."* The word heirs is not appropriate to the disposition of personal property, and when used in reference to it means those who take by law or under the statute of distribution. This is the rule when there are no other words to give it a different meaning; here the other words fix that to be the meaning, for it is put in opposition to "children." 2 Williams Ex., 726.

The widow was entitled to one-seventh part of the three negro women and their children. This will be declared to be the opinion of the Court.

The prayer is for partition as among tenants in common, but the bill discloses the fact that the defendant Watlington holds one of the women and her children under a purchase of the absolute estate from the

(118) widow, and Watlington in his answer sets up title to them *in severalty.* This question must be disposed of before a decree for partition can be made, for this Court cannot take jurisdiction unless the parties are tenants in common. The bill seems to have been hastily drawn and the cause is set down for hearing on bill and answer, by which the allegation of a claim in severalty, on the part of the defendant Watlington to a part of the claims, is admitted. Upon a suggestion that the main object of the parties is to get a construction of the will in regard to the rights of the widow, the Court makes the declaration as above, and the cause is retained for further directions. The parties may move hereafter as they are advised.

We give no opinion as to the rights of the parties upon a *subdivision* of the shares of the deceased children. The bill in that particular is multifarious.

Decree accordingly.

Cited: Henderson v. Henderson, 46 N. C., 224; *Kiser v. Kiser,* 55 N. C., 30.

ELIZABETH EARP *against* WILLIAM EARP.

No appeal will lie from an order of the Court of Equity under the act of 1852, allowing alimony, *pendente lite*, to the wife, who sues for a divorce and alimony.

APPEAL from an interlocutory order made by his Honor, Judge MANLY, in a case for a divorce and alimony at the Court of Equity for JOHNSTON, at Fall Term, 1853.

At the Spring Term, 1853, the bill in this case was filed, and the following term the defendant demurred, and at the same time the plaintiff moved under the act of 1852 for a reasonable and sufficient alimony during the pendency of the suit, which was allowed her, (119) and the defendant being satisfied, prayed an appeal to the Supreme Court, which was allowed. As the facts contained in the proceedings are not at all considered in the opinion of the Court, it is deemed unnecessary to state them.

Q. Busbee, for plaintiff.
Miller, Bryan and *Moore,* for defendant.

NASH, C. J. The bill is filed for a divorce from bed and board and for alimony. The defendant demurred, and at the same term the presiding Judge decreed to the plaintiff the amount set forth in the pleadings, and from that interlocutory order permitted the defendant to appeal to this Court.

The appeal was granted under sec. 23, ch. 4, Rev. Stat., and if that statute stood alone, the order would have been correct and we should have been under the necessity of looking into the bill and of judging for ourselves whether it presented such a case as entitled the plaintiff to the relief she sought. For if the bill did not present such a case upon its face as to entitle her to the main relief sought, the one incident to it could not be granted. But we are not called to this duty. We are of opinion that the appeal was improvidently granted.

The Legislature, at its session in 1852, ch. 53, p. 110, directed that when a bill is filed for a divorce and alimony, the Court may, at the

term when the process is returned, grant to the plaintiff a sufficient sum for her support. Before the passage of this act it had been settled by this Court (*Wilson v. Wilson,* 19 N. C., 377) that the Court, under such a bill could not grant alimony before the final decree, upon the ground that if upon the hearing it should appear that the complainant was not entitled to any decree for a divorce, the alimony allowed would
(120) be so much lost to the defendant, as the plaintiff is not required to give any security for its return. The act of '52 seems to have been passed to alter the law on this subject, and it gives no right of appeal. To have done so would have entirely defeated the benevolent object of its framers.

A husband by his brutal conduct to his wife, either in outrages to her person or by bringing a strumpet into his family, forces her from his house and she is compelled to throw herself upon the charity of friends and relations and to appeal to the laws of the country. During the pendency of the suit, which may continue for a year or more, she must be supported, and the law says her husband, the worker of the wrong, shall do so. To allow an appeal to this Court in such a case would be virtually to condemn her to starve. This certainly was not what the Legislature meant. The relief as to the alimony, which they contemplated, was an immediate one, upon the ground that until the contrary appeared the plaintiff was entitled to be supported by her husband out of his estate during the controversy. That the alimonial relief was intended to be immediate is shown by the provision of the act; it was to be allowed at the return of the process. We do not mean to say that it *must* then be allowed, but that it may. That no appeal was intended by the act of 1852 is further proved from the other provisions contained in it. It provides that the amount of alimony allowed may be increased or diminished by the Court at any time upon a proper application. There is no necessity, then, for any appeal, and the act does not warrant it.

Holding, as we do, that the defendant had no right to appeal, we have entered into no consideration of the bill and demurrer, nor into the amount of the alimony granted, or the fund out of which it is to be paid.

PER CURIAM. The appeal is dismissed as improvidently grant-
(121) ed. The defendant must pay the costs of this Court.

Cited: Taylor v. Taylor, 46 N. C., 531; *Everton v. Everton,* 50 N. C., 206; *Morris v. Morris,* 89 N. C., 112; *Moore v. Moore,* 130 N. C., 334-6.

NOTE. Since Rev. Code, ch. 39, sec. 15, an appeal lies by either party, *Moore v. Moore,* 130 N. C., 336.

ROBERT T. PELHAM *against* RICHARD P. TAYLOR, EX'R.

Where property is given to one, with the absolute power of disposing of the same, with a limitation over in the event of the first taker dying intestate, *or* without children, *or* without disposing of the same, the executor has no right to demand a forthcoming bond for the property, to meet such a contingency.

CAUSE removed by consent of parties from the Court of Equity of GRANVILLE, Spring Term, 1853.

The bill was filed in September, 1852, and states in substance that Robert Taylor died in May, 1847, having duly executed his last will and testament, leaving him surviving four children, one of whom is the defendant, Richard P. Taylor, and two grandchildren, viz., Robert T. Pelham, the complainant, and his sister Susan, who are the children of a deceased daughter of Robert Taylor.

Robert Taylor bequeathed to his wife, Mildred Taylor, an annuity of twelve hundred dollars, chargeable upon his whole estate, and to be paid semi-annually. After specific bequests to Robert T. and Susan Pelham, he directed that the residue of his estate should be divided between his four children and Robert T. Pelham and his sister Susan, so that the shares of the two last should together equal the share of one of his four children. He further directed that their shares should be held in cross-remainders in case they should die without issue them surviving; and in case the survivor should die without issue and intestate, his share, as well as any accumulation thereon, should go to his other children or grandchildren, the latter taking by *stocks,* (122) declaring that it was not his intention to prevent such survivor from disposing of the same as he or she might think proper. The limitation over was itself subject to a limitation in favor of the husband or wife of the survivor, who was to receive such portion of their shares, whether original or accumulated, as he or she would have been entitled to at law.

In 1847 Richard P. Taylor and others were appointed executors of Robert Taylor, and about the same time the said Richard was appointed guardian for the complainant and his sister Susan, they being under age. The executors agreed to set apart a fund sufficient to raise two hundred dollars annually towards the payment of the annuity, and to divide the rest of the estate, debts, etc., being paid among the several legatees, and that each legatee should pay semi-annually a ratable part of the remaining portion of the annuity.

Richard P. Taylor, as guardian to Robert T. and Susan Pelham, paid semi-annually $100 towards said annuity, that being their ratable portion, and charged himself with the same in his account as guardian.

In 1848 Susan died under age without issue and never having been married. Her estate becoming vested by the limitation in Robert, was transferred to his account by his guardian.

Since that time Robert T. Pelham has attained the age of twenty-one and has called upon Richard P. Taylor to come to a settlement, which he refuses to do unless he be allowed to retain in his hands sufficient to raise the ratable part of the annuity, or the plaintiff should otherwise sufficiently provide for its payment. The defendant also doubts whether it be not his duty, as executor, to require security for the forthcoming of the property in case of the death of Robert T. Pelham without issue and intestate.

The answer admitted all the statements in the bill to be correct.

(123) Set for hearing on the bill and answer and removed by consent.

No counsel for the plaintiff.

Lanier, for the defendant.

PEARSON, J. Two questions are presented:

1st. There is no doubt that in pursuance of the arrangement by which the property came into the hands of the defendant, as guardian, the plaintiff is bound to secure the semi-annual payment of $200 to the widow of the testator during her life, that being his ratable part of the annuity not otherwise secured. This he may do either by bond with personal security or by a conveyance of a part of the property sufficient for that purpose, as may be arranged between the parties.

2d. The plaintiff, as survivor, is entitled to the share given to himself and his sister, together with any accumulation thereon, and takes the absolute property therein, with the right to dispose of it as he may see proper, by will or otherwise, subject only to a limitation over to the children and grandchildren (who may be the children of any deceased child and are to take by stocks or *per stirpes*) of the testator in the event of his dying intestate and without leaving a child living at his death, which limitation over is itself subject to a limitation to the wife of the plaintiff if he should marry, of such share as she would be entitled to by law in the event of his dying intestate, leaving a widow.

When the case was opened a very interesting question was suggested, that is: Is not the limitation over void as being repugnant to the absolute right of disposition? The case was held under an *advisari* to consider of this question. We are satisfied the question is not presented as the case now stands, and therefore are not at liberty to decide

(124) it, for suppose the limitation over is not void, it is very clear that the plaintiff is entitled to have the property delivered over to him, to be disposed of as he may think proper, without giving security for its forthcoming.

If property be given to one for life with a remainder over, the executor has no right to require a bond for its forthcoming. That must be obtained at the instance of the remainderman, if there be good ground to fear that the property will be destroyed or taken to parts unknown; *a fortiori,* the executor cannot require a bond where the property is given with the absolute power of disposition. The only contingency in which the question as to the repugnancy of the limitation over can ever be presented is the death of the plaintiff intestate without a child and without having disposed of the property. Should all of these doubtful events happen, and the plaintiff have creditors who have acquired no specific lien on the property, they may raise the question as to the validity of the limitation over. We will not speculate on such remote possibilities.

The plaintiff is entitled to an account if he desires it. His rights will be declared as above. It is usual in such cases to decree the costs to be paid out of the fund, but the defendant's grounds for refusing to come to an account and deliver over the property are so untenable, particularly as no difficulty was made in regard to securing the ratable part of the annuities, that we do not allow the defendant his costs.

Decree accordingly.

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(125)

WILLIAM B. LEE *against* JOHN C. FOARD.

1. Where a bill sets forth that A bound himself to make a "good and sure title in the fee-simple," and refers to a bond which he files, and prays may be taken as a part of the will; and it appears from that, that the obligation is "to make a good and lawful warrantee deed," any incongruity that there may be between the allegation and proof is obviated by this reference in the bill.
2. Where there is a devise of land to A's heirs of a certain name, it is good, though A being living, and A takes no interest therein.
3. If A disposes of said land, receiving money and bonds in payment therefor, and dies, the purchaser may file a bill to have his bonds in the hands of A's administrator surrendered, and have an account as to the assets.

BILL transmitted from the Court of Equity of RANDOLPH, Fall Term, 1853.

The following case is made by the pleadings: Philip Beeker, the intestate of the defendant Foard, contracted to sell to the plaintiff two tracts of land lying in Davidson County, one of two hundred acres for $600, and one of fifty acres for $200—making it all $800. He received in cash $300 and took the plaintiff's notes for the remainder of the eight hundred dollars. At the same time he executed a penal bond in the sum of $1,600, reciting the sale of the said two tracts of land, with

a condition to make or cause to be made to the plaintiff "a good and lawful warrantee deed" for the same. The said two-hundred-acre tract had, before the date of the said bond, been devised by Henry Beeker to his son "Philip Beeker's heirs by the name of Beeker," and the said Philip Beeker was living at the time the said will took effect and had at the same time seven children, all of whom were infants at the time of the bringing of the suit except one. The several notes given for the remainder of the purchase money are in the possession of the defendant Foard, the administrator.

The bill alleges that the title of Philip Beeker to the tract of 200 acres is defective, and submits to take the fifty-acre tract at two hundred dollars, the price agreed on. The prayer of the bill is that
(126) the contract may be rescinded so far as related to the two-hundred-acre tract; that the notes may be surrendered up to be cancelled, and that the defendant Foard be decreed to repay the money paid, after deducting the price of the fifty-acre tract. John C. Foard and the children of Philip Beeker are made defendants.

The defendants insist that the plaintiff purchased with full notice of the defect in the title, and agreed to buy his title and take the risk. There was replication and proofs taken in the cause. Set for hearing and removed to this Court.

No counsel for the plaintiff.
J. H. Bryan, for the defendant.

BATTLE, J. There can be no doubt that the title of the defendant Foard's intestate to the principal tract of land sold to the plaintiff was, at the time of the sale, and still is, defective. That tract was devised to Henry Beeker, the father of the intestate Philip, to his (Philip's) heirs by the name of Beeker. This was a good devise to his children of that name, though he was living at the time and took no interest in it. *Ward v. Stowe,* 17 N. C., 509.

There was, then, an entire failure of the consideration for the money paid and the notes given for that tract of land. No fair pretence can be made that the plaintiff was acquainted with the state of the title and intended to purchase the mere chance of getting a good one. The full price which he agreed to pay for the land, as well as the bond given by Philip Beeker to make or cause to be made to him a good and "lawful warrantee deed" for it upon payment of the purchase money, is directly opposed to such a supposition. The plaintiff is, then, clearly entitled to relief if there be no defect in the frame of this bill.

It is said in the argument here that there is a fatal defect in
(127) it, to wit, that it sets out a different title which the intestate was bound to make upon the payment of the purchase money for

the land from that which is mentioned in the bond. It is insisted that the bill alleges that the intestate was to execute a deed containing a covenant of seizin, while the bond exhibited in evidence shows that the deed was to have a covenant for quiet enjoyment only. Hence it is contended that there is a substantial variance between the allegation and the proof, and that consequently the bill must fail. If the premises be correct the conclusion is legitimate; but are they correct? We understand the statement of the bill to be different from what is assumed by the counsel. The statement is that the intestate bound himself in an obligation to make "a good and sure title in fee simple," and it then refers to the bond and prays that it may be taken as a part of the bill. If it be admitted that "a good and sure title in fee simple" is different from "a good and lawful warrantee deed to the plaintiff or his heirs," the more extended sense of the first expression is restricted by the reference to the bond which immediately follows. The apparent repugnancy between the allegation and the proof thus vanishes. But it is said further that the bill ought to state the price as specified in the bond for title. It does so, so far as we can infer any statement of the price in the bond, and that is half the penalty therein mentioned. The bill states (and in that it is sustained by the proofs and by the answer of John Beeker) that the plaintiff was to pay eight hundred dollars for the two tracts, to wit, six hundred for the larger and two hundred for the smaller.

Of this sum he paid three hundred and fifty dollars in cash, and gave his notes for the residue. No difficulty has arisen as to the smaller tract, but for the money and notes given for the other the plaintiff is entitled to relief. That relief is to have his bonds in the hands of the defendant Foard, as administrator, surrendered up and to have an account of the assets in the hands of the said administrator (128) to ascertain whether there be sufficient to satisfy his claim for the money paid, after deducting the price of the small tract.

Decree accordingly.

ELIZABETH GILLIAM, EXECUTRIX OF HENRY GILLIAM, *against* JOHN WILLEY, ADM'R OF JETHRO WILLEY.

Where an administrator pleads to a bill the act of Assembly limiting the time of bringing suits against an administrator, etc., to two years from the time of the qualification of such administrator, etc., Rev. Stat., ch. 42, secs. 16, 17, he is bound to show clearly, by proof, that he advertised within two months, at more than one public place, or his plea will not amount to a bar.

CAUSE removed to this Court from the Court of Equity of GATES, at Spring Term, 1853.

The only question decided in the case is sufficiently stated in the opinion of the Court.

Moore, for plaintiff.
Bragg, Heath and *Smith,* for defendant.

NASH, C. J. The bill is filed for an account of a fishing copartnership entered into between the testator of the plaintiff and the intestate of the defendant. The intestate died in 1842; the defendant administered upon his estate at May Term, 1842, of Gates County Court, and the bill was filed at Spring Term, in 1847. In his answer the defendant states that "more than two years elapsed from the time of his qualification as administrator of the said Jethro Willey and advertising, as aforesaid, before the plaintiff brought his suit, and he therefore prays the benefit of the act of Assembly requiring all suits to be brought (129) against the estates of deceased persons within two years from the time letters of administration may be granted to him."

The act pleaded is a full bar to the plaintiff's claim if the defendant has brought himself within its protection. The act requires that every executor and administrator shall, within *two months* after being qualified, advertise at the courthouse of the county where the deceased usually dwelt at the time of his death and other places within the county, etc. The section following directs the executor or administrator to take copies of his advertisements and to exhibit them at the next term of the County Court succeeding their qualification, which shall, if proved according to the act, be recorded by the Clerk under the order of the Court. The concluding clause in that section authorizes the executor or administrator to prove his compliance with the act in any other manner which may be deemed competent by the Court. Rev. Stat., ch. 46, secs. 16-17. We think the defendant has entirely failed in bringing himself within the act. Mr. Parker fixes the time when he thinks he saw the advertisement sticking up at the Cross Roads in Scratch Hall in the month of July or August. Mr. Hudgins saw the advertisement sticking up at the courthouse door in Gatesville at August Court, 1842, and in the same month at Norfleet's mill. Mr. Norfleet saw the advertisement sticking up at Harvey's gig shop in the fall of 1842. Mr. Norfleet saw one sticking up at the courthouse door between the Courts of May and August. When asked to state the time when he saw it, he thinks it was soon after the sale of the perishable property, and Mr. Doughtrey states that the sale referred to by Mr. Norfleet was within ten or fifteen days after the appointment of the defendant as administrator. If it be admitted that the last two witnesses bring the advertisement at the courthouse door within the required

time, still the act is not satisfied, for it must be advertised at other public places within the county within the two months. (130) All the advertisements at the other places were in August or in the fall of the year, or in July, and if the latter, at what time the witnesses do not state. Where a party has it in his power to reduce his evidence in such a case to a record and neglects to do so, but chooses to trust to the slippery memory of witnesses, he must not complain that he is held to strict proof of the fact. It is for him to *establish* the fact that he did advertise as required by the act: failing in such proof he fails in the defense made under the act. *McLinn v. McNamara,* 22 N. C., 82. The proofs do not sustain the defense and the act is no bar to the suit and the plaintiff is entitled to an account.

PER CURIAM. There must be a reference to the Master to state the account.

FREDERICK JOHNSON, JR., *against* DAVID CHAPMAN, EXECUTOR, AND OTHERS.

Contribution to make up the share of a child born after the execution of his father's will, under the act of Assembly of 1808, must be made by the legatees, in proportion to their respective interests under the will, rated as of the time when the estate was settled, or should have been settled, by the executor, bearing interest from such time.

THE question in this case arises out of exceptions taken to the report of the Commissioner, to whom it was referred to take an account of the estate of Frederick Johnson, Sr., by a decree of this Court at June Term, 1853, which is reported in 45 N. C., 213. The nature of the exceptions sufficiently appear from the opinion of the Court.

J. H. and *J. W. Bryan,* for plaintiff.
Donnell, for defendants. (131)

PEARSON, J. The exceptions of the defendants raise the question, at what time ought the valuation of the slaves and other property which was secured by the legatees to be made for the purpose of ascertaining the amount to which the plaintiff is entitled as his share of the estate? The Commissioner adopted the principle of valuing such of the slaves and their increase as are still retained by the legatees *at the time of making the report* and adding the amount of hires that had been or might have been received up to that time, and of valuing such as had been disposed of *at the time they were sold* and adding thereto interest up to the time of the sale of each respectively. The exceptions insist that the correct principle was to fix the value of those received by the

widow *at the time she received them* and of those received by the two daughters at the time *they received them.* We do not think either principle correct and are satisfied that the true principle is to adopt the valuation at the time the estate was settled, or ought to have been settled; that is, as soon after the death of the testator as a settlement could have been made consistently with the rights of creditors. This was adopted as the principle upon which to ascertain the amount to which a widow who dissents is entitled as her share of the personal estate (*Hunter v. Husted,* 45 N. C., 98), and it commends itself as the principle upon which to ascertain the amount to which a child born after the death of the testator, for whom the will makes no provision, is entitled. It is based on these reasons:

1st. It produces uniformity to act upon the rule in reference to an after-born child, which has been adopted in reference to a widow who dissents. So an advancement is valued when received, without reference to a subsequent increase or falling off in value.

2d. No other rule will make the sums to be contributed by the
(132) legatees equal and conform to the maxim, "Equality is equity." Upon the principle adopted by the Commissioner each legatee is made to contribute a different amount. Why should a legatee who was fortunate enough to keep his slaves be rated higher, because of the fact that they have increased and the price of slaves was high at the date of the report, than the one whose slaves were sold many years ago? Why should one be charged with the amount which might have been received for hire while the other is only charged with six per cent upon the amount for which his slaves sold? This of necessity will produce inequality as between the legatees in every case, to say nothing of the difficulty of fixing on the proper amount to be charged for hire after the expiration of many years, when scarcely any two witnesses will agree as to the hire that might have been obtained in any one year, and of the hardship of charging one with negro hire for a series of years during which, in fact, they were not hired out, and he acted with them and used such profits as he made as if he was the absolute owner? Almost any man, according to the ordinary way of using slaves, would be ruined if, after some thirty years, he is called to a strict account as if the negroes had been hired out.

3d. In this way an after-born child will receive the exact amount to which he is entitled, and the amount will be fixed and certain, and will not depend upon the accident of death of negroes and a fall in prices on the one hand, or upon their increase or a rise in prices on the other.

In support of the principle acted on by the Commissioner, it was insisted that the plaintiff is not merely entitled to one-fourth the value of the slaves, but to one-fourth of the slaves specifically, and therefore

has an Equity to follow the fund and require of the executor an account of his breach of trust, and of the legatees, on the footing of being a tenant in common, one-fourth of the present value of the slaves and their increase, together with the profits that might have been (133) made. This position is untenable—neither the premises nor the conclusion are correct. An after-born child is not entitled to a part of the property specifically under the act of 1808. The object was to provide for him, but there is nothing to justify an interference with the dispositions of the will, except so far as it is necessary to accomplish that object. Such a child is put on a middle ground between that of a specific and a general legatee. If there is a surplus out of which the amount to which he is entitled can be raised it should be applied to that purpose. If there is no surplus the 4th section requires the legatees to contribute. So he stands on higher ground than a general, but lower than a specific, legatee. Even a specific legatee, however, has no right *in rem* and is not considered in Equity as the owner of the property, for the executor does not hold the property as a mere trustee. The interest of the legatee cannot be sold as a trust under the act of 1812; and if the executor sells the property the legatee cannot follow it in the hands of a purchaser, although he might with notice. The extent of the Equity of the legatee is to have the property delivered to him specifically, provided it is not necessary to sell for the payment of creditors, but remains in the hands of the executor. The doctrine of following the fund has no application. It is a principle of Equity that when a trustee converts the fund and for the purpose of speculation invests it in slaves or merchandise or anything else, the *cestui que trust* has his election to call for the original fund with interest on it if the investment turns out badly, or to claim the benefit if it has been profitable. This is a departure from the general rule that "he who runs the risk should take the gain." The exception is made for the purpose of removing all temptation to misapply the fund by attempting to speculate upon what belongs to another. The doctrine, however, is confined to cases of pure trust when the *cestui que trust* is considered in Equity as the owner of the fund. It never has been applied (134) to the case of an executor or administrator.

In our case, so far as the executor is concerned, the doctrine can have no application; for a further reason, he did not attempt to make gain by a conversion of the slaves, and "the head and front of his offending" is that he delivered them over to the legatees and omitted to take care of the interest of the plaintiff as the statute makes it his duty to do. So far as the legatees are concerned, they held no fiduciary relation towards the plaintiff, and did not receive the slaves as tenants in common with him, but in their own right, as that to which they were entitled under

the will, and the statute simply makes them liable to contribution, not to give up any of the specific property. So the extent of the plaintiff's Equity, as was declared in the former decree, is to have a lien on the property so as to secure the amount to which he is entitled.

The legacies to the daughters, although not to be delivered until marriage or arrival at age, never vested or conferred a present right; so they stand in regard to the settlement on the same footing with the widow: when she received her part the settlement was made as to all; a valuation of the whole estate at that time will fix the amount to which the plaintiff is entitled, with interest.

No exception being taken to the report in regard to the land, it is in that respect confirmed. It is set aside as to the rest and referred back to the Commissioner to state the account according to these directions.

Decree accordingly.

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(135)

JOHN TINNIN AND WIFE *against* JOHN WOMACK AND OTHERS.

When property is bequeathed to the separate use of A during her natural life, free from the control and not subject to the debts of any future husband, with a limitation over to such child or children as she may leave surviving, and if she die without leaving child or children, to such child or children of B as may be living, and no trustee was appointed: *Held*, that C, the executor under the will, became trustee, and is responsible for the forthcoming of the property at her death.

CAUSE set for hearing upon bill and answer, Fall Term, 1853, of the Court of Equity for CHATHAM, and transferred by consent to the Supreme Court.

The bill was filed by Tinnin and his wife Frances against John Womack, executor of Joseph W. Small, and against several others of the name of Bain.

It alleged that in 1850 Joseph W. Small, the brother of the complainant Frances, died after having made his last will and testament and appointing Womack his executor. The will contained the following clause: "I desire and bequeath all my estate and property of every kind and description whatsoever, including everything which I own or am entitled to, whether in possession or in action, to my sister Frances Small during her natural life, and at her death to such child or children as she may leave surviving her. And if my said sister should die without leaving any child or children surviving her at the time of her death, then, and in that event, to such child or children of my uncle, William T. Bain, as may be living at that period. All the estate and property given to my said sister as aforesaid is for her sole and separate use, or for her exclusive benefit, so as not to be under the control or in any way

subject to the contracts, debts, liabilities or incumbrances of any husband that she may hereafter marry."

Frances Small married the complainant Tinnin in 1852, and they have applied to the defendant Womack to pay over the property given to Frances by the above will. The defendant declined doing so until his duty was clearly defined by a decree of a Court of (136) Equity. Whereupon his bill was filed.

The defendant Womack admits the truth of the allegations contained in the bill and asks the Court to declare the true meaning and construction of the will—whether he is constituted a trustee for the complainant Frances during her natural life, and whether he is bound to deliver the property to the husband of Frances without receiving a forthcoming bond.

Waddell and *J. H. Bryan,* for the plaintiffs.
Haughton and *Winston,* for the defendants.

PEARSON, J. We are of opinion that the defendant is made a trustee, and as such it is his duty to hold the property for the plaintiff Frances during her coverture. This construction is necessary in order to carry out the intention of the testator, which was to secure the property and have the profits applied to the separate use and maintenance of his sister, free from the control of her husband, so as not to be subject to his debts or contracts. This can only be done by the intervention of a trustee, and as the legal estate was vested in the defendant by his appointment as executor, it must remain in him as trustee, for there is no person to whom he can pass it during the life of the plaintiff Frances. It is the duty of the defendant, as trustee, to see that the property is taken care of and the profits applied according to the directions of the will; for this purpose he may retain the property in his own possession and manage it himself, or he may, if he chooses, deliver it to plaintiff Tinnin and let him manage it. But the responsibility will be on the defendant, and he is at liberty to require a sufficient bond for his protection.

This case is certainly different from that of a legacy to one for life with a limitation over. There the tenant for life is (137) entitled to the legacy; he has nothing more to do with it. Here the tenant for life is not entitled to the legal estate, and consequently it must remain in the defendant as trustee. The defendant is entitled to his costs.

Decree accordingly.

WILLIE WALLSTON against BENJ. G. BRASWELL, EX'R, AND LOESTON COBB AND HIS WIFE MARGARET.

1. Where an assignment of a legacy was made by deed, and an executor, after such assignment, but without notice of its existence, takes the note of the legatee, who is insolvent, for property of the estate, without security, and pays debts for him, with an understanding that these sums are to be deducted from the part coming to the legatee: *Held*, that the executor was entitled to such credits.
2. *Held*, that registration of such a deed of assignment is not sufficient notice to charge the executor.

BILL removed from the Court of Equity of EDGECOMBE, Fall Term, 1853.

Robert R. Braswell by his will, duly executed and proven, gave to his children Benjamin, Joseph, Thomas, Robert S., Arnetta, Ansey, Margaret, and to Anseylina, his widow, certain specific legacies, and then bequeathed the remainder of his estate to be sold and the proceeds "to be equally divided between his living children and their lawful heirs." Benjamin G. Braswell and Joseph J. Braswell were appointed executors, but only Benjamin qualified, the other having renounced. Margaret, one of the children, intermarried with Loeston Cobb, who with his wife are made defendants.

In October, 1848, Loeston Cobb executed a deed assigning all his interest in the estate to the plaintiff for the benefit of his creditors, which was duly registered. In the same year, but after the execution
(138) and registration of the deed of assignment to the plaintiff, the executor, without notice of this assignment, under an authority in the will, sold to Loeston Cobb a tract of land for two hundred dollars and took his note without security, with an understanding that this sum should be deducted out of his share of the estate; he also, after this assignment and registration, but without notice, at the request of Cobb, paid notes and a judgment for him to the amount of forty-three dollars with the same understanding; these sums, with interest on the $200, amount to $300. Loeston Cobb is insolvent. The prayer of the bill was for an account. It was referred to the Clerk and Master to take an account, who reported allowing this sum of three hundred dollars as a credit to the executor, to which the plaintiff excepted.

No counsel for plaintiff.
Biggs, for defendant.

PEARSON, J. It was held in *Allen v. Smitherman*, 41 N. C., 341, that the assignee of a distributive share takes it subject to all the Equities to which it was liable at the date of the assignment. We go further and

hold that he takes it subject to all Equities up to the time that he gives notice to the administrator.

In our case an executor held a residuary fund to be divided among the children of the testator. The husband of one of the children assigned his share. Afterwards the executor, having no notice of the assignment, took his note without security and paid off debts at his request, with an express understanding that the amount advanced should be deducted from his share. We think it clear that he is entitled to a credit for the amount in a settlement with the assignee.

Such an interest is not assignable at law. Equity permits it to be assigned, but to guard against fraud the assignment is con- (139) sidered imperfect until consummated by notice of the trustee. It is supposed that prudent men will make enquiries of him before dealing with the *cestui que trust;* and the object of requiring notice to be given to the trustee is to put it in his power to give correct information.

In regard to land, fines and common recoveries, which are matters of record, livery of seizin and the enrollment of deeds of bargain and sale give notoriety to the change of ownership. A lease for years is consummated by the entry of the lessee, the purchaser of chattels may take them into possession (if he fails to do so it is a strong badge of fraud, *Twyne's case*), and the change of possession is evidence of a change of ownership. The endorsement of negotiable instruments or the possession of paper, when payable to bearer, shows for itself; but a trust, when the subject is personal property and choses in action other than negotiable instruments, are not susceptible of actual possession, and Equity, pursuing the analogy of the law in allowing the assignment, requires that the change of ownership shall be shown by giving notice to the trustee or the person liable, which is taken as tantamount to a change of possession. Notice is necessary to perfect the assignment so as to deprive the assignor of any subsequent control. Adams Eq., 54. Before notice is given to the trustee or person liable the assignment is binding upon the assignor and volunteers and all who are affected with notice, but the assignment is imperfect and is put on the footing of a mere contract of purchase. After such notice the title is perfect and the assignee has a complete right *in rem.*

It is insisted that as the assignment was by deed of trust to pay debts, and was registered before the advancements were made by the executor, the registration was notice to him. We do not think so for two reasons: Admit, for the sake of argument, that a deed of trust assigning such an interest is within the operation of the registration laws; (140) admit, too, which is also for the sake of argument, that the notice required to be given to the trustee, like the notice which will affect a purchaser, may be by implication, it is certain that an absolute assignment

of such an interest need not be registered. So the necessity for registration depends on the accident of the assignment being absolute or in trust. It cannot be law that an administrator or executor before he may safely pay, in part or in whole, a distributive share must search the office for an instrument which he has no reason to expect to find there, unless it happens to be of a particular kind, when he has no intimation or ground for belief or suspicion that one of any sort has been executed.

But a deed of trust assigning such an interest does not come within the operation of the registration laws. The acts concerning the registration of mortgages and deeds of trust are intended to prevent debtors from committing frauds, and are confined to lands and chattels—such things as may be sold under execution. The act of 1828, although it uses the general terms "estate, real and personal," goes on to restrict the meaning to lands and chattels by providing that the deed, if for land, shall be registered in the county where the land lies; if for chattels, in the county where the bargainor resides, or if he resides out of the State, "in the county where said chattels, or some of them, are situate."

No provision is made in reference to the counties where a deed of trust assigning choses in action or distributive shares is to be registered. Suppose a merchant assigns book-debts, notes and judgments, in which county must it be registered? It is evident such a deed does not come within the words of the statute, and it is equally clear that it does not come within the mischief intended to be remedied. A creditor (141) cannot be hindered or delayed in having his execution satisfied by such a deed, because his execution cannot reach the subject of it. This construction is sustained by the opinion of the Judges in *Doak v. Bank,* 28 N. C., 309. It is true they differ as to whether a "pledge," as distinguished from a mortgage of a chattel, must be registered, but they agree that a mortgage or deed of trust assigning "bank stocks, debts and choses in action generally" need not be registered. *Dearle v. Hall,* 3 Russ., 1; 3 Eng. Cond. Chan., 266, is direct authority for our decision in both points of view. One being entitled to an annuity of £93 to be paid out of a fund held by the executor, assigned it by deed indented to Dearle in trust to secure the payment of £37 a year to said Dearle during the life of Brown and to pay the residue to Brown; this deed was enrolled, but notice was not given to the executor. Afterwards Brown assigned the whole annuity to Hall; before completing the purchase Hall enquired of the executor if Brown had a right to assign, and was informed that he had. Hall thereupon took the assignment and gave notice to the executor. It was decided that Hall was entitled to the annuity on the ground that Dearle had not perfected the assignment to him by giving notice to the executor. In reply to the suggestion that the enrollment amounted to notice so as to affect Hall (there was not even a

suggestion that it required such notice as is required to be given to the trustee), it was said: "It is true the assignment, being given to secure an annuity, was required to be enrolled, but if the annuity had been assigned absolutely no enrollment would have been necessary, how then could Hall be expected to look in the offices for a decument which had no natural connection with the transfer of the fund?

"It was mere accident that it required enrollment. It would be too much to impose on a purchaser the obligation of making a search, to which there was nothing to lead him." (142)

Our case is stronger than that in two particulars: here the executor advances a part of the fund to the person originally entitled to it. There the contest was between two purchasers. Here the deed required no registration; there the deed to the first assignee required enrollment and was enrolled accordingly. The exception must be overruled.

Decree accordingly.

Cited: *Miller v. Moore,* 56 N. C., 436.

GEORGE REID *against* GEORGE BARNHART AND OTHERS.*

1. When several persons enter into a partnership to work a gold mine, the terms being that each one should work personally, or in case of sickness or indispensable business should send one of his own white family, and divide the gains daily: Upon an issue whether one had been received as a substitute on a particular day, what one of the partners said to such persons recognizing him in that character, in the presence of the others, without dissent from them, is competent evidence.
2. When this Court sends down an issue to be tried in the Superior Court and exceptions are taken to such trial, it is the proper practice for the Judge below to present the questions raised to this Court, in order that the party objecting may have an opportunity of moving that the issue may be again set.

THIS cause was transmitted to the Supreme Court from the Court of Equity of Cabarrus, at Spring Term, 1845.

The bill is filed by George Reid against George Barnhart, Robert Motley, Andrew Hartsell and John Reid, the younger. The case is: That John Reid, the elder, was the owner of a gold mine in the county of Cabarrus, and in November, 1834, he granted permission to his son and sons-in-law (who were the plaintiffs and defendants) (143) and three others to work the mines upon the following terms: They were daily to pay him (the father) one-third part of the gold found, and the residue of each day's gains was to be divided equally

*This cause was decided at Fall term, 1845, but omitted to be reported.

among those who worked on the several days. The son and sons-in-law were themselves to do the work personally, unless they should be kept away at any time by sickness or indispensable business, in which case one so absent should be at liberty to send one of his white family as a hand in his place. The son and sons-in-law agreed to work the mine upon those terms and proceeded to do so accordingly. On 20 November, 1834, the four defendants attended at the mine and went on to work in person, the plaintiff and the three other sons-in-law not being there. But the plaintiff, being necessarily detained at home, sent Arthur Reid, his son, to work in his stead that day, and Arthur worked accordingly, as the plaintiff alleges. Shortly after the operations of the day were begun one of the defendants found a large lump of gold weighing about nine pounds, avoirdupois weight, which, after paying to the father his share, the defendants divided among themselves.

The bill was filed by the plaintiff, claiming from the defendants an equal share of the gold found on that day upon the ground that his son was sent by him as his substitute, as he had a right to do, as he was an able and sufficient hand out of his own family, and at all events, that he had been accepted by the defendants as a hand and had been set to work in his father's place.

The answer admits that Arthur Reid was at the mine on the day mentioned, and at work, but the defendants say he worked by himself and for himself, and not with or for them, and they deny that they did receive him as a hand on account of his father, or that they would have done so, inasmuch as they alleged he was too young to do a man's (144) work.

Upon the point thus in dispute there was much conflict in the depositions, so much so as to induce the Court to direct issues to be tried in the Superior Court of Cabarrus: 1st, whether Arthur Reid was received by the defendants as a hand to work in the stead and lieu of his father before the finding of the piece of gold on 20 November, 1834; and 2d, if he were so received, whether he had been discharged upon the finding of the piece of gold.

On the trial of the issues, *Judge Battle* presiding, several witnesses were offered by the plaintiff to prove that Arthur Reid was at the mine at work on the day in question, and that he was at one time sent to some distance by one of the defendants (but which is not stated) for an implement used in the mine called a dipper, and that while he was gone the defendant Motley complained "that he stayed too long, and said that Arthur must be smarter or he would send him home, and that George Reid (the plaintiff) should come himself or send a better hand." This was objected to as evidence against the other defendants on the ground that one partner could not receive another person as partner without the

concurrence of his copartners. But it was received by the Court, and the jury found upon that and other evidence both the issues in favor of the plaintiff against all the defendants.

His Honor thereupon stated the case so as to present the question and enable the defendants to move this Court to direct the issues to be tried over again, if the Court should be of opinion that the evidence was not proper against the defendants, and the defendants' counsel made that motion.

RUFFIN, C. J. We are of opinion that his Honor rightly admitted the evidence. It is not a question about the admission of a stranger into the partnership by one of the partners without consulting his companions, for there is no pretence that Arthur Reid was to become a partner, or entitled even to wages for his labor from the de- (145) fendants.

The father was the partner and he had become so by agreement with all the defendants, and the only question was, whether he had complied with his contract so as to entitle *him* to a share of the gains by sending a competent hand in his stead, as provided for on the agreement. The plaintiff says he did, and to establish it he says the defendants themselves accepted the person he sent as a hand for him. It is surely evidence of the fact of acceptance that the young man was engaged openly in the work, and that one of the defendants, from the deference due to his years or superior skill, undertook to direct the operations of this person for the common good; spoke of him as his father's substitute, no one at the time making objection to the hand nor to the acts or declarations of the person thus assuming authority over the hand. Such circumstances tend, certainly, to show that all concerned recognized Arthur as the substitute of his father.

The Court, therefore, is satisfied with the result of the trial. It entitles the plaintiff to the decree he asks, and it must be referred to the Clerk to take an account of the sum due to the plaintiff in the premises and enquire which of the defendants holds the fund.

Decree accordingly.

Cited: Fisher v. Carroll, 46 N. C., 29; *Peebles v. Peebles,* 63 N. C., 658.

(146)

PAMELA A. GWYN *against* RICHARD GWYN, EX'R, AND OTHERS.

1. A will of realty and personalty is construed as if executed immediately preceding the death of the testator, unless the contrary appears from the will itself.
2. Where the testator died without leaving a child, in 1853, having made his will in 1848, and therein devised to his widow in the following words, "in addition to what the law gives her, of my personal estate, I will her the bureau," etc.: *Held*, that she took one-half of the personal estate, with the addition of the bureau, etc., under the act of 1852, instead of one-third, under the act of 1835.
3. *Held*, also, that the widow was entitled to the crop growing on the land at the testator's death, and to a year's provision.

CAUSE removed from the Court of Equity of Caswell County, Fall Term, 1853.

Littleton A. Gwyn, the testator, died in July, 1853, without leaving a child or the lawful issue of such. The other facts of the case sufficiently appear from the opinion of the Court.

Morehead, for the plaintiff.

No counsel appeared for the defendants.

NASH, C. J. The bill is filed to procure a judicial exposition of the will of Littleton A. Gwyn. The testator devises to his wife, the complainant, the tract of land on which he lived, describing the metes and bounds. In the same clause is the following bequest: "In *addition* to what the law gives her of my personal estate, I will her the bureau," etc. The will bears date in 1848, and the testator died in July, 1853. By Laws 1835, ch. 10, sec. 1, where a man died intestate, leaving no issue, his widow was entitled to one-third of his personal estate. In 1852 another act was passed upon the subject; therein it is provided that hereafter when any person dies intestate "possessed of personal estate, leaving a widow, but having no child or children nor any issue of the same, one-half of said estate shall be allotted to said widow." The testator has left no doubt as to his intent and wishes in the bequest to his wife: he desired her to have that portion of his personal estate to which she would be entitled under the law regulating the distribution of (147) such property. Being a man of large estate, he thought that her share under the law would be an ample provision. That such was his meaning is confirmed by the manner in which he speaks of the devise of the land to his wife: he calls it "the dower" land, as if she were to claim it by her right of dower. A doubt was suggested whether she can claim under the will any of the personal property but the unimportant articles included in the words, "I give her the bureau," etc. The

intention of a testator, gathered from the will itself, is the leading rule in the construction of wills. Being very clearly of opinion that the testator intended to give to his widow what the law would have secured her in case of his having died without a will, the doubt above stated cannot exist, for he gives those articles "in addition" to her distributive share.

The only question in the case is under which act, that of 1835 or of 1852, is her distributive share to be allotted to her? The will was made in 1848, at which time the rule of distribution in a case of intestacy, where there were no children or the issue of such, was one-third of the personal property to the widow. The act of 1852, in such case, gives her one-half. It is common and familiar learning that a will is ambulatory until the death of the testator, and by the act of 1844-5, ch. 3, sec. 3, it is provided that "every will shall be construed with reference to the real and *personal* estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator or testatrix, unless a contrary intention shall appear by the will."

The will of Mr. Gwyn, then, must be considered as having been executed by him in 1853, immediately before his death, as there is nothing in it to control this legal intent.

It is true this case does not come within the letter of the act of 1852, because there is no intestacy, but most clearly within its scope. The testator, as before said, in making his bequest must be considered as executing his will immediately before his death, and with refer- (148) ence to the rule of distribution as then existing as saying: I give my wife that portion of my personal property which the law, as it now stands, secures to her in a case of intestacy. What portion of the personalty did the law then secure to a widow in a case of intestacy? One-half; and to this portion of the personal property the plaintiff is entitled—and in addition to that portion the law also gives her a year's allowance; this is also embraced in the bequest, and to it she is entitled.

It is clear that the widow taking the land under the will is entitled to the crop growing upon it at the time of the testator's death. *Tayloe v. Bond*, 45 N. C., 5. The proviso in the act of 1852 has no application. The testator could not have contemplated a dissent by the widow, as he has made for her a more ample provision than the law would have allowed her; this is shown by the fact of the bequest of the small articles, which she would have lost by a dissent.

If required there must be a reference to the Master to take an account of the personal estate of Littleton A. Gwyn, which has come to the hands of the defendant, and of its administration, and also of the value of the plaintiff's year's provision.

The case is retained for further directions.

GENERAL ORDER

AT

DECEMBER TERM, 1853

The following shall be Rules of Practice in this Court:

I. Unless exception to the competency of evidence contained in a deposition be made before the hearing of any cause, the whole shall be deemed competent so far as it may be deemed relevant.

II. If any one will except to the competency of such evidence, he shall specify the matter and cause of exception, and furnish the opposite counsel with the same, who shall, in writing, either admit the exceptions, and the excepted matter shall be expunged, or shall deny the sufficiency of the causes of exception, and thereupon the excepted matter shall be referred to some member of the Bar, whose decision, unless appealed from, shall be conclusive, and he shall expunge the excepted matter allowed as such. The costs of the reference shall be taxed against the party failing and shall not be costs in the cause.

III. If there be no opposite counsel present, the exceptions shall be filed with the Clerk and deemed served.

IV. Upon a petition to rehear any order or decree hereafter filed, there shall be taxed against the petitioner, should he fail in obtaining a reversal of modification of such order, full costs, including a Solicitor's fee and five dollars for the fee of the Clerk.

It is ordered that the causes be called on the third day of the term, beginning with the First Circuit (Equity and Law), then the Second Circuit, and so on, and the Clerk will docket the causes according to this arrangement.

MEMORANDUM.

Hamilton C. Jones, Esq., of Rowan, was appointed Reporter at this term in the place of *Perrin Busbee, Esq.,* deceased.

SUPREME COURT OF NORTH CAROLINA

JUNE TERM, 1854

AT RALEIGH.

JOHN DEW AND OTHERS against EDWIN BARNES, ADMINISTRATOR, AND OTHERS.

In the construction of a will, in order to arrive at the intention of the testator, a word will be supplied when the sense of the clause in question, as collected from the context, manifestly requires it.

CAUSE removed from the Court of Equity of EDGECOMBE, Spring Term, 1854.

The bill was filed by the plaintiffs, as the next of kin of Benjamin Simms, against the defendant Edwin Barnes, the administrator of said Benjamin, and against Willie Simms, who set up a claim to the property sought to be distributed under the will of James Simms. The principal question between the parties arises upon the construction of the will of James Simms, executed in September, 1846, shortly before the death of the testator. At the time of his death the testator had two sons, the defendant Willie, who was then about nineteen years of age, and Benjamin, aged about seventeen, and four daughters. He left also a widow.

By several clauses in this will the testator devised and bequeathed to each of his daughters, by name, considerable legacies (150) in land, money, slaves and other property in kind. By several other clauses in the same will he devised and bequeathed to Benjamin the remainder in a tract of land after the death of his mother; also another tract of land, eight slaves, by name, and their increase, and various other kinds of property; and to his son Willie he gave land, slaves by name and various other kinds of personal property; and immediately succeeding these devises and bequests to his two sons he adds these words: "If either of my—should die without a lawful heir the longest liver heirs the whole of both estates." Benjamin died without ever having had a child or children (never having been married), leaving Willie him surviving, and the defendant Barnes, as administrator, took possession of and now holds all the personal property bequeathed to him by the will of the testator, James, his father. The plaintiffs insist that by a proper construction of the above recited will the intestate Benjamin took an absolute estate in the property given therein to him, and

that they, as his next of kin with the defendant Willie and Mrs. Barnes, are entitled to distributive shares of the slaves and other personal estate thus bequeathed. While the defendant Willie contends that under the will aforesaid this limitation was contingent, and that on the death of the said Benjamin without issue the property vested in him as the *longest liver* of the two sons.

The defendant Barnes submits in his answer to pay and distribute the estate in his hands to whomsoever the Court may consider entitled to the same, and asks to be advised as to his duty in this particular.

The prayer of the bill is for an account of the assets in the hands of the administrator, and for general relief. The cause was set down for hearing on the bill, answer and exhibit, and transmitted to this Court by consent of parties.

Biggs, for plaintiffs.
Moore, for defendants.

(151) BATTLE, J. No rule of law is better settled or more generally known than that in the construction of a will, the intention of the testator, apparent in the will itself, must govern—and that in order to effectuate that intention as collected from the context, words may, when necessary, be supplied, transposed or changed. 1 Jarman Wills, 427; *Sessoms v. Sessoms,* 22 N. C., 453. The difficulty in the clause of the will which we are called upon to construe arises manifestly from the omission of one or more words, which makes the sense incomplete. But no person, in reading the will, can doubt for a moment what the omitted words were intended to be. The testator had in preceding clauses given to each of his two sons land, slaves and stock, and then subjoined the clause in dispute. "If either of my should die without a lawful heir, the longest liver heirs the whole of both estates." The word "either" taken by itself signifies "one or another of any number," but it is here confined to two by force of the word "both," which signifies "two, considered as distinct from others or by themselves." The omitted word or words, then, is or are "sons" or "two sons," and it is so plain that such and no other was the testator's meaning that no argument can make it plainer. It is manifest also that by dying without a lawful heir the testator meant a lawful child, because if the one or other brother died without heirs, in a technical sense, there could be no survivor. One of the sons having died unmarried and childless, his estates goes, under the limitation, to his surviving brother. There must be a decree to that effect.

PER CURIAM. Decree accordingly.

(152)

NATHAN B. DOZIER *against* ROBERT SPROUSE AND WIFE.

Any matter, which has a bearing upon the right of the plaintiffs to a decree for an account, comes up at the hearing, when the decree for an account is asked for; but a matter of *charge*, *i. e.*, what does or does not, form a part of the fund, or of *discharge*, cannot then be gone into, and comes up regularly by exceptions to the report of the Master.

CAUSE removed from the Court of Equity of YADKIN, at Fall Term, 1853.

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

No counsel appeared for the plaintiff.

Winston and *H. C. Jones,* for the defendants.

PEARSON, J. Smith Dozier died, having his domicil in South Carolina, 10 December, 1831, leaving him surviving the plaintiff, who was his only child, and his widow, who is one of the defendants.

The widow was appointed administratrix and sold much of the property and paid off the debts and then removed to this State, bringing her only child, the plaintiff. She afterwards married the other defendant, and the object of the bill is to have an account of the estate of Smith Dozier. Among other things the bill charges that the intestate owned a slave named Sandy, who is still in the possession of the defendants and is of great value, being a "first-rate tanner"; and it is insisted that Sandy, together with the profits and hires that have been or ought to have been made, form a part of the estate of the intestate, for which the defendants are bound to account.

The bill also charges that the intestate purchased from Mary Bright, the mother of his wife, an undivided share in many slaves, or that he acquired a right to them as husband of the defendant Eliza- (153) beth, by reducing them into possession in his life. A discovery is asked in regard to these slaves, and it is insisted that they, or the price of such as have been sold, form a part of the estate for which the defendants are bound to account.

The defendants submit to a decree for an account of the estate of Smith Dozier, but they say that in regard to the slave Sandy he was sold by the administratrix at public sale and purchased by her. That the sale was in all respects regular and the price a fair one; and that by the law of South Carolina an administrator may be a purchaser at his own sale, provided it is regular and he pays a fair price. In regard to the slaves conveyed by the deed of Mary Bright, the defendants insist that it was a gift to Elizabeth and her other children of their mother's interest and right to the estate of their father; and that as her husband

died before the estate was settled and the property divided, the right survived to her.

There was replication and commissions, and after taking much testimony the cause was removed to this Court.

Upon the opening of the case it was suggested to the defendants' counsel (the plaintiff having no counsel in this Court) that as the defendants submitted to a decree for an account there was at this stage of the proceeding no issue or question for the Court to act on; and that the matter in regard to Sandy and the slaves derived from Mrs. Bright would properly come up upon exceptions to the report. The counsel, however, insisted that they were entitled to have the question now heard so that the decree for an account might be made with instructions in regard to these matters; and they pressed it on the ground that a declaration of the facts and of the opinion of the Court thereon would save much trouble before the Master.

We have considered the subject and have come to the conclusion that according to the course of the Court we cannot now make any declaration, and the decree must be in the usual form to take an account
(154) of the estate of the intestate that did or ought to have come to the hands of his administratrix.

The plaintiff, upon the hearing, is required to make such proof only as will entitle him to the decree he asks for in the first instance (Adams Eq., 362). In our case the plaintiff asks for a decree to account. The defendants submit to it. So no proof was necessary, and after replication a decree for an account ought to have been made as of course. If, therefore, we should at this stage of the case make a declaration in regard to the slave Sandy or the slaves derived from Mrs. Bright, the plaintiff might well say: "I am taken by surprise. I prepared only such proof as was necessary to entitle me to a decree for an account and that proof was supplied by the answer. When the matter comes before the Master I hope to be prepared to show what belonged to the estate of the intestate and should be a charge, and also to meet any false claim of discharge."

It will be seen at once, that at this stage of the case the only question is, Are the defendants bound to account? No other question is now presented and of course no other question ought now to be decided. For instance, a bill charges a partnership or an agency, and prays for an account—the relation of partner or agent is denied—at that stage of the case the fact of the alleged relation is the only question. Or suppose the bill charges that the defendant is the administrator of the plaintiff's father and is bound to account, the relation being admitted, there can, at that stage of the case, be no other question.

The rule is this: any matter which has a bearing upon the right of

the plaintiff to a decree for an account comes up at the hearing when the decree for an account is asked for—but a matter of charge, *i. e.*, what does or does not form a part of the fund, or of discharge, cannot then be gone into, and comes up regularly by exception to the report of the Master. *Law v. Hunter,* 1 Russ., 101; *Ib.,* 107; *Tomlin v.* (155) *Tomlin,* 1 Hare, 245. The propriety of this rule of practice is so obvious that it seems hardly worth while to say much about it; but for the sake of those members of the profession whose clients suffer by an unnecessary delay in this stage of the case, we extract and adopt the language of 2 Daniel, 997: "In the case of a plaintiff it is sufficient to prove so much only of the allegations in the bill as is necessary to entitle him to a decree. Thus, when the suit is for an account, all the evidence necessary to be read at the hearing is that which proves the defendant to be an *accounting party,* and then the decree to account follows of course. Any evidence as to the particular items of an account, however useful it may be in a subsequent stage of the cause, would be irrelevant at the original hearing. For this reason, when the suit is against an administrator, all that is necessary to prove on the part of the plaintiff is that the defendant fills and has acted in that character."

It is suggested that as the domicil of the intestate was in South Carolina, the plaintiff, as next of kin, has no right in this State to call for an account, and that the suit ought to have been in the name of an administrator appointed in this State. We have considered the question and think it clear that as the intestate, at the time of his death, had no effects in this State, administration could not be taken here, and consequently that the suit is well brought in the name of the next of kin, who is entitled to have the same relief in our Court that he could have had in the Court of his father's domicil, but for the accident of the removal of the parties to our State. The removal and its consequences did not in any point of view originate a right on the part of the *intestate* upon which our Courts could grant letters of administration. The injury, if any, was done to the plaintiff or next of kin.

The plaintiff is entitled to a decree for an account.

PER CURIAM. Decree accordingly.

Cited: Hairston v. Hairston, 55 N. C., 125; *R. R. v. Morrison,* 82 N. C., 143; *Neal v. Becknell,* 85 N. C., 302; *Chalk v. Bank,* 87 N. C., 202; *Royster v. Wright,* 118 N. C., 154.

(156)

HUGH CAMPBELL, ADM'R, *against* FELIX SMITH.

Where a bill alleges a secret trust and the answer is evasive as to such allegation, yet if the testimony in the case clearly and distinctly disproves the allegation, the plaintiff will not be entitled to have such trust declared, and the bill will be dismissed with costs.

CAUSE transferred from the Court of Equity of CASWELL.

The case sufficiently appears from the opinion of the Court.

E. G. Reade, for the plaintiff.
Morehead, for the defendant.

BATTLE, J. The bill seeks to set aside the deed by which the plaintiff's intestate conveyed her slaves to the defendant, upon the ground that it was obtained by fraud or the exercise of undue influence; or to convert the defendant into a trustee upon the ground that the slaves in question were conveyed to him upon a secret trust that he was to hold them in a qualified state of bondage. The allegations upon the first ground are denied in the answer; that denial, so far from being disproved, is fully supported by the testimony, and the position is now abandoned. There is some doubt upon the second ground, not as to the law, for that is clearly settled (see *Lemmond v. Peoples,* 41 N. C., 137, and the cases there referred to), but as to the testimony. It is established by the proof, as we think, that the intestate did intend at one time to convey her slaves to the defendant upon the secret trust charged in the bill. It is highly probable that she thought he, being their father, would not hold them in absolute slavery, but would permit them to enjoy as much of freedom as was compatible with their condition. In
(157) addition to this, there is the appearance of evasiveness in that part of the answer which responds to the charge of the secret trust. The words are: "This defendant utterly denies that there was any secret trust or understanding between himself and intestate that said slaves were to be freed by him; on the contrary the intestate well knew that they were to be and remain the slaves of this defendant." The specific allegation in the bill, to which the above is a response, is, in effect, not that the defendant was to free or set free the slaves, but that he was to hold them nominally and ostensibly as slaves, but really and secretly as free persons. The plaintiff might have filed exceptions and thereby compelled from the defendant a more direct and definite answer. Not having done so, the evasiveness in the answer may cast suspicion upon it, but will not supply the plaintiff with proof upon that point. The effect of this suspicion, however, taken in connection with the proof of the intestate's previously declared intention and the probability that

such was her real purpose, arising from the relative situation of the parties, would induce us to believe that the deed in question was executed upon the secret trust as charged, were it not disproved by the clearest and most indisputable testimony. There are three subscribing witnesses to the deed, to wit: George Williamson, William Long and Vincent Bradsher, all of whom were examined. George Williamson was first called and testified that a short time previous to the execution of the deed the defendant informed him that Polly Coile wished to see him; that he thereupon went to her house, where she told him that she wished to convey her slaves to the defendant, upon which he said to her that it was a matter of importance and she had better call in some of her neighbors and consult them about it; that she requested him to see a lawyer and get a proper instrument drawn, which he did; that he then went to her house, where he met William Long and Vincent Bradsher, and the subject was talked over by them all; that he told Polly Coile that by conveying the slaves to the defendant they (158) would not be free, but would be slaves and liable for the defendant's debts and subject to any disposition he might think proper to make of them; to which she replied that she was fully aware of that, but she preferred they should belong to him in preference to any of her relations; that she had once made a will and given the slaves to her relations, but they manifested such a desire to get possession of them before her death that they displeased her, and she intended they should not have them; that after talking the matter over, she being fully apprised of the contents of the deed, executed it, and he and the other two witnesses subscribed it; and that she at the time seemed fully to understand what she was doing. This witness testified further that two other instruments were executed at the same time, one of which was a bond for $200 given by the defendant to Polly Coile for the purchase money of the slaves, and the other an obligation by him to take care of and furnish a home for a superannuated negro man owned by Polly Coile named Harry. The testimony of Long and Bradsher is substantially the same with that of Williamson as to what occurred when the deed was executed, with some additional particulars which it is unnecessary to mention. The defendant, in his answer, admits that he never paid the $200 to Polly Coile, but says that she surrendered the bond to him upon his undertaking to pay debts for her to that amount, a part of which he says he had paid, but he has made no proof of it. The testimony of the three subscribing witnesses rebuts, as we think, the presumption arising from the other circumstances of the case, that the deed in question was executed upon a secret trust that the defendant was to hold the slaves in a qualified state of bondage. The proof of the declarations of the intestate, made after she had executed the in-

strument, as to her intention in executing it, if admissible at all,
(159) is not much to be relied on, because it is apparently contradictory and can only be reconciled by supposing that to some of the witnesses she spoke of her wishes to set her slaves free, but, as she stated to others, the intention to do so had been abandoned when she found that the laws of the State forbade it. What the defendant himself said about the matter, to wit, that the intestate had offered the slaves to him several times, but he did not think he could hold them, though he had concluded at last that he would try it, is not very intelligible, because nothing was said at the time to show for what purpose she had offered them, or upon what terms he was to hold them. At any rate, the testimony is not sufficient to weigh down the proof, clear and indisputable, that after a full explanation from the three subscribing witnesses the intestate executed the deed declaring that she knew that the negroes were to be the slaves of the defendant, liable to the payment of his debts and subject to any disposition he might think proper to make of them. To hold otherwise would be to make circumstances of suspicion stronger than the most positive proof. That we are not disposed to do, and we must declare that the plaintiff has failed to sustain the material allegations of his bill, and of course it must be dismissed with costs.

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(160)

BENJ. F. BIDDLE AND OTHERS *against* GOULD HOYT AND OTHERS.

Slaves were bequeathed to J. B. and S. B., his wife, "for and during their joint lives, and to the survivor for life, and upon the death of the said J. B. and S. B., to their children, to be equally divided between them, or the survivor of them, their heirs and assigns forever." J. B. and S. B. had three children at the death of the testator, two of whom died without issue in the lifetime of S. B., the surviving life tenant, and the third was living at the time of her mother, S. B.'s death: *Held*, that this surviving child was entitled to the whole interest in the legacy.

CAUSE removed from the Court of Equity of PITT, Spring Term, 1854.

Elizabeth Simpson died in 1804, having made and published her last will and testament, which was duly admitted to probate and recorded, and James Easton and Joseph Brickell were appointed executors and were duly qualified, and among other bequests was the following:

"It is my will and desire that the other half of my estate (the same being a residue) as aforesaid, consisting of notes, bonds, negroes, horses, cattle, sheep, hogs, and one-half of any residue of my estate, and I give the same unto Joseph Brickell and Sarah Brickell, his wife, for and during their joint lives, and to the survivor for life, and upon the death of the said Joseph and Sarah Brickell I will the aforesaid one-half of

notes, bonds, negroes, horses, cattle, sheep, hogs, household and kitchen furniture, and one-half of any residue of my estate unto the children of the said Joseph and Sarah Brickell, to be equally divided between them or the survivor of them, their heirs and assigns forever."

Sarah Brickell was the daughter of the testatrix, and at her death the children of Joseph and Sarah were Sarah S., Joseph, John and Martha Ann, and no other children were born to them afterwards. Joseph Brickell and his wife Sarah took possession of and held the property bequeathed until his death in 1813, and then his widow, the said Sarah, continued to hold the same till her death, which occurred in 1852.

Sarah S., one of the children of the tenants for life above mentioned, was married in 1819 to one John Norcott, and died in 1820, leaving a son, Joseph John, who died in 1848. (161)

Joseph John Brickell, another of the children of the tenants for life, died intestate and without issue about the year 1849, and the remaining child, Martha Ann, yet survives, having married the defendant, Gould Hoyt, in the year 1825.

The plaintiffs contend that on the death of the testatrix, Mrs. Simpson, the remainder, bequeathed as above stated, vested absolutely in the children of Joseph and Elizabeth Brickell, subject to the claim of any other child that might thereafter be born, and that on the death of Sarah Brickell, the surviving tenant for life, the slaves in question became divisible among the representatives of Sarah S. Norcott and Joseph J. Brickell and the surviving Mrs. Hoyt.

Benjamin F. Biddle, the administrator of Sarah S. Norcott; Samuel S. Biddle, the administrator *de bonis non* of John Norcott, and William B. Pope, the administrator of the testatrix Elizabeth Simpson, are the plaintiffs. The prayer of the bill is for a division of the slaves, as above insisted, and for general relief.

Gould Hoyt and his wife Martha are made parties defendant. Gould Hoyt, the executor of Sarah Brickell, is made a defendant, and in their answers admit the facts as above stated, but insist that by the proper construction of the will of Mrs. Simpson the whole of the property mentioned in the clause recited above vested in him, in right of his wife, Martha Ann, who was the only surviving child of Sarah, and Joseph J. Brickell at the death of Sarah, the surviving tenant for life.

Joseph J. Dancey, administrator of Joseph J. Brickell, was also made a party defendant, who, in his answer, concurred in the statements and views of the other defendants, and declined contesting the same.

Cause set for hearing on the bill, answers and exhibit, and (162) transmitted to this Court by consent.

Moore, for plaintiffs.

Biggs and *Donnell,* for defendants.

BATTLE, J. Elizabeth Simpson died in 1804, leaving a will in which was contained the following clause: "It is my will and desire that the other half of my estate as aforesaid, to wit: consisting of notes, bonds, negroes, etc., I give the same unto Joseph Brickell and Sarah Brickell, his wife, for and during their joint lives, and to the survivor for life, and upon the death of the said Joseph and Sarah Brickell I will the aforesaid one-half of notes, bonds, negroes, etc., unto the children of the said Joseph and Sarah Brickell, to be equally divided between them or the survivor of them, their heirs, and assigns, forever." Joseph Brickell and Sarah, his wife, had at the death of the testatrix three children, and never had any others. Sarah Brickell, who was the daughter of the testatrix, survived her husband many years and died in 1852. Of the three children Joseph J. Brickell died without issue in the lifetime of his mother. Sarah S. married John Norcott and died leaving one child, who died without issue in the lifetime of his grandmother. Martha married Gould Hoyt and is still living. The question presented by the pleadings is whether, upon the death of Elizabeth Simpson, the testatrix, the property bequeathed by the above recited clause of her will became vested in the children of Joseph and Sarah Brickell so that upon the death of two of them, in the life time of the mother, their interests devolved upon their respective representatives, or did it remain suspended during the life of Sarah Brickell and upon her death vest in her sole surviving child, Martha, the wife of the defendant Gould Hoyt.

(163) Upon the question to what period words of survivorship contained in wills are referable, many decisions have been made by the Courts, both of England and this country. It would be a needless task to attempt a review of all the cases, and a difficult one to extract from them a principle by which to reconcile them one with another. In looking over the English cases on the subject it will be found that the rule of construction varied at different times, and it was not until 1819 that one was established which was so founded upon reason and convenience as to secure the approbation of the Courts, and to lay down a principle for future guidance. In *Cripps v. Wolcott,* 4 Madd., 11, which came before *Vice-Chancellor Leach,* a testatrix devised and bequeathed her real and personal estate in trust for her husband for life, and after his decease directed that her personal estate should be equally divided between her two sons, Arthur and George, and her daughter Ann, and the survivors or survivor of them, share and share alike. Arthur died in the lifetime of the husband and George and his sister, surviving the life tenant, claimed the whole. The Vice-Chancellor said: "It would be difficult to reconcile every case upon this subject. I consider it, how-

ever, to be now settled that if a legacy be given to two or more, equally to be divided between them, or to the survivors or survivor of them, and there be no special intent to be found in the will, that the survivorship is to be referred to the period of division. If there be no previous interest given in the legacy, then the period of division is the death of the testator, and the survivors at his death will take the whole legacy. *Stringer v. Phillips,* 1 Eq. Cas. Ab., 292. But if a previous life estate be given, then the period of division is the death of the tenant for life, and the survivor at such death will take the whole legacy. This is the principle of the cited cases of *Russell v. Long,* 4 Ves., 551; *Daniel v. Daniel,* 6 Ves., 297, and *Jenour v. Jenour,* 10 Ves., 562. In *Bindon v. Lord Suffolk,* 1 P. Wms., 971, Brow. Par. Cas., 189, the House of Lords found a special intent in the will, (164) that the period of division should be suspended until the debts were recovered from the Crown, and they referred the survivorship to that period. The two cases, *Roebuck v. Dean,* 2 Ves., Jr., 265, and *Perry v. Woods,* 3 Ves., 204, before *Lord Rosslyn,* do not square with the other authorities. Here, there being no special intent to be found in the will, the terms of survivorship are to be referred to the death of the husband, who took a previous life estate."

The rule of construction thus clearly enunciated is so applicable to the case before us, where the division is directed to be made among the children of Joseph and Sarah Brickell *upon their deaths,* that we can have no hesitation in deciding in favor of the child who was the survivor at that time, unless we find that the rule has been since overruled. The question, then, is, has it been overruled? So far from it, Mr. Jarman says, it was so reasonable and convenient for general application that subsequent Judges adopted and followed it, instances of which are to be found in *Gibbs v. Taft,* 8 Simons, 132, and *Blewitt v. Stanffers,* 9 Law Journ. N. S., ch. 209. Mr. Jarman, after noticing these and other cases upon this branch of the subject of limitations to survivors, concludes thus: "In this state of the recent authorities one scarcely need hesitate to affirm that the rule which reads a gift to survivors simply as applying to objects living at the death of the testator is confined to those cases in which there is no other period to which survivorship can be referred, and that when such gift is precluded by a life or other prior interest, it takes effect in favor of those who survive the period of distribution and those only." 2 Jarman Wills, 651. Such, too, was undoubtedly the conclusion to which this Court came in the recent case of *Hilliard v Kearney,* 45 N. C., 221. In their decision the Court say (p. 229) that the defendant would be entitled whether " 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

(165) or, at all events, when all died except two." But in discussing the subject, the Court concludes that: "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." *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."

The remainder of the discussion is confined mainly to the latter proposition, as will be seen by what is said on page 231: "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 authority is decidedly in favor of the former." It is manifest that the establishment of the latter proposition does not in the slightest degree affect the former, to wit: That where *there is an intermediate period* between the death of the testator and the legatee, that period will be adopted as the time when the legacy will be considered absolute. This appears, not only from what had already been stated, but also by what is found on page 232, where the hypothetical case is dropped and the actual case is again considered. "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 (166) by the words or a necessary implication. This period is presented at the death of the tenant for life or when the 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." In the will now under consideration such an intermediate period is fixed upon and expressed in clear and unequivocal terms. The division of the property is to be made *upon the death* of Joseph Brickell and his wife; it is to be then made between their children or the survivor of them. It is distinguished from many of the cases cited by the plaintiff's counsel by the total silence of the will as to one of the children dying without an heir or dying without issue. In all material respects it is identical with the case of *Cripps v. Wolcott, ubi supra,* where it was held that the children who survived the life tenant took the whole. The rule established in that case we approved in

Hilliard v. Kearney, 45 N. C., 221, and we feel bound to follow it.

PER CURIAM. Dismissed with costs.

Cited: Vass v. Freeman, 56 N. C., 224; *Price v. Johnson,* 90 N. C., 596; *Buchanan v. Buchanan,* 99 N. C., 313; *Galloway v. Carter,* 100 N. C., 121; *Campbell v. Cronly,* 150 N. C., 468.

(167)

HARDY H. BOYETT *against* JAMES R. HURST, ADM'R.

1. Where a guardian, with means in his hands amply sufficient to educate his ward, altogether fails to have him sent to school or in any manner instructed, but permits him to hire his own slaves and rent his own land and to carry on the business of farming during the last three years of his minority, during which time he becomes indebted almost to the value of his estate, and on the day of such ward's arrival at age seeks him and obtains a release from him, without making any exhibit of items, and without, in any manner, accounting with his ward: *Held,* that such conduct amounts to gross neglect and abuse of his trust, and that in accounting in this Court every inference is to be made against such guardian.
2. *Held, also,* that a guardian, thus acting, was accountable to his ward for the full value of the hires of his slaves and the rent of the land, but not being able to procure a bond, which the guardian had taken from the ward, with a surety thereto, and which had been surrendered to him on the settlement above mentioned, the ward was not in a situation to have relief in this respect.
3. Where a guardian, thus grossly abusing his trust, claims a credit for $500 for his ward's expenditures, and files no exhibit of the items of these expenditures, and does not make it appear that they were proper, such credit will not be allowed him.
4. Where the guardian lends the money of his ward to a trading firm, composed of two partners, who both became insolvent at the same time, and from the same causes, no security having been taken besides the names of the two partners, it was *held,* that the guardian was accountable for the money thus loaned, notwithstanding at the time of this loan the partners were considered as entirely solvent and their failure was sudden and unexpected.

CAUSE removed from the Court of Equity of DUPLIN, Spring Term, 1852.

This was a bill filed by the plaintiff against the administrator of his guardian, seeking an account and settlement of the guardianship, which was answered by the defendant, and replication made and proofs taken, and being set down for hearing, was transmitted to this Court by consent. In this Court, at June Term, 1855, it was decreed that the plaintiff was entitled to an account, and it was referred to the clerk to take an account, and having made his report at the last term of this Court, ex-

ceptions to the same were filed by the plaintiff, and now the cause is again heard upon the exceptions. The whole case is presented in the opinion of the Court.

D. Reid, for the plaintiff.
W. A. Wright, for the defendant.

(168) PEARSON, J. There are many peculiar circumstances which distinguish this case from any of the kind that has ever fallen within the observation of either member of the Court. During a period of five years the guardian makes no sort of return, and there is nothing among the papers of the Clerk's office to charge him with one cent. A few days after the ward arrives at age the guardian goes to him in the country and professes to come to a settlement in the presence of the ward's mother and a brother-in-law of the guardian. No memorandum is made of the settlement and the larger part of the supposed balance is paid off by handing to the ward notes upon two men, both notoriously insolvent, and thereupon the ward is induced to execute a formal release under seal.

For the last three years of his minority the ward is permitted to become the hirer of the slaves and the renter of the land, and to go on and trade and manage the business as if he was of full age.

Besides pretending to manage the business the ward gets married, and upon arriving at full age had a wife and two children on his hands. With an ample estate the ward is not sent to school or, at all events, when he arrives at age he is not able to read or to write, and makes his mark to the release given to the guardian. The day after he arrives at age the ward is under the necessity of executing a deed of trust, whereby he conveys his entire estate for the satisfaction of creditors. Thus, at the age of twenty-one, he is thrown upon the world, unable to read or write, with a wife and two children, and without one cent of a large patrimonial estate.

These, truly, are unfortunate results, and every one will say, in this instance, the benign purpose of the law in requiring guardians to be appointed has failed of its object. In the absence of all explanation, we are forced to the conclusion that the guardian has been guilty of gross neglect, and the question is: To what extent is it in our power to hold him accountable for such utter disregard of his duty?

(169) The Clerk, in his report, says: "No vouchers for expenditures are produced. No returns were made. No commissions are allowed the guardian." The defendant does not except. Our attention is consequently confined to the three exceptions of the plaintiff, and reference is made to this part of the report, as it was to the "unfor-

tunate results" set out above, merely to give a general outline of the case, from which it abundantly appears that the defendant, like all trustees, guardians and agents who are guilty of gross neglect, must submit to have every inference made against him.

1. No charge is made against the guardian for the profits of the estate for the last three years. The Clerk gives as his reason for not making a charge the fact that "the plaintiff rented the land and hired the negroes for three years, and at the settlement received his notes therefor as part payment of the balance due him." This reason is not a sufficient one, and if the question stood upon it alone the exceptions would be sustained.

Suppose a guardian allows the ward to take the management of the estate, and the land and negroes yield nothing, can it be that the fact of the ward's being allowed to control the business operates to relieve the guardian from his liability to account for such rents and hires as the property should have been made to produce? The very purpose for having a guardian is because the infant is supposed not to have sufficient discretion to manage the property himself, and to allow a guardian to discharge himself in this way will defeat the whole purpose of the law and enable a guardian to take advantage of his own wrong and protect himself because he has been guilty of a gross neglect of trust confided to him. Nor is the case altered by putting up the property to be rented and hired at public vendue and going through the form of taking the ward's notes, for, of course, when it is known to be the pleasure of the guardian and ward that the latter shall have the property, no one will bid against him, so the amount of it will be that the guardian escapes his liability to account for the full value that the property ought to be made to yield, and the ward is to take the chances (170) of being able to manage his estate successfully.

But there is another fact shown by the proofs: the mother of the plaintiff became his surety upon the several notes given by him for the rents and hires; these notes were handed to him and *he is not now able to produce them,* consequently he is not in a situation to avail himself of this exception, and it must be overruled, for the defendant cannot be charged with these items unless he can have the benefit of the notes executed by the plaintiff's mother out of which to seek indemnity, so far as they would reach, towards the real value of the rents and hires.

2. The Clerk allows the guardian $500 as expenditures. The estimate is based upon the deposition of Mr. Kenan. If this was all that the ward was allowed to expend in five years it would certainly be reasonable enough, but for the last three years he was allowed to expend all that he could make out of the property and all he could get credit for, and the result was such as we have seen. Without going more at large into the

subject, it is sufficient to say the guardian has filed no account showing the items of expenditure, and without doing so, a guardian can never entitle himself to a credit. It is his duty to provide for the maintenance and education of his ward, and for this purpose he can make all necessary outlays, keeping within the ward's income. But when he comes to claim credit for an expenditure he must, as of course, show the items, so that it may appear that the expenditures were proper. No account whatever is filed in this case. Mr. Kenan simply says that the guardian paid him between $400 and $500, he thinks the latter sum, during the time he was guardian, by way of the ward's expenditures. How does it appear that these expenditures were for education or maintenance, or any other proper purpose? It may have been for horses, or guns,
(171) or spirituous liquor, and most probably was, in a great measure, for the expenses of the plantation while under the ward's management. This exception is sustained upon the ground that there is no account showing the items of expenditure.

3. The Clerk credits the guardian with the notes of Blackman & Eves, on the ground that the insolvency of the firm appears to have been entirely unexpected to the community; took place in 1843, and was so sudden that the first announcement of it seems to have been not until an assignment of their whole effects was made, and so he concluded the guardian was guilty of no negligence, and the loss should fall on the ward.

The statute makes it the duty of guardians to "lend out the money of wards upon bond or note with good and sufficient security," etc., and requires them, "if the person or persons to whom such money shall be lent, or *their securities,* are likely to become insolvent, to use all lawful means to collect the money, on pain of being liable for the same." Of course, if a guardian has complied with the statute, and taken bond with good and sufficient security, and the borrower and his securities fail so suddenly that the money cannot be saved by the use of proper diligence, the loss must fall upon the ward; but to entitle the guardian to the benefit of this rule, it is incumbent on him to show that he has complied with the requisition of the statute by taking a bond or note with good and sufficient security; and the question is, did the guardian, in this instance, do so? We concur with the counsel of the defendant that the security meant is personal security, and that a guardian is not, by our law, as he is by the law of England, required to invest the funds of his ward upon real or government securities. So, if he takes good and sufficient personal security he has complied with our statute; but he must take security of some kind. Suppose a guardian lends the money of his ward to a person who has property in possession to the value, say of $100,000, and is not at all embarrassed nor engaged in any business of a haz-

ardous nature, and it should so happen that the borrower sud- (172) denly fails, the loss will undoubtedly fall upon the guardian; for, although he took a good note, yet he neglected to take *good* and *sufficient* security, and has not complied with the letter or the spirit of the statute, the policy of which is to require the investment to be secured by the bond or note of some person in *addition to the borrower.*

Or suppose a guardian lends the money of his ward to a firm, consisting of two persons, who are engaged in merchandise, and who are solvent and in good credit at the time the money is lent, and it so turns out that they afterwards fail suddenly, the loss will undoubtedly fall upon the guardian, because he neglected to take good and sufficient security, and in effect, took only the note of the borrower. And if it be said, as the firm consisted of two individuals, the note had in fact the names of two persons, the reply is the two made in truth but one; for whatever breaks one will break both. So there is no security but the name of the borrower. This is not as strong a case as the one first put, owing to the nature of the business in which the firm was engaged.

In our case it appears from the proofs that the firm of "Blackman & Eves" owned a large property, had a very extended credit, and was engaged in large operations—farming, making turpentine, buying turpentine and pork on speculation—and the business of the two was so connected that if one failed the other was obliged to fail also, as was shown by the general assignment of all their effects, and their total insolvency. So the guardian had, in fact, only the note of the borrower, and neglected to take the security which he was required by law to do. Admit that, owing to the high credit of Blackman & Eves, some prudent men would have taken their note without requiring security, for the purpose of effecting a large sale of turpentine or pork at the top of the market. That is a very different operation from lending money, which can always be readily effected, although the borrower is required to (173) give good security.

This exception is sustained on the ground that when a guardian lends money to a firm it is his duty to take some other security besides the names of the members of the firm.

The report must be reformed according to this opinion.

PER CURIAM. Decree accordingly.

Cited: Williamson v. Williams, 59 N. C., 65; *Hurdle v. Leith,* 63 N. C., 600; *Camp v. Smith,* 68 N. C., 541; *Collins v. Gooch,* 97 N. C., 190; *Watson v. Holton,* 115 N. C., 37.

Dist.: Whitford v. Foy, 65 N. C., 268.

WILLIAM COBLE *against* DANIEL F. CLAPP.

1. Where a petition was pending in court for the partition of a tract of land between tenants in common, and after an order is made appointing commissioners to divide the land, but before they have made their report, one of the partitioners sells and conveys his undivided interest, such purchaser is *privy* to the suit and is bound by the judgment of the court confirming the partition made by the commissioners, although such report and confirmation is after his purchase.
2. Where one of the tenants in common, after a partition is made by commissioners and a judgment is entered confirming their report, conveys his interest by deed, describing the same as an undivided half of the whole tract, as it was before it was divided, the grantee is not estopped by such description, so as to subject him to a repartition of the land.

CAUSE removed from the Court of Equity of GUILFORD, Spring Term, 1854.

The bill was filed for the partition of a tract of land in the county of Guilford. The questions made in the case are fully presented in the opinion of the Court.

Miller, for plaintiff.
Morehead and *Graham,* for defendant.

(174) NASH, C. J. The bill is filed to procure the partition of the tract of land set forth in it. George Faust was the owner of the land, and by his last will devised the same to his two granddaughters, Sally Holt, the wife of Thomas Holt, and Barbara C., who intermarried with John W. Kirkman. These two females were thus tenants in common of the premises. In 1838 Thomas Holt and his wife Sally filed a petition in the Court of Pleas and Quarter Sessions of Guilford County, within which the land lay, against John W. Kirkman and his wife Barbara, to procure a partition of the premises. At February Term, 1839, commissioners were appointed to divide the land, who made their report to May Term following, which was, by a decree of the Court of the same term, confirmed, and the division ordered to be registered. During the pendency of this petition, to wit, in April, 1839, Thomas Holt and Sally Holt, his wife, sold their undivided moiety of the land to the plaintiff, and in their deed of conveyance they describe it "as their undivided interest, it being one-half, in the following piece or parcel of land," etc., then setting out the metes and bounds of the whole tract. In 1847 John W. Kirkman and his wife sold and conveyed all their interest in the said land to the defendant Clapp, and in describing the premises they use the same terms and mention the same boundaries as are contained in the deed to Coble. In his bill the plaintiff alleges that he is not bound by the decree of the County Court, for two reasons: the first, because, as he

alleges, he was no party to the proceedings; and, secondly, because the defendant is estopped by his deed from Kirkman and wife to deny that the land was, at the time of his purchase, still undivided. As to the first point, it cannot avail the plaintiff. The decree in the County Court bound all parties and privies. The plaintiff, by his purchase, became a privy in estate with Holt and wife. Nor can he be heard to say he had no notice of the pendency of the suit—a *lis pendens* is notice to all the world—and the plaintiff, upon a proper representation to the Court, might have been made a party of record, after his purchase; and thereby entitle himself to examine testimony, or take an appeal, if (175) dissatisfied with the report of the Commissioners. But he cannot, in this way, attack the correctness of the judgment of the County Court. Until reversed by a regular judgment, it imports absolute verity, and cannot be controverted. As to the second ground, there is no estoppel on the defendant to plead the judgment. It is true that when he received his conveyance from Kirkman and his wife the land had been duly divided between the parties, and they were seized each of his moiety in severalty—and though the description in the deed is not literally correct, and does not set out the metes and bounds of the moiety—yet the description given does embrace it. How it can estop the defendant to show, by the judgment of the County Court, the partition of the land, we cannot well see.

It is not necessary to decide whether the judgment of the County Court can now be reversed at the instance of the plaintiff, but unreversed, it is binding on all the parties to it, and their privies.

It appearing, then, according to the plaintiff's own showing, that there had been a partition of the land between the tenants in common, under a decree of a Court of competent jurisdiction, the effect of which is claimed and insisted on by the defendant, the plaintiff's bill cannot be sustained, and must be

PER CURIAM. Dismissed with costs.

Cited: Pullen v. Mining Co., 71 N. C., 565; *Dickens v. Long*, 109 N. C., 172; *Western v. Lumber Co.*, 162 N. C., 192.

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(176)

THOMPSON AND FRENCH *against* J. B. WILLIAMS.

1. In a bill for a special injunction, to stay the cutting of timber, it is necessary that the plaintiff should set forth, not only that the threatened injury would be irreparable, but he must show how it would be so.
2. In a contest between two, for a tract of land, each claiming the legal title, and the one in possession is cutting down timber, and building in the ordinary course of agriculture, the Court of Equity will not stay the operations of him in possession, upon the ground, merely, that he is insolvent.

THOMPSON *v.* WILLIAMS.

APPEAL from an interlocutory order of the Court of Equity of ROBESON, dissolving the injunction, at the Special Term in May, 1854.

This case is sufficiently set forth in the opinion delivered by this Court.

Moore, for plaintiffs.
Banks, for defendant.

NASH, C. J. The power of a Court of Equity to restrain waste is of ancient standing; to restrain a mere civil trespass is of modern origin. The first case in which it was canvassed was *Marquis of Devonshire v. Sandys,* 6 Ves., 107. There *Lord Thurlow* refused the application. It is, however, now firmly established—admitted at first with hesitation, it is exercised now with much caution—being a trenching upon the jurisdiction of the ordinary Courts of common law.

The act complained of must not be a mere ouster or temporary trespass, but one attended with permanent results—destroying or materially altering the estate. Adams Eq., 210. There must be something particular in the case, so as to bring the injunction under the head of quieting possession or preventing irreparable injury. *Livingston v. Livingston,* 6 John, ch. 497. The injury threatened must not be such as is sus-
(177) ceptible of compensation at law. We think the decretal order in this case, dissolving the injunction, was correct. There may have been sufficient grounds for the original order, but certainly none for the continuance of it, after the coming in of the answer. The bill alleges that the plaintiffs are the owners of a large tract of land, and that at the time the title was acquired by them, the defendant was in possession of some two hundred acres, where he still resides; and "that he has greatly wasted and otherwise injured the land by cutting down timber and converting the same into ton-timber, and conveying it off, and that he has threatened he will continue to do so as long as he remains in possession. That the land is *mainly* valuable for timber and turpentine, and if the timber is cut off the value will be greatly impaired." An action of ejectment has been brought by the plaintiffs to recover the possession of the land. To give a ground for an application to this Court, for its protecting aid, the bill further alleges "that the defendant is a man of little or no substance, and as your orators are *informed* and *believe,* is insolvent, and if he be permitted to cut down and carry off the trees from the premises that he will not be in a condition, upon your orators' gaining the possession, to make any compensation therefor. Your orators *believe* that it is the intention of the defendant to cut down and carry off the timber, and otherwise to waste the timber," etc.

The answer is fully responsive to the bill—meets its allegations without anything like evasion—admits that he, the defendant, is in possession

of the land, which he avers belongs to him; that the land is not mainly valuable for timber and turpentine; but is good farming land; that he has cut and sold about twenty trees, and since he took possession he has built a house on the premises, and otherwise greatly improved its value; expects to live there, and intends still further improvements; has not wasted the land, and does not intend to do so. Denies the defendant is insolvent, and avers that over and above the land, he has other property sufficient to answer any damages the plaintiffs may recover. The pleadings present the ordinary case of a contest between two men (178) for the possession of a tract of land, each claiming the legal title, and the defendant, in the meanwhile, using it in the ordinary course of agriculture, clearing and erecting buildings with a view to a permanent residence. If, in such a case, a defendant can be enjoined, we see no good reason why in every case, where he is a poor man, possessed only of the land for which he is contending, he may not be stopped by an injunction from opening and clearing the ground. The defendant admits the cutting and selling twenty trees. Is this sufficient to prove irreparable mischief? Is his expressed determination to go on and clear and improve the land sufficient? Surely not. As to his inability to answer for such damages as the plaintiff may recover, he avers his ability to pay them, and positively denies his insolvency.

The plaintiff's counsel drew our attention to the following cases as authorities in his favor. We think they are each distinguishable from this, to wit: *Purnell v. Daniel,* 43 N. C., 9; *Lloyd v. Heath,* 45 N. C., 39; *Capehart v. Mhoon, Id.,* 30. The latter case contains a very clear discrimination between what are termed common injunctions and special injunctions; that in the former, the plaintiff cannot avail himself of affidavits upon the argument to sustain his application, but must derive all his Equity from the answer, and if that is fully responsive, and denies the Equity, the injunction must be dissolved. In a special injunction the bill may be used by the plaintiff as an affidavit in contradiction to the answer. In *Lloyd v. Heath,* the Court recognizes the difference between the injunctions, as pointed out in *Capehart v. Mhoon,* and that in a special injunction both the bill and answer are to be considered by the Court, "and if, upon the whole case, the matter is left doubtful, the injunction will be continued to the hearing, so as to give the plaintiff a chance to support his allegations by proofs before a thing, the consequence of which is irreparable, is allowed to be done." Now, the doubt here alluded to is, whether the act complained of is of a na- (179) ture to produce irreparable mischief to the plaintiff. Trying this case by that rule, the injunction must be dissolved. The mischief is stated to be irreparable, but the bill itself does not show how it is so, for it states that the land is mainly valuable for the timber and turpentine.

The answer, which is also evidence before us, is that the land is valuable for farming purposes, and of course, clearing it improves its value. Taking this statement in connection with the defendant's averment as to his ability to pay all such damages as might be recovered against him, we are satisfied that the injury of which the plaintiff complains is not irreparable. In the case above stated the defendants had made on the land, and had then on hand, two hundred thousand shingles, and the prayer of the bill was to restrain them from selling them. The defendants, in their answer, denied that they had got the shingles on the land of the complainants, but the truth of that allegation depended on a question of boundary, and the answer upon this point was not as clear as it ought to have been. For these reasons the injunction was continued to the hearing. In *Purnell v. Daniel,* 43 N. C., 9, the motion to dissolve the injunction was refused, because, from the nature of the act complained of, the mischief, if permitted, was clearly irreparable. Neither of these cases, then, meets this. We are sustained in the view we have taken of this case by the opinion of the Court in *Wright v. Grist,* 45 N. C., 203. "It is well settled," says his Honor, *Judge Battle,* in delivering the opinion of the Court, "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 retained to the hearing"; and upon that principle, the Court entertaining no doubt, the injunction was dissolved. Here, as before stated, we have no doubt. In the decree dissolving the injunction in this case there is no error. The plaintiffs will pay the costs of this Court.

PER CURIAM. Decree accordingly.

Cited: Bogey v. Shute, post, 182; *Gause v. Perkins,* 56 N. C., 181; *Thompson v. McNair,* 62 N. C., 122, 124; *Bell v. Chadwick,* 71 N. C., 331; *Jordan v. Lanier,* 73 N. C., 91; *McCormick v. Nixon,* 83 N. C., 115; *Dunkart v. Rinehart,* 87 N. C., 227; *Frink v. Stewart,* 94 N. C., 486; *Newton v. Brown,* 134 N. C., 445; *Lumber Co. v. Cedar Co.,* 142 N. C., 417.

(180)

MARCUS C. BOGEY *against* WILLIAM H. SHUTE, SENIOR.

In a bill for an injunction to restrain a person who is in the possession of a tract of land, under an adverse claim of title, from cutting and carrying timber off of such land, it is not sufficient for the plaintiff to allege that the act complained of will be productive of irreparable injury, but the allegation must be attended with such a statement of facts as will enable the Court to see that such would be the result.

BOGEY *v.* SHUTE.

APPEAL from an interlocutory order of the Court of Equity of CRAVEN, at the Spring Term, 1854, continuing the injunction until the hearing of the cause, by *Ellis, J.*

The bill was originally filed against Roderick J. Shute, to foreclose a mortgage made by him to the plaintiff to secure the payment of certain debts therein mentioned, for which the plaintiff was the said Shute's surety to several persons; which mortgage embraced three several tracts of land and divers articles of personal property. Roderick J. Shute died before he answered the bill, and the plaintiff got leave to file an amended and supplemental bill against William H. Shute, Jr., who was the heir at law of R. J. Shute, and against William H. Shute, Sr., who, it was alleged in this amended bill, claimed title to two of the tracts of land embraced in the mortgage deed, by a deed without any consideration, and which had been fraudulently antedated so as to overreach the mortgage. Afterwards another amended and supplemental bill was filed against William H. Shute, Sr., reciting the foregoing bills and the proceedings thereon, and alleging that the defendant, W. H. Shute, Sr., had got possession of the two tracts of land above mentioned, and had cut down and destroyed, and was continuing to cut down and destroy, much of the pine timber on these tracts. It was further alleged in this amended bill that the land was sterile and not fit for agricultural (181) purposes, and but for the pine timber upon it, was of very little value. This bill further alleges that the defendant is insolvent, and that unless he is restrained by the Court from cutting down the timber and making waste of the lands in question, the plaintiff will be deprived of his security for the debts mentioned in the mortgage deed and will be exposed to irreparable loss. The prayer is for an injunction and for general relief.

The defendant, William H. Shute, Sr., answers both of the amended bills. To the first he answers and avers that the deed under which he claims title to one of the tracts of land mentioned is *bona fide* and for a valid consideration, and goes extensively into the history of the transaction in which this deed originated; he denies that it is antedated, but says that it is truly dated, and is, in point of time, prior to the mortgage deed of the plaintiff. He says he has had possession under this deed for several years. As to any other of the tracts than the one derived from one Lovick, he denies that he has in any way interfered with it, and disclaims all right, title and interest in the same.

In his answer to the bill for the injunction, he recites and repeats the facts set forth in his former answer and further insists that the other property conveyed in the mortgage deed is more than sufficient to secure the debts the plaintiff was liable for as the surety of R. J. Shute, and that these debts have been nearly paid off. He further insists that under

the act of Assembly of 1826 there is a presumption of payment or abandonment arising from the length of time, and insists on the same as a bar. He denies that he has committed spoil or destruction on the premises; admits that he has cut timber on the tract, but says that believing himself to be the lawful owner of it, he has exercised this right with prudence and discretion. He denies that the land is valuable for the timber only, but says that it is fit for cultivation and that he
(182) has used it as such and that its value has not been impaired by anything that he has done. He denies, further, that he is insolvent.

William H. Shute, Jr., who is an infant, answered by his guardian, professing to have no knowledge of the matters referred to and insisting that the plaintiff be held to proof.

Upon the coming in of the answers the defendants moved for the dissolution of the injunction, which had been issued since the last term of the Court, but the Court refused to dissolve and ordered the injunction to be continued over to the hearing. From which order the defendant, Wm. H. Shute, Sr., prayed and obtained an appeal to this Court.

Green, for plaintiff.
J. H. Bryan, for the defendant.

NASH, C. J. This case comes within the principle of *Thompson v. Williams, ante,* 176. The injunction in this, as in that case, was granted, not to stay waste, strictly speaking, but to restrain a simple trespass, and in order to bring it within the rule of Equity in such cases, the bill charges that the defendant William H. Shute is insolvent, and that if he is permitted to go on and cut down the timber as he has done, the land will be injured, and he be unable to compensate the plaintiff for the damages he may recover. It is not sufficient for a plaintiff to state that the acts complained of will be attended with permanent results, destroying or materially altering the estate, but the allegation must be attended with such a statement of facts as to enable the Court to see that such would be the result. There is nothing in the bill here to show that such would be the case—that the injury would be irreparable. If there was any doubt upon the question the answer has entirely removed it. The defendant, William H. Shute, Sr., claims the land in dispute as his
(183) property—alleges that he is in possession, and has been for some time; and has used the same as the owner thereof—having a due regard "to his own interest and right, and as any other manager of his own estate would have done as a prudent and careful owner. That while the trees standing thereon are valuable for timber—and this defendant hath to a very limited extent so used them—the land is valu-

able for agricultural purposes," etc.; and he denies he is insolvent. In addition to all this, it appears from the bill, which was originally filed to foreclose an equity of redemption, that two other tracts were mortgaged to the plaintiff; and the answer avers they are amply sufficient to repay the money due the plaintiff. So that if the defendant W. H. Shute were insolvent, the plaintiff would lose nothing. In looking at the bill and answer as affidavits, containing the facts severally relied on by the parties, we have no doubt that the injunction ought to have been dissolved. We cannot sit here to try the title to land; that is the province of a Court of Law. Nor can we allow the power of the Court of Equity to be interposed in every case of disputed title to land—to stop agricultural pursuits. This would be the result in every case of disputed boundary, where one of the parties was in possession—using the land for farming purposes—if the injunction in this case were continued to the hearing.

There is error in the interlocutory order made below, and the injunction must be dissolved. The plaintiff must pay the costs of this Court.

PER CURIAM. Decree accordingly.

Cited: Gause v. Perkins, 56 N. C., 182; *Thompson v. McNair,* 62 N. C., 122; *Jordan v. Lanier,* 73 N. C., 91; *Lumber Co. v. Hines,* 126 N. C., 256; *Newton v. Brown,* 134 N. C., 445.

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(184)

JESSE A. CLEMENT AND OTHERS *against* JOHN M. CLEMENT, ADMINISTRATOR DE BONIS NON OF JOHN CLEMENT.

1. Where a bill seeks to convert a purchaser of a slave at an auction into a trustee for the plaintiff, upon the ground that the purchase was made with the money of the plaintiff, and as his agent, the legal title having been made to the purchaser, mere parol proof that the purchaser admitted the trust will not be sufficient to entitle the plaintiff to relief. There must be proof of facts and circumstances, *dehors the deed,* inconsistent with the idea of an absolute purchase for himself.
2. Where the facts and circumstances relied on as corroborating the evidence of the purchaser's declarations are unsatisfactory and susceptible of various and contradictory conclusions (some of which are consistent with the defendant's claim), they will not be deemed sufficient to establish the trust.

CAUSE removed from the Court of Equity of DAVIDSON, Fall Term, 1853.

This case sufficiently appears from the opinion of the Court.

Winston and *H. C. Jones,* for the plaintiffs.
Miller, for the defendants.

BATTLE, J. The object of the bill is to convert the defendant into a trustee for the plaintiffs of a certain slave named George, upon the allegation that his intestate purchased him with the money of and for Lawrence Clement, under whom they claim, while he took the conveyance to himself. The allegation that his intestate purchased for Lawrence Clement, or with his money, is expressly denied in the answer. On the contrary, the defendant avers that his intestate purchased the slave for himself, took the bill of sale to himself, paid for him with his own
(185) money, and took and kept possession of him—using and claiming him as his own until his death. A replication to the answer was filed, and the parties proceeded to take proofs; and the question presented for our consideration is whether the plaintiffs have sustained the allegations by that kind and amount of testimony which a Court of Equity, in such cases, requires. It has long been settled, both in England and in this State, that if one person buys an estate for another, with the money of the latter, a trust results for him; and that such trust may be proved by parol evidence. *Gay v. Hunt,* 5 N. C., 141; *Henderson v. Hoke,* 21 N. C., 119; *Hargrave v. King,* 40 N. C., 430; Adams Eq., 144; Hill on Trustees, 95. But where the evidence is merely parol, it will be received with great caution, and the Court will look anxiously for some corroborating circumstances in support of it; and in cases of this nature, the claimant in opposition to the legal title should not delay the assertion of his right, as a stale claim would meet with but little attention. Hill Trustees, 96; 2 Sug. Ven. and Purch., ch. 15, sec. 2 (p. 152, 9 Ed.); *Tench v. Tench,* 10 Ves., 517; *Wilkins v. Stephens,* 1 You. and Col. N. C., 431; Adams Eq., 144. The case before us is very much like that of a bill seeking to correct a deed absolute on its face, and to hold it as a mortgage or other security for a debt. "To do this (as this Court has several times held) 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." *Kelly v. Bryan,* 41 N. C., 283; *Sowell v. Barrett,* 45 N. C., 50; *Brown v. Carson, Ibid.,* 272. In both classes of cases the object of a Court of Equity is the same; that is, to convert a deed, absolute in terms, into a deed in trust or a mortgage, or some other security for money; and to do this by the aid of parol testimony. It is in effect to
(186) make titles to property, which ought to be evidenced by solemn instruments in writing—to depend under certain circumstances, in some degree, on the "slippery memory of witnesses." The Court would be faithless to the high trust confided to it did it not, in such cases, proceed with great caution, and require something more than proof

of the party's declarations to take from him his estate in whole or in part. Such testimony is (as that eminent Judge, *Sir William Grant,* has said) "in all cases most unsatisfactory, on account of the facility with which it may be fabricated, and the impossibility of contradicting it. Besides, the slightest mistake or failure of recollection may totally alter the effect of the declaration." Hence the rule that, in addition to the proof of declarations, there must be proof of facts and circumstances *dehors the deed* inconsistent with the idea of an absolute purchase by the party for himself.

Having ascertained the kind and amount of testimony which the Court requires, we are prepared to proceed to an examination of the proofs, to see whether upon them the plaintiffs are entitled to the relief which they seek. It is admitted that George, the slave in controversy, was purchased by John Clement, the defendant's intestate, at a sale made by Giles W. Pearson, Esq., as trustee, 28 June, 1828, and that an absolute bill of sale was executed to the purchaser on the same day. The price bid was $143, of which sum $26.06 was paid to the trustee, and a note for the residue, $116.94, was given by the purchaser to A. G. Carter, Esq., who was a trustee of all the remainder of the debtor's property, for the benefit of John Clement and Lawrence Clement, who were respectively guardians of certain minors. The note expressed on its face that it was the excess of the sale of John Nail's (the debtor) property, and was made payable to Carter as "trustee for the use of John Clement and others." The deed to Carter does not specify the debts which it is intended to secure, otherwise than by a general description of "sundry bonds to the amount of $1,315 or thereabout, part now due (187) and owing, and a small balance owing and payable at a future day, as set forth in said bonds." Nor does it show how much was due to each of the creditors. It appears, however, from the exhibits filed that at least $712 were due to John Clement. Carter's sale was made 7 August, 1828, John and Lawrence Clement both being present, and buying nearly all the property. From the original account of the sale, which is on file as an exhibit, it appears that the purchases made by John Clement amounted to about $840, and those by Lawrence to only about $40; the whole amount, including purchases made by others, being about $900. If to this be added the amount of the note given by John Clement, as the excess of Pearson's sale, the whole fund in the hands of Carter, applicable to the payment of the debts secured in the deed to him, was about $1,016. This fund, as is manifest without adverting to the statement to that effect by Carter, was insufficient for the payment of the debts, and they had to be scaled. The settlement between Carter and the creditors was made, as testified by Carter, in the presence of both, and John's note was included in it; but whether it was paid out of John's or

Lawrence's money, the witness did not know. In calculating the interest on the bonds and making the estimates necessary for the *pro rata* deduction to be made on the debts, Carter was assisted by John Clement, who was a man of business, and the figures made by them in pencil appear on the back of the account of sale, and John's note. Carter afterwards executed to John Clement a bill of sale for the slaves Betty and Minerva, purchased by him at the sale. Lawrence Clement, though present at the settlement, did not assist in making it. He was then, as deposed to by Carter, a man feeble and afflicted, but of a good mind, and understood how to manage his money matters as well as anybody; and though not good at figures, it was hard for any person to take advantage of him. John, who was his nephew, had been his agent in the
(188) transaction of some of his business, but whether he was so in making the settlement with Carter the latter did not know, and it does not appear from the testimony of any other person. The proofs thus far certainly do not sustain the allegations of the plaintiffs, that John Clement purchased George as agent for Lawrence, and paid for him out of the latter's money. On the contrary, they show that he bid off the slave at Pearson's sale, apparently for himself, took the bill of sale to himself, and in payment for the greater part of the price gave his note to Carter, and afterwards accounted for it in a settlement with him. It is true that his purchases at Carter's sale amounted to three or four hundred dollars more than the debts which he as guardian had secured in the trust, and that surplus was to be paid to Lawrence by the trustee. It is possible that an arrangement may have been made between John and his uncle Lawrence by which the latter was to take George as a payment in part or in whole for that surplus; but neither Mr. Carter nor any other person, so far as the testimony shows, ever heard of such an arrangement; or that Lawrence, either then or at any other time during his life, ever set up any claim to George. If, then, what has been before referred to were the only testimony in the case, we should feel ourselves bound to declare that the plaintiff's claim was entirely unsupported by proof. Let us proceed now to examine whether this defect is supplied by the remaining testimony.

John Click, whose deposition was given in August, 1852, states that in the year 1841 or 1842, John Clement, on his return from his aunt's, in Davidson County, stopped at his house one or two hours, and during that time, told him that "he bought the Nail negroes, and that he was doing business for his uncle Lara, and bought them and paid for them with his uncle Lara's money, and had the right made in his own name, but they did not know it." The witness says that John Clement was
(189) a much older man than himself—was a public man, and was in the habit of doing a great deal of private business for his neigh-

bors. That he did not name any of the Nail negroes, and witness did not know them, and that he could not recollect how the conversation about the negroes commenced, or what gave rise to it. He says that he thought it strange, was much surprised, and it was impressed upon his memory by his thinking at the time that it would be the occasion of a lawsuit.

Radford Foster, who was examined a short time after the other witness, testified that about ten years before, at Christmas or hiring time, John Clement offered to hire to him a negro boy named George, who had belonged to John Nail, whom, he said, his aunt had sent to him to be hired out for her, but the price being too high for witness, he did not take him; though he did hire, from John Clement, a girl, Minerva, who, he told him, belonged to his aunt. The witness said further, that after John Nail's sale he had seen the boy George at Lawrence Clement's several times, but at what time, whether before or after Lawrence's death, or upon what terms he was staying there, he did not know.

The testimony of Grandison Roberts, who was examined in 1850, is that some time since the year 1835 the boy George was in the possession of Polly Wilson, who was a sister and one of the legatees of Lawrence Clement; that said boy was hired one year to John Wilson and another to William Thomas, and afterwards went back into the possession of Polly Wilson, and witness had heard her request John Clement, who was her nephew, to take George and hire him out, because he was so unruly that she could not manage him; and that witness, having on a certain occasion corrected him for misconduct, at the request of Polly Wilson, John Clement afterwards enquired of him how his aunt Polly's George was behaving himself.

John Nail, Jr., was examined for the defendant in October, 1852, and in his deposition states that after his uncle John Nail's sale, George went first into the possession of John Clement, afterwards (190) into that of his mother, Elizabeth Clement, and then went to Lawrence Clement's, where he lived about a year, and then left him about three years before his (Lawrence's) death; that witness lived about half a mile from Lawrence's, and was often there; that John Clement had a negro boy named Bold, who worked for several years for his aunts, in Davidson County, and that about the time that Bold was taken back from Davidson George was sent over, but witness does not say by whom he was sent.

L. R. Rose, whose deposition was taken at the same time, testifies that he knew that John Clement had George in his possession for several years, claiming him as his own; that he sometimes hired him out, and took the notes for the hire, payable to himself.

Joseph Daniel gave his deposition in September, 1850, in which he

states that when he first knew George he was living with John Clement's mother, and then went to Lawrence Clement's and lived there from March until Christmas, when Lawrence sent him over into Davidson with one of his sisters; that George left about one year and seven months before the death of Lawrence; that witness was living with him at the time George went there; that he had been living there three years before, and continued there about two years and ten months afterwards; that Lawrence sent for George from Mrs. Clement's, and while he had him in possession exercised the same control over him as he did over his other negroes. All the witnesses who speak on the subject testify that Lawrence Clement was capable of attending to his business, and did attend to it, generally, until within a short time before his death. In reviewing the above testimony we find that three witnesses testify to declarations of the defendant's intestate which tend, with more or less force, to prove that he bought the slave in question for Lawrence Clement and paid the price with his money. But it is clearly a case in which the Court cannot, consistently with established principles, make a decree for
(191) plaintiffs, unless there be found in the testimony some corroborating circumstances inconsistent with the idea of an absolute purchase by the claimant for himself. The purchase was made, and the bill of sale taken in June, 1828; Lawrence Clement died in 1834, leaving a will, in which he bequeathed his "negroes" to his sisters, Mary Wilson and Catharine Eve and Margaret Clement; John Clement died in the year 1845, and this bill was filed the year afterwards, 1846. There was a period, then, of six years from the time of the purchase to the death of Lawrence Clement, the alleged *cestui que trust;* of seventeen years to the death of the purchaser, the alleged trustee, and eighteen years to the time when the bill was filed. The witnesses who testified to the declarations of the purchaser speak of conversations which occurred ten years before the time when they deposed. If any case demands a support from circumstances in corroboration of the party's declarations, surely this does. The plaintiffs contend that it has, in the proof that the slave was taken possession of by Lawrence Clement in his lifetime; that he sent the boy to his sisters in Davidson County, and they kept possession of him several years, before and after Lawrence's death. This might satisfy the requisition of the law, were it not capable of explanation, and were it not actually rebutted by other testimony. There is no proof—certainly no direct proof—that Lawrence Clement, though he must have known that his nephew John had purchased George at the first sale of John Nail's property, ever in words set up any claim to him in his lifetime.

According to Joseph Daniel's testimony, George did not go into Lawrence Clement's possession until more than three years after he was purchased by John, and during that time he was in the possession of John

and his mother. In what capacity Lawrence took and kept George (ten months according to one witness and twelve according to another) is not stated. He may have taken him as an owner, and he may have taken him as a hirer; and the utmost that can be claimed (192) for the plaintiffs is that, from the circumstances, one is about as probable as the other. Lawrence sent the boy to his sisters in Davidson County; but that was just at the time when Bold, another boy who undoubtedly belonged to John Clement, had been taken home because his aunts could not manage him. It is not pretended that Lawrence gave George to his sisters before his death, and the boy may have gone to them with John's consent, or by his request to work for his aunts in the place of Bold. Such a supposition is, at least, consistent with the facts stated by Mr. Rose, that John afterwards had him in possession, claiming him and hiring him out for his own use. Nor is it contradicted by what is said by Grandison Roberts, that he "heard Polly Wilson request John Clement to take George and hire him out, because he was so unruly that she could not manage him." She did not say, "hire him out for *her*"; and it may have been that she wished his owner to take him again, as she had on a former occasion sent back his boy Bold for a similar reason. It is thus seen that every circumstance relied on by the plaintiffs as corroborative of their claim may receive a fair and probable explanation consistent with the idea of an absolute purchase of the slave in question by the defendant's intestate. It is seen further that there are several other circumstances appearing upon the testimony of some of the witnesses, particularly upon that of Carter and Rose, which cannot be reasonably explained upon any other hypothesis. The plaintiff's case must rest, then, at last, upon the proof only of the declarations of defendant's intestate, deposed to by witnesses ten years at least after they were alleged to have been made. This, as we have shown, is insufficient, and the bill must be

PER CURIAM. Dismissed with costs.

Cited: Briggs v. Morris, post, 194; *Lamb v. Pigford, post,* 199; *Glisson v. Hill,* 55 N. C., 259; *Ferguson v. Haas,* 64 N. C., 778; *Shields v. Whitaker,* 82 N. C., 521; *Link v. Link,* 90 N. C., 238; *Williams v. Hodges,* 95 N. C., 34; *Hemphill v. Hemphill,* 99 N. C., 440; *Hinton v. Pritchard,* 107 N. C., 136; *Houck v. Somers,* 118 N. C., 612; *Sanderlin v. Kearney,* 154 N. C., 605.

(193)

MAHALA BRIGGS AND OTHERS *against* FREDERICK MORRIS.

To convert a purchaser who takes a deed absolute on its face into a trustee for another, it must be alleged and proved that the clause of redemption or the declaration of the trust was omitted either through ignorance, mistake, fraud or undue advantage, and this must be established, not merely by proofs of declarations, but of facts and circumstances, *dehors the deed*, inconsistent with the idea of an absolute purchase.

CAUSE removed from the Court of Equity of FORSYTH, Spring Term, 1854.

Elizabeth Briggs, the sister of the plaintiffs, executed her bonds, with Benjamin Briggs and Henry M. Briggs as her sureties, for the purchase money of the tract of land in controversy to the then owner, Samuel E. Britz, and took from him a bond to make title to the same whenever Elizabeth should pay the purchase money. Britz died shortly afterwards, and the land survived to his wife, who also died in a short time, and C. D. Keeln qualified as her executor. The bill alleges that Elizabeth Briggs being unable to pay the purchase-money, it was agreed between her and Keeln, the executor, that the land should be put up at auction and sold in order to pay the bond; that as the plaintiffs lived on the land they applied to the defendant Morris, who had money to lend, to purchase the land for them, and he agreed to do so and reconvey to them whenever they should pay the purchase-money. It was further agreed, as they allege, that they should retain the possession and give him one-third of the crop for the interest of the money.

Accordingly, the defendant purchased the land at the sale for $201, and took an absolute deed for the same from the executor, which was greatly less than the value of the land, it being, as they allege, about $450. That while the auction was going on the defendant made

(194) known to the bystanders that he was buying the land for the plaintiffs, and thus prevented others who were present, and who were willing to buy in the land for the plaintiffs, from bidding for the same, and by these means he was enabled to get the land at an undervalue. The bill further alleges that having procured the money they tendered the same to the defendant, who denied the contract and refused to convey to the plaintiffs. The prayer of the bill is for a conveyance of the land and for general relief.

The defendant's answer denies the plaintiff's whole equity.

There was replication to the answer, commission and proofs, and the cause being set for hearing, was sent to this Court by consent of parties.

Miller, for plaintiff.
Morehead, for defendant.

BATTLE, J. The bill seeks to convert the defendant, who claims the land in controversy as his own under an absolute deed to himself, into a trustee for the plaintiffs, upon the allegations that he purchased it for them under a promise to let them have it when they should repay him the purchase-money; and that by representing to bidders at the sale that he was so purchasing, he got the land at an undervalue, and then refused to perform his contract. Several objections have been urged against the right of the plaintiffs to recover, of which it is necessary for us to notice one only, which is decisive against them. We have heretofore said in several cases, all of which are referred to in *Clement v. Clement, ante,* 184, that to correct a deed absolute on its face and to hold it as only a security for a debt, or to convert a purchaser who takes an absolute deed to himself into a trustee for another, it must be alleged and proved that the clause of redemption or the declaration of trust 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* (195) *deed,* inconsistent with the idea of an absolute purchase. Here the only circumstances relied upon of the latter character are the inadequacy of price and the possession of the land by the plaintiffs. As to the inadequacy of price, there is some discrepancy in the testimony; but if there were not, and it were fully established, it would not be of itself sufficient. The argument derived from the other circumstance, the possession of the land by the plaintiffs, is deprived of all its force by the admitted fact that the plaintiffs paid one-third of the produce as rent. It is true they say it was paid in lieu of interest on the purchase-money; but, unfortunately for them, it leaves their case dependent for support solely upon the declarations of the defendant. This case very much resembles, in its prominent features, that of *Brown v. Carson,* 45 N. C., 272, and must be disposed of in the same way. The bill must be

Dismissed with costs.

Cited: Glisson v. Hill, 55 N. C., 259; *Ferguson v. Haas,* 64 N. C., 778; *Shields v. Whitaker,* 82 N. C., 521; *Link v. Link,* 90 N. C., 238; *Hemphill v. Hemphill,* 99 N. C., 440; *Harding v. Long,* 103 N. C., 7.

(196)

HUGH LAMB *against* EDWARD PIGFORD AND ISAAC LAMB.

1. Where land and negroes had been conveyed by deeds, absolute upon their face, to a brother-in-law of the bargainor, and to a bill, seeking to convert such conveyances into a trust, the defendant answers evasively and unsatisfactorily as to the mode of payment made by him, and it appears that he had recognized such trust by conveying a large portion of such property, according to the terms of the trust insisted on, and had taken receipts, and done other acts inconsistent with an absolute conveyance, and where it also appeared that the bargainor was weak in intellect, and subject to be controlled by the bargainee, and was deceived and imposed on by him as to the nature of the conveyances, a Court of Equity will declare the existence of the trust, and will hold the defendant to an account.
2. Where a part of this parol trust was alleged to be that certain slaves were to be conveyed to the plaintiff's daughters on their marriage, it was *held* that the daughters had no such interest in the question as to make it requisite or proper that they should be parties to the suit brought by their father: *Held further*, that the daughters and their husbands were competent witnesses in the cause.

CAUSE removed from the Court of Equity of NEW HANOVER, Spring Term, 1854.

The plaintiff, Hugh Lamb, a man of weak intellect, illiterate and easily imposed on by one in whom he had confidence, had become much dissatisfied with the conduct of his wife, who had given birth to a colored child, left his domicil and went to live with his brother, the defendant, Isaac Lamb, taking with him his two daughters, Rebecca Ann and Julia Maria, who were infants, his only children, where he resided for about five years. About the time of his removing to the house of his brother he made an absolute conveyance of the tract of land he had been living on, also of his slaves, six in number, and some other property. These conveyances are admitted by Isaac to have been without consideration, and he says that they were made to exclude his wife from any participation in the plaintiff's property. The plaintiff in his bill alleges that these conveyances were upon certain trusts entered into and agreed on between the two brothers, viz., that Isaac should maintain his brother and two daughters during his (plaintiff's) life, and after his death should convey the property to the two daughters in equal shares. That these trusts were not inserted in the conveyance or at all expressed in writing, because he was ignorant and believed that they could be enforced without being so expressed.

In 1829, after having lived with his brother Isaac some four or five years, the plaintiff removed with his two daughters to the house of the defendant Pigford, who had married his sister; about the same time the conveyances which the plaintiff had made of his land and negroes

(197) to his brother Isaac were surrendered to him and canceled (never having been registered), and conveyances were made at the same

time to the defendant Pigford of the property which he had conveyed to his brother Isaac, to wit, a tract of land of 350 acres and eight slaves (naming them). The consideration for the land as expressed in the deed was $350, and for the slaves $1,500. The plaintiff and his daughters continued to reside with the defendant Pigford from 1829 until 1838, when Rebecca Ann married one John Watkins; the defendant Pigford at this time conveyed to her one of the negroes which her father had conveyed to him, and three others, the children of another woman, who had been thus conveyed. The plaintiff and his daughter Julia still continued their residence with Pigford until the year 1844, when Julia intermarried with one Josiah Johnson, and on 13 October in that year the defendant Pigford settled by deed four slaves upon the said Julia and her children, which slaves were of the negroes conveyed by the plaintiff to him and their increase. Shortly after the marriage of his daughter Julia the plaintiff left the house of Pigford and resided with one or the other of his sons-in-law.

The bill alleges that these conveyances for the land and slaves to Edward Pigford were wholly without any consideration paid or secured by him, but were made in trust and confidence that the said Pigford would maintain and support the plaintiff at his house during his (plaintiff's) life; also support and educate his two daughters, until their marriage. On their marriage the slaves were to be equally divided between them, excepting four (which were named), and on the death of the plaintiff, these four with the land were to be conveyed by the said defendant to the said two daughters, or in case of their death, to their next of kin; that the rents of the land and the services of the slaves were to be received by the defendant as a compensation for maintaining the plaintiff and his two daughters, and for educating the latter. The bill further alleges that this trust was not put in writing, for that the (198) plaintiff was ignorant and illiterate, and was deceived and misinformed by his brother-in-law, the defendant Pigford, in whom he had confidence, who advised and persuaded him to the course pursued and that he verily believed these trusts were as valid as if they had been incorporated and set forth in the conveyances themselves. The plaintiff in his bill further alleges that the defendant has complied with the trust undertaken by him, so far as to give the slaves above mentioned to the two daughters upon their several marriages, but that he refuses to execute the same any further and denies that any such trust exists. That he has sold the tract of land to the other defendant Isaac, who had full notice of the plaintiff's equity.

The prayer is for a reconveyance of the land and slaves, and an account of the rents of the land and hires of the slaves and for general relief.

The defendant Pigford in his answer denies that there was any trust in his dealing for the land and slaves in question. He alleges that this transaction was fair, and well understood by the plaintiff, and that the sale was intended to be absolute; that the considerations expressed in the deeds were about the value of the property purchased by him, and that the same was duly paid. He says that he paid sixty dollars of the money down, and gave his note for the residue of the purchase-money, which he has long since paid off, and that the plaintiff owes him for board for himself and daughters, and for money lent, and for personal services and articles furnished to the amount of $1,500 or more. He denies that the plaintiff is a man of weak intellect; denies that he used any persuasion or any means to deceive the plaintiff, and insists upon the length of time as a bar to the plaintiff's claim; also upon the statute requiring contracts of this kind to be in writing. As to the conveyances of the negroes to the daughters on their respective marriages, he
(199) says that he did not make the same out of any sense of trust, duty or obligation, but was therein *moved entirely by benevolence and affection for the plaintiff and his family.*

Isaac Lamb in his answer admits that he bought the land from the defendant Pigford at $450, but denies that he had any notice of the plaintiff's equity.

Replication to defendant's answer, commissions and depositions filed in the cause (the substance of which is set forth in the opinion of the Court). Upon these, with the exhibits and former orders, the cause was set down for hearing, and sent to this Court by consent.

W. A. Wright, for plaintiff.
Miller, for defendants.

BATTLE, J. This case adds one more to the many which have recently been before the Court, in which the plaintiff has sought by parol proof to convert a deed absolute on its face into a trust or security for money, upon the allegation that the clause of the declaration of trust or redemption was omitted by reason of ignorance, mistake, fraud or undue advantage. The principles upon which relief is given, and the kind and amount of testimony which is required in such cases, are attempted to be fully set forth and explained in *Clement v. Clement, ante,* 111, and need not be again repeated. Before proceeding to the enquiry whether the plaintiff has supported his allegations by the necessary proof, it is proper that we should dispose of the objection urged by the defendants against the bill for the want of parties. It is contended that as a part of the trust (which the plaintiff charges was intended to have been inserted in the deeds to the defendant Pigford and omitted by means

of his fraudulent contrivance) was for the two daughters of the plaintiff, they and their husbands ought to have been made parties, and that the bill cannot be sustained without them. (200)

The objection raises the question, whether the plaintiff's daughters have such an interest in the land and slaves, by reason of the trust which he intended to declare for them, as can give them any right in their father's lifetime to enforce it in equity? Our opinion is that they have not. It is a well-settled rule in equity that a contract will not be specifically enforced if it be not founded on a valuable consideration. Adams Eq., 78; *Woodall v. Prevatt,* 45 N. C., 199. Here was no contract between the defendant and the plaintiff's daughters, and no consideration moving between them. As between the daughters and their father, there was indeed a meritorious consideration, but as his intended bounty to them was imperfectly executed, it could not be enforced against him in his lifetime, though it might be, if his intention remained unaltered at his death, against any person claiming by operation of law without an equally meritorious claim. Adams Eq., 97; *Garner v. Garner,* 45 N. C., 1. The father's title to the land and slaves conveyed to the defendant, so far as his daughters are concerned, remained, therefore, unaffected by his intended disposition of them in their favor, and he alone is entitled to call upon the defendant to execute the alleged trust. The daughters and their husbands have no direct and certain interest in the subject matter of the suit, nor indeed, any other interest, except the possibility of succeeding to the estate of the father as his heirs at law and next of kin, and of course they would be improper parties to the suit. If this view of the case be correct, and we think it is, it disposes also of the objection to the competency of these persons as witnesses for the plaintiff. It is not pretended but that children may be witnesses for their father, though they may ultimately be benefited by the decision of the suit in his favor. Their relation to him may affect their credibility, but not their competency.

We are prepared now to enter upon the examination of the testimony taken upon the issues made by the pleadings. The (201) main issue, and that upon which the case must principally turn, is whether the deeds executed by the plaintiff to the defendant Pigford were intended to be what they purport on their face, absolute deeds conveying, for a full and fair price paid to the plaintiff, the land and slaves therein mentioned to the said defendant for his own use, unaffected by the trusts set forth in the bill. The burden of proof is on the plaintiff, and we have seen that he must show, not merely declarations of the defendant acknowledging the trusts, but facts and circumstances, *dehors the deed,* inconsistent with the idea of an absolute purchase for himself. Before looking to the plaintiff's proofs, it is proper to remark that the

statements of the answer in relation to the payment of the purchase money are not so full, explicit and circumstantial as the case required. They deal so much in generalities as to give that part of the answer the character of evasiveness, and thereby to induce a suspicion of its candor and truthfulness. But if it were otherwise, the plaintiff's testimony has fairly met and completely overthrown it. That the plaintiff was an illiterate, simple-minded man, and one easily imposed upon by those in whom he had confidence, is clearly proved by many witnesses. That the defendant Pigford held the land and slaves mentioned in the deed, in some way for the use and benefit of the plaintiff and his daughters, he more than once acknowledged to John Watkins and others. But throwing this testimony aside, and counting for nothing, too, the long period during which the defendant permitted the plaintiff and his infant daughters to live at his house and furnished them with board and other necessaries, all of which was in accordance with the alleged trust, we have abundant proof from the *acts* of the defendant to show that he did not hold the property absolutely as his own, but upon the trusts alleged by the plaintiff. Upon the marriage of the daughters he gave to each of them four of the slaves and their increase, which he had ob-
(202) tained from the plaintiff. This is admitted by the defendant; but he alleges that they were mere gifts—pure gratuities induced by no legal, moral or any other consideration than good will and benevolence toward the parties, who were nieces of his wife and inmates of his family. That may be so, but it is so contrary to our experience of the ordinary course of human conduct that we hesitate to believe it, unless we find it corroborated by something more than the defendant's assertions. Do we find any such corroborative testimony? Not so; on the contrary, we find a circumstance connected with the execution of the deed of gift for the four slaves from the defendant Pigford to the wife of John Watkins, deposed to by the said Watkins and John Gideons, which is consistent enough with the idea of a transaction founded upon a valuable consideration or the performance of a duty, totally at variance with that of a gift or voluntary bounty. The circumstance is thus stated by Gideons, who was one of the subscribing witnesses:

"I was present and witnessed such with Hugh Sharpless. Mr. Pigford presented a receipt to Mr. Watkins to sign, which Watkins refused to sign. Pigford then asked him what he would do, and he said he would sign a receipt that he had received these four negroes. Mr. Pigford told him to sign that receipt, and not to come back there after any more property. Mr. Watkins then signed it. This was the second receipt as prepared."

The account of the transaction given by Watkins himself is much more full and circumstantial, stating, among other things, that the re-

ceipt which he refused to sign expressed that his wife "should never expect to receive any more of Hugh Lamb's property." The enquiry occurs at once to every mind, why, if the gift of the slaves was free and voluntary, take a receipt at all? Why permit the donee to higgle about the receipt? Surely the records of benevolence might be searched in vain for such another instance of impertinence on the part of a donee, and forbearance on that of the donor! Strange as this conduct of the defendant Pigford may appear, we might perhaps believe (203) it were it consistent with other parts of his conduct as deposed to by some of the other witnesses, whose character is stated by his own witness, John D. Powers, to be good. When the plaintiff, or his agent for that purpose, Thomas H. Tate, demanded the property in question of the defendant, he was rude, and according to the statement of Edward Pittman, vulgar and insulting. He denied the right of the plaintiff, and then insisted that the plaintiff owed him an account of $1,500 according to one witness and $2,500 according to another, and yet, though requested to do so, he never produced any account nor proves any part of it, nor indeed the payment of the purchase-money for the land and slaves, except by his son James B. Pigford. And the credibility of this witness, though his character is proved to be good, is much impaired by the fact that a part of his testimony, to wit, that relating to the demand, is directly contradicted by the testimony of four others whose character is also proved to be good. Without adverting to every minute circumstance appearing in the proofs, we feel ourselves bound to declare that the transfers of the eight slaves to the daughters of the plaintiff upon their respective marriages, and the circumstances which attended them, particularly that made to Mrs. Watkins, are not shown by the defendant Pigford to have been pure gifts, and are therefore inconsistent with the idea that he purchased the slaves of the plaintiff at a full and fair price *bona fide* and absolutely for himself. We feel bound to declare further, that the trusts alleged by the plaintiff were assumed by the defendant Pigford, but were omitted in the deed by the fraud and imposition of the said defendant. The pretended purchase of the land was made at the same time and formed a part of the same transaction with that of the slaves, and was, in our opinion, agreed to be taken upon the same trusts. We are satisfied from the testimony of John Watkins, taken in connection with the fact that the defendant Isaac Lamb had taken similar conveyances from his brother, the plaintiff, upon similar trusts, that he very well knew the character of the deeds (204) from his brother to his codefendant and brother-in-law, Pigford.

The plaintiff is entitled to a decree declaring that the defendants hold the property mentioned in the pleadings (except such of the slaves as have been conveyed to his daughters) in trust for the plaintiff, and also

that they shall account to him for the rent, hires and profits of such land and slaves. In taking the account the defendant will be allowed for all proper expenditures for the board, etc., of the plaintiff and his two daughters.

Cited: *Glisson v. Hill,* 55 N. C., 259.

JESSE COLEMAN, EXECUTOR, *against* JOHN HALLOWELL AND JOSEPH SMITH.

Where a legacy is given to a trustee for the use of a married woman, who died without having received the same, the personal representative of the husband, who survived the wife, but who also died without having received the wife's legacy, is entitled to a decree for the same, against the wife's administrator.

CAUSE removed from the Court of Equity of WAYNE, Spring Term, 1854.

Sally Smith, by her last will and testament, bequeathed as follows: "I leave the sixth part of the money that is left after paying my just debts, to my son Joseph Smith, as agent for Phebe Bryan, to be put to her use annually, or as she requires it, with interest from the time it comes into his hands." The defendant John Hallowell, who was appointed executor, qualified and proceeded to execute the will. Phebe Bryan, the legatee above mentioned, died in the year 1850, leaving her hus-
(205) band Bennet Bryan surviving. Bennet Bryan, the husband of Phebe, died eight days after his wife, without having administered on her estate, leaving a last will and testament in which the plaintiff, Jesse Coleman, is appointed executor, who qualified as such. John Hallowell also became the administrator of Phebe Bryan.

The bill is filed by Coleman, the executor of Bennet Bryan, against Hallowell as executor of Sally Smith and as administrator of Phebe Bryan, and against Joseph Smith, praying that whichever may have the fund in his hands may account and pay over the same to him, and for general relief.

The defendant Hallowell says in his answer that he had paid the amount in question to the trustee Smith, and Smith in his answer says that he had paid a part of the said legacy to Phebe Bryan in her lifetime, but that he has a part thereof still in his hands, and submits whether he is not by the will entitled to retain the same, discharged of the trust.

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

Dortch, for plaintiff.

J. H. Bryan, for defendants.

BATTLE, J. There is no difficulty in ascertaining the rights of the parties in this case. The legacy given to the defendant Smith, in trust for Phebe Bryan, whether given for her separate use or not, having never been received by her husband in her lifetime, would have accrued to him as her administrator, had he taken out letters of administration on her estate. But as he died without having done so, and the defendant Hallowell having taken them out, the latter is entitled to call upon the defendant Smith for the payment of the said legacy, or such part thereof as had not been paid to the wife in her lifetime; and then the plaintiff, as the executor of Bennet Bryan, the husband, is entitled to call upon Hallowell, as the administrator of the wife, for the same. The plaintiff may have a decree upon these principles, which (206) are too well known to the profession to require a reference to any authority in support of them.

PER CURIAM. Decree accordingly.

Cited: Colson v. Martin, 62 N. C., 126.

GEO. A. SANDERFORD AND WIFE AND OTHERS *against* JOHN C. MOORE.

1. Where an estate in slaves is given to A, but if he should die without leaving a lawful child then to his sisters, B and C, and A died without leaving a child, but having sold the whole estate in the property to D, in a suit against D brought by the sisters (the sale to D being admitted in the pleadings), it was *held*, not necessary that the personal representative, A, should be made a party.
2. Where in the above case it appeared that D, the purchaser, had notice of the sisters' contingent interest, but removed the slaves out of the State and sold them in the lifetime of A and his sisters, and the property never having been again within the jurisdiction of a court of law of this State, it was *held*, that the plaintiffs were entitled to their remedy in equity, the defendant being looked upon as the legal owner at the time he removed them, and the plaintiff's contingent rights having become absolute only after that event.

CAUSE removed by consent from the Court of Equity of WAKE, Spring Term, 1854.

Mary Dean, by her last will and testament, bequeathed, amongst other devises and bequests, as follows: "I give and bequeath to my grandson, Marcellus Hilliard, one negro woman, Nelly, and her (207) child Hugh White, but in the event of the said Marcellus departing this life without lawful child, the said negroes, Nelly and Hugh White, are to be equally divided between Martha H. Sanderford and Frances A. Hilliard, to them and their heirs forever." Mary Dean, the testatrix, died in 1849, and James L. Terrell qualified as her executor, who delivered the slaves Nelly and Hugh White to the legatee, Marcellus.

Frances A. Hilliard died intestate, in the lifetime of her sister Martha A. Sanderford and her brother Marcellus, without having been married, leaving Martha and Marcellus her next of kin. Shortly after the death of Frances, her brother Marcellus died intestate, without leaving any "lawful child," having after her death sold and conveyed to the defendant, John C. Moore, the two slaves, Nelly and Hugh White—the purchaser having full knowledge (as is established by the testimony in the case) of Martha's and Frances' contingent interests. Within ten days after this purchase by Moore, he carried the slaves out of the State, to the city of Richmond, and there sold them, and it does not appear that the purchasers were known to the plaintiffs, or that the slaves were ever again within the limits of this State.

George A. Sanderford and his wife Martha, and John L. Terrell, administrator of Frances A. Hilliard, are the plaintiffs. The prayer of the bill is that the defendant account for the value of the slaves, Nelly and Hugh White, and for general relief.

The defendant objects to the plaintiffs' right to recover, upon the ground that the personal representative of Marcellus Hilliard is not a party to the bill, and he further contends that the plaintiffs' claim being a legal one, there was no ground for going into a court of equity. There was replication to the answer, commissions issued and proofs taken, and the cause, being set for hearing, was removed by consent to (208) this Court.

Moore and *Miller,* for plaintiffs.
G. W. Haywood, for the defendant.

PEARSON, J. The estate of Marcellus was determinable, being subject to a limitation over to his sisters, Martha and Frances, in the event of his death without leaving a child living at the time of his death.

Frances died leaving Marcellus and Martha her next of kin. Marcellus sold the slaves to the defendant, who had notice of the limitation over; the defendant carried the slaves to Richmond and sold them; afterwards Marcellus died without a child. The object of the bill is to follow the fund in the hands of the defendant. The right to do so is settled. *Hales v. Harrison,* 42 N. C., 299; *Cheshire v. Cheshire,* 37 N. C., 569.

What part of the fund are the plaintiffs entitled to? Martha, under the limitation over, is entitled to one-half. The defendant Terrell, the administrator of Frances, is entitled to the legal estate in the other half; but as he makes no suggestion of their being creditors of his intestate, Martha, as one of the next of kin, is entitled to one-half of his share; so she is entitled to three-fourths of the fund.

At the time he sold to the defendant, Marcellus was entitled not only to the determinable estate, but also to one-half of the share of his sister Frances. So the defendant, as assignee of Marcellus, is entitled to one-fourth of the fund.

The defendant insists that the plaintiff cannot have a decree, because the personal representative of Marcellus is not a party.

If the plaintiffs sought to recover the whole fund, and denied the fact of the assignment by Marcellus to the defendant, there would be some ground for the objection; but as they admit the assignment, and only ask for three-fourths of the fund, being content to leave (209) the other fourth in the hands of the defendant, there is no ground for the objection, because by the assignment the interest of Marcellus, as one of the next of kin of Frances, passed to the defendant; consequently at his death there was nothing to pass to his personal representative. Why, then, should he be a party? The only object for making him a party would be to give him an opportunity to deny the fact of the assignment; but as to that, the parties are agreed.

The defendant also insists that the plaintiffs ought to have sued at law, and have no equity against him. If the slaves could be found, an action at law would lie, because the plaintiffs are *now the legal owners;* but at the time the defendant took the slaves to Richmond and sold them *he was the legal owner* and the plaintiffs had only a future contingent interest. So, as against the defendant, their only remedy is to follow the fund.

The plaintiffs are entitled to a decree for three-fourths of the fund, after deducting a reasonable allowance for the expense of carrying the slaves to Richmond and making the sale. As their equity is to follow the fund, they must be content with it, and have no right to hold the defendant responsible for the actual value; that would be treating him as a wrong-doer, whereas the ground of the bill is to treat him as a trustee of a fund in which the plaintiffs have an interest.

PER CURIAM. Decree accordingly.

(210)

HIRAM BRINSON *against* DAVID W. SANDERS AND JOHN S. JONES.

Where a guardian to certain infants, who held property independently of their father, permitted the children for several years to remain with the father, and allowed him to have the profits of their estate for keeping them, but at length called upon the father for security for the ensuing year; but told the person signing the bond as surety that he would not lose, for that the bond should be discharged by what the father was to have for keeping the children, and the children during that year were kept and supported by their father; it was *held*, that the guardian should be compelled to credit the bond with the price of the children's board and maintenance for that year.

CAUSE removed from the Court of Equity of JONES.

The defendant, David W. Sanders, had been appointed guardian to the children of one John S. Jones, who had an estate consisting of land and slaves derived from their grandfather, the income of which was about $700, and which had been, for several years before the transaction in question, expended in the support and maintenance of the children. Being still of tender years, it had been deemed expedient by the guardian to let them remain with their parents, and as the father was in reduced circumstances, to enable him the better to provide for the children he had been permitted to rent the land of his children and hire their slaves, without being required by the guardian to give security, receiving what he could make from the land and slaves as his compensation for thus keeping and maintaining his children. In the year 1850, however, for the first time, the property being knocked off to Jones, the father, at a public hiring, he was required by the guardian to give security for the rent and hires for the ensuing year.

The bill charges that Jones, the father, applied to the plaintiff
(211) to sign a bond for the sum of $305, which was the amount of the rent and hires for that year; that knowing that Jones was utterly insolvent, he at first refused to sign the bond, but that the defendant Sanders, the guardian, accosted him, and of his own accord assured him that he intended to let Jones still keep his children, and that if he did so, the proposed bond should be discharged by the price that he would allow him for thus keeping and supporting them; that upon this assurance he signed the bond aforesaid as the surety of Jones, the principal. It further alleges that Jones, the father, did keep and maintain his children for that year, and that a fair compensation for his doing so was more than the amount of the bond. That when the same became due he applied to the defendant to have the bond settled and discharged with what was coming to Jones, which he refused to do, but put the same in suit, and has taken judgment, and threatens to make the money by an execution out of the plaintiff. The prayer of the bill is for an injunction; for an account for the board and maintenance of the children, and that the bond may be declared to be extinguished and satisfied to the amount found due, and for general relief.

The answer of the defendant Sanders admits that he had let the defendant Jones have and use the property of his children for several years previous to 1850 without requiring security from him, and that he permitted the rents and hires of the land and negroes to go in satisfaction of his claim for supporting the children for those years; but for the year 1850 he says he gave Jones notice that security would be required if he again took the property, and that he bid off the property with this distinct understanding. He denies that "he made any cove-

nant, contract or agreement with the complainant Brinson that if he would sign the bond or note of the said John S. Jones for the said sum of $305 or any other sum that he would see that he did not lose thereby, or that he ever persuaded the said Brinson to execute the said note or bond, and states, on the contrary, that the said Brinson seemed rather anxious than otherwise to sign the same." He says that (212) "he simply remarked that he thought it probable Brinson would lose nothing by signing the said bond." He further says in his answer that his wards had been during the whole term of his guardianship, and still are, indebted to him for advancements made for them out of his own funds, and that he made further advancements in provisions in 1850.

The defendant Jones in his first answer says that the whole answer of the other defendant is true, and the same being excepted to, he filed another answer affirming every fact stated by the plaintiff, and alleging that his first answer was extorted from him by the threats of Sanders to oppress him.

On the coming in of the answers the injunction which had theretofore issued was dissolved, and the bill stood over as an original bill. There was replication to the defendant's answer, commissions and proofs, which are stated in the opinion of this Court, and being set for hearing, the cause was sent to this Court by consent.

J. W. Bryan and *Green,* for plaintiff.
J. H. Bryan, for defendants.

NASH, C. J. We are of opinion that the plaintiff is entitled to relief, under the facts of this case, against the defendant Sanders. The children of John S. Jones were the wards of the defendant Sanders, and entitled to a considerable estate, both real and personal, derived from their grandfather. The children were young, and permitted to remain with their parents, and their father was from year to year suffered to hire portions of their property without giving to the guardian any security. This continued up to 1850, when Jones, the father, rented and hired property to the amount of $305.75, and was required to give bond and security. The plaintiff was applied to by Jones to become his surety, which he declined, when the defendant Sanders (213) came up and was asked by Mr. Brinson if there would be any difficulty if he signed the note. He answered no; for, if Jones kept the children, there would be enough to pay the bond. Brinson did sign the bond, and Jones kept the children during the year, 1850, for the hiring of which year it was given.

The defendant Sanders in his answer avers that in consequence of a disagreement between Jones, the father, and the former guardian, the

latter would not advance any funds for the maintenance of the children for the year 1847, when he became their guardian, and that he maintained them that year, whereby they became indebted to him largely; and that during the year 1850 he made large advances in provisions for their support.

He has failed to prove either allegation. In the deposition of Mr. Hall it is shown that upon his examination two receipts signed "John S. Jones" were produced by the defendant Sanders, one bearing date 1 January, 1851, for the sum of $449.22, "for board and clothing and other expenses of my children for 1850, for whom he is guardian." The second receipt is for $199.81, and is in these words: "Received of D. W. Sanders, guardian of my infant children, $199.81 on account of their board and clothing for this year. 25 April, 1850." Subsequently to the taking of the deposition of Mr. Hall, in October, 1852, the deposition of G. W. Hawkins was taken, in which he states that about two years before that time the defendant Sanders placed in his hands an old judgment against John S. Jones, which he renewed, and appended to this deposition is the following acknowledgment signed in the name of the defendant Sanders: "David W. Sanders admits that the receipt of John S. Jones to him, dated 25 April, 1850, was given for the claim referred to by G. W. Hawkins, and a yoke of oxen, which receipt is for $199.81."

Again: Jane Jones and William Jones both testify that Sanders
(214) furnished John S. Jones during the year 1850 with only one barrel of pork and twenty pounds of coffee, and with no clothing, and that the family was supplied with provisions by the plaintiff, with the knowledge of Sanders. The insolvency of Jones is admitted. It is clear to us that the plaintiff was induced to sign the note for $305.75, as the surety of John S. Jones, by the representation made by the defendant Sanders, and that those representations were designed to have that effect. That the execution of the note by the plaintiff was in the nature of a contract that the board and clothing of the children for the year 1850 should be appropriated to its discharge, as far as they would go, and that it ought to have been carried out by the defendant Sanders in good faith. If Sanders had proved that he had in fact made advances to Jones during the year 1850 to the amount of the receipt of January, 1851, which he has entirely failed to do, as against the plaintiff's claim, they would have availed him nothing, for they would have been made in bad faith, in direct violation of what he knew to be the inducement to the plaintiff to become Jones' surety. The loss occasioned by Jones' insolvency, if any, must fall upon Sanders, and not upon the plaintiff. The plaintiff is entitled to have the note of $305.75 credited with the price of the board and clothing of the children for the year 1850, and if the amount of that note has been paid by him to the defendant

Sanders, he is entitled to a decree for the full amount with interest thereon from the time of payment, or to so much as the value of the board and clothing of the children for 1850 amounts to.

There must be a reference to the Master to ascertain the names and number of the children of John S. Jones who lived with him during 1850, the value of their board and clothing, also the amount due upon the note of $305.75.

PER CURIAM. Decree accordingly.

(215)

GUSTAVUS P. ANDERSON AND WIFE *against* THOMAS C. ARRINGTON, EXECUTOR.

1. Where a testator leaves his plantation, his slaves, his stock and farming implements to his widow, with a request that she shall carry on the farm and support the children out of the profits, but in case she married the will provides that the whole property shall be sold, and the proceeds of the sale divided between her and the children, the will making no disposition of any surplus that might accrue during her widowhood, it was *held*, that such surplus shall go to the second husband.
2. The amount of damages accruing upon the resale of property, which resale was made necessary by the bidder at a former sale not having complied with the terms of such sale, is too uncertain a question to be disposed of in a court of equity, and should be left to the proper tribunal, a court of law.

CAUSE removed by consent from the Court of Equity of NASH, Spring Term, 1854.

The bill was filed by the widow of Peter Arrington and her second husband against the executor, for an account of the hires of slaves and sales of property bequeathed to the plaintiff Sarah Anne in the testator's will. The bill suggests that the terms of the will in question are of doubtful import, and refers several questions to the Court which materially affect their rights. The following is the portion of the will upon which these questions are presented:

"I give to my wife Sarah Anne, during her lifetime or widowhood, the tract of land whereon I now reside, together with all the negroes belonging to me that are in this State, also all my household and kitchen furniture, plantation utensils, all my stock of every description, horses, mules, cattle, hogs and sheep, crop and provisions, all produce on hand of every description, and my carriage and buggy, with the understanding and upon the condition that she is to make no charge against any one of my children for board or any necessaries she may furnish;
and if there should not be a sufficiency raised upon the planta- (216)
tion for the support and maintenance of the family, my executor,

hereinafter named, is authorized to supply such deficiency out of any moneys that may be in his hands belonging to my estate, and whenever any one of my children shall arrive at the age of one and twenty years, or should marry, such child shall have allotted off, if desired, a fair share of my estate, and in the event of the death or marriage of my wife, in that case I will and direct that the tract of land on which I now live be sold, also all the above mentioned property, with exception of the negroes, to wit, household and kitchen furniture, plantation utensils, all the stock or its increase of every description, horses, mules, cattle, hogs and sheep, crop and provisions, and all produce that may be on hand, of every description, and carriage and buggy or such vehicle as may be on hand, for the use and convenience of the family.

"It is my will and desire that my negroes that are in the State of Alabama should continue to be hired out annually, and should any one of my negroes, either in the State of Alabama or here in this State, become disobedient or ungovernable, in such case my executor is hereby authorized to sell or otherwise dispose of such negro or negroes. I will and direct that the tract of land I own in the county of Franklin, known as the Eben Nelms tract, be sold by my executor, either publicly or privately, as in his discretion he may think most advisable. It is my will and desire that if my wife should marry, in that case she shall have allotted to her a fair distributive share of my personal, and proceeds of my real, estate, and the residue of my estate of every description, both real and personal, I give and bequeath to my children, namely (the six infant defendants), to them, their heirs and assigns, to be equally divided, share and share alike."

The bill alleges that during her widowhood the *feme* plaintiff
(217) lived upon the farm and cultivated the same, and maintained and educated the children, for which she made no charge. That she was married to the plaintiff Anderson 3 December, 1853, and immediately thereafter the defendant took possession of all the personal property, excepting the slaves, and advertised the same for sale, and in the next ensuing month sold the same to the highest bidder; that not only the property ordered by the will to be sold was thus disposed of, but a large amount besides, which the *feme* plaintiff had by her care and industry produced from the farm, slaves and other property left her in the above recited will, especially from the profits of a blacksmith shop which she had carried on.

The plaintiff Anderson bid off a good deal of this property under an erroneous impression that the same was obliged to be sold under the will. But he says that, being a stranger in the community, he was unable to comply with the terms of the sale by giving security, and prevailed on the defendant to let him keep the property for a short time

longer, and give him an opportunity to comply with these terms; but he still not being able to do so, the defendant again advertised and sold the property to other persons, which last sale was forbidden by the plaintiff Anderson. The defendant sold the home tract and the Eben Nelms tract, and hired out the negroes in Alabama.

The plaintiffs insist that the course pursued by the plaintiff was erroneous in selling the personal property, but that at any rate he had no right to sell the accumulations of the *feme* plaintiff upon the farm during her widowhood, which they say belong to them. The children of Peter Arrington were made parties defendant. The prayer of the bill is for an account, etc., and for general relief.

The defendant in his answer says that the plaintiff Anderson did not act in good faith in bidding off the property at the first sale; that although he requested and obtained time to comply with the terms of the sale, he made no effort to do so, and at the second sale (218) much of the property was not brought forward by him, but was secreted so that defendant could not get it, and that what was sold went much below the prices bid at the first sale. He contends that all the property which had accumulated, as well as that left by the testator, was subject to sale, according to the terms of the will. And he further contends that the plaintiff Anderson should be held liable for the loss which was incurred by a resale of the property, and that he should account for all the property that went into his hands when the same was bid off by him.

The cause was set for hearing upon the bill, answer and exhibit, and sent to this Court.

Miller, for plaintiff.
Moore, for defendant.

BATTLE, J. The bill is filed for the purpose of obtaining a construction of the will of the late Peter Arrington, and an ascertainment of the rights and liabilities of the parties in relation to his estate in certain events which have occurred. Taking for our guide the well settled and well known rule in the construction of wills, that the intention of the testator as appearing upon his will taken as a whole is to govern, we proceed to declare our opinion upon such parts of it as are presented for our determination.

The first enquiry is, whether the widow is entitled to the surplus profits of the estate given to her for life or widowhood. It is manifest that the testator intended her, so long as she remained a widow, to live on the plantation which he had devised to her, and to cultivate it as he had done, for the support of herself, her children and other family.

If the profits of the farm were not sufficient for that purpose, the deficiency was to be supplied out of other funds in the hands of the
(219) executor. If they were more than sufficient, then the question arises, what is to be done with the surplus? Is the widow entitled to it? We think she is, upon the general rule that a tenant for life or widowhood of stock, etc., is entitled to the increase or profits during the continuance of her estate, unless otherwise disposed of by the will. Here the profits are otherwise partially disposed of; to wit, so much as might be required to furnish board and other necessaries for the children. Beyond that they are not otherwise given away by the will, and of course belong to the widow. Another question then arises, what is the surplus? We answer in the language of the defendant's counsel that it is what remains after keeping up the premises, paying all the necessary charges of cultivating crops, providing necessaries for the family, and leaving on hand a stock of provisions, horses, hogs, etc., required by the exigencies of the farm. In other words, what would be a surplus to a prudent owner and manager shall be a surplus as to her and shall belong to her absolutely.

The next enquiry is whether she is entitled to the profits of the blacksmith shop and we think clearly that she is. Those profits arising during her widowhood are not mixed with the funds assigned to the support of the family, and are not otherwise disposed of by the will, and therefore belong to her under the general rule.

The hires of the slaves in Alabama will form a part of the personal estate, a fair distributive share of which is given to her, in express terms, by the will. The widow having married, the executor acted properly in selling the plantation and other property as directed by the will. The plaintiffs must account for all the items of personalty bequeathed to the widow and which came into her possession or the possession of her second husband, unless the same were lost or destroyed without their default, and they will retain the surplus profits as above stated. The only remaining question is as to the liability of the plaintiffs in this
(220) Court for the loss incurred by a resale of the property, made necessary by the failure of the plaintiff Anderson to comply with his contract. What would be the liability of the plaintiffs at law it is unnecessary to say, except that if liable at all (as to which we express no opinion) the damages would not necessarily be the difference in the price at which the articles sold at the two sales. From the circumstances detailed in the answer of the executor, it is manifest that if the plaintiff acted in good faith in asking the indulgence which the executor granted, and failed to comply with his contract after an honest effort to fulfill it, it would be a hard measure of justice to compel him to pay, as damages, the difference between the price which he offered for the property and

that for which it finally sold. The property may not have been worth, and the executor may not have been able to have got, as much at the first sale as the plaintiff offered for it; and while he was honestly endeavoring to procure security (if he were honestly endeavoring to do so) the property may have, in the fluctuations of prices, depreciated in value; all which, and perhaps other considerations, might properly influence a jury in assessing the amount of damages for the breach of the contract. We have said thus much to show that the damages are too uncertain to be a proper subject of enquiry in a court of equity and must be left to be passed upon by a more appropriate tribunal—the jury in a court of law.

The plaintiffs may have a decree for an account upon the principles set forth in this opinion.

PER CURIAM. Decree accordingly.

(221)

JAMES BARNETT AND OTHERS *against* JOHN BARNETT AND OTHERS.*

1. The ancient doctrine that persons born deaf and dumb were to be considered as idiots has been abandoned in modern times and the legal capacity of such persons fully recognized.
2. Where a deaf mute had made a bequest of slaves and directed one of the witnesses to keep it and have it recorded, but on the next day, took back the will and executed a deed of gift, which was taken possession of and carried away by the same witness without objection from the donor, but without any particular instructions: *Held*, that this was a delivery of the deed of gift.

CAUSE removed from the Court of Equity of PERSON, Spring Term, 1854, by consent.

The case is fully presented by the opinion of the Court.

Miller & Lanier, for the plaintiffs.
Norwood, E. G. Reade and *E. Jordan,* for the defendants.

NASH, C. J. The bill is filed to set aside a paper-writing purporting to be a deed of gift from Susanah Barnett to the defendants. The grounds upon which relief is sought are two: the first, that the donor was from natural causes incapable in law of making such a disposition of her property; and secondly, if she had sufficient capacity, the deed was obtained from her by fraud.

Susanah was deaf and dumb from her birth, and lived at the time of her death, and had done so for some time previous, with the defendant John Barnett. (222)

*The case of *Adams v. Barnett*, decided also at this term, is so identical with this, that it is not deemed necessary to report it.

In the earlier history of the law a person who was born deaf and dumb was considered to be an idiot. That period has long passed, and the question as to their legal ability to make a contract is placed on its proper ground—their mental capacity. Modern inventions have restored these unfortunates to their proper stations in society. The domestic relation with all its endearments is open to them, and we find them occupying distinguished stations in almost every department of the arts and sciences. To the Abbe Sicard is justly due the distinguished honor of leading in the humane effort to enlighten and instruct this unfortunate class of human beings, and under his direction their instruction assumed a systematic course. Buildings were erected, which have in time spread over Europe, and our own country is dotted with them. If we cast our eyes over the street, we see a noble structure erected at the public expense for this benevolent purpose. Able teachers employed, and among them those to whom nature has denied the usual inlets to knowledge. There may be seen the deaf mute instructing his brother mute—throwing the light of science across his path, and leading him to the knowledge of the common Father of us all. The Bible is no longer a sealed book to the poor mute. Such are the blessings which have been conferred upon this class of beings in modern times—and it is now an established principle that the deaf mute's capacity is not to be measured by what he has not, but what he has. Some controversy took place at the bar as to the *onus* of proving capacity. It is not necessary for us in this case to decide the question; we are satisfied by the testimony of the witnesses of the entire capacity of Susanah Barnett to understand what she was doing. Dr. Jordan, who drew the paper and witnessed it, states "that the grade of understanding in both (alluding to her brother Benjamin, who was also a deaf mute) appeared to be good, particularly in Susan. They were as intelligent as individuals could be with their means of information." The doctor further states that he lived
(223) within half a mile of John Barnett's, where Susan lived, and was the family physician for twenty years; that he could converse with her upon ordinary subjects. When any of the family were sick, she generally attended to them, but particularly when any of the children were, then her attentions were most constant. "I believe" (are his words) "in every instance I left the prescriptions with her—could learn from her the effects of the medicine. She generally noticed those effects, particularly on the children." The high standing of Dr. Jordan, both as a physician and as a man of intelligence, entitles his statements to full faith. In another part of his testimony, he is asked if Susan gave him any directions when he took possession of the paper in controversy. His answer is, "that she directed me after the first paper was executed to keep it until it was put on the big books at the courthouse. Of *this,*

however, I am not positively certain. I knew they were both in the habit of speaking of things that went on the record books of the county in this way." But Dr. Jordan is not left alone upon this question. John A. Barnett, whose character is proved to be as high as any man's, states that after the death of John Barnett's wife in 1836 Susan Barnett had the whole management of the domestic affairs of the family up to 1850, all of which she attended to as well as any housekeeper in the neighborhood, and she had the character of being one of the best managers in all the country. This testimony sufficiently establishes the mental capacity of Susan Barnett, the donor, though there is much other to the same effect.

As to the alleged fraud, the plaintiffs have entirely failed to sustain their allegation.

Dr. Jordan, who wrote the paper-writing and witnessed it, states that receiving a message that Susan Barnett wanted to see him, he went to John Barnett's, where she lived; he went into the room where she was, and told her what he had come for, when she by signs directed a servant to bring pen, ink and paper, and a stand; and while this preparation was going on he learned from *her* how she wished to (224) dispose of her property. "I wrote" (says the witness) "a nuncupative will, as I supposed. At her instance I carried it away for safe keeping." He then states that in "thinking over the transaction it was impressed on his mind that she wanted a deed of gift, and that the paper he had drawn was no deed of gift. "I returned the ensuing morning, and stated to John Barnett what I had come back for. I immediately went into her room and told her the paper-writing I had written the day before would not do; it must have her mark to it. I then sat down and wrote the one now before me and explained it to her; she made her mark and I witnessed it. I never had any doubt of her intention to dispose of her property in the way it is disposed of in that paper." In a subsequent examination the doctor stated that when he drew the present paper he explained to her that the first would not do, she must make her mark, and that it made the same distribution of the property as the one written the day before. With respect to the disposition of the present paper, the witness stated that he kept it without any particular direction from the donor, but because she had directed him to keep the first and have it put on the big books at the courthouse, and that when he placed it among his private papers he endorsed upon its back: *Deed of gift from Susan Barnett.*

John A. Barnett states that he believes she understood she was *conveying* her property to the persons therein named, and that she was well satisfied, and intended to convey the negroes in that way, by deed of gift. She got her slaves from her brother. He further stated that not

being at home when the writing was drawn, meeting with Dr. Jordan, they went into the room where Susan Barnett was lying, and had the negroes all brought in, and she was requested to state how they were disposed of in the deed, which she did, assigning each negro as assigned in the deed.

(225) The deed upon its face is an absolute conveyance, *in presenti,* of the property; the plaintiffs, who allege that it was intended by her as a will, have produced no evidence to show that such was the fact. The first paper prepared by Dr. Jordan was of a testamentary character, and upon its being explained to her, the present paper was prepared, making the same disposition of her property as the preceding one, and which was by the testimony of the witnesses precisely that which she had previously often expressed. As a will of slaves, this paper cannot operate—it has but one witness; that if we doubted as to the intention of the donor, as to whether it was to operate as a deed or will, upon the principle of *res magis valeat quam pereat,* we should decide that it is what it purports to be, a deed of gift. The declarations of Dr. Jordan that he would not have had the deed registered during the life of Susan Barnett, because he thought such was her intention, cannot alter the nature of the conveyance; and his endorsement made at the time shows what he considered was the character of the paper at that time and what he declared to be his opinion when he drew the paper. The doctor taking the paper with him under the circumstances was a delivery by the donor. It was taken possession of with the donor's knowledge, and may be considered as coming within the direction given by her to the witness the day before as to the other paper.

Objection was made to the deposition of John A. Barnett, taken in behalf of the defendant. No reason was assigned, and we cannot perceive any. He may have had some interest in setting the paper-writing aside as a deed. He certainly has none in supporting it as such, and so far as it went to show the capacity of Susan Barnett, and of her knowledge, of what she did when she executed the paper now in question, its competence is established by *Norwood v. Marrow,* 20 N. C., 578.

(226) The case is entirely destitute of any evidence to show undue influence, if it could have any bearing. There is no proof that the donor did not understand the difference between a deed and a will, but a sufficiency to show she intended the paper to operate as a present gift. Nor does the fact of her stripping herself of all her property show she did not intend so to do. She enquired of Mr. Barnett what was her mother's age. When she found that she was about the age she then was, she at once proceeded to arrange her affairs, and no doubt intended to adopt the same mode by which she acquired her property, these very negroes. It is further objected that Dr. Jordan received his informa-

tion as to the names of the negroes given through a negro woman who was much better acquainted with the signs of her mistress than he was. We think this an unimportant objection, more particularly as the negroes were afterwards brought into her presence, and she designated each negro, and to whom given, which accorded exactly with the disposition of them in the deed.

Dismissed with costs.

(227)

THOMAS UZZLE AND WIFE *against* JAMES WOOD AND OTHERS.

1. Where a father having made a voluntary deed of gift to a daughter, in order to "upset" the same has the property levied on and sold for his debts bought in by his agent, and by his direction it is conveyed to the other children of the donor (the father), these last holders will be declared trustees for the original donee (the daughter).
2. The fact that the husband of the first donee (the daughter) had the property in his possession when it was levied upon will not prevent the wife from asserting her cause of action after three years, nor her administrator after her death, the suit having been brought within the time allowed to *femes covert*, under the act of limitation.

CAUSE transmitted from the Court of Equity of LENOIR, at Fall Term, 1853.

This case appears from the opinion of the Court.

Moore, Person and *J. W. Bryan,* for the plaintiffs.
J. H. Bryan, for defendants.

PEARSON, J. Jonas Wood had five children, James, Dempsy, Sally (the wife of Lassiter), Amy (the wife of Waters), who are defendants, and Mary, the intestate of the plaintiff (who was her husband).

In July, 1836, Jonas Wood executed a deed of gift, by which he gave certain slaves to James, and certain other slaves to Dempsy, and other slaves to Mary and Amy. Afterwards Mary married the plaintiff Uzzle.

In 1837, the slaves, 15 or 20 in number, were sold by the sheriff under executions. Lassiter, the husband of Sally, became the purchaser (amount of sale $91.50).

In 1838, Lassiter conveys the slaves to Jonas Wood, and afterwards by several deeds of gift he conveys them to the defendants.

The bill charges that after the intermarriage of the plaintiff with his daughter, Jonas Wood, being dissatisfied, desired to "upset" the deed of gift executed in 1836, which had been duly registered, and applied to a gentleman learned in law, who advised him that although the deed was registered, still if "they *could procure* the creditors of *Jonas Wood*" to

sue, take judgments and issue executions, and thereby have the property sold and purchased by a friend, he could reconvey to Jonas Wood, and thus *"upset" the deed of gift.*

That in pursuance of this advice Jonas Wood, by payment or
(228) by substitution of other security, got control of the debts which were outstanding against him, and had judgments taken, and executions issued, under which the property was sold, having previously made an arrangement with Lassiter that he should bid off the property at the sheriff's sale, and then reconvey to Wood. All which was done for the avowed purpose of "upsetting the deed of gift made in 1836," so that Jonas Wood might give off the property to his four other children, to the exclusion of his daughter Mary, who had married Uzzle, for whom he had no kind affection.

The answers but faintly deny the allegations, and rest the defence mainly upon long possession and the statute of limitations. The proofs fully support the allegations of the bill.

It is clearly settled that although equity will not enforce an executory agreement made without consideration, yet if the gift be executed, and rights have become vested, they will be protected.

By the deed of 1836 the plaintiff's intestate acquired title to the slaves in controversy, subject only to the rights of the creditors of the donor. He could not defeat or avoid the effect of his gift, and a court of equity will prevent that from being done indirectly which could not have been done directly. The effect of the sale by the sheriff was to vest the legal title in Lassiter, who passed it to the donor. But as the proceeding in the name of the creditors was not *bona fide* or at their instance, and was a mere contrivance of the donor with intent to avoid the effect of his deed of gift, he held the legal title thus acquired as a trustee for the donees; and the defendants to whom he subsequently conveyed having full notice, and three of them being in fact *particeps criminis*, will in this Court be converted into trustees, and be considered as holding the property in trust for the donees under the deed of 1836. So the plaintiff's intestate has a clear equity to call for a conveyance, and an account in regard to the slaves given to her by that deed.

When a trust is not created by agreement of parties, but the
(229) person having the legal title is converted by a decree into a trustee, on the ground of fraud, he may insist that his possession was adverse, and protect himself under the statute of limitations. Are the defendants protected by the statute, or does the case come within the saving in favor of *femes covert?*

For the defendants it is insisted that this is the suit of the husband; that upon his marriage the slaves were reduced into his possession and became his property, so that the wife had no further concern with

them. For the plaintiff it is insisted that the possession taken by the husband was subject to the rights of the creditors of the donor, and that the proceedings in their names had the effect to supersede and wipe away all right which the husband had acquired; and that the equity to convert the donor, after the title had vested in him, into a trustee, was a chose in action of the wife.

After much consideration we have arrived at the conclusion that the effect of the sale by the sheriff was to defeat entirely the right acquired by the husband, which rested upon the fact of his having taken possession, and that the equity to convert the defendants into trustees was a right of the wife.

Suppose a woman purchases a slave, and marries, and the slave is recovered from the husband by one having title paramount; it is clear that the action against the vendor upon the warranty must be in the name of the wife. She made the contract, and the right to sue for a breach of it is hers. The effect of the recovery against the husband is to defeat entirely all right on his part, which rested upon the fact of his having had the slave in possession. So, as it seems to us in our case, when the slaves were taken from the husband, and the title became vested in the purchaser at sheriff's sale, the effect was to defeat all right on the part of the husband, which rested upon the fact of his having had the slaves in possession, because that possession was overreached and superseded and blotted out by a paramount right. (230)

An instance where possession is overreached and the effect of it superseded is given by my *Lord Coke*. Father dies; the son, who is married, enters and afterwards assigns dower to his mother; her seizin overreaches that of the son; so that the son's wife cannot support a claim to dower, in regard to the part covered by the mother's dower. Hence the maxim *"Dos de dote peti non debet."*

As the equity to convert the defendants who acquired the legal estate with notice into trustees was a right of the wife, it was proper to institute this suit in the name of her administrator, and of course the defendants cannot protect themselves by the statute of limitations.

Decree for plaintiff.

Cited: Taylor v. Dawson, 56 N. C., 91, 93; *University v. Bank,* 96 N. C., 287.

(231)

L. C. HINTON AND OTHERS *against* JOHN D. POWELL AND WIFE AND OTHERS.

Where the main object of a testator appeared to be to provide a home and maintenance for his infant children, and for that purpose directed that his plantation should be kept up under the care and supervision of his widow, and such object was likely to be defeated by the death of the widow, and by the distribution of most of the slaves, under another clause of the will, whereby the farm became ruinous and unprofitable, and it appearing to the court that the interest of all persons interested in the land would be greatly promoted by a sale of the premises, especially that of such of his children as were still infants, a decree for a sale will be made.

CAUSE transmitted from the Court of Equity of WAKE, Spring Term, 1854.

The case sufficiently appears from the opinion of the Court.

Miller and *Winston,* for plaintiffs.
Moore and *G. W. Haywood,* for defendants.

NASH, C. J. The question presented in this case arises under the will of James Hinton, deceased. The item is as follows: "4th. I desire and direct my executors to hold and keep the remainder of my estate, as well real as personal, as a common stock for the benefit of my wife and children, not before mentioned by name, the profits of which to go to the support of the family and the education of my children; to keep up the plantation and fence in such manner as he sees best for the interest of my wife and such as are under age or may be disposed to remain with her after the age of twenty-one or after marriage; and to hire out any of the slaves that may not be necessary for carrying on the farm; and the moneys for which hiring to be used for the comfort of my wife and children who may remain with her for the time being. Provided my beloved wife *should again marry,* the property, real and personal, which is mentioned in this item as a common stock, shall be so divided, with all the increase of the same, that my beloved wife may receive her equal portion of all the estate, real and personal, of which I may die seized and possessed. And provided, when any of my children shall arrive at the age of twenty-one, or shall marry, then such child or children, shall, if they so require, take his or her portion of the property, as he or they would be entitled to by law, it being my will and desire that my real estate should not be disposed of otherwise than is provided, until all my children are of lawful age, or are married. *When my children arrive at twenty-one,* I desire my executors to dispose of the land either in lots to suit the demand, or in one lot as they may see most (232) desirable for the common interest." The widow is now dead,

never having married. Indiana Hinton, one of the children of the testator, died after him, an infant, leaving no issue; and two of his children are still infants, are parties, and answers have been filed for them. All the rest of the children are either arrived at twenty-one years or are married, and under the will have received their shares of the negroes. The petitioners state that in consequence of the children thus withdrawing their portion of the slaves, but seven are left, which belong to the minor heirs Eugenia and Frances; that they are too few to cultivate the plantation to advantage and keep it up; that the plantation is rapidly deteriorating, and if its cultivation shall be continued until the minors come of age, it will be very injurious to them, as the proceeds will not equal the interest of their portion of the purchase money of the land if sold, and the hire of their slaves; that lands are now high in market, and slaves hiring high, and the prayer of the bill is for a sale of the land. The leading object of the testator in the devise we are considering is to provide a home for his infant children until they should come of age. That home was to be their mother's house as long as she should remain his widow. His confidence in her was full. Their interests were hers, and as long as she remained her own mistress he was willing that interest should be a common one. But a contingency has occurred for which he has made no provision. She has died his widow, and that home is broken up—*there* they can no longer reside. They are still infants. Their brothers and sisters have other homes. What is now to be done with the old homestead? Are the directions of the testator to be carried out literally, when the reasons which influenced him no longer exist? Are those directions to be pursued to the manifest injury of those whose interests were so dear to him? Are they to be injured by the very care their father took to provide for and secure their interests? Can there be a case more illustrative of the legal (233) maxim, *Cessante ratione, cessat et lex?* With great propriety and a proper attention of the guardian of the minor devisees and legatees, he has filed their answer admitting nothing affecting the interests of his wards, but placing them under the protection of the Court. It is to be much regretted that so few guardians *ad litem* know or seem to know for what purpose they are appointed, namely, to protect their wards from injury in the *lis pendens*. The affidavits of six persons are filed by the plaintiffs, showing that the land cannot be divided by metes and bounds without injury to all the parties concerned, and that the interests of the infants require that it should be sold; as a contingency has arisen for which the testator did not provide, and as by death of the widow the parties, plaintiffs and defendants, have become tenants in common of the lands, and it is satisfactorily shown that the land cannot be divided without injury to all the parties, and that the interests of all

will be advanced by a sale, and particularly the interests of the infants, it must be made. The sale is not under the words of the will, but beside the will, as carrying into effect the intention of the testator, as gathered from the will itself. Indiana, one of the children, died after her father and before her mother. Her remainder was vested in her, and descends to her heirs and next of kin. Her mother is one of the latter, and having survived her, is entitled to a distributive share of her personal property, including the proceeds of the sale of the land, which in equity is considered as money. The defendant, Mrs. Delia Powell, is entitled to a distributive share of the sale of the land, but must account for the $500 received by her more than her share of the personal property; to ascertain which there may be a reference to the Master, if the parties cannot agree. Let it be so declared.

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(234)

WILLIAM S. CHEEVES AND OTHERS, EXEC'RS, *against* SARAH BELL AND OTHERS.

A bequest to four grandchildren, the children of a deceased son, which is contained in a clause giving off the whole personalty to the children and grandchildren of the testator shall be construed to be *per capita* and not *per stirpes*, there being nothing in the will to show that the testator meant differently.

CAUSE removed from the Court of Equity of FRANKLIN, Spring Term, 1854.

The bill was filed by the executors of Henry Williams to obtain a construction of the will and for instructions in the payment of legacies according to the provisions of the same. The following is the material portion of this will, viz.:

"I bequeath that after my death that my negroes, land and every species of my property be sold, and after my honest debts have been paid, the balance be divided among my heirs as my will directs.

"First, I give unto my daughter Sarah Bell, Nancy Hightower and heirs, Simon Williams' four children (Wilson, Anne, Craven and Mary), Marmaduke Williams. I give unto my beloved grandson, Henry Carter, his mother's part of my estate, Margaret Cheeves. Rebecca Hopkins' part I give unto her four children, and lastly, I give unto Obedience Dolvin one hundred dollars."

The testator left surviving him the following children, Sarah Bell, Obedience Dolvin, wife of James Dolvin, Nancy Hightower, wife of William Hightower, Marmaduke Williams, Margaret Cheeves, wife of William S. Cheeves, and Rebecca Hopkins. A son, Simon Williams, had died in the lifetime of the testator and left the following

children him surviving, viz.: Wilson Williams, Craven Williams, (235) Mary Fort, wife of William Fort, Anne Harris, wife of Richard Harris. Another daughter of the testator, Mary Carter, was also dead at the time of making this will, leaving her surviving one child, Henry Carter.

Rebecca Hopkins is still alive, and her children are Joseph H. Hopkins, Sarah Hopkins, Elizabeth Hopkins, Simon Hopkins and Obedience Dolvin, wife of James Dolvin.

The several questions arising in the construction of this will, as presented by the answers of the parties are:

1st. Dolvin and his wife contends that the will, except as to the clauses giving him $100, and those providing for the sale of the property and the payment of the testator's debts, is so vague and uncertain in its terms that no sensible rule for distributing the property among the persons therein mentioned can be derived from it, and they therefore insist that a distribution shall be made according to the statute upon the subject of intestate's estate.

2d. The children of Simon Williams say that they are entitled each to a share with Sarah Bell, Nancy Hightower, Marmaduke Williams, Henry Carter, Margaret Cheeves, and the four children of Rebecca Hopkins (the last taking as a class), that is, they each claim one-tenth of the fund, after deducting the debts and one hundred dollars for Mrs. Dolvin.

3d. The defendants, Margaret Cheeves, Marmaduke Williams, Henry Carter, Nancy Hightower and the four children of Rebecca Hopkins (excluding Mrs. Dolvin), insist that the distribution ought to be made between them as laid down in the second proposition, except that the children of Simon Williams shall only have one share between them, that is, that each shall have a seventh part of the fund, except the Hopkins children, who claim a seventh among them, and Simon Williams' children, who are entitled to a seventh among them.

The cause was set for hearing upon the bill, answers and ex- (236) hibit, and sent to this Court by consent.

Moore, for plaintiff.
Lewis and *Eaton,* for defendant.

BATTLE, J. The bill was filed by the executors of Henry Williams, against his legatees, stating that difficulties had been suggested in the construction of his will in certain particulars, and calling upon the Court for its advice and direction. In examining the will with a view to its construction, it will be most convenient to consider the questions raised in the reverse order from that in which they are presented in pleadings. The counsel for the defendants Dolvin and wife contends

that the will is void for uncertainty, except so much thereof as relates to the legacy to the wife of $100, the sale of the testator's property, the payments of his debts, and the appointment of his executors. But if that be not so, he then insists that they are entitled to an equal share of the estate, in addition to the legacy of one hundred dollars. In *Owen v. Owen,* 45 N. C., 121, we said that " 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 into 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." Taking this rule for our guide, we have no hesitation in declaring the objection of uncertainty to be unfounded. The counsel says that, excepting the legacy to Mrs. Dolvin, nothing is given to any person whatever; that the testator merely names certain of his children and grandchildren, without giving them anything. That might perhaps be so, were the clause referred to taken by itself, but it is to be considered in reference to the other parts of the will; and taking it in connec-
(237) tion with the clause immediately preceding, it shows that the whole estate, when converted into money, is directed to be divided among his "heirs" in certain specific proportions which are subjoined. The claim for Mrs. Dolvin of a share of the estate, in addition to the legacy of $100, is clearly inadmissible. The sentence in which the legacy is given is complete. There is no apparent omission in it, as there is in the will of James Simms, which we were called upon to construe in *Dew v. Barnes, ante,* 149. We might as well supply any other words as those which the counsel insists ought to be inserted.

The main question in the case is whether the testator's four grandchildren, the children of his deceased son, Simon Williams, are to take *per capita* with his children, or *per stirpes* as representing their deceased father. The rule is firmly settled that they are to take *per capita* unless there be something in the will to show that, upon a just construction of it, the testator's intention is apparent that they should take otherwise. *Ward v. Stowe,* 17 N. C., 509; *Martin v. Gould, Ibid.,* 305; *Spivey v. Spivey,* 37 N. C., 100; *Harris v. Philpot,* 40 N. C., 324; *Henderson v. Womack,* 41 N. C., 437. The general rule was adhered to in *Ward v. Stowe,* and *Harris v. Philpot,* in the first of which the question was fully argued by counsel, and the whole subject fully considered in an elaborate opinion of the Court, in which all the English cases were reviewed. The other cases of *Martin v. Gould, Spivey v. Spivey,* and *Henderson v. Womack* were held to be exceptions to the admitted general rule, upon the special indications of intention ap-

parent in the wills, respectively, which those cases brought before the Court. This narrows the question before us to the inquiry whether any expression is to be found in the present will to exclude the application of the general rule. It must be admitted that there is not, unless it be in the first clause of the will, which is as follows: "I request that after my death, my negroes, land, etc., be sold, and after my (238) honest debts be paid, the balance be divided among my heirs, as my will directs." It is contended by those who are opposed to the application of the general rule that the word "heirs" means children, and that by dividing his property among his children the testator intended to assign to each living child an equal share, except as otherwise directed, and then to give the shares of his deceased children to their children, respectively. It may be that the testator by the term "heirs" meant "children," but it is more probable that he meant his issue, for whom he felt bound to provide, and therefore included his grandchildren, whose fathers and mothers were dead. Whether he meant the one or the other, we think the construction contended for cannot be admitted. The testator shows that he knew how to give the share of a child to his or her children, whether such child were living or dead. For instance, he gives to his grandson, Henry Carter, the share of his mother, who was dead, and to the four children of Rebecca Hopkins the share of their mother, who was living. Why, if he intended to make a like gift to the children of his deceased son, Simon Williams, did he not express himself in similar terms? Why name Simon Williams's children *seriatim* at all, unless he intended them to take *per capita* with the other named legatees who were to have a share? We think the intent to be collected from the will itself is rather for than against the admissibility of the general rule, and it must prevail. A decree may be drawn in accordance with this opinion.

Cited: Winder v. Smith, 47 N. C., 331; *Bivens v. Phifer, Ib.,* 438; *Burgin v. Patton,* 58 N. C., 427; *Britton v. Miller,* 63 N. C., 270; *Thomas v. Lines,* 83 N. C., 199; *Culp v. Lee,* 109 N. C., 677.

(239)

ELIZABETH EARP *against* WILLIAM EARP.

1. In a petition for a divorce, it is not necessary to negative the fact of the petitioner's receiving the offending party to conjugal embraces after coming to a knowledge of the adultery complained of, this being a ground of defence. Especially is it unnecessary to negative this fact where the prayer of the petition is only for a separation from bed and board for alimony.

2. Where there is a general demurrer to the whole bill, and there is any part of it which entitles the plaintiff to relief, the demurrer will be overruled.

EARP *v.* EARP.

PETITION for divorce and alimony removed from the Court of Equity of JOHNSTON, at Spring Term, 1854.

The defendant filed a general demurrer to the whole petition, and the cause being set down for argument upon the petition and demurrer, was removed to this Court by consent.

This case sufficiently appears from the opinion of the Court.

Lewis, Busbee and *Winston,* for the plaintiff.
Moore, J. H. Bryan and *Miller,* for the defendant.

NASH, C. J. The bill is filed to obtain a divorce from bed and board and for alimony. There is a general demurrer to the whole bill; and if there be any part of the bill entitling the plaintiff to relief, the demurrer must be overruled. Adams Eq., 335. I Daniel Ch. Pr., 538-540. It is a principle of pleading, both at law and in equity, that a demurrer admits everything that is properly pleaded, its object being to avoid an answer, upon the ground that an answer is not necessary, as from the plaintiff's own showing he is not entitled to the relief he seeks.

On the argument it was contended that there was no charge (240) in the bill upon which the Court could order an issue, with the exception of that of taking a strumpet into his house by the defendant, and having children by her. This it was admitted would furnish an issue, and the facts by the demurrer are admitted. Being bad, then, in this particular, it is bad in the whole, for a demurrer cannot be good in part, and bad in part, where it is in itself one whole. To avoid this difficulty it is alleged that the bill is deficient in not averring that she never admitted the defendant to conjugal embraces after she discovered his intercourse with Betsy Mason, having continued to live with him for eight years; that she had slept too long upon her injuries. The bill states, "about eight years ago the defendant invited to his house one Betsy Mason, a woman of lewd character, and he hath permitted the said woman to reside upon his premises in his yard, and by her, as your petitioner charges and believes, has had several children; and that he recognizes her and her said children as his family, having them at his table, and otherwise feeding, clothing and caring for them, as objects of his bounty and affection." The petition then charges, "that about eight years previously, that is, before filing the petition, her mind became partially deranged by this and the other conduct of the defendant." It then proceeds, "that she has been forced at all times, and especially of late years, by her said husband to lead a secluded life, rarely receiving visits from her frineds, or being permitted to go out from home, and she shows that on several occasions she did endeavor to escape from his brutalities and flee to the house of her friends, but she was at the command of her said husband carried

back to his house by his servants. That she succeeded on 26 February in making her escape; and that it was recently after being beaten by her husband." All this is admitted by the demurrer, for it is properly pleaded. But it is urged by the defendant's counsel that, if true, it is not sufficient to entitle the petitioner to the relief she seeks, (241) because the allegation is not accompanied with an averment that she did not admit her husband to her conjugal embraces after discovering his infidelity. For this position he relies upon the act of the General Assembly, Rev. Stat., ch. 39, secs. 2, 3 and 8. These sections do not sustain the position. The second points out the causes for which a divorce from the bonds of matrimony and from bed and board may be obtained, and the third enumerates those for which a divorce from bed and board alone may be obtained, and in each they are different. Among the causes enumerated in sec. 2, is the following: "If either party has separated him or herself from the other, and is *living in adultery*," etc. The 8th section provides: "In any suit for a divorce for the cause of adultery, if it shall be *proved* that the plaintiff has been guilty of the like offence, or has admitted the defendant to conjugal society or embraces, after he or she knew of the criminal fact, etc., it shall be a good defence, etc., against said suit." It appears, then, from the 8th section that the so receiving to conjugal embraces is a matter of defence, to be proved upon the trial under an issue to that effect. It is not necessary, therefore, for the petition to negative the fact. But if it is necessary for the petition so to aver, it is only in cases under the 2d section for a divorce *a vinculo matrimonii*. For in that section is the case of living in adultery made a specific cause for a divorce absolutely. But it is further alleged that the bill shows, as to this specific cause, that she has laid by too long. The petition sets forth the reason why she did so long delay. After enduring for nearly thirty years the brutal oppression of the defendant, the finishing blow was inflicted by bringing into his house his strumpet, and his bastards, and forcing them upon the company of his wife. What greater indignity could he have inflicted upon her? Personal injuries she might endure, blows and brutality from drunkenness she might suffer, but woman's nature must and will rebel against this last indignity; or mind itself give way. Accordingly, she tells us her mind became partially deranged. (242) And she was then in a manner confined by her husband to her own house; and when she attempts to make her escape, her own servants, at the command of her husband, rudely seize and force her back. As soon as she does make her escape, she appeals to the laws of her country; and it would be a disgrace to the administration of them if she did not receive relief. This, then, is a charge sufficiently specific upon which to form an issue, and which is admitted by the demurrer.

The petition further sets forth a list of grievances running through a long series of years. It may be that they are not individually set forth with that particularity as would entitle the petitioner to the relief she asks; but taken as a whole they constitute a history of suffering against which the law ought to, and we think does, provide. For forty years these persons lived together as man and wife, and for thirty of them the petitioner was exposed to harsh and brutal treatment on the part of the defendant. She bore with it, as only woman can bear, and when at last she seeks redress she is told, "you ought to be more precise in your charges—you ought to name the times and places when I committed these acts; the policy of the law is to heal these family breaches —to give time for the angry passions to cool—and the erring party to repent and reform." The complaining party is compelled to swear that the facts upon which the application is made have existed for more than six months. Patience and forbearance one with the other is inculcated. It does not wish nor expect that for every act of improper violence a resort should be had to the law, nor does it expect that married people shall keep in a diary those many causes of strife which disturb the tranquillity of families.

The petition contains a plain, artless, feeling statement, well calculated to stir up the deepest sympathies of our nature and to
(243) cause deep regret that in God's best temporal gift to man so much of sin and misery so often mingle.

We have examined the cases to which our attention has been drawn. We do not think that they conflict with our opinion in this. In *Harrison v. Harrison,* 29 N. C., 484, the issue was, "Did the defendant offer such indignities to her person as to render her condition intolerable and her life burdensome?" The Court decide that the issue was too general. The facts constituting the indignities must be found by the jury. *Foy v. Foy,* 35 N. C., 90, turned mainly upon the fact that the allegations and *probata* must correspond. In *Whittington v. Whittington,* 19 N. C., 64, the Court decide that a petition for a divorce ought, *as far as possible,* to charge specially the facts to be given in evidence. The charges that the defendant, within the last eight years before the filing of the petition, repeatedly, without any provocation on her part, beat her, may be sufficiently specific to call upon the defendant for an answer. This we are not now called on to decide, as we have put the decision upon another and sufficient ground. The demurrer must be

PER CURIAM. Overruled with costs.

Cited: Coble v. Coble, 55 N. C., 393; *Erwin v. Erwin,* 57 N. C., 84.

EDMUND COOR, ADM'R, *against* WILLIAM STARLING AND WIFE AND OTHERS.

A bastard dies intestate, leaving the daughter of a bastard brother, born of the same mother, his next of kin, and a widow. It was *held*, that the widow was only entitled to one-third of her husband's personal estate, and the daughter of his bastard brother to two-thirds.

CAUSE removed from the Court of Equity of WAYNE, by consent of parties, Spring Term, 1854. (244)

The case sufficiently appears from the opinion of the Court.

Dortch, for the plaintiff.

J. H. Bryan and *Person,* for defendants.

NASH, C. J. The petition is filed by the administrator of Edwin Jones to ascertain who are his next of kin, and in what proportions they are entitled, under the acts of distribution, to the surplus of the property remaining after the payment of the debts of his intestate.

In 1801, Catharine Jones, a single woman, was delivered of a bastard child named Edwin Jones, who subsequently married and died in January, 1851, leaving no child or the issue of such, but a widow, who is now the wife of the defendant Starling, herself one of the defendants. Catharine Jones, in the year 1804 or '5, married one Simon Lunsford, who lived with her four or five years and then left her and removed from this State to parts unknown, and has never since been heard of. About the year 1824, Catharine Jones, as she still continued to be called, had another child called Henderson Jones, who died in 1845, leaving a widow and one legitimate child, who is the defendant Catharine Elizabeth. Starling, in right of his wife, claims, as stated in the petition, the whole of the personal property, and Catharine Elizabeth claims two-thirds. We are of opinion that the defendant Starling, in right of his wife, is entitled to one-third of the assets in the hands of the administrator of Edwin Jones, and Catharine Elizabeth to the other two shares.

In 1836, the Legislature of this State, by an act then passed, provided that, "when any citizen of this State shall die intestate, etc., leaving a widow and no kindred that are known to exist, etc., the widow shall be entitled to the whole of the personal property of her husband." This act was originally passed in 1823-'31 (Rev. (245) St., ch. 121, s. 15), and under its operation the claim of Starling, in right of his wife, would have been correct. Edwin Jones was a bastard, and by the common law no such consanguinity existed between him and his bastard brother as enabled the latter or his issue to claim any portion of his estate, real or personal. A bastard can be heir to no

one, nor can he have any heirs, but of his own body; for, being *filius nullius,* he is kin to no one. 1 Blackstone Com., 459. Henderson Jones was himself a bastard. Children born during a lawful marriage are presumed to be legitimate, but this presumption may be rebutted by proof of illegitimacy. Formerly, the rule in favor of legitimacy was so strict that nothing but the absence of the husband from the country during the whole time of gestation would counteract the principle. But the rule now is firmly established that any circumstances which show an impossibility that the husband could be the father will put an end to the presumption, and the child will be deemed illegitimate. These circumstances are: the husband's being under the age of puberty, or laboring under disability occasioned by natural infirmity, or *by length of the time since his death, or from his continued absence. Rex v. Luffe,* 8 East, 193; 1 Phil. Ev., 158. Catharine Jones, the mother of Henderson Jones, was duly married to Lunsford in 1804 or '5, who left her and the State in 1808 or '9, and Henderson Jones was born in 1824, which was fifteen or sixteen years after all access of Lunsford to his wife could have taken place, and eight or nine years after being heard of last, which raised in law a presumption of his death. Henderson Jones, then, was the illegitimate brother of Edwin Jones, by the same mother, and under the common law was not of kin to his brother Edwin, and under the acts of 1823-'31 the defendant Mrs. Starling would have been entitled to the whole of the surplus of the personal property of her late husband Edwin Jones.

But at the session of the Legislature in 1836 another act was (246) passed, by which it is provided, "if any such illegitimate or natural-born child shall die intestate, without having any child or children, his or her personal estate shall be divided among his or her brothers or sisters born of the same mother and their representatives, in the same manner and under the same regulations and restrictions as if they had been born in lawful wedlock." Rev. Stat., ch. 64, s. 4. This act recognizes the consanguinity between bastards, and establishes their rights under certain circumstances to the succession to personal property. The defendant Mrs. Starling is not entitled to the whole of the surplus of the personal property of her deceased husband, for the defendant Catharine Elizabeth is the daughter of his half-brother by the same mother, but he is entitled, under the general act of distribution, to one-third, and Catharine Elizabeth is entitled to the other two-thirds. The costs will be paid out of the fund.

PER CURIAM. Decree accordingly.

Cited: Fairly v. Priest, 56 N. C., 386; *Harrell v. Hagan,* 147 N. C., 115; *Kennedy v. R. R.,* 167 N. C., 20.

THOMAS TAYLOR *against* JOHN TAYLOR AND OTHERS.

A deed, absolute on its face, will be declared a trust where a parol agreement has been proven to that effect, accompanied with circumstances, *dehors the deed*, inconsistent with the idea of an absolute purchase.

CAUSE removed from the Court of Equity of ANSON, Fall Term, 1853.

On 2 March, 1813, one Burwell Benton conveyed the land in question by deed to Stephen Taylor, now deceased, the father of (247) the plaintiff and of the defendant John Taylor. The bill alleges that the plaintiff furnished one-half of the purchase-money, and that it was agreed between the plaintiff and his father that one-half of the land should be conveyed to him, and that in pursuance of this agreement one Allen Carpenter, a surveyor, was employed by the parties to run off the land into two equal tracts, and to write a deed for one part of the same from Stephen, the father, to the plaintiff; that Carpenter accordingly divided the land, and drew a deed for one-half, to-wit, 237 acres; that the son immediately thereafter, by the father's consent, went into possession of the part allotted to him by Carpenter's survey, and remained in possession thereof up to the time of Stephen Taylor's death; that from accident the deed was not signed by said Stephen, though he frequently declared his willingness to do so, and admitted that plaintiff had paid one-half the purchase-money to Benton and was entitled to half of the land.

The bill further alleges that all the other defendants, except John Taylor, who with him are the heirs at law of Stephen Taylor, have admitted the plaintiff's equity, and by a deed executed by them attempted to convey their interest in the share laid off for him by the surveyor, but by the unskillfulness of the draughtsman only a life estate was conveyed to him by this deed. The prayer of the bill is that the defendants convey in fee-simple the share of the land laid off by the surveyor to the plaintiff.

The bill was taken *pro confesso* as to some of the defendants, and the rest, with the exception of the defendant John, admitted the plaintiff's bill.

John Taylor, one of the heirs at law of Stephen Taylor, answered the bill, and denied the payment of half the money by the plaintiff. He admits that there was an agreement between the plaintiff and his father that he was to have one-half of the land bought of (248) Benton whenever he paid half of the money, and that this was the reason why the land was run off by the surveyor, but says the plaintiff never paid any part of the money to his father or to any one else, and being a very poor person, was totally unable to do so.

Replication was taken to this answer, and proofs filed, the material portions of which are recited in the opinion of the Court.

Cause set for hearing and transferred to this Court.

Strange and *Kelly,* for plaintiff.
No counsel appeared for defendants.

BATTLE, J. The bill was filed for the purpose of compelling the defendant to execute a conveyance to the plaintiff for an interest in one-half of a certain tract of land, which the plaintiff alleges was purchased and paid for jointly by him and Stephen Taylor, his father, and for which his father took the deed to himself, with a promise to convey one-half of the land to plaintiff. The defendant John Taylor denies the trust, and the question is, has the plaintiff supported his allegations by proof sufficient to entitle him to a decree? This is one of a class of cases of which several have recently been before the Court, and in which it has been held that to convert a deed absolute on its face into a security for money or a trust there must be proof, not merely of the party's declarations, but of facts and circumstances, *dehors the deed,* inconsistent with the idea of an absolute purchase. We think that the testimony furnishes abundantly the required proof. In addition to the oft-repeated admissions by the father of the joint purchase and payment by himself and his son, there are the clearly-proved facts of the survey, plat and division of the land between the purchasers, made by the surveyor Carpenter, the taking possession of his part by the plaintiff with his father's knowledge and consent, and retaining the same (249) up to the time of his father's death, and afterwards until the filing of the bill, without paying any rent therefor. These facts are entirely inconsistent with the idea of an absolute purchase by Stephen Taylor of the whole land for himself. The plaintiff is entitled to a decree that the defendants shall execute the necessary conveyance or conveyances to perfect his title to the land in question. The defendant John Taylor must pay the costs.

Decree.

Cited: Glisson v. Hill, 55 N. C., 259; *Ferguson v. Haas,* 64 N. C., 778; *Henderson v. McBee,* 79 N. C., 221; *Harding v. Long,* 103 N. C., 7.

LUCY THOMAS AND OTHERS *against* NATHANIEL J. PALMER.

Emancipation, followed by immediate removal from the State, is not forbidden by our laws. But where it is provided in a will that certain slaves shall have their own time, and may work or not, as they see proper, having the care and protection of a nominal master, and a fund for their support and maintenance, such a state of qualified slavery is regarded by the Court as unlawful, and the bequests void.

THOMAS *v.* PALMER.

CAUSE removed from the Court of Equity of CASWELL, Spring Term, 1854.

Nathaniel P. Thomas, among other things, devised and bequeathed as follows:

"My mill tract of land, situate in Caswell County, containing eighty-five acres, on the waters of Pumpkin Creek, adjoining the lands of Carter Powell and others, and the Crowder tract of land, containing about sixty-six acres, adjoining the same, I do hereby devise to my executor, to be sold on a liberal credit, and the proceeds of the said sale to be placed at interest, after investing a portion of the same in purchasing a suitable home for my mulatto woman, Lucy, and children, purchased of the trustees of Robert A. Crowder; the (250) interest in the said two tracts to be appropriated toward their support, and until the amount of said sale becomes due I direct my executor to appropriate a sufficient amount out of the proceeds of my estate generally for their maintenance and support.

"3d. My mulatto woman Lucy, as aforesaid, I do hereby devise and bequeath to Nathaniel J. Palmer, together with her children, Mary Jane, James and Newton, and any other children that she may have, in trust and confidence, nevertheless, that he will provide for them a suitable home, as aforesaid, and for her support, and that of her children, until they are able to support themselves, out of the proceeds of the real estate aforesaid. And in the event of the death of the said Nathaniel J. Palmer, the said woman and children are to be held by my friend, William Bryant, of Pittsylvania County, Virginia, as trustee aforesaid, and in the event of his death, they are to be held by such trustee as he may select and the County Court of Caswell approve and appoint, it being understood that the said woman and children are not to be removed from the County of Caswell without her free will and consent and a copy of this will recorded in the Clerk's office of the county to which she may remove."

In a codicil to this will the testator provides as follows: "In the event that the laws of North Carolina, or the policy of the same, as construed by the Supreme Court, shall present any obstacle to the fulfilment of the trust mentioned in the foregoing will in relation to my mulatto woman, Lucy, and her children, I do hereby authorize and direct my executor to send them to such State, territory or country as she may select, and he may think best, and I do hereby charge my estate with a sum sufficient to provide for their removal to such State, territory and country, and for their comfortable settlement there; it being my will and desire that she shall not be continued in slavery."

The woman Lucy, being advised that the policy of the laws of the State forbade her remaining in the State and obtaining any of (251)

the advantages proposed in this will or codicil, removed with her children to the State of Ohio, where they are now domiciled, and are, by the laws of that State, free persons.

The plaintiffs (the woman Lucy and her children) in their bill allege that by their own exertions, and by the partial aid of Mr. Palmer, the executor, they were enabled to get to Ohio, but that they have not been provided with a home or settlement as the will directs, and that they are in want and destitution, and that the children being small, the mother is unable to support herself and them, without the assistance of the fund provided in the will. They insist that the codicil of the will above recited made good and valid the provision made for them in the will, and that they are entitled to the proceeds of the sale of the two tracts of land, which amounts to some $1,500; but besides this, they are entitled to the expenses of their removal, and to a comfortable settlement out of the estate of the testator. And accordingly such is the prayer of the bill, as well as for general relief.

The answer of the executor, Palmer, objects to the construction insisted on by the plaintiffs, but says that he is advised that there is nothing in the codicil to validate and set up the deficient and illegal devises in the body of the will, so that the plaintiffs are not entitled to anything but the expenses of their removal and a comfortable settlement in the land to which they have gone; that he has already advanced funds to them to assist in removing them to Ohio, and that as soon as the condition of the estate will allow he intends to provide for a comfortable settlement of them in Ohio. But he submits to the advice and direction of this Court in the premises.

The cause was set for hearing on bill, answer and exhibit, and sent to this Court by consent.

Morehead, for plaintiffs.
Norwood, for defendants.

(252) PEARSON, C. J. Emancipation is not forbidden by our laws; but a negro who is set free is required forthwith to leave the State; for it is against public policy to have the number of free negroes increased, or to allow negroes to remain among us in a qualified state of slavery.

The latter is, if anything, the worst evil of the two. Free negroes constitute a distinct class; and the poor creatures seldom prosper so well as to become objects of envy. Whereas slaves who have the care and protection of a master have houses provided for them, and a fund set apart for their support and maintenance, so that they can have the control of their own time, and may work or not, as they see proper, necessarily

become objects of envy to those who continue to look upon them as fellow-slaves. So that nothing can be more calculated to make our slaves discontented; accordingly, such a state of things is expressly forbidden by statute. It follows that the provision in the will by which Lucy and her children were to remain in this State under the care and protection of one who was to act nominally as master, but was to provide a house for them to live in, and apply the interest of a certain fund for their support and maintenance, so as to let them have the control of their own time, is void. Fortunately for the complainants, the testator became aware of this in time to make provision by a codicil for their emancipation and removal to another country, and "for their comfortable settlement there."

The complainants insist that the codicil has the further effect of making valid the provision that is made for them in the will, and that they are now entitled as well to the provision which the testator intended to make for them by the will as that which he did make for them by the codicil. In other words, that besides having the expenses of their removal and comfortable settlement in another country paid out of the estate of the testator, they are entitled to the fund produced by the sale of the two tracts of land. We do not think so.

The provision made by the codicil is intended as a substitute for that made by the will—*"in the event"* that the latter cannot (253) be carried into effect. The intention is clearly this: If the negroes can be kept in this State, they are to be provided for as directed by the will. If they cannot remain here and be so provided for, then they are to be provided for as directed by the codicil. There is not the slightest intimation that the two modes of providing for them are in any degree, or to any extent, to be cumulative.

Decree accordingly.

Cited: Hogg v. Capehart, 58 N. C., 72.

ELIZABETH B. DAVES AND OTHERS *against* E. G. HAYWOOD AND OTHERS.

1. Where a fund is directed by a will to be equally divided amongst children, interest will be charged on advancements out of that fund, whenever it is necessary to make the division equal.
2. A release of interest endorsed upon a note which was never delivered to the releasee is inoperative.
3. Under our act of distribution advancements made by intestate mothers as well as intestate fathers are required to be brought into hotchpot. Gifts made to the grandchildren are not required to be thus brought in.

CAUSE removed from the Court of Equity of CRAVEN, Spring Term, 1854.

Edward Graham, of New Bern, devised and bequeathed a large real and personal estate to his wife for life and afterwards to his two (254) daughters, Elizabeth, who intermarried with John P. Daves, and Jane, who intermarried with Wm. H. Haywood, Jr., and to his son Hamilton C. Graham, to be equally divided; and the will further provides that if either of these children should die in the lifetime of their mother, leaving children, that the children of such child should take the share intended for his or her parent, and he appointed his wife Elizabeth Graham his executrix and guardian to his children. The will further provides that she might sell and dispose of such part of the estate as she might find necessary and best for the payment of certain charges against his estate and for the maintenance and education of his children.

The testator lived until all three of his children married and arrived at the age of twenty-one.

Hamilton C. Graham, above mentioned, having married, the following issue was born to him, that is, Edward Graham, Charles Graham and Hamilton Graham, who are plaintiffs in this suit. After the death of the testator, Hamilton C. Graham, with his wife and three children, for several years, lived with his mother, the executrix, and he and his family, during that period, were maintained and supported by her out of the estate and proceeds thereof. She also advanced money to the said Hamilton C. Graham at different times, for which she took his notes, and after the death of her son Hamilton C. she continued to support his children until her death.

Elizabeth, one of the above-named legatees, intermarried with John P. Daves, who died in the year 1838, much embarrassed with debts, and upon the final settlement of his estate it proved insolvent. Among his debts were three notes for the aggregate of $2,300, with interest payable to the executrix, Mrs. Graham, and one for $1,200, payable to her individually. At the sale of the property of John P. Daves it was arranged with the executor of Mr. Daves and his widow, the plaintiff Elizabeth and Mrs. Graham, that she should purchase at the sale of her husband's estate to the amount of these notes, and that she should account (255) for the amount in the distribution of Mr. and Mrs. Graham's estate. She purchased according to this agreement, and gave her note to her mother, Mrs. Graham, for $3,775, due in 1838.

Mrs. Graham, the executrix, also made an advancement of $2,000 to her son-in-law, Mr. Haywood, for which she took his note, upon which note there is a release of interest, but without date. There were other advancements made to Mrs. Haywood by her mother. The distributees of the two estates are the same persons, and the proportion of each the same.

The bill was filed by Mrs. Daves and the three children of Hamilton C. Graham, to-wit, Edward, Charles and Hamilton, and by F. J. Jones, administrator of H. C. Graham, against Edward G. Haywood, administrator *de bonis non* with the will annexed of Edward Graham and as administrator *de bonis non* of Mrs. Elizabeth Graham (the previous administrator, W. H. Haywood, Jr., having died), and against Mrs. J. F. Haywood, executrix of Wm. H. Haywood, Jr., praying for an account and a distribution of the estates of Mr. and Mrs. Graham. The defendants answered and an order was made referring the account to a Commissioner to be stated.

On the coming in of the Commissioner's report, exceptions were filed by both parties, which raised the following questions, viz.:

1st. Whether the Commissioner was right in charging Mrs. Daves with interest on the note given to her mother, Mrs. Graham, as executrix of her father.

2d. Whether the Commissioner was right in charging interest on the notes given by Mr. Haywood and Hamilton C. Graham.

3d. Whether the children of Hamilton C. Graham were properly chargeable with the board, money, etc., furnished to him by his mother.

4th. Whether the children of Hamilton C. Graham were chargeable with the board money, etc., furnished them by their (256) grandmother after the death of their father.

The cause was set for hearing upon the exceptions, and sent to this Court by consent.

J. W. Bryan, for the plaintiffs.
Moore and *E. G. Haywood,* for defendants.

BATTLE, J. The Commissioner was right in charging Mrs. Daves with interest on the note given to her mother as executrix of her father. If taken as a debt to the estate, interest was undoubtedly chargeable. The rule is the same, if the money for which the note was given was intended by the mother as an advancement out of the remainder limited to the children after the mother's death, because it is necessary that interest should be charged in order to produce equality in the division of that fund among the children. The Commissioner was equally right in charging interest upon the notes given respectively by Mr. Haywood and Hamilton C. Graham. The releases endorsed on the notes never operated for want of a delivery. Indeed, we learn from the parties that if interest be charged on Mrs. Daves' note, no objection is made to the counting of interest on the others.

The children of Hamilton C. Graham, deceased, are properly charged with the board money, etc., furnished to him by his mother. In the dis-

tribution of her estate they are to be regarded as advancements. It is true that under the English statute of distributions none but the children of an intestate father are bound to account for advancements, because the father only is under a legal obligation to provide for his children. But our statute, which was passed originally in the year 1792, and re-enacted when the statutes were revised in 1836 (see 1 Rev. Stat., ch. 64, sec. 2), uses the words, "he or she" and "him or her," in reference to the intestate whose children were to account for personal property given
(257) to them or put into their possession in their parents' life-time. Both sexes are clearly embraced by these words, and we do not feel at liberty to reject them, but are bound to hold that the Legislature intended to apply them to an intestate mother, as well as to an intestate father. With regard to the board, money, etc., furnished by Mrs. Graham to her infant grandchildren, the rule is different. Even if such things given to *infant* children were to be regarded as advancements, which we hold that they are not unless expressed to be so by the parent (see 2 Williams on Executors, 923, and *Meadows v. Meadows,* 33 N. C., 148), yet they are not to be extended to grandchildren, as was distinctly held by this Court in *Headen v. Headen,* 42 N. C., 159.

The exceptions to the report of the Commissioner are all overruled, and the report is in all respects confirmed.

PER CURIAM. Decree accordingly.

Cited: Shiver v. Brock, 55 N. C., 141.

BENNETT ROWLAND AND WIFE AND OTHERS *against* CANDIS PARTIN.

Where property has been seized under an order of sequestration, to prevent a removal and hired out, the owner for life (from whom it was taken) is entitled to these hires, and the court of equity will so order.

APPEAL from the Court of Equity of WAKE, Spring Term, 1854.

William Partin by his last will and testament (among other things) bequeathed as follows: "I also give to my said wife all my negroes, namely, Morning, etc., to be disposed of at her discretion equally
(258) between all my daughters, namely, Pernina Partin, etc., except my wife should be of opinion that by the increase of the said negroes, or otherwise, they should be of more value than what my sons have had heretofore, and now given to them from me, then my wish is that my said wife may divide the surplus part of the said negroes equally among all my sons, namely, John, etc., nevertheless she is at liberty finally to sell one or more of said negroes, as she may think proper."

Candis Partin, the widow of the testator, mentioned in the above clause as his wife, sold two of the negroes, and the bill alleges that she was about to sell the others, and that they were about to be removed beyond the limits of the State. The bill was filed by the daughters and their husbands, praying for a writ of sequestration, and for a construction of the above-recited clause of the will, so that the interest which the plaintiffs have in this bequest may be ascertained.

The Court accordingly granted the writ of sequestration, and according to the terms thereof the negroes in question were seized by the sheriff (the widow not being able to give the security required by the Court).

By another order of the Court the hires of these negroes were directed to be paid to Candis Partin, the widow.

At a subsequent term of the Court the plaintiffs filed a petition for a rehearing of this latter order, and prayed that it should be reversed. The Court, on argument and consideration of this petition, reversed the order, and thereupon the defendant prayed for leave to appeal to this Court, which was granted.

Miller and Winston, for plaintiffs.
G. W. Haywood and *Moore,* for defendant.

BATTLE, J. We think his Honor erred in reversing the in- (259) terlocutory order upon the petition to rehear it. At the time it was entered it was the only order to which the plaintiffs upon the allegations and prayer of their bill were entitled. They do not pretend that they have an absolute or, indeed, any other certain interest in the slaves in question; on the contrary, they say expressly, "that it is doubtful what estate in the said slaves they have under the bequest contained in the last will and testament of William Partin." And they pray only to have the slaves in the possession of the defendant, and the money for which she had sold the others secured. The *fiat* made by the Judge, and the writ of sequestration issued upon it, were in accordance with the prayer. The plaintiffs nowhere set up any claim to the accruing profits of the slaves during the life of the defendant, but, on the contrary, had permitted her to enjoy them unquestioned for nearly thirty years. Had she given bond for the forthcoming of the slaves, according to the *proviso* in the *fiat* and writ of sequestration, she would undoubtedly have enjoyed their hires and profits, and we think that she was equally entitled to them, when the slaves were taken into possession and hired out by the sheriff. The order to that effect made by the Court was therefore proper, and ought not to have been reversed. The order to reverse the decretal order in question will be reversed with costs, and the Court below may proceed in the cause.

PER CURIAM. Decree accordingly.

SUPREME COURT OF NORTH CAROLINA

AUGUST TERM, 1854

AT MORGANTON.

E. D. AUSTIN AND THE NORTH CAROLINA RAILROAD COMPANY *against* OTHO GILLASPIE AND RUFUS M. ROSEBOROUGH.

Where A had agreed, conditionally with others, to subscribe a certain amount to the stock of an incorporated company, and B and C agreed with him in writing, if he would do so unconditionally, they would each take one-fourth of such stock off of his hands by subscribing for it in their own names, and A afterwards made such subscription absolutely, *held*, that equity would decree the specific performance of such agreement.

CAUSE removed from the Court of Equity of ROWAN, Spring Term, 1854.

Under the charter of the North Carolina Railroad Company, after unsuccessful efforts had been made to raise the sum of one million dollars, which was required to be subscribed by individuals before the subscription of two millions was to be made by the State, about eight hundred thousand dollars remaining to be subscribed by individuals, a number of persons associated themselves together for the purpose of raising the remainder of the sum required in a written agreement, called "the hundred-man plan," which was as follows:

"Whereas, only a part of the one million of individual sub- (262) scription to the North Carolina Railroad Company is taken; whereas the purpose of this agreement is to take and secure the balance of the one million of individual stock not already subscribed, and to be subscribed by others, we, the undersigned, interchangeably agree with each other and the said company, to take each the one hundredth part of the said balance of the said individual stock. This agreement to be binding on none unless one hundred persons or companies subscribe the same, or the entire amount be made up. Each person or company to be at liberty to subscribe as many shares of the hundred as he or they please, and bound for no more than his or their own subscription. 29 November, 1849."

To which agreement the plaintiff E. D. Austin, amongst many others, signed his name with the hope and expectation, as he alleges in his bill, that his friends would relieve him from the burthen which he had thus undertaken, by joining with him and taking a part of the sum off of his hands. Accordingly, he applied to the defendants Roseborough and

Gillaspie to assist him in this emergency, and they, together with one A. J. Fleming, agreed and undertook, in writing, as follows:

"Whereas, there is an arrangement, commonly called the hundred-man plan, entered into to secure the charter of North Carolina Railroad, in which arrangement each subscriber does engage to take the one-hundredth part of the said stock not taken by other individuals, and each is bound only for the amount of his own subscription, and whereas, E. D. Austin has become a subscriber on that plan;

"We, the undersigned, interchangeably agree with each other to take each such proportion of said share as shall be annexed to our names of the said individual stock already taken by the said E. D. Austin,
(263) and to be bound for no more than his own subscription. 2 March, 1850.

"E. D. AUSTIN,
"OTHO GILLASPIE, 1-4,
"R. M. ROSEBOROUGH, 1-4,
"A. J. FLEMING, $200."

After the execution of this agreement, and, as he alleges, partly induced by it, he went forward, and on ——, in due form, subscribed on the books of the North Carolina Railroad Company his estimated share of the remaining unsubscribed individual stock, to-wit, the sum of eight thousand dollars, upon which he paid, as required by the charter, five per cent.

The bill alleges that the railroad company, who are a party plaintiff, have been willing, and are still willing, to accept the defendants as subscribers to the shares engaged with Austin to be taken by them, and to discharge and release him from so much thereof, and the plaintiff Austin alleges that he has frequently made application to them to make the subscription according to their written agreement, but that they refuse so to do. He states that since his subscription to the stock of the company he has sold and transferred to others eighteen hundred dollars worth of the stock subscribed by him, and he offers to allow a deduction of their proportion of that sum from the subscription asked to be made by them. As to Fleming, he says he has paid his subscription, and he has no ground of complaint against him. The prayer is for specific performance of the agreement, and for general relief.

The defendants allege in their answer and insist that this contract was without consideration, was not mutual, and that it was made on the promise and assurance of the plaintiff Austin that he could and would get large and beneficial contracts for them to do work on the railroad, and that they were to form a joint company to work out the stock proposed to be taken, and were to pay no money beyond their propor-
(264) tion of the five per cent already paid by plaintiff, and that plain-

tiff not only failed to get such contracts, but did not endeavor to do so, and that the specific execution of the contract would be oppressive to them and unreasonable. They say further that they believed at the time of entering into the agreement that Austin had already made an unconditional subscription to the stock of the company.

There was replication to the answer and proofs taken, the material portion of which is noticed in the opinion of the Court.

Boyden and *H. C. Jones,* for plaintiffs.
W. P. Caldwell, for the defendants.

BATTLE, J. An attentive examination of this case has led us to the conclusion that the agreement entered into between the plaintiff Austin and the defendants is a binding contract, and being in writing, signed by the defendant, is one of which the court of equity, acting upon its well-established principles, will decree a specific performance. It may be admitted that at the time when this agreement was made it was merely voluntary and not obligatory upon the parties for the want of a consideration; but when the plaintiff Austin afterwards went forward and subscribed on the books of the North Carolina Railroad Company for eighty shares of stock, in pursuance of what was called "the hundred-man plan," it changed its character, and became invested with all the essential qualities of a valid contract. From the recital which precedes the agreement, and which is explanatory of its objects, it plainly appears that the plaintiff Austin had not then become a subscriber for stock upon the books of the railroad company, but that he had entered into an arrangement with others to do so whenever a sufficient number of men could be found to secure the charter of the company by taking the required amount of stock not taken by others. It appears, (267) further, that this arrangement or plan was reduced to writing, and that each person who signed it was called a subscriber, and in that sense, and not in the sense of having become already a subscriber on the books of the railroad company for stock, was the term used. This is clearly manifest from its being stated expressly in the recital that the arrangement commonly called the hundred-man plan was "intended to secure the charter of the North Carolina Railroad Company." From this recital, introduced for the very purpose of explaining the agreement which the plaintiff Austin and the defendants were about to enter into, it is clear that when the parties spoke of the "said individual stock already taken" by the plaintiff, they did not mean stock for which the plaintiff had already subscribed in the books of the company, but only what he had previously engaged with others to take in order to secure the charter of the company. Admitting, then, that when the agreement

in question was signed by the parties the defendants were bound in honor only, and not in law, to fulfill it, and that they might have notified the plaintiff and thereby have avoided it, yet when the plaintiff, relying upon their engagement to take a portion of the stock for which he might subscribe, went forward and by his subscription on the books of the company bound himself to pay for eighty shares of stock in such manner as might be required by the company, the defendants became legally bound to relieve him by taking a certain portion of such stock. The weighty obligation assumed by the plaintiff of paying, either in money or work, eight thousand dollars towards the accomplishment of what was supposed a great public improvement, in which profits to the individual subscribers were indeed anticipated, but were necessarily somewhat doubtful and contingent, and were certainly not to be realized for several years, formed undoubtedly a valuable consideration for the (268) defendant's promise to him. But the defendants object that the contract is one for the transfer of stock in a public company for the breach of which the plaintiff has his remedy at law, and that therefore the court of equity will not interfere to give the extraordinary relief of decreeing a specific performance. This objection might avail when applied to a contract for the sale and transfer of stock in a company already in existence, and whose stock had in market a certain or nearly certain value. In such a case damages at law would afford an adequate and complete redress. 2 Story Eq., sec. 717. But the slightest reflection will convince any one who turns his attention to the subject that this is a very different case. Here the North Carolina Railroad Company was just struggling into life, and the subscribers for its stock were taking upon themselves very heavy burdens, with a dim prospect of future advantage. It would therefore be manifestly impossible to give to the plaintiff, in a suit at law, damages at all commensurate with the injury which he might sustain by failure of the defendants to fulfill their engagement with him. 1 Story Eq., sec. 717, 718, 719. This view of the case answers also the objection that it would operate hardly upon the defendants to compel a specific execution of their contract. It would be much harder upon the plaintiff if it should not be done. *Ibid.*, sec. 724, *et seq.* It is objected further, for the defendants, that the remedy must be mutual, "that it is requisite that a mutual enforcement in specie be practicable." Adams Eq., 80. That is so; and here we think there can be no doubt that the defendants could compel the plaintiff Austin to transfer to them the number of shares which they agreed to take. But it is objected again for the defendants that though they signed the agreement in question, they did so upon the express understanding and engagement that he was to procure for them contracts for work and labor in grading the track of the railroad, which would save them from

the payment of their subscriptions in money, and that their agree- (269)
ment with the plaintiff was to become obligatory upon them only in the event of his procuring for them such contracts. These alleged stipulations of the plaintiff were, it is admitted, not inserted in the written agreement, because the defendants thought they might rely upon the parol promise of the plaintiff to fulfill them. The doctrine of courts of equity is that they "will allow the defendant to show that by fraud, accident or mistake the thing bought is different from what he intended, *or that material terms have been omitted in the written agreement,* or that there has been a variation of it by parol, or that there has been a parol discharge of a written contract," and that if any of these things be shown by parol they will decline to interfere, and leave the party to his remedy at law. 2 Story Eq., sec. 770. Whether the present case comes within the operation of the doctrine it is unnecessary for us to decide, for if it does, the defendants have altogether failed in proving their allegations. From the proof it rather appears that although the subject of procuring contracts for work on the road was discussed between the parties, and although a plan for obtaining such contracts by the plaintiff and the defendants and others was actually drawn up in writing, yet the paper was never signed, and was finally abandoned, and it seemed to be understood that each party was to procure for himself such contracts as he could.

Upon a review of the whole case we think we have shown that the agreement between the plaintiff Austin and the defendants is founded upon a valuable consideration, is mutual and capable of being mutually enforced in specie, is of such a nature that an enforcement in specie is necessary to the plaintiff and not oppressive to the defendants, and our conclusion, therefore, is that such agreement, being in writing and signed by the defendants, ought to be specifically enforced by this Court. Adams Eq., 78, *et seq.* The North Carolina Railroad Company, which has been made a party plaintiff for that purpose, states its will- (270)
ingness to accept the defendants as subscribers for its stock in lieu of the plaintiff Austin, who may, upon making a ratable deduction for the eighteen shares of which he was relieved by the company, have a decree according to his prayer.

PER CURIAM. Decree accordingly.

Dist.: Branch v. Tomlinson, 77 N. C., 391.

PHINEAS HORTON *against* ADAM COOK.

1. An entry, calling for "a chestnut tree, in a known line as a beginning corner, and lying on the headwaters of Elk Creek, and between the lands of other persons," is sufficiently certain to sustain a grant on it.
2. Where A makes an entry which loses its priority by the lapse of time, and B makes another, which is also permitted to lapse, both stand on the same footing, under the act of 1850, and A having got a grant after B's entry lapsed, it was held to be good.

CAUSE removed to this Court from the Court of Equity of WATAUGA, Spring Term, 1854.

The plaintiff made his entry for the tract of land in dispute 21 September, 1847, and had the same surveyed 25 January, 1850. On 1 December, 1850, he obtained a grant from the State. On 4 November, 1844, the defendant made an entry for one hundred acres of land, which was surveyed, and a grant obtained 11 March, 1850, which covers the greater and only valuable part of the land surveyed for the plaintiff and granted to him as above stated.

It is alleged in the plaintiff's bill that the survey was made of
(271) his entry before that of the defendant was surveyed, and that the defendant was present and assisted plaintiff in making the survey, and encouraged him in doing so by pointing out the corners of adjacent tracts and showing him how and where he might include the best of the vacant land where they were running; that he fraudulently and deceitfully concealed from him the fact that he had a previous entry which could be extended over the land in question, and by various pretenses of good offices and friendship put the plaintiff off his guard, and caused him to delay the taking out his grant; that after plaintiff had made his survey the defendant went forward and made his survey of the hundred-acre tract so as knowingly to include the fifty-acre tract which plaintiff had had surveyed, and avers that there was enough vacant land there for him to have got the complement under his entry without encroaching upon the land surveyed for him, the plaintiff. He sets forth the defendant's entry as follows: "Adam Cook enters one hundred acres of land in Wilkes County, on the headwaters of Elk Creek, between Jacob Lewis and James Brown's line, beginning at a chestnut in James Brown's line and running various courses for complement"; and insists that it is too vague, uncertain and indefinite to entitle the plaintiff to any preference over him. The prayer is for a conveyance of so much of the fifty acres granted to plaintiff as is covered by the prior grant of the defendant.

The answer of the defendant denies all fraud and misrepresentation; he admits that he did go with the plaintiff and assist him in pointing out corners and in showing him the good land, but he says that he did

this under the full assurance and conviction that the time for completing his title was past, and that the defendant had acquired an indefeasible right against him, but afterwards he found that the plaintiff had let his entry lapse, without having done anything to secure a priority, and being advised that they both then stood on the same ground, he did not believe there was anything against conscience in endeav- (272) oring to get the first grant, and accordingly he did so.

There was replication and commissions, and some proofs taken, but the material portions of them are mentioned in the opinion of the Court.

Lenoir, for plaintiff.
Neal, for defendant.

BATTLE, J. There is not much difficulty in determining the relative rights of these parties, if we attend to the dates of their respective entries and grants. The plaintiff made his entry 21 September, 1847, and had it surveyed 25 January, 1850, and obtained his grant on 1 December the same year. The defendant's entry was made 4 November, 1844, and although the date of his survey is not particularly stated, yet we infer from the pleadings that it was after that of the plaintiff's; but his grant was prior to the plaintiff's, to wit, 11 March, 1850. It appears, then, that the defendant precedes the plaintiff, both in making his entry and obtaining his grant. But the plaintiff seeks to avoid the effects of that priority, so far as the entry is concerned, by alleging that when his survey was made the defendant was present and by his fraudulent representations induced the plaintiff to include in it lands for which the defendant afterwards obtained his grant. He contends, also, that the defendant's entry was too vague, indefinite and uncertain to be of any force against his entry and survey, because his survey was prior to that of the defendant, which he insists gives to him the effect of a prior entry, of which the defendant had notice at the time when be obtained his grant. But if this be not so, then the plaintiff contends that Laws 1850, ch. 59 (see Ire. Dig. Man., 182), by virtue of which the defend- ant had the right to take out his grant, contains a *proviso* by (273) which the plaintiff's right as a junior enterer was saved.

Neither of the grounds of defense, against the effects of the defendant's prior entry and grant, can avail the plaintiff. The allegation of fraud and misrepresentation is expressly denied and disproved by the defendant. As to that, then, the plaintiff fails upon the question of fact. The objection to the vagueness and uncertainty of the defendant's entry and its effect upon his rights is equally against the plaintiff. Such an objection would have come with more force from the plaintiff to repel the allegation of notice of the defendant's entry, if he had obtained the first grant; but in truth the defendant's entry was sufficiently definite

and certain to fix the plaintiff with the actual notice which it is clear from the proofs he had of it. It specifies a certain tree in a certain line of another tract of land, at which it commences; and it mentions the headwaters of the creek on which, and the tracts of land belonging to other persons between which, it is located. In that respect it differs materially from the entries set forth in *Johnson v. Shelton,* 39 N. C., 85; *Monroe v. McCormick,* 41 N. C., 85, and *Fuller v. Williams,* 45 N. C., 162, and is sufficient to sustain the proof of actual notice of it, according to the principles established in *Harris v. Ewing,* 21 N. C., 369.

The last and main ground upon which the plaintiff contends that he is entitled to relief is that at the time when he made his entry the defendant's entry had lapsed, and the acts of 1848, ch. 54, sec. 2, and 1850, ch. 59, sec. 2, which gave further time for paying the purchase money to the State and perfecting the title, contains a *proviso* in favor of junior entries, by virtue of which his, the plaintiff's, right was made the preferable one. That would have been true had the plaintiff, after making his entry, proceeded to pay the purchase money, and take out his grant within the time prescribed by law; *Bryson v. Dobson,*

(274) 38 N. C., 138; *Buchanan v. Fitzgerald,* 41 N. C., 121. But unfortunately for the plaintiff, his entry lapsed by reason of his not having paid the purchase money and taken out his grant on or before 31 December, 1849, 1 Rev. Stat., ch. 42, sec. 10. He was therefore compelled to claim the aid of the act of 1850, ch. 59, sec. 2, which extended the time for the benefit of the defendant's entry as well as for his own. They both then stood upon the same footing, and we can see no reason why the defendant's equity is not as good as that of the plaintiff, and thus give application to the maxim that *"qui prior est tempore portior est jure."* Indeed, in *Bryson v. Dobson,* 38 N. C., 138, the Court say, *arguendo,* that the law is so "when applied to two entries which had both lapsed and were both revived by the act. As neither could get the land but by that act, they stand on the same ground, and then the general principle applies that priority of time in making payment creates a priority of equity." The act to which reference was made was the act of 1842, ch. 35, sec. 2, the object of which is the same as that of 1850, ch. 59, and the latter must receive the same construction in this respect as the former. The bill must be

PER CURIAM. Dismissed with costs.

Cited: McDiarmid v. McMullen, 58 N. C., 31; *Wilson v. Land Co.,* 77 N. C., 458; *Gilchrist v. Middleton,* 107 N. C., 678; *Euliss v. McAdams,* 108 N. C., 512; *Perry v. Scott,* 109 N. C., 379; *Grayson v. English,* 115 N. C., 364; *Barker v. Denton,* 150 N. C., 725; *Cain v. Downing,* 161 N. C., 599, 600.

(275)

DAVID T. CALDWELL AND OTHERS *against* JOHN J. BLACKWOOD, TRUSTEE, AND OTHERS.

Where a defendant demurs to a bill specially for the want of the proper parties, without setting forth in the demurrer the names of the persons who ought to have been made parties, the demurrer is defective, and ought to have been overruled on the hearing below. In this Court, however, the question having been brought up by appeal, it is competent to demur, *ore tenus*, on the same objection, as to parties; and such demurrer will be sustained, if the facts of the case make it proper so to decree. But the effect of sustaining such demurrer is not necessarily to have the bill dismissed. It may be remanded to the Court below for amendment.

APPEAL from an interlocutory order of the Court of Equity of MECKLENBURG.

The bill sets forth that the plaintiffs, D. T. Caldwell and W. F. Davidson, together with one J. H. Blake, were sureties of one William Davidson in a note to the defendant Blackwood, payable to him as agent of the Bank of the State, for $15,000. That in 1837 Davidson executed a deed of trust to secure the same, and that the said Blackwood was made the trustee in this deed. That previously to this, Davidson had executed a deed in trust to Washington Morrison, the testator of the defendant Wilson, to secure certain debts therein mentioned, which deed conveyed the same property as that to Blackwood and much more; that the debts mentioned in the first deed had been satisfied by the sale of a part of the property in the lifetime of the said Morrison. It also alleges that Blackwood, as trustee in the second deed in trust, also made sale of property conveyed in trust to him sufficiently to satisfy and pay off the debt for which plaintiffs were sureties, and that the said debt to the bank was in fact so paid and satisfied. The bill further alleges that before the sale thus made by Blackwood a judgment had been taken against Davidson and the plaintiffs, as his sureties, upon the said note, upon which execution was issued, but the debt having been satisfied by a sale under the trust deed, plaintiffs paid no attention to it then, nor had their attention directed to the matter afterwards. They aver that they expected that the defendants would have some entry made on the execution, or some record to show that the debt had been satisfied. But that they have lately discovered that no such (276) entry was ever made, and that the defendants have caused the execution to be regularly issued and kept alive, and that they are now endeavoring to force a sale of plaintiff's property under the same. The prayer is for an injunction to restrain the collection of this execution, and for an account of the trusts, and for general relief. David T. Caldwell and William F. Davidson were the only plaintiffs in the suit,

and John J. Blackwood, Joseph Wilson, executors of Washington Morrison, and the president and directors of the State Bank, are made defendants.

The defendants answered severally and demurred specially for the want of parties, thus, "It is apparent that there are other persons interested in the matters and things which are made the subject of litigation in this suit who ought to have been made parties thereto."

The cause was heard below upon a motion to dissolve the injunction and upon the demurrer, and the record of the hearing sent to this Court is as follows: "It is ordered and decreed that the injunction be continued to the hearing for the whole amount except the sum of $762.20. Demurrer sustained." Appeal prayed and granted.

Boyden and *Bynum,* for the plaintiffs.
Avery Thompson and *E. P. Jones,* for defendants.

BATTLE, J. It is apparent from the pleading that James H. Blake, a joint surety with the plaintiff David T. Caldwell in the judgment obtained by the defendant, the president and directors of the Bank of the State of North Carolina, which the plaintiffs seek to enjoin, and the *cestui que trust* in the deed in trust executed to the defendant, Wilson's testator, Morrison, are necessary parties to the suit before any final decree can be made. *Fisher v. Worth,* 45 N. C., 63. For this cause the defendants filed a demurrer in the Court below, in which, however, they omitted to state the names of the persons who ought to have been made parties. The demurrer was, by reason of this (277) omission, defective and ought to have been overruled. But the defendants now insist, by a *demurrer ore tenus,* on the same objection for the want of the persons above referred to as proper parties. The objection is a valid one, and may be taken in this way. *Gordon v. Holland,* 38 N. C., 362; Story Eq. Pl., sec. 541. The effect of the objection thus taken is not necessarily that the bill must be dismissed, but it may stand over, with leave to amend by adding the necessary parties. *Gordon v. Holland* cites Calvert, 176; Story Eq. Pl., sec. 264. But if it were dismissed, it would be without prejudice and without costs. Story Eq. Pl., sec. 541. As the case comes before us upon an appeal from an interlocutory order continuing the injunction until the hearing, the injunction must be dissolved, but without costs, and the plaintiffs may proceed in the Court below as they may be advised.

PER CURIAM. Decree accordingly.

Cited: *Rountree v. McKay,* 59 N. C., 89.

(278)

GEORGE BARNES *against* JOHN TEAGUE AND J. J. CALHOUN.

1. A part performance of an agreement for the exchange of lands (as where the parties mutually exchange possession) will not dispense with the provision in the statute of frauds, requiring such agreement to be in writing.
2. A defendant is entitled to the protection of the statute, where he claims it by plea or answer, though he admits the parol contract as alleged by plaintiff's bill.

CAUSE removed from the Court of Equity of MACON, Spring Term, 1854.

The allegations in the plaintiff's bill are that he entered into a parol agreement with the defendant Teague to exchange a tract of land which he owned in Pickens District, South Carolina, for a tract which the defendant Teague owned in the county of Macon, one of the terms of which said agreement was that Teague should surrender a judgment for about seventy-five dollars which plaintiff owed him, and that as soon as they could get a friend to do the writing between them the proper deeds of conveyance were to pass from the one to the other, and that confiding in the promises of the defendant he left his home in Pickens District and removed to the land thus procured in exchange, lying in Macon County. He states that there was no memorandum of the agreement in writing made at the time, because they were both illiterate and could not write. That Teague, instead of complying with his agreement to make a deed, caused the land of plaintiff in South Carolina to be sold to satisfy the judgment which he had promised to surrender as the difference between their lands, and purchased the same himself at the sheriff's sale and refused to make the exchange, but sold the land in Macon to the defendant Calhoun, who had notice of plaintiff's equity.

The prayer of the bill is for a specific performance of the contract, and for general relief.

The defendant Teague answered, admitting such an agreement was made, but insisted on the protection of the statute making void agreements for the sale of lands not being in writing and signed by the party to be charged therewith. The other defendant also answered, denying all knowledge of the plaintiff's equity, and insisting on the protection of the statute.

There was replication to the answer, commissions and proofs (279) taken, but as the opinion of the Court rests upon the pleading, the proofs are immaterial.

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

NASH, C. J. By the English courts of equity, and by those of this country, the statute requiring all contracts for the sale of lands or any interest therein to be in writing and signed by the party to be charged therewith is held to be one for the suppression of frauds and perjuries. The former courts have put such a construction upon this statute as in their judgment best carries out the intention of the Legislature. Thus they have decided that a substantial part performance of a parol contract will take a case out of the statute, as where the purchaser has been put into possession of the bargained premises upon the ground that it would be a fraud in the party refusing to execute it under such circumstances. Our courts have refused to follow the example of the English courts in this particular. The first case under our statute was *Ellis v. Ellis,* 16 N. C., 180, where it was decided that our statute ought to receive the same construction with the English statute. This case was, however, reviewed very soon thereafter, and the decree reversed, 21 N. C., 341. The doctrine upon this point has ever since been considered as settled in this State: that where to a bill for the specific performance of a parol contract the defendant denies the contract as alleged, and relies on the statute, *no parol* evidence can be received even upon the ground of part performance. This case presents another question which, though not an open one now in England, is so here, whether a defendant who admits a parol contract in his answer can protect himself against its execution by pleading the statute. At one time it was held that if a bill for the specific performance of a contract stated the agreement generally, without specifying whether it was in writing (280) or not, as that general statement *may* be understood of an agreement in writing, a plea in the nature of an answer would be admitted. *Morrison v. Towne,* 18 Ves., Jr., 182; *Whitechurch v. Bevis,* 2 Bro. Ch., 566; Story Eq. Pl., s. 762.

But if the bill stated the agreement to be in writing, and seeks only the execution of the contract, a *plea* that there is no such agreement in writing will not be received without an answer. Same cases. It is now, however, settled in England that this plea extends as well to the discovery as to the performance of the parol agreement, and that a defendant may, while he admits or confesses the parol contract, protect himself under the act from its performance by pleading the statute. *Whitechurch v. Bevis, ubi supra;* Cooper Eq. Pl., 256; *Lord Redesdale's* opinion in Mitford Eq. Pl., 266-8, where the doctrine is examined; Story Eq. Pl., 763, and in note. The doctrine is summed up as follows: "At length it seems to have been decided that although a parol agreement be confessed by the defendant's answer, yet if he insists upon the protection of the statute, no decree can be made merely on the ground of that confession." Our courts having discarded the construc-

tion of the English courts as to part performance, the principle as above stated is freed from the closing condition, and in analogy with the previous decisions we have no hesitation in saying that a defendant may in his answer admit the parol contract without depriving himself of the protection of the statute by his plea or answer, and that the Court cannot, under such a state of things, decree a specific performance.

Here the bill states that the contract was by parol, and the defendant admitting it claims the benefit of the statute, the bill must be

PER CURIAM. Dismissed with costs.

Cited: Breaid v. Munger, 88 N. C., 300; *Love v. Atkinson,* 131 N. C., 547; *Rhea v. Craig,* 141 N. C., 610.

(281)

RICHARD CULBERTSON, EX'R, *against* SAMUEL FROST AND OTHERS.

A bequest to J, "to go to her after her husband's death, and if she dies before him, I allow *her part* to go to her sons (naming them) when they come to the age of twenty-one," passes a present right to be enjoyed at the death of the husband, with a limitation over to the sons in the event of her dying before her husband.

CAUSE removed from Spring Term, 1854, of the Court of Equity of ROWAN.

The bill was filed by the executor of Henry Robertson to obtain a construction of the testator's will, and for instructions as to the disposition and management of the fund arising from the sale of the estate. Samuel Frost, the husband of the legatee Jane, and the children of the said Jane, as well as the other legatees in the will, are made parties defendant.

The clause in the will upon which the advice of the Court is asked is sufficiently set forth in the opinion of the Court.

Osborne, for plaintiff.
Craige, for defendants.

PEARSON, J. The testator left him surviving his brother John, the children of a deceased brother George, and his sister Jane, the wife of Samuel Frost. He directs that all his estate should be converted into money, and after payment of debts and funeral expenses the fund is divided into three equal parts. He gives to his brother John one part, to the children of his brother George one part, and in regard to the other part he expresses his intention in these words: "I give and bequeath to

my sister Jane one-third of my estate, *to go to her* after her husband's (Samuel Frost's) death, and if she dies before him, I allow *her* (282) *part* to go to her sons, Franklin R. Frost, James D. Frost, Ebenezer C. Frost, when they come to the age of twenty-one years."

The paramount intention was to give to his sister Jane one-third of the fund. But he had a secondary intention, *i. e.,* to exclude her husband from any benefit or control over her part. To effect this double purpose he gives to his sister a *present right* to the fund, but postpones the time of enjoyment until the death of her husband, and makes a limitation over in the event of her dying before her husband. His right to make this restriction as to the time of enjoyment, and the validity of the limitation over, are fully settled by the authorities.

It must be declared to be the opinion of the Court, that the executor is to retain the fund (upon investments so as to make interest), to be paid over to the wife if she survives her husband; or to the children named (if she dies first) upon their arrival at the age of twenty-one.

PER CURIAM. Decree accordingly.

(283)

JOHN W. RHEA *against* JOEL VANNOY AND OTHERS.

1. A copartnership had been established to purchase Cherokee lands and to work them for mining, etc., as partners. One of the specifications in the agreement of copartnership was to be that such disposition was "made of their property as a majority should deem advisable," two of the partners having become insolvent, and a third nearly so, and all having abandoned the work and neglected the payment of the installments for the purchase-money, leaving the whole burthen upon the fourth partner; neither of these three partners has a right to complain in equity that the fourth partner, in order to relieve his sureties, has disposed of the land without the concurrence of a majority.
2. Especially has he no equity against the purchaser from such fourth partner at a fair price and without notice of such equity.
3. All that he can ask, under such circumstances, is for an account against his copartner for the money received for the land, and for any tolls, rents or profits made in mining or by agricultural operations.

CAUSE removed from the Court of Equity of CHEROKEE, Spring Term, 1854.

The facts of the case sufficiently appear from the opinion of the Court.

J. Baxter and *Gaither,* for the plaintiff.
Williams and *J. W. Woodfin,* for defendants.

PEARSON, J. In 1838 the plaintiff Rhea and the defendants Vannoy and Garland, and McKay, whose heirs are defendants, entered into a

written agreement, under seal, in regard to certain tracts of land, bid off at the land sales, in Cherokee County, among others, lots Nos. 4 and 5, in District 7 (the subject of this controversy). According to this agreement, the parties were to own the land as copartners; pay for it equally, and share equally in all profits arising from mining operations or agricultural pursuits or other use or disposition of the land. "Such disposition to be made of the property as a majority might deem advisable." One-eighth of the price was paid in cash, and the balance secured by note and sureties, as required by the statute. Lot No. 4 was purchased at $879.75, and there was paid thereon, including the one-eighth paid in cash, $513.11. The excess over one-eighth was paid by Vannoy, except $50, which was paid by the plaintiff, but Vannoy alleges he let him have this money. Lot No. 5 was purchased at the price of $270.56, and there was paid thereon $76.37. The excess of this sum over the one-eighth was paid by Vannoy.

The bonds to secure the purchase money were executed by (284) McKay and Vannoy, with one Piercy and Carson as sureties. Rhea was an obligor in the small note for lot No. 5, and the certificate of purchase was given in the name of David McKay & Co. McKay became insolvent and left the county, and afterwards, in 1845, Vannoy sold the land to the defendant Daws and executed a deed therefor, and received from him $500 in money, and an obligation to assume the payment of the balance due, or the bonds given for the purchase money, and relieve the principals and the sureties from the payment thereof, and have his name substituted as principal on the bonds, which was accordingly done by the consent of the agent of the State, and the note then stood in the list of notes where the principals are solvent. After the passage of the act of 1850, which provides for a revaluation, Daws was recognized by the commissioners appointed under that act as the purchaser of the land and the person entitled to take out the grant upon the payment of the balance of the purchase money, and they gave him a certificate to that effect. Upon the revaluation the price to be given for the land was reduced about $400, so as to leave only about $60 to be paid upon the bonds in which Daws was the principal, he having before made a payment of $100. The plaintiff, after the act of 1850 was passed, bought the claim of Garland, and having, as he alleges, previously bought the claim of McKay, so far as regards the mineral interests, filed this bill to enjoin the defendant Daws from taking out the grant in his own name, and praying that he may be declared by a decree of this Court to be entitled to one-half of the land, *i. e.*, one-fourth as an original copartner and one-fourth as the assignee of Garland, and to one-fourth of the mineral interests in the whole as the assignee of McKay, and that partition be made accordingly; and in the

alternative, if he is not entitled to the relief prayed for against Daws, that Vannoy may be required to account for the amount received of Daws in the sale of the land, also for the large sums which he had
(285) previously received by way of tolls and rents and profits made by him both in mining operations and agricultural pursuits.

The defendant Garland, who is described in the bill as a citizen of the State of California, and the defendants, the heirs of McKay, who are described as citizens of Blount County, Tennessee, do not answer, and the bill is taken *pro confesso* as to them.

Vannoy in his answer avers, that besides his own he also paid McKay's part of the cash installment of one-eighth; that he let the plaintiff have the $50 which he paid on the bonds, and that he made all the other payments that were made on the bonds; that a small part of the amount so paid by him was the proceeds of the tolls, rents and profits that he had made from the lands, which he applied towards the extinguishment of the bonds, but he was under no obligation to use the land for mining or farming purposes, unless he chose to do so; that the plaintiff worked at different times and different places on the land just as he chose, but failed to make any payments on the bonds, although he supposes, judging from the result of his own operations, that the profits were small; that he paid out his own money, and property, which was sold under executions issuing on the judgments taken on the bonds, a sum exceeding $500; that McKay, soon after the purchase, became insolvent and ran away and went to parts unknown, and abandoned all further connection with the business; that Garland resided in the county of Yancey, and finding the land not valuable for mining purposes, and not being a party on the bonds, gave himself no further concern about it; that Rhea was insolvent, and left the county, and was absent when the time came for suits to be brought on the bonds, and gave himself no further concern about it until after the passage of the act of 1850, under which proceedings were taken by the defendant, Daws, and the valuation was reduced nearly one-half; and he avers that neither McKay or Garland or Rhea offered to assist him in any way, either by furnishing credit or funds, and thus he was deserted and left alone and
(286) unsupported to do the best he could in the premises; that after he had been sold out, and became insolvent, the sureties urged him to relieve them by disposing of the land, as it was impossible for him to pay for it; this could only be done by a surrender under the act of 1844, or by selling to some solvent person who would agree to take the trade off of their hands and assume the payment of the bonds, or rather the judgments which had been taken upon them; accordingly, he transferred the lands to the defendant, Daws, who became the principal in the bonds, and thereby relieved both the former principals and the

sureties, and paid him $500, which he avers will not reimburse him for the money he has paid and the costs and other losses he has been subjected to, after making full allowance for the tolls, rents, and profits he has been able to realize.

The defendant Daws avers he purchased the land and took a conveyance from Vannoy, who was in possession and had the entire management and was insolvent, and unable to complete the purchase or relieve his sureties except by making some disposition of the land, that he paid him $500 in cash, and assumed to pay the balance due on the bonds given to secure the purchase money. This he avers was a full consideration. He also avers that he purchased without notice of any equity on the part of the plaintiff. He also avers that under the deed of bargain and sale executed to him by Vannoy, he took possession in 1845, and has held a continued adverse possession for more than seven years before the bill was filed.

The manner in which the lands in the county of Cherokee were sold, the privileges given to purchasers, the many acts that have been passed for their relief, the facility given to the transfer of these land claims, and the surprising extent to which they have been made the subject of traffic and speculation, present an anomalous condition of things, to which it will be very difficult to apply the ordinary rules either (287) of law or equity.

Are the purchasers or their assignees, before a grant has issued, to be considered for any purpose as claiming the legal estate? Is there no law in Cherokee, and must all controversies in regard to these land claims be carried into the court of equity? Can a purchaser for valuable consideration without notice protect himself in no case, on the ground that he is not clothed with the legal title? If the legal estate is in the State for all purposes, and the transaction be treated as a mere contract of sale, then by the ordinary rules of equity the vendor is a necessary party, for otherwise he will not be bound, and the decree will not end the litigation. How can the State be made a party so as to be bound to make title according to the decree? Can the officers of the State be made parties? Will no length of adverse possession under color of title quiet a man in the enjoyment of his estate, on the ground that the title is in the State, and *nullum tempus occurrit Regi?* These are questions suggested by an examination of this case, but which we are not now called on to decide, and we prefer to follow a prudent rule, and feel the way as we go.

We are satisfied from the bill, answer and proofs, and many concurring circumstances, that the averments of Vannoy are true. The land turned out to be only valuable for farming purposes. McKay became insolvent, left the country, and abandoned all interest under the agree-

ment. Garland, who was not liable as obligor, also abandoned it, and Rhea, if not insolvent, certainly was not in a condition to be able to raise the amount necessary to discharge the balance due on the bonds, if he had been willing to do so; and it could not be forced out of him by legal process. So he also abandoned all interest under the agreement and went to Georgia, where he thought the prospects of finding gold were more flattering. This conduct on their part superseded the stip-
(288) ulation by which a concurrence of a majority was required in regard to the disposition of the land, or rather it amounted to an implied concurrence or consent that Vannoy, who was left as the only acting and managing partner, might make any disposition of the land that was necessary and proper in the emergency, in order to relieve the members of the firm and their sureties from the embarrassment in which they were placed. Good faith and fair dealing support this inference and all they could in equity require of Vannoy was to dispose of the land, *bona fide,* so as to make the most of it, and to account to them for whatever he was able to save out of the wreck. We are satisfied he acted with *bona fides,* and made an advantageous disposition of the property, considering the circumstances. Upon this broad ground of substantial justice we think the plaintiff has failed to establish any equity against the defendant Daws and cannot, after Daws has relieved "the firm" from a burden that it was not able to bear, come into a court of equity and ask to deprive him of the benefit of a statute passed five years afterwards, upon any technical right growing out of the agreement of copartnership, which they had long before abandoned. In *Rhea v. Tathem, post,* 290, decided at this term, where the facts are the same, it is held that Vannoy had the right, under the act of 1844, to surrender the land. If he had done so in this instance, the plaintiff would have had no right whatever; consequently, it can be no ground of complaint that, instead of doing so, he disposed of the land to the best advantage, so as to give the plaintiff a right to call for an account and to share in whatever has been saved.

To prevent the inference that we think any other relief, except an account against Vannoy, could be given under this bill had the plaintiff made out his case, it is proper to notice the prayer, *i. e.,* that the defendant be enjoined from taking out a grant, and be decreed to account for profits, and in the event he should obtain a grant, that he be declared a trustee and that partition be made, and for general relief.

The prayer for an injunction against obtaining a grant, except
(289) as secondary and in aid of some other relief, is without precedent.

The plaintiff must be entitled to relief at the time the bill is filed, and cannot ask for relief upon the happening of a future event; consequently, the admission that neither of the parties had the legal

estate puts the prayer for partition out of the question. Partition is made of the "corpus." The parties must have the legal estate in order to make it; an interest under a contract of purchase cannot be *divided into parts.*

The prayer that the Court will make a declaration of its opinion as to how the parties are respectively entitled under the contract of purchase, and the prayer for general relief, can answer no purpose; for the court will not make a declaration of its opinion as to which of two parties is entitled to an equity, unless it can take some action and enforce the right by its decree. *Tayloe v. Bond,* 45 N. C., 5. This Court has no right to give its opinion as to which of two persons the sovereign ought to issue its grant. How the plaintiff could get a case constituted in Court so as, according to the course of the Court, to be able to follow the land before the title was passed out of the State, is one of the difficulties growing out of the supposition that the legal title is, to all purposes, still in the State, alluded to above.

Bill dismissed as to Daws with costs, and decree for an account between plaintiff and Vannoy, to include the $500, and such tolls, rents, and profits as were received by either of the parties up to the time of sale to Daws, and the payments made by each.

PER CURIAM. Decree accordingly.

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(290)

JOHN W. RHEA AND OTHERS *against* JAMES W. TATHEM AND OTHERS.

A, B, C and D entered into a copartnership to purchase a tract of land at the Cherokee land sales, and to work the same for gold, etc. A and B only gave bonds for the purchase-money, with sureties, whom they procured. B, C and D left the country, abandoned the work for several years, and gave no aid to A, either in working on the land or paying the purchase money, but suffered him alone to be pressed for the debt. A, in good faith, to relieve his sureties, under the act of 1844 surrendered the land to the State, and afterwards under another act obtained from commissioners appointed under the act a "pre-emption right" for the same land, and sold the same for a sum of money: *Held,* that neither the original partners nor their assignees could hold A to an account for this money.

CAUSE removed to this Court from the Court of Equity of CHEROKEE, Spring Term, 1854.

The whole case is set forth in the opinion of the Court.

J. Baxter, for the plaintiffs.
Williams, Gaither and *J. W. Woodfin,* for the defendant.

PEARSON, J. The defendant Tathem purchased of the defendant Vannoy the "preëmption right," at the price of ten dollars and the further consideration that Vannoy should be allowed the full benefit of all mineral interests in the land; and to secure the enjoyment thereof, Tathem executed to Vannoy a penal bond. Tathem paid to the State the amount at which the land was valued, and in the words of the bill, "the said land was duly and legally granted in fee simple to him." Tathem avers that he is a purchaser without notice of any equity on the part of the plaintiffs.

After Tathem obtained the grant, Vannoy sold all his interest (291) in the minerals to the defendant Woodfin for the sum of four hundred dollars, and he associated with him the other defendants, Woodfin and McDowell, and they aver that they are purchasers without notice of any equity on the part of the plaintiffs. The plaintiffs have not by their proofs affected these defendants with notice, and as to them the case fails; so the question is as to the defendant Vannoy. In 1838, Vannoy, the plaintiff Rhea, and Garland, the assignee of the plaintiffs Thomas and McKay, the ancestor of the other plaintiffs, entered into a written agreement, under seal, in regard to certain tracts of land bid off at the land sale in Cherokee, among others, No. 41, District 7 (the subject of this controversy). According to this agreement, the partners were to own the land as copartners, pay for it equally, and share equally in all profits arising from mining operations or agricultural pursuits or other use or disposition of the land; such disposition was to be made of the property "as a majority of them might deem advisable." One-eighth of the price was paid in cash, and the balance secured by note and sureties as required by statute.

In 1845 all the plaintiffs being absent from the State (as the bill alleges) "engaged in private business," Vannoy surrendered the land to the State, according to the provisions of the act of 1844, entitled "An act more effectually to secure the debts due from the Cherokee lands, and to facilitate the collection of the same," the securities given for the balance of the purchase money (upon which judgments had been taken) were cancelled, and the judgments discharged.

In 1847, the plaintiffs being still absent from the State, Vannoy applied for and obtained a certificate of the preëmption right allowed to purchasers who had surrendered. He took the certificate in his own name alone, and afterwards sold it to Tathem, reserving the mineral interests, which he afterwards sold to Woodfin, as stated above.

The plaintiffs insist that Vannoy had no right to make a surrender; that he did so in fraud of their rights, and with a view to (292) his own benefit, and is bound to account and pay over to them equal shares of the sums realized by him, for and on account of the preemption right, to which, as they allege, they were equally entitled; that is, $400 by the sale, and other large sums by working a rich gold mine before he sold the mineral interest.

They insist further that if Vannoy had a right to make the surrender in their absence, and cannot be made liable on the ground of fraud, still as they were copartners and joint purchasers, they were under the 2d section of the act of 1846 entitled as purchasers to a joint interest in the "preëmption right," and the defendant, although he took the certificate in his own name, will in equity be deemed a trustee, so as to let them in for equal shares of the profit derived from the "preëmption right."

Vannoy in his answer avers that the bonds for the balance of the purchase money were executed by him and McKay alone as principals, with one Piercy and Carson as their sureties; that McKay became insolvent, ran away, and went to parts unknown, and the writs issued upon the bonds against himself and McKay, and the two sureties, were returned *non est inventus* as to McKay, and the judgments were taken against himself and the sureties; that the plaintiff Rhea was also insolvent and had left the country; that Garland resided in the county of Yancey, and paid no attention to the business; that his alleged assignee, the plaintiff Thomas, resided in the county of Haywood, and was at the time absent from State; that neither Rhea, Garland or Thomas offered to assist him in any way, either by furnishing credit or funds, and thus he was deserted and left unsupported and alone to do the best he could in the premises; that he himself became insolvent, and although he wished to hold on to the land, yet he was compelled to take the benefit of the act of 1844, which allows the land to be sur- (293) rendered when the commissioners certify that the *principals* in the bonds are insolvent; that accordingly the commissioners did duly certify (and according to the truth) that he and McKay (the principals in the bonds) were insolvent; that the land was thereupon surrendered and the bonds and judgments thereon discharged and considered to be released and satisfied, and that in making the surrender he acted under compulsion and without fraud, that being the only way in which he could relieve the sureties, which in conscience he felt bound to do.

The answer further avers that afterwards, upon the passage of the act of 1846, the defendant Vannoy became entitled, under section 2, to the "preëmption right" as a purchaser who had surrendered, and who was an *actual settler* on the land; that neither McKay or his heirs,

or Rhea, or Garland, or his alleged assignee Thomas, were in any way interested or entitled to participate in such preëmption right, for they were all expressly excluded by section 7, which provides: "The pre-emption right granted by section 2 of this act shall not extend to any person or persons who are not actual settlers on the land, who do not design to become permanent residents of the county."

Upon looking into the proofs we are satisfied that McKay and Vannoy alone executed the bonds as principals. That McKay became insolvent and left the State. Vannoy also became insolvent, and judgments were taken against him and his sureties. There is no evidence that either of the plaintiffs offered to assist in any way by credit or cash, and consequently Vannoy was compelled, in order to relieve his sureties, to make the surrender. So the charge is wholly unsupported; in fact, Vannoy could not have made the surrender with a view to his own benefit, for he did so *before* the passage of the act which confers the "preëmption right on purchasers who had surrendered, being actual settlers
(294) or persons desirous of becoming permanent residents of the county."

The charge of fraud certainly comes with an ill grace from the plaintiffs, who deserted their partner and left him to get out of the difficulty in the best way he could. The first ground on which the plaintiffs place their equity fails.

The second ground depends upon whether the plaintiffs or either of them were entitled, under the act of 1846, to a participation in the pre-emption right as purchasers who had surrendered, for if they had such an interest, they have an equity by which to hold Vannoy as a trustee, and to consider him as having obtained the preëmption right as well for their benefit as his own, by reason of their former connection as partners, and to hold him to an account for such profits as he may have realized therefrom. This equity we think clear from analogy to the well settled doctrine in regard to the renewal of leasehold estates. "If a trustee or executor holding renewable leaseholds renew in his own name, he cannot hold for himself, even though a renewal of the former trusts may have been refused by the lessor; the same result will follow by a mortgagee or *partner,* or by a tenant for life; for although he may not be bound to renew, yet if he does renew *behind the back of the other parties interested,* he cannot, by converting the new acquisition to his own use, derive an unconscientious benefit out of the estate on which it is a graft." Adams Eq., 60. So the question is: were the plaintiffs, as purchasers who had surrendered, interested and entitled to participate in the "preëmption right"? The 7th section expressly excludes all who are not actual settlers on the land or desirous of becoming permanent residents of the county. McKay is out of the question, and there is no

allegation in the bill by which to bring either Rhea, Garland or Thomas within the requirement of the act; so the field was open to Vannoy, and there was no reason why he could not with a good conscience avail himself of a benefit which the act conferred, and which was preserved to him on account of his residence.

PER CURIAM. Dismissed with costs.

Cited: *Rhea v. Vannoy, ante,* 288.

(295)

SAMUEL WILSON *against* LARKIN HENDRICKS AND OTHERS.

1. Upon a motion to dissolve an injunction, an allegation in the bill which is evaded and not responded to in the answer is taken to be true.
2. It is no ground for refusing to entertain a motion to dissolve an injunction, that one of the defendants in the bill has not answered, where it appears that such answer, if it had been obtained, could not affect the rights of the party enjoined.

APPEAL from the Court of Equity of HENDERSON, from an order dissolving an injunction, heard before *Dick, J.,* Spring Term, 1854.

The material allegations in the bill are that the plaintiff, having a debt of about $323.13 on the defendant Folger, was put to much inconvenience about it, and was from the defendant's precarious circumstances, doubtful of being able to save the same; that in order to save his debt he agreed to take a negro girl about eleven years old by the name of Nancy, at the price of $525, out of which sum his own debt should be discharged; and he gave his bond for the residue, to-wit, about $252, due 25 December, 1851. That the negro Nancy was the joint property of the defendant Folger and one Chain Strowed, who lived in South Carolina, but that the title was made to him by the latter, who made a written warranty of soundness except as to a defect in the eyes, they pretending that the title of the slave was in Strowed, and they both joined in repeated assurances to the plaintiff that they were dealing fairly with him, and that the slave was sound except that she was a little near-sighted. The bond for the remainder of the purchase-money, after deducting Folger's debt, was made payable to him on the suggestion of both him and Strowed that it was immaterial to whom it was given. The bill further sets forth that the negro girl Nancy was unsound at the time of the sale, being affected with consumption, and that in about twenty months thereafter she died of that disease; also, that ten days after the sale of the slave to him, having dis- (296) covered the fraud practiced on him, he advertised in a newspaper of the neighborhood the facts of the case, and cautioned the public against trading for the note given on the occasion. The bill

further charges that in order to evade the equitable defence of the plaintiff the bond in question was transferred to the defendant Hendricks after it was due, and as he believes without consideration, and with a full knowledge on the part of Hendricks that the plaintiff set up this defence against it, and it particularly charges that Hendricks had admitted to him that he had seen the advertisement before he took the assignment of the note, and that he only held it as a pledge. That the bond had been sued on at law in Henderson Superior Court, a judgment obtained and execution threatened to be issued. The bill prays for an injunction and for general relief.

The answer of the defendant Folger details the circumstances of the case minutely. It denies that the slave Nancy was unsound at the date of the transaction, or that she died of consumption, but avers that she died of pneumonia, contracted long afterwards; but if in this he should be mistaken, he further avers that he was totally ignorant that she had any ailment or defect but that of the eyes, which was excepted in the bill of sale, and he denies that there was any copartnership or joint ownership in the slave in question between him and Strowed.

The defendant Hendricks put in his answer, the purport of which is sufficiently set forth in the opinion of the Court.

The defendant Strowed filed no answer.

On a motion in the cause to dissolve the injunction, the same was heard upon the bill, and answers filed, and the injunction was ordered to be dissolved. Appeal to the Supreme Court.

N. W. Woodfin, for plaintiff.

J. Baxter, for defendants.

PEARSON, J. The defendant Hendricks claims to be a pur-
(297) chaser for a valuable consideration, and in general terms denies notice of the plaintiff's equity; but the bill avers that the plaintiff had given notice in a newspaper published near the residence of the defendant that the note had been obtained by fraud; and it also avers that the defendant had actually seen this advertisement before the note was assigned to him. To these averments the defendant makes no response, and upon a motion to dissolve an injunction, an allegation in a bill which is evaded and not responded to in the answer is taken to be true. So without reference to the allegation that the assignment was after the note fell due (a direct answer to which is also evaded), we consider the defendant Hendricks as affected with notice, and consequently subject to all equities that the plaintiff is entitled to against the defendant Folger. Thus the matter stands as if the defence was in the name of Folger. He meets directly with a positive denial the allegation that he and the other defendant Strowed were partners or part owners of the slave for which Strowed executed a bill of sale with warranty of

soundness. He also meets directly and by a positive denial the allegation of the *"scienter,"* and avers, in response to the bill, that if the negro girl was unsound and did not die of pneumonia but was in fact the subject of consumption, he had, at the time the slave became the property of the plaintiff, no knowledge of the unsoundness and no interest as a part owner. So the plaintiff's equity, as regards these two defendants, is fully met and denied by them.

But the plaintiff insists that the motion to dissolve the injunction ought not to have been entertained, because the other defendant, Strowed, has not answered.

The defendant Hendricks is the party enjoined; he answers and is put in the place of the defendant Folger; he answers and fully denies the equity of the plaintiff, so far as he is concerned; and the question is, upon what ground can the Court refuse to entertain the motion to dissolve the injunction until the defendant Strowed an- (298) swers? The injunction does not reach him, and the plaintiff could not use his answer against the other two defendants, according to the well-settled rule, "an answer cannot be read against a co-defendant, unless he refers to it by his answer as correct, or is so connected with the answering party as to be bound under the ordinary rules of law by his declarations or admissions." Mitf., 188; Adams Eq., 20. There is no such connection in this case; consequently, if the answer of Strowed was filed, admitting all the allegations of the bill, it could not be used against the defendants Hendricks and Folger, and of course the fact that Strowed has not answered can furnish no ground for refusing to entertain this motion to dissolve the injunction.

There is no error in the order appealed from.

PER CURIAM. Affirmed.

Cited: Evans v. Lovengood, post, 302; *Ijames v. Ijames,* 62 N. C., 41; *Thompson v. McNair, Ib.,* 123.

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(299)

JOHN B. EVANS *against* G. W. LOVENGOOD AND OTHERS.

1. Where it was alleged that a certificate for a pre-emption claim in Cherokee was obtained from the commissioners appointed under the act of 1850 by false swearing, and the purchaser of such claim, who obtained a grant by virtue of such certificate, answers that he purchased the same for a valuable consideration without knowledge of the alleged perjury, an injunction obtained to restrain the grantee from taking possession under a recovery in ejectment must be dissolved.
2. It is no ground for refusing to entertain a motion to dissolve an injunction that one of the defendants in the bill has not answered, where it appears that such answer, if it had been obtained, could not affect the rights of the party enjoined.

APPEAL from a decree of the Court of Equity of CHEROKEE, dissolving an injunction theretofore granted, heard before *Dick, J.*, Spring Term, 1854.

In 1850 the Legislature passed an act authorizing the sale of refuse lands owned by the State in the counties of Cherokee and Macon, in which was provided, also, a pre-emption right in favor of settlers and those who had made valuable improvements, still being citizens of the State.

To carry this act into effect, and in pursuance of a further provision in the act, the Governor of this State appointed Henry Cansler, Charles McDowell and Mark Coleman commissioners, whose duty under the act was (among others) to award certificates to persons entitled to such lands. The commissioners met in the town of Murphy and proceeded to discharge their duties under this act, when one Amos Carden presented himself before the board and put in his claim for a pre-emption right to the land in question, on the ground that he was the *bona fide* assignee of his brother Alfred Carden, who had made valuable improvements thereon. Plaintiff alleges that on the investigation of this claim which was claimed by Amos Carden, his brother Alfred was produced and sworn in behalf thereof, and that he falsely and fraudulently stated the facts of the case, and deceived the commissioners aforesaid by such false representations, and thus induced them to award them such certificate. That the fact was not true that he left property on the premises (as stated by him before the commissioners) in order to enable him to hold possession. That it was not true, as further stated on this occasion, that he had made any valuable improvement on the land.

That in truth he made no improvement except to occupy an Indian hut for about two months, to put up a few rails and plant a patch of corn, when the Cardens both left the State. That in truth the
(300) first and only improvement, except as above stated, was made by one Reuben Burden, who assigned the same for valuable consideration to one Singleton Rhea, who in like manner assigned to P. M. G. Rhea, and he to one Richard Roberts, and he to the plaintiff; that as there was no way of getting his witnesses before the commissioners, he was not able to show the facts of his case nor to prevent the defendants Carden from imposing by fraud and perjury upon them and thus obtaining the certificate. The plaintiff further alleges in his bill that G. W. Lovengood assigned his interest in the land in question to his son, Drury Lovengood, with a full knowledge of the plaintiff's equity, but whether with or without a valuable consideration he is not able to say; but that the said Drury has obtained a grant for the premises, and having brought an action of ejectment to recover possession, has obtained a judgment, and threatens to take out a writ of possession on the

same. The prayer of the bill is for an injunction to restrain the defendant Drury from taking out his writ of possession, and for general relief.

The defendants Amos Carden and Alfred Carden filed no answer, but the other two, G. W. and Drury Lovengood, answered, denying the general allegations of the bill, and insisting that Alfred Carden made the first substantial and valuable improvement on the land in question, but that availing himself of a temporary absence of Alfred Carden, one Reuben Burden entered and took possession of the same, and held and occupied the same by himself and his assignees against his (Carden's) remonstrances; but that as they were all trespassers on the public lands, he had no legal remedy to regain the possession. When, however, the board of commissioners above mentioned was organized, the case was brought regularly before them on the application of Amos, the brother of Alfred, who had become interested in the same, and that the plaintiff was heard in opposition to this claim and made no objection for the want of witnesses, but went voluntarily into the trial, and upon a due consideration of the facts of the case, the commissioners (301) awarded to Amos Carden a certificate upon this possession and improvement of his brother Alfred, and he (G. W. Lovengood) then believing that the plaintiff had given up his claim, bought the claim of the Cardens and sold the same to his son, the defendant Drury, who thereupon obtained a grant from the State. They insist that the facts were fairly represented to the commissioners, and that if this was not so, they were entirely ignorant of the misrepresentation and fraud alleged by the plaintiff.

The case was heard upon the bill and the answer of the Lovengoods. On a motion to dissolve the injunction, and upon argument of counsel, his Honor ordered that the same should be dissolved at the costs of the plaintiff; whereupon the plaintiff appealed to this Court.

J. W. Woodfin, for plaintiff.
J. Baxter, for defendant.

PEARSON, J. The only ground upon which the plaintiff's equity can be put is that fraud was practiced upon the commissioners and their certificate obtained by perjury.

The defendant Drury Lovengood, who is the party enjoined, and the defendant G. W. Lovengood, under whom he claims, both answer, fully denying the allegations of the bill, so far as they have any knowledge, information or belief. They say they have no reason to believe that any fraud was practiced upon the commissioners, or that perjury was committed by the other defendant, Carden, in order to obtain the certifi-

cate. On the contrary, they believe the certificate was regularly awarded after a fair investigation, and acting under this belief the defendant G. W. Lovengood purchased the land for a valuable consideration and conveyed it to the other defendant, Drury. So, in this stage of the proceedings, these defendants are to be considered as purchasers for valuable considerations without notice. Of course the injunction (302) ought to have been dissolved, unless there is something in the objection that the motion to dissolve could not be entertained until the other defendants had answered. In regard to this, we refer to *Wilson v. Hendricks, ante,* 295. If the answers of the Cardens were on file, and if they therein should admit that they had sworn falsely in order to obtain the certificate (which supposition is not very probable), still their answers could not be read as evidence against the defendant Drury Lovengood, who is the party enjoined. Therefore the fact that they had not answered can be no ground for refusing to entertain this motion to dissolve the injunction.

PER CURIAM. Affirmed.

Cited: Burgess v. Lovengood, 55 N. C., 460.

BARBARA E. THOMAS, BY HER GUARDIAN, *against* FIELDING KYLES.

1. Where it is alleged in a bill that the defendant had made his son a deed for a tract of land in consideration of natural love and affection, and that the deed having never been registered was left with the father, the grantor, for safe keeping, and that after the son's death he destroyed it, and the father admits the conveyance, but says it really was in consideration of an agreement to support the grantor and his wife for their lives, and that the bargain was subsequently rescinded: *Held,* that it was incumbent on the defendant to make good this defense by full proof, and that failing to do so he would be decreed to convey to the heir of the son.
2. Where a person enters upon land under a parol contract of purchase, which is not performed, the purchaser is entitled for improvements made on the land while occupying it under such contract.

CAUSE removed from the Court of Equity of IREDELL.

(303) The facts of the case are sufficiently stated in the opinion of the Court.

Gaither, Mitchell and *T. R. Caldwell,* for plaintiff.
Boyden, for defendant.

BATTLE, J. The execution of the deed, dated 20 February, 1844, which the plaintiff by her bill seeks to establish, is admitted by the defendant in his answer, and if it were necessary that it should be so, is

fully proved by John Davidson, who surveyed the land, drew the deed under the instructions of the defendant, and attested it. The plaintiff would then be entitled to the relief which she asks, upon that admission in the answer, but for what is stated further by the defendant to rebut it. He alleges that though the consideration for the conveyance of the land mentioned in the deed is natural love and affection, yet the true consideration was an agreement by his son John Thomas, Jr., the grantee, to support him and his wife, the mother of the said John; to secure the due performance of which his said son was to have a bond prepared and executed. He alleges further that the said bond never was prepared and executed by his son; but that the latter, becoming dissatisfied with the agreement, they agreed to rescind the bargain and have the deed canceled, it not having been registered, and that accordingly it was surrendered to him by his son John, and he canceled it by tearing his name off in the presence of John and his, the defendant's, daughters, and he then verbally released his son John from his agreement to support defendant and his wife. Are these allegations of the defendant supported by the testimony? So far from it that we think they are substantially disproved. The only testimony offered in support of them are the depositions of members of his own family and two or three other witnesses of doubtful character, who speak only of the declarations of the grantee that he had not given a bond for the support of his father and mother, and had surrendered up the deed (304) for the land. But in one particular of some importance, to-wit, the statement that the deed was delivered up by the grantee and canceled by the grantor in the presence of his daughters, he is not supported by their testimony. They do not pretend that they know anything of the rescission of the contract and cancellation of the deed except what they heard their brother say about the matter. Giving to the testimony of the defendant's witnesses, however, all the weight to which it is fairly entitled, its effect is very much weakened by the depositions offered by the plaintiff of the three Messrs. Troutman and Mr. Waugh, though one of these witnesses is the maternal grandfather of the plaintiff, another is her uncle, and a third is a distant kinsman. They testify that they heard the defendant at different times, both before and after the death of his son, say that he had given John a deed for the land in question, never mentioning or intimating that the contract had been rescinded and the deed canceled.

Thus stands the case upon the mere declarations of the parties, declarations which may have been (as such declarations often are) thoughtlessly uttered, imperfectly understood, and still more imperfectly remembered. It is a great satisfaction to us that we are not bound to come to a conclusion either way upon them. There is some other testi-

mony in the cause which we think puts the question of the consideration upon which the deed was made beyond doubt, and satisfies us that the deed itself never was surrendered up and canceled during the life of John Thomas, Jr., the grantee. John Davidson, who is admitted by both parties to be an intelligent man, testifies that he was called upon by the defendant to run off a piece of land which he wished to give his son John, saying that John had lived with him and worked for him until he was twenty-five or six years old, and he now wished to give him
that piece of land and make him a deed for it, and that he in-
(305) tended to write to Alabama for his son Anderson to come in and
live with him, and that if Anderson would do so he would give him a deed for the balance of his land, upon condition that he would support the defendant and his wife during their lives. Witness surveyed the land and laid off the part intended for John, when he asked the defendant what consideration he wished to be inserted in the deed, to which he replied, that John had worked with him until he was twenty-five or six years old, and he wanted to give him that land (pointing towards it), and upon witness suggesting love and affection for the consideration, he said that would do. The deed was accordingly so prepared, and when signed and attested the old man handed it to John, calling upon the witnesses at the same time in an earnest manner to notice that he had delivered it to his son for the land, repeating again the reason why he wished to give it to him. John then said that he had no safe place in which to keep the deed, and handed it back to his father to keep for him, and the father took it and put it in his pocket, which was the last the witness had seen of it. Witness states expressly that he never heard a word said about any other consideration for the deed than that above mentioned.

Another witness, Henry Troutman, the maternal grandfather of the plaintiff, testifies to declarations of the defendant, assigning the same reason for his gift of the land to his son, with the addition that John had to pay for it. Mr. Young, the magistrate who took the list of taxables in the district in which the defendant lived, for 1844, states that John Thomas, Jr., gave in the land in question for that year, while his father gave in that much less than he had done for some years before, and that he did again after the death of his son John.

We are satisfied, then, from the testimony of John Davidson, that the account given by the defendant as to the consideration upon which
the deed in question was made, is not true. We are hence less
(306) inclined to rely upon his allegation as to the rescission of the
contract between him and his son, relative to the deed and the cancellation of that instrument, and as the burden of proving them is upon him, we think that he has altogether failed to do so. The result

is that the plaintiff is entitled to a decree for a conveyance of the land described in the deed which was executed by the defendant to her father on the 20th day of February, 1844, and afterwards destroyed by the defendant, and also to an account for the rents and profits of the said land received by the defendant since the death of her father.

The contract for the purchase of the five acres of land including a spring, alleged in the plaintiff's bill, was never reduced to writing, and is not admitted in the answer. It cannot, therefore, be specifically enforced, even though partly executed, but the plaintiff is entitled to an account for the substantial improvements put upon the land by her father. See *Albea v. Griffin,* 22 N. C., 9.

Cited: Jackson v. Spivey, 63 N. C., 263; *McCracken v. McCracken,* 88 N. C., 284; *Tucker v. Markland,* 101 N. C., 427; *Luton v. Badham,* 127 N. C., 100, 102, 105.

Doubted: Sain v. Dulin, 59 N. C., 198.

(307)

HENRY PARDUE AND WIFE *against* ROBERT GIVENS AND OTHERS.

After disposing of his personal estate to his wife and children, the devisor proceeds to give to his wife, during her life or widowhood, the dwelling house and several fields, and provides that at her death or marriage it shall "return to the common stock"; and then comes these words: "I do further will that my children, William Givens, Robert Givens, Margaret Pardue, and the surviving children of my son Samuel Givens, and Jane, the widow of my son John, and her children, James Givens, George A. Givens, and Tabitha Givens, the widow of my son Allen Givens, do settle on and abide on any part of my lands that is unoccupied, so as not to interfere with the premises of those now residing on the land: and any of the above named children who shall not settle on my land, or those now settled that will not remain on said land, but will remove off and leave the same, then the premises shall revert back and be for the use and benefit of those who may still remain and live on the said premises, and in no case shall any of the aforesaid children or their lawful representatives have the right to sell, alien or transfer any of my lands, for if any of my heirs will not live and abide on the said land it shall then remain and be for the sole benefit of those of my heirs who may and will abide, remain and cultivate the same": *Held,* that these words conveyed a fee-simple to the persons named, and that the children of the deceased sons and daughter took as a class, and that the words of restraint upon alienation and requiring residence were void, also that the widows of the deceased sons are to be included in the class with their children.

SAMUEL GIVENS died in 1846, leaving a will in which were contained the following among other clauses: "As to my worldly estate, I dispose of the same as follows: I will that all my personal estate (except such

as is hereinafter disposed of), consisting of horses, etc., be sold to the highest bidder, and the money arising from the said sale, after paying debts, etc., to be equally divided between all of my children; to wit, William, Robert, Margaret, Samuel, John, James, George and Allen, share and share alike, so that the children of any of the deceased children above named may take the same share that their parents would take provided the same were alive." After giving several specific legacies to his wife during life or widowhood, the testator proceeds thus: "I do will and dispose of my lands, containing seven hundred and seven acres, comprehending the following tracts, etc., unto my beloved
(308) wife, Lucy Givens, in the following manner, viz., the dwelling house, the pasture field as is called the barn field, the meadow branch field, and the field including the gin house and old orchard, together with the privilege of cutting timber on any part of my whole plantation for the purpose of keeping in repair the said premises to her allotted, to have and to hold unto her own use and benefit during her natural life or widowhood, and at the death or marriage of the said Lucy Givens, then the said land to return into the common stock, and I do further will that my children, William Givens, Robert Givens, Margaret Pardue, and the surviving children of my son Samuel Givens, and Jane, the widow of my son John Givens, and her children, James Givens, George A. Givens and Tabithy Givens, the widow of my son Allen Givens, do settle on and abide on any part of my lands that is unoccupied so as not to interfere with the premises of those now residing on said land; and any of my above-named children who will not settle on my land aforesaid, or those now settled and will not remain on the said land, but will move off and leave the same, then the premises shall revert back and be for the use and benefit of those who may still live on the said premises, and in no case shall any of the aforesaid children or their lawful representative have the right to sell, alien or transfer any of my aforesaid lands, for if any of my heirs will not live and abide on the said land, it shall then remain and be for the sole benefit of those of my heirs who may and will abide, remain on and cultivate the same."

The plaintiffs filed their petition in a court of equity for Union County, in which they insisted that the devise contained in the will of the father of the *feme* plaintiff as above set forth, was void for uncertainty, and because it tended to create a perpetuity, and that therefore the said land descended to the heirs at law of the testator; and they prayed a partition thereof. To the petition all the heirs at law of the testator, as well as the widows of his deceased sons, were made parties.

Some of the defendants filed answers, in which they contended
(309) that the devise above set forth was not void for either of the reasons assigned by the plaintiffs; but, on the contrary, was good

and effectual, and gave to such of the persons named in the will as had settled on the lands in question a conditional freehold estate so long as they should continue to reside thereon, and that they alone were entitled to the same. But if the construction contended for by the plaintiffs was correct, then they insisted that a partition of the lands by metes and bounds could not be made without great injustice to all the parties, and that a sale of the said lands ought to be directed. The petition was taken *pro confesso* as to the parties who failed to answer, and was set for hearing upon bill and the answers of the other parties, and transmitted to the Supreme Court, where it was submitted without argument by

Osborne, for the plaintiffs.
No counsel appearing for the defendants.

BATTLE, J. The petition for partition is based upon the construction which the plaintiffs put upon the will of Samuel Givens. They insist that the devises therein contained, except that to the widow, are void for uncertainty and for their tending to produce a perpetuity, and that consequently the lands descend to the children and certain of the grandchildren of the devisor as his heirs at law. The defendants deny the propriety of this construction and contend that the devisees are liable to neither of the objections urged by the plaintiffs; but, on the contrary, are intelligible and certain, giving to each of the devisees a conditional freehold in the lands so long as he or she shall continue to reside thereon. The question, then, is whether the clauses in the will which produce the difficulty are to be rejected as senseless and void, or are susceptible of an interpretation which can give to the objects of the devisor's bounty certain and definite estates? It must be admitted that (310) this question is not without difficulty, but after much reflection we have come to the conclusion that the devises are not void because of either of the reasons assigned by the plaintiffs, but are good and effectual, giving to the persons therein named an estate in fee-simple absolute as tenants in common. In coming to this conclusion we have endeavored to avail ourselves of the assistance of those settled rules of construction which the courts and the sages of the law have set up for the guidance of those whose duty it is to search for and find out, amidst their dark sentences and apparently inconsistent expressions, the intention of unlearned and sometimes unwise and capricious testators. In this case it is clear that the testator intended to dispose by his will of his whole estate. He commences it by saying: "As to my worldly estate, I dispose of the same as follows." He then proceeds to bequeath all his personal estate to and among his wife and children, in the manner

therein specified. His lands, consisting of several distinct tracts, but (as may be inferred from the pleadings) all lying adjacent to each other and used by him as one plantation, form the next and last subject of his disposition. Of them he gives to his wife, during her life or widowhood, the dwelling house and several fields by name, "together with the privilege of cutting timber on any part of his whole plantation for the purpose of keeping in repair the said premises to her allotted," declaring that at her death or marriage "the said land shall return unto the common stock." So far the will is explicit enough, but then comes the clauses set out in the pleadings, which create the doubt. The language of these clauses is manifestly very inartificial, and in the strange and uncommon conditions which he annexes to his devises, it is very difficult, if not impossible, to ascertain the devisor's intention as to who are to take, what they are to take, and what estates they are to have in his lands. No time is fixed upon in which his children, his daughters-in-law and his grandchildren are to elect "to settle and abide on his (311) lands" so as thereby to acquire an interest in them. No definite part of the land is given to each settler, so as not to interfere with the premises of the other residents. And it is not distinctly stated whether the settlers are to have life estates, upon the condition of residence, base or qualified fees or fees simple. Of one thing we feel confident: that the testator *intended* to dispose, not only of all his lands, but of his whole estate in them, as he had done, clearly enough, with regard to his personal property. It must be admitted that the words, "I will that my children William Givens, etc., do settle and abide on my land," are not appropriate terms for conveying a fee. Nor was the word "land" which was the term used in *Cox v. Marks,* 27 N. C., 361, but we think they may have that effect, when such is shown to be the intention of the devisor. This appears not only from the clause of his will first referred to, but from his showing that he knew how to limit a life estate by giving to his wife one in express terms and then providing that the land he had given her should at her death or marriage return to the common stock. In the subsequent gifts to his children no limit to their estates is fixed, and he speaks of them and their lawful representatives in connection with the estates which he gave them. We conclude, then, that he intended a fee for his devisees, but he intended also to annex certain conditions to such fee which are inconsistent with the nature of that estate and are therefore void. He intended to give an absolute estate, with a restriction upon the power of alienation, and to confer a tenancy in common, or *quasi* tenancy in common, with the like restriction upon the power of compelling partition. He intended to fix his children and their heirs forever upon a particular spot, without the power of removal for any cause or under any

circumstances. Such conditions and restrictions are inconsistent with free and full enjoyment of a power of disposition over a fee-simple and are therefore void.

Supposing, then, that the devisees are to take an uncondi- (312) tional estate as tenants in common in fee, a question arises whether the surviving children of the testator's deceased son, Samuel, and the widow and children of his deceased sons, John and Allen, shall take *per stirpes* or *per capita*. We are of opinion that they take *per stirpes*. Such was clearly expressed to be the case as to the children of the testator's deceased sons taking the shares of their respective fathers in the personal estate, and though not so fully declared, yet we think it may be fairly inferred that such was the testator's intention with regard to his lands. The children of each deceased son are mentioned as a class, and the widows are entitled, because they are expressly named in conjunction with their children.

Our opinion, then, is that the children of the testator, the widows of his deceased sons, John and Allen, with their children, and the children of his deceased son, Samuel, take under his will an unrestricted estate in fee-simple in his land, as tenants in common, subject to the life estate of the testator's widow in a part of such lands; that the children of Samuel, the son, and the widows and children of the sons of John and Allen take *per stirpes*, that is, the shares which the sons would have taken had they been living, and that the petitioners, as tenants in common with the defendants, are entitled to have their lands divided either by an actual partition or by a sale for that purpose. As most of the parties object that an actual partition cannot be had without doing great injustice to all, and therefore insist upon a sale, and as we have no proof before us to show whether a sale or an actual partition would be most advantageous to all the parties, we must direct an enquiry upon that subject, and the cause will be retained for further directions upon the coming in of the report. It is hardly necessary to observe that as all the persons interested in the lands mentioned in the pleadings are made parties to the partition, and are now before the Court, a partition or sale may be had under the present proceeding, though (313) some of the parties, to-wit, the widows of the deceased sons, will be entitled to a part of the land or a portion of their proceeds if sold, contrary to the view taken by the petitioners.

PER CURIAM. Decree accordingly.

Cited: Twitty v. Camp, 62 N. C., 62; *Latimer v. Waddell,* 119 N. C., 377.

ALEXANDER W. BRANDON *against* JOSEPH MEDLEY.

Where A and B were co-sureties on an administration bond, and being sued upon the same by one of the next of kin, and while the suit was pending compromised the same by the payment of $1,100 each, under the advice of counsel and from an honest belief that both were liable to a larger sum on account of the *devastavit* and insolvency of their principal, and it is afterwards discovered that B, who had administered on the estate of the principal, had, by a misapprehension of law, but acting under legal counsel, and in good faith, erroneously given up assets of their principal to another claim, which, if they had been held by him, would have saved them both from loss by this suretyship, yet it was held that A could not sustain a bill to throw the whole loss on B, there being no evidence that B had concealed from A the fact of having thus parted with the assets and not making any allegation of fraud or imposition on the part of B.

CAUSE removed to this Court from the Court of Equity of ROWAN, Spring Term, 1854.

This case sufficiently appears from the opinion of the Court.

Osborne, for the plaintiff.
Boyden, for the defendant.

PEARSON, J. One McKenzie died in 1830, intestate, leaving (314) him surviving a widow and a child. One Jennings administered and soon afterwards died. At October Term, 1831, one Wilson, who had married the widow, took out letters of administration *de bonis non* and executed a bond with the plaintiff and the defendant as his sureties. Wilson took the estate of McKenzie into possession, made sales, etc., etc., and died in 1835, intestate. The defendant then became his administrator, and also the administrator *de bonis non* of McKenzie, and *paid over to the widow some $4,000 as her distributive share of the estate of McKenzie, her first husband.* Afterwards the daughter of McKenzie, who had married one Wyatt, brought suit against the plaintiff and the defendant as the sureties of Wilson on his administration bond, and they compromised by paying the sum of some $2,000 and taking releases in full. The defendant made the payment to Mrs. Wilson, under the advice of counsel that by survivorship she was entitled to a distributive share of the estate of her first husband, and that there had been no act on the part of Wilson, the second husband, by which he had so reduced the chose in action into possession as to make it his own and exclude her right. The effect of this payment to the widow was to leave the estate of Wilson in arrear some four thousand dollars, and when Wyatt and wife sued the plaintiff and defendant as sureties on the administration bond of Wilson, with a full knowledge of the fact that this payment had been made to the widow, and under the

belief, which was honestly entertained on the part of both the plaintiff and the defendant, that Wyatt and wife would be able to effect a recovery for some large amount, they entered into the compromise as stated above.

The plaintiff, as he alleges, has since discovered that the defendant made the payment to the widow in his own wrong, and that in fact, and according to law, the estate of Wilson was entitled to a credit to that amount by force of his marital rights, he having appropriated and made use of the amount due his wife as distributee (315) of her first husband, and which had come to his hands as administrator; and that if the proper credit had been given to the estate of Wilson, there would have been nothing in arrear for which he and the defendant could have been made liable as sureties on the administration bond. The prayer is that the defendant be made to pay back to the plaintiff the sum which he was induced to pay Wyatt and wife for the purpose of affecting the compromise.

The defendant says that when he made the payment to the widow, he believed she was entitled to receive the amount; that he acted under the advice of learned counsel; did not expect to make anything by it in one way or another, and acting under the impression that the payment to the widow was correct, he informed the plaintiff, his co-surety, that their principal was in arrear for a large sum, and they agreed to make an offer to compromise by paying some two thousand dollars, which was accepted, and releases and receipts in full were passed on all sides, and matters, as he had supposed, finally disposed of by a loss on his side of some $1,100 inasmuch as the estate of Wilson, upon which he administered with a view of saving for himself and the plaintiff, turned out to be insolvent.

We are inclined to the opinion that after the second husband, as administrator of the first, had reduced the funds into possession and had control of them from 1831 to 1835, during which time he applied to his own *private purposes* the part of the fund to which his wife was entitled, it was in law an appropriation by him, and such a "reducing into possession" as excluded the claim of the wife by survivorship, although her second husband as administrator of her first husband made no settlement, paid over nothing to the guardian of the daughter, who was the other distributee, and in fact left a large debt outstanding against the estate, which was afterwards paid by the defendant as administrator *de bonis non* of McKenzie. *Arrington v. Yar-* (316) *brough, ante,* 75; *Mardree v. Mardree,* 31 N. C., 295.

Admit that the defendant made the payment to the widow under a mistake as to her rights; probably after he had been sued, and compelled to pay the same over to the daughter, he had a good cause of

action against the widow to recover the amount from her as money paid by a mistake, and possibly the plaintiff, who had also become implicated in the matter and paid some eleven hundred dollars to get out of it, might have been entitled to join with the defendant in calling upon the widow to refund and thereby correct the mistake. But we can see no principle of law or equity by which he has a right to call upon his co-surety (who has suffered to the same extent without any prospect of gain) to bear the whole loss resulting from a compromise which was made and entered into by them deliberately, with a full knowledge of all the facts, and with the mutual and confident belief that it was the best they could do under the circumstances. Nothing short of a fraudulent concealment from the plaintiff, his co-surety, by the defendant of the fact that he had made the payment to the widow (and there is no allegation of such a fraud) could entitle the plaintiff to the equity he insists on, that is, that the defendant shall pay back the amount that he paid in pursuance of the compromise, so as to put the whole loss upon the defendant, resulting from the supposed mistake in regard to the rights of the widow, as to which the plaintiff had as full information as the defendant before he entered into compromise.

PER CURIAM. Dismissed with costs.

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(317)

JOHN B. WOODFIN *against* JAMES JOHNSON AND JOHN PRATHER.

Where a bill for an injunction alleges that a note has been paid off and agreed to be surrendered, and that it was nevertheless assigned to another, and it appears from the answer that an obligation containing the terms of the agreement was in the plaintiff's possession, which was to stand in lieu of the note if not surrendered, and the bill does not set forth said obligation nor offer to surrender it, the injunction will be dissolved.

CAUSE removed from the Court of Equity of YANCEY.

The plaintiff, who was extensively engaged in procuring pensions from the general government for military services, had contracted with the defendant James Johnson, as the agent of Mary Dowell, for one-half of the pension to which she might be entitled, as the widow of Captain Richard Dowell, for military services in the war of the Revolution, at the sum of $1,400, and having adjusted and satisfied $235 of the amount agreed to be paid, executed his note to defendant Johnson and Mary Dowell for $1,165. Upon a representation made to the obligees by the plaintiff that he had received information that this purchase by him of half of Mrs. Dowell's pension right was against the policy of the law and void, it was agreed that the contract should be rescinded.

The plaintiff avers that in the adjustment of this business, and in canceling the contract between them, there was an outstanding note payable to defendant Johnson for $300, which had been given him for the unsettled balance of this consideration for the pension right, and which he says was to have been surrendered to him by the terms of this rescission, but that as defendant Johnson did not have (318) the note with him, it was agreed that he would bring or send it in a short time; that he afterwards made an excuse for not surrendering it that he had left it behind him in his trunk in Wilkes County; that instead of surrendering the note, as he had agreed and promised that he would do, he assigned the same to one John Prather, with a full knowledge on the part of Prather of the plaintiff's equity. That suit has been brought by Prather on the note, and a judgment obtained by him in his own name as assignee, and execution issued and about to be enforced. The prayer is for an injunction, and for general relief.

The answer of Johnson denies there was any agreement to surrender this note of $300 upon the rescission of the pension contract; that so far from that, he informed the plaintiff that he had parted with the interest in it to defendant Prather for a valid and full consideration; that he did not believe he could get it from Prather, but that he would do so if he could, and that in lieu of that note, which he had traded off, he gave the said Woodfin an obligation, of which the following is a copy:

"$300. Due John B. Woodfin three hundred dollars for value received of him, as witness my hand and seal. It is, however, understood that if James Johnson shall surrender to said Woodfin a note of hand given to said Johnson by said Woodfin for three hundred dollars, bearing equal date with this note, with a credit of five dollars thereon, which note said Johnson transferred to John Prather, that it is to discharge this note, this 26 May, 1852." Signed by the defendant Johnson.

He states this obligation was antedated to make it bear equal interest with the one traded to Prather. He says that not being able to get back the note in question, he assigned the same, in pursuance and in virtue of his agreement with Prather, to whom he had already sold it and received his pay for the same.

Upon the coming in of this answer, at Spring Term, 1854, (319) of said Court, before *Dick, J.*, a motion was made to dissolve the injunction; and upon consideration, the injunction heretofore obtained was ordered to be dissolved with costs, from which interlocutory order the plaintiff appealed to this Court.

Gaither, for plaintiff.
Neal, for defendants.

BATTLE, J. We have no hesitation in saying that the order to dissolve the injunction, from which the appeal was taken, must be affirmed. Without considering whether there may not be other grounds of objection to the injunction, there is one upon which it is manifest that it cannot stand. The plaintiff's claim to equitable relief against Prather cannot be sustained, unless upon the answer of the defendant Johnson it appears that he should be entitled to enjoin him were he the plaintiff in the judgment at law. The bill alleges that when the contracts between the plaintiff and the defendant Johnson were all rescinded, "Johnson said he had forgotten to bring the $300 (pension) note with him, but that he would bring or send it in a short time, and that in July, when Johnson had removed part of his things to Yancey, the plaintiff asked him for the note, when he said it was, be believed, in his trunk in Wilkes." To this allegation the defendant Johnson answers that neither at the time of the rescission of the contract, nor at any other time, did he tell the plaintiff "that he had forgotten to bring the $300 note with him, or that it was behind in his trunk in Wilkes, nor did he, according to his best recollection, ever promise to return the said note. But, upon the contrary, the defendant avers that upon the rescission he expressly told the plaintiff that he had sold the $300 note to his co-defendant Prather for a full and valuable consideration, and therefore

(320) he executed in *lieu* thereof his own obligation to the complainant for the same amount, which the complainant accepted in full satisfaction of his own note, now the subject of complaint."

A copy of this allegation is set forth in the answer, and it provides as follows: "It is, however, understood that if James Johnson shall surrender to said Woodfin a note of hand given to said Johnson by said Woodfin for three hundred dollars, bearing date with this note, with a credit of five dollars thereon, which note said Johnson transferred to John Prather, that is to discharge this note, this 26 May, 1852." The answer states that this obligation was antedated for the purpose of making it bear interest from the same time with the $300 note in question.

This part of the defendant Johnson's answer is decidedly responsive to the above-recited portion of the bill, and must upon this motion to dissolve be taken as true. How, then, can the injunction be supported without a surrender of this obligation or at least an offer to surrender it upon the injunction being perpetuated? If the plaintiff were to bring suit upon the obligation, it may be that the court of equity would give relief against it, if it had enjoined collection of the other. But it is one of the main objects of a court of equity to prevent a multiplicity of suits, and we should, while sititng in equity, feel ourselves faithless to one of our highest duties were we to decide one suit which paved a way for

another, where we had the complete power to put an end to the whole litigation at once. For this reason alone, then, without adverting to any other, we affirm the order at the costs of the plaintiff.

PER CURIAM. Affirmed with costs.

(321)

JOSEPH SMITH *against* JOHN HAYS AND HENRY HELTON.

Where a creditor fraudulently removes his debtor with an intent to hinder and delay the surety in the collection of such sum as he might have to pay for such debtor, a court of equity will enjoin him from collecting the debt out of the surety.

CAUSE sent to this Court from the Court of Equity of BURKE.

The plaintiff Joseph Smith became surety for one Henry Helton to the defendant John Hays for the sum of one hundred and seven dollars, upon which sum a final judgment was rendered against him in the Superior Court of Burke County. Plaintiff alleges that this debt arose on two smaller judgments, on which judgments were rendered against the principal debtor, Helton, and himself, in April, 1842, and that the plaintiff, shortly after the rendition of these judgments, requested the said Hays to press the collection of them out of Helton, and that the defendant Helton was then abundantly able to pay the same. That Hays not only refused and neglected to make the money out of Helton, but that he fraudulently assisted him to remove with his assets from the State; that this removal took place in November, 1846, and that it was done with the fraudulent view of throwing the whole liability of these debts upon the plaintiff. That in January, 1847, he caused suit to be brought against plaintiff, upon which the judgment in question was finally rendered. The prayer of the bill is for an injunction and for general relief.

The defendant Hays answered, and a judgment *pro confesso* was entered as to Helton. There was replication to the answer and commissions under which proofs were taken and the cause sent to this Court.

N. W. Woodfin, for plaintiff.
Gaither and *Avery,* for defendants.

PEARSON, J. The allegations of the bill present this ques- (322) tion of law: a creditor fraudulently aids and assists the principal debtor in removing out of the county, with an intent to hinder, delay and defraud the surety in his remedy against the principal for the amount that he afterwards would be compelled to pay to the creditor; has the surety an equity to enjoin the collection of the debt from

him, and have it considered discharged, so far as he is concerned, by the fraud of the creditor?

The mere statement is enough to show that it is against conscience for the creditor, after removing the principal, to require the surety to pay the money. Every one, from a natural sense of justice, will exclaim at once "he ought to be enjoined."

As a surety receives no part of the consideration, and is not benefited in any way, and binds himself merely for accommodation, he is looked upon with favor to some extent in a court of equity, or rather he is allowed to stand strictly upon his rights. If, therefore, the creditor without his consent modifies the contract in any way, or does any act by which he is prejudiced, it operates as a discharge; *e. g.*, if the creditor enters into a binding contract with the principal by which further time is given for payment, the surety is discharged. He may say: "I agreed to stand bound for six months; you had no right to extend the time to twelve months, and to take from me the right at the end of the six months to pay up the money and sue my principal." Adams Eq., 107. The doctrine is carried much further in some of the States. It is held that if the creditor refuses or neglects to sue at the request of the surety, it amounts to a discharge. We do not go so far, but the doctrine is sound to the extent laid down above. If so, the question before us, where the creditor does an act *fraudulently* with an intent to injure the surety, is too plain for argument.

The defendant insists that upon the plaintiff's own showing he had a remedy at law by an action under the statute for fraudulently removing a debtor. *March v. Wilson,* 44 N. C., 143; *Booe v. Wilson,* 46 (323) N. C., 182, were actions at common law; so we may, for the sake of argument, suppose that the plaintiff has a remedy under the statute, but if we assume it, there is an equitable ingredient in our case by which the Court is induced to take jurisdiction, *i. e.*, the creditor is the party who has been guilty of aiding and assisting in the fraudulent removal of the debtor; so if he recovers with one hand, he is bound to pay back with the other. Now, apart from the consideration that equity seeks to avoid multiplicity of suits, and that to receive with one hand and pay back with the other is not only useless, but can be of no advantage to the one and may put the other party to inconvenience—probably subject him to loss—we have here the equitable ingredient that the conduct of the creditor has not only given to the plaintiff a cross-action, but it amounts in equity to a discharge of the debt, so far as the surety is concerned, and gives him a right to demand a release or a perpetual injunction.

The law being with the plaintiff, the next question is in regard to the facts. Much evidence was read on both sides, and serious impeachment

is made of many of the witnesses, in respect to character; so that we find the questions of fact cannot be satisfactorily decided by us upon depositions, when one witness looks just as good as another, and there is no opportunity to pass upon the degree of credit to which he is entitled by observing his looks, manners, etc., as is the case upon jury trials. Besides, according to our mode of taking depositions, it is impossible to make the testimony as full or to give the test of cross-examination the force it sometimes has, when the witness is in the presence of the jury. The fact must be tried by an issue submitted to a jury.

The defendant Hays denies that he aided in removing the other defendant, Helton, and he insists, by way of justification (supposing he did aid in the removal), that the plaintiff has no ground to complain, for that Helton had let the plaintiff have a horse and other property, in consideration that he would pay the debt to Hays, (324) whereby the plaintiff became the principal debtor, to whom Hays was to look in the first instance for payment.

If this be the fact, there is no question that it is a full answer to the plaintiff's equity; an issue will also be submitted to the jury to try this allegation. *Fisher v. Carroll,* 46 N. C., 27; *S. c.,* 41 N. C., 485.

PER CURIAM. Decree accordingly.

Cited: Brittain v. Quiet, post, 331.

BARNEY CASTEL *against* THE HEIRS OF N. A. STRANGE.

In a bill for an account of the profits of a mill, and for specific performance of a contract to convey the one-half of the interest in such mill to the plaintiff upon his being paid the excess of his advancements over the other partner (the plaintiff), the personal representative of the deceased joint owner, as well as his heirs at law, must be made a party defendant, the personal estate being primarily liable.

CAUSE removed from the Court of Equity of CHEROKEE, Spring Term, 1854.

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

No counsel appeared for the plaintiff.

J. W. Woodfin and *J. Baxter,* for the defendant.

NASH, C. J. The bill in its present state cannot be supported, and must be dismissed, but without prejudice. The bill is filed for the specific performance of a contract and for an account. It alleges that

the plaintiff was the owner of a tract of land on which he was
(325) desirous to erect a grist and sawmill, and entered into a contract with N. A. Strange to build thereon at their joint expense and for their joint use. That after the building had made considerable progress, to quiet the fears of Strange as to his interest in the matter, he, the plaintiff, conveyed the whole tract to him, taking at the same time a bond from him to reconvey one-half of the land and mills to him upon his paying his share of the expenses of erecting the mill. It further states that after the mill was built a settlement of the expense incurred was had between the parties, when it was found that Strange had advanced upwards of one hundred dollars more than the plaintiff, and it was agreed that he should retain the possession and work the mill for his sole benefit until from the profits thereof he had paid himself what was due from the plaintiff. It then alleges that Strange, out of the profit of the mill, had received a sum more than sufficient to discharge what was due from the plaintiff. Strange is dead, and the bill is filed against his personal representative and his heirs, praying a conveyance and an account. The personal representative of Strange is a necessary party. It is a rule of equity practice that parties who have a concurrent interest in the subject matter in dispute, or who are liable to exonerate the defendant, or to contribute with him to the plaintiff's claim, must be made parties to the suit in order to a complete decree and to a final ascertainment of the amount of the mutual liability of the parties. From the heirs the plaintiff has a right to a conveyance of the land, according to the allegations of his bill, and the property itself in their hands is liable to the plaintiff's demand for compensation. The personal property of the intestate is, however, the primary fund for the payment of the debts of the estate, of which this is one, and the heirs have a right to call upon the administrator to stand between them and the plaintiff; a bill, therefore, cannot be filed against an heir at law for the payment of the debts of his ancestor, without making his personal representative a party. Adams Equity, 319; *Knight v.*
(326) *Knight*, 3 P. Wms., 339. The plaintiff here stands in the character of mortgagor and N. A. Strange in that of mortgagee; and upon the death of the latter it is necessary, under such a suit as this, to have the personal representatives as well as the heirs before the Court. *Worthington v. Gee*, 2 Bland, 684. The draughtsman of the bill in this case was apprised of this necessity, and accordingly has filed it against the personal representative of N. A. Strange and his heirs; but the former never was made actually a party; no process has been issued against him or been served on him. It is said he resides out of the jurisdiction of the Court. If so, the act of Assembly points out the

mode by which he might have been made a party; the record shows no such proceeding under the act. The bill must be dismissed with costs, without prejudice.

PER CURIAM. Decree accordingly.

ISAAC MORRIS *against* JOHN MORRIS, EXECUTOR, AND OTHERS.

A charge by an executor for personal services in traveling on the business of the estate, in addition to a charge for the actual expenses of the journey, cannot be allowed an executor, inasmuch as his commissions are allowed him for the very purpose of compensating for personal services bestowed on the estate.

CAUSE removed from the Court of Equity of McDOWELL.

This was a bill filed against the executor for a settlement of the estate of William Morris. The defendant John Morris, the executor, and Elisha Morgan, who had been the administrator *pendente lite,* having answered, the matter was referred to a commissioner to take an account, upon the coming in of whose report, exceptions were (327) filed and the cause sent to this Court to be heard. The nature of these exceptions and the facts in relation to them are sufficiently set forth in the opinion of the Court.

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

BATTLE, J. This cause comes before us upon exceptions to the Master's report.

1st. The first exception is that the defendant John Morris, as executor of William Morris, has been allowed $140 for his services and expenses, besides his commissions. We have looked into his vouchers and find that he charged $41 for his *personal* services in making two trips to Georgia, in addition to his expenses. That is erroneous, and to that extent the exception must be sustained. Commissions are allowed for the very purpose of remunerating an executor or administrator for the personal attention which he devotes to the estate, and he is not allowed to make an extra charge for it; but he is entitled to be repaid his actual expenses; so that the exception as to the residue of the $140 must be disallowed.

2d. The second exception objects to the allowance of more than $200 for counsel fees. The defendants have produced no testimony to show that the fees charged were unreasonable, or that the executor could have procured the services of able and skillful counsel on better terms

than he did. The depositions on file show that the suit was very warmly contested, and required a great deal of labor and attention in preparing it for trial, and great skill in conducting the trial; and that it was tried three several times before the will was finally established. Under these circumstances we cannot say that the compensation paid to counsel was too much, or that the defendants ought not to be allowed the whole amount which he paid, to wit, $400.

3d. The plaintiff must show that the defendant received in-
(328) terest on moneys in his hands before he can be charged with it. There is no such evidence here, and the third exception must be disallowed.

4th. The fourth exception must be overruled also, because the plaintiff has produced no testimony tending to show that Elisha Morris, to whom a legacy of $200 is given in the will, was dead at the time of the death of the testator. A presumption of his death, from lapse of time since he was last heard of, may have arisen; but if so, it is, so far as we can discover, that he died since the death of the testator. In such case an administrator on his estate must be appointed, to whom the defendant will be accountable.

The report, after being reformed in the particular mentioned in our opinion on the first exception, will be in all respects confirmed.

PER CURIAM. Decree accordingly.

Cited: Wilson v. Lineberger, 88 N. C., 433; *Parker v. Grant,* 91 N. C., 343.

MARK BRITTAIN *against* JAMES H. QUIET.

The rule that a party must establish his judgment at law before he can come into equity is confined to cases where a creditor seeks the aid of a court of equity in the collection of his debt on the ground of imposing on an equitable interest the liability which would attach at law on a corresponding legal interest. It does not apply to the case where a surety has paid money for his principal and seeks to enjoin an execution on a judgment against him in favor of such surety, the latter being out of the State and insolvent. In such a case the surety is entitled to relief, though he did not pay the money until after the suit against him had been commenced, and therefore could not have pleaded it at law as a set-off.

THIS cause was removed from the Court of Equity of BURKE.

The facts upon which the plaintiff's equity depends are all recited in the opinion of the Court. The cause was heard on demurrer.

Gaither and *T. R. Caldwell,* for plaintiff.
Avery, for defendant.

PEARSON, J. In 1850 the defendant sued the plaintiff in as- (329) sumpsit, and at Spring Term, 1853, obtained judgment for $198, for which execution has issued. In 1841 the plaintiff became the surety of the defendant to one Pearson for $175. In 1850 Pearson sued for the debt and obtained judgment, which was paid off by the plaintiff in December, 1852.

The prayer is to enjoin the defendant from collecting any more than the difference between the two sums; that the one sum may be declared to be a discharge of the other; a demurrer is filed; upon the argument the defendant's counsel put the case on the objection that the plaintiff could not be heard in this Court, because he had no judgment at law to prove his debt. From the argument in this case and several others, when the matter was alluded to incidentally, we perceive that the members of the profession have fallen into error in regard to the extent of the rule that the party must establish his debt by a judgment before he can come into equity. That is not a general rule, but is a rule confined to cases where a creditor seeks the aid of a court of equity in the collection of his debt on the ground of imposing on an equitable interest the liability which would attach at law on a corresponding legal interest. Inasmuch as the right of a creditor cannot attach to a legal interest until he takes judgment, and in most cases until he issues execution, so no right can attach to an equitable interest of the debtor until the creditor has taken judgment at law, and in most cases until he has issued execution. This doctrine is treated of in the English works under the head of equitable *fieri facias and elegit,* and the cases in our reports all show that the rule is confined to creditors who are seeking the aid of equity in the collection of their debts, having no other ground for coming into equity than the fact that they are not able to enforce collection at law. Under these circumstances the court of equity will not give relief until the debt is established by a judgment, and in most cases not until the fact that collection cannot be enforced at law is established by having an execution returned *nulla bona. Bridges v. Moye,* 45 (330) N. C., 173; *Rambaut v. Mayfield,* 8 N. C., 85; *Brown v. Long,* 36 N. C., 192; *Dozier v. Dozier,* 21 N. C., 96; *Peoples v. Tatum,* 36 N. C., 414; *Donaldson v. Bank,* 16 N. C., 103.

A perusal of these cases, notwithstanding some general expressions, will show clearly that the rule is not a general one, but applies only to particular cases. Our case shows that such a rule would not work right as a general rule, for the very ground of the plaintiff's equity is that in the meantime (pending the suits) the defendant removed to the State of Arkansas, having no estate here, so that the plaintiff has no remedy against his person or property, unless he is allowed in equity to retain of the fund which he owes the defendant the amount that the

defendant owes him, so as to consider the difference between the two sums as the amount actually due; to require of him to take a judgment at law before he can come into this Court would be in effect to deny the equity.

Instances where the issue "debt or no debt" has been passed upon by a court of equity without requiring that the fact of the debt should be first fixed by a judgment at law are without number, as when an executor is allowed to retain out of a legacy a debt due by the legatee to the testator; *Barnes v. Pearson,* 41 N. C., 482; or a mortgagee to insist that debts other than that secured shall be paid before redemption; and in the numerous cases of creditor's bill against an executor or administrator.

In the investigation of this case another point was suggested. The plaintiff paid the money in December, 1852. The suit was brought in 1850, though the judgment was not taken until the Spring, 1853; could the plaintiff have had the benefit of this payment as a set-off by way of plea since the last continuance? It would seem that he could not, for a set-off must exist at the time the original action is commenced—its being true at the time of plea pleaded will not suffice. *Mizell v. Moore,* 29 N. C., 255.

So a plea since the last continuance would not be applicable to
(331) set-offs. But without deciding the question of special pleadings, as is said in *Smith v. Hayes, ante,* 321, "apart from the construction that equity seeks to avoid a multiplicity of suits, and that to receive with one hand and pay back with the other is not only useless, but can be of no advantage to the one and may put the other party to inconvenience and probably subject him to loss," we have here the equitable ingredient that the defendant has removed to the State of Arkansas, leaving no property in this State, so that unless the plaintiff is allowed to "hold on" by way of retainer to the fund in his hands he will be without remedy. This equity as between the parties, that is, when the rights of third persons do not intervene, is clear and well settled, both upon principle and by the authorities.

Injunction continued until the hearing, demurrer overruled. Defendant required to answer.

PER CURIAM. Decree accordingly.

JOHN M. MATTHEWS AND OTHERS *against* DOWNS, ADMINISTRATOR.

A guardian who permits a sum of money belonging to his wards to remain in the hands of the executor of the estate from which the money is coming, to enable him to defend a suit which is pending against that estate, in which suit the wards are materially interested (the amount thus retained not being greater than their proportion), cannot be subjected to the payment of the same, on the ground of negligence; although the executor never paid any portion of it towards these expenses, and although such executor became wasteful and intemperate within the knowledge of the guardian and the money was finally lost by the misconduct and insolvency of the executor.

THE bill states that Jonathan Downs was appointed guardian of the plaintiffs; that they were entitled to receive considerable sums of money under the will of their grandfather, Reuben Bozzle, which was in the hands of Ambrose M. Rea, the only acting executor under the (332) said will, and that the said guardian failed to call for the same from the said executor, but was grossly negligent in not doing so. That he was a resident in the same neighborhood with the executor Ambrose and well knew that he, Ambrose, was becoming intemperate and wasteful in his habits, and that he was likely to become insolvent, and that he used no exertions to obtain the estate coming to the plaintiffs from the executor before he became finally insolvent, and the bill seeks to subject the estate of the guardian to the payment of this amount for the want of diligence. The bill was filed against the administrator of Downs, the guardian, who answered. Replication was made to the answer, and under a decree that the defendant account the case was referred to commissioners, who made a report, and the question submitted to this Court arises on an exception to this report. The nature of the exception and the testimony relating to it are sufficiently stated in the opinion of the Court.

Osborne and *Hutchinson,* for plaintiffs.
Wilson and Bynum, for defendants.

NASH, C. J. The case comes up on an exception to the report of the referees.

The referees find that upon adjusting the account of the defendant Downs as guardian of the plaintiffs he is indebted to them in the sum of $335.38. That in settling with A. M. Rea, the executor of Reuben Bozzle, the defendant Downs left in his hands a sum which with interest to 5 January, 1852, amounted to $335.38, which was lost to the plaintiff through the insolvency of the said Rea. The defendants except because there is no sufficient evidence that the defendant Downs knew that there were any funds in the hands of the executor after the payment of the

debts of said Bozzle. We must take the exception as it is intended and with reference to the facts disclosed in the report and in the case. Rea, as the executor of Bozzle, had, under the will of the latter, sold (333) all the property contained in the residuary clause except the land and negroes which were delivered to the defendant, the guardian. At the time he delivered over the land and negroes a suit was pending against the executor to recover a negro woman named Rose and her issue, consisting of about thirteen in number, in six of whom the wards of Downs were concerned, and to meet the expenses of that suit the executor retained in his hands the sum mentioned. Was the defendant Downs guilty of any negligence in leaving in his hands funds to the amount he did to meet the expenses of that suit? We think he was not. If a bill had been filed by the guardian to draw out of the hands of the executor the funds of his wards, upon its appearing that such a suit existed against the executor the latter would be entitled to retain in his hands a sum sufficient to meet the probable expense of defending it; and if it had been a money demand, to pay such judgment as might be rendered against him. Considering the nature of the suit and its importance both to the estate and to the children, a court of equity would have allowed the executor to retain in his hands a sum at least equal to that left with him by the guardian. Nor is the question altered by the fact that at that time the executor was insolvent or in failing circumstances; his right to retain was the same. Nor does it alter the question that he never paid the cost; that is a matter between the plaintiff in that suit and the executor. The question before us is, was the defendant Downs, the guardian, guilty of negligence in doing that which a court of equity would have allowed him to do? We cannot say he was guilty of any negligence in the matter.

The exception is sustained, and the report to be reformed accordingly.

PER CURIAM. Reversed.

(334)

JESSE WARD *against* JAMES WARD.

Relief may be prayed in the alternative and granted where the first ground set forth on the bill is not sustained.

CAUSE removed from the Court of Equity of WATAUGA, by consent, at Spring Term, 1854.

The facts of the case sufficiently appear from the opinion of the Court.

Neal, for the plaintiff.

Mitchell, for the defendant.

NASH, C. J. The proofs offered by the complainant do not sustain the allegations of his bill as to the specific relief asked for. The allegation is that the plaintiff sold the land in question to the defendant conditionally, the condition being that if the purchase money was not paid at the time specified the conveyance was to be void. The deed upon its face is absolute, the purchase money specified $300.

The defendant positively denies the allegation and insists that the sale was an absolute one and without any condition whatever, either expressed or implied. The only witnesses who bore out in full the charge in the bill as to the condition are Shull and Mrs. Moss. The testimony of the latter is such that we can place no confidence in it. She states she was present when the contract was made; that she attested the bond as a subscribing witness, and that it was made payable in three years. The bond is produced and she is not a witness to it, and instead of three years' credit it was five years. We can put no reliance on the recollection of a witness whose memory is so treacherous. We repeat, therefore, that the plaintiff has failed to sustain the allegations in his bill by competent testimony. His allegation as to the parol agreement is further weakened by the fact that the defendant gave his bond to the plaintiff for the purchase money, an instrument which is negotiable and might have been negotiated by him. The bill does not allege that the price agreed on was an adequate one, and the (335) answer states that it was a fair one, and the testimony sustains the answer. Neither does it allege that the plaintiff was from imbecility of mind incapable of making a contract, but that his mind was so weak as to expose him to imposition and importunity by those in whom he had confidence. None such is proved; on the contrary, the evidence proves that the price was a fair one. The plaintiff, then, is not entitled to the specific relief for which he prayed.

The bill, however, charges that no part of the purchase money has been paid, while the answer avers it has all been paid, and that upon a settlement had with the plaintiff the bond was by him, the plaintiff, surrendered to the defendant, and he produces it appended to his bill. The bill is framed in the alternative. If the plaintiff is not entitled to a reconveyance of the land, he prays that the defendant may be decreed to pay him what is due upon the bond, and concludes with a general prayer. The old bill in chancery did not contain any special statement of relief, but only what is called the prayer for general relief, namely, "that your orator may have such relief in the premises as the nature of the case may require and to the Court may seem fit"; but the uniform practice now is to insert a special prayer and to conclude with a general prayer. If it be doubtful to what relief the plaintiff is entitled, he may frame his prayer in the alternative to have the one relief or the

other, as the Court shall decide. Mitford, 389; 1 Dan. Ch. Pr., 260, 366. And in this manner the plaintiff has shaped his prayer for relief. After praying that the deed may be delivered up to be cancelled, the bill proceeds: "or that your Honor would order and decree that the defendant James Ward pay the amount of the bond aforesaid with interest thereon for three years after the execution of the deed aforesaid."

The prayer for the rescinding of the contract by delivering up the deed of conveyance is clearly within the jurisdiction of a court of equity, and the plaintiff could sue only in this Court, and having thus (336) obtained jurisdiction, the Court will proceed to do justice between the parties in all the matters growing out of it and made a subject of complaint in the bill and for which relief is asked. Adams Eq., in note 309. Upon this point the bill seeks an account; the answer objects to the account on two grounds; the first is that he has fully paid off the bond, and secondly, that upon a settlement with the plaintiff the bond was surrendered up to him. As to the payments, they can be ascertained in this case only by a report, and as to the surrender of the bond, that was obtained under circumstances of such suspicion as not to carry full conviction. The defendant in his answer avers that he and the plaintiff had a settlement about the first of April, 1840, and he claims the benefit of the act of the General Assembly limiting the time of the bringing of actions, and also of the act raising the presumption of payment or abandonment of any contract, agreement or other equitable interest. The act provides that the presumption of payment or abandonment shall arise within ten years after the right of action on the same accrued. Rev. Stat., ch. 65, ss. 13, 14. The bill in this case was filed 19 March, 1850, so that ten years had not elapsed between the alleged settlement and the filing of the bill or the issuing of process. In *Hamlin v. Mebane, ante,* 18, the Court decided that the lapse of nineteen years and eleven months after the action should have been brought, without a reference to a statute of limitation or rule of presumption, will authorize the Court, viewing it as a matter of fact, to declare that there has been a settlement or abandonment of the claim. In that case there were very strong circumstances sustaining the payment or abandonment of the claim; here all the attendant circumstances tend to rebut it. The complainant is a weak-minded man; has resided with his brother, the defendant, eight or nine years before the contract was made; continued to reside with him several years thereafter, and no witness was called to the settlement. These circumstances, so far from satisfying the Court that as a mere matter of fact the settlement did take place, throw such suspicions over the whole transaction (337) that we could not declare there was any such settlement or aban-

donment. As to the ordinary statute limiting the bringing of actions, it does not apply to suits in equity.

It must be referred to the Clerk to report the amount of the bond in principal and interest, and any payments made by the defendant, or any set-off he may have.

PER CURIAM. Decree accordingly.

THOMAS JONES AND OTHERS *against* L. D. PERKINS AND OTHERS.

1. Whether a court of equity will reform a deed of gift of a slave so as to give a *feme covert* a separate property therein, upon the ground that the draughtsman mistook his instructions, such instructions not being in writing—*Quere?*
2. But certainly it will not do so unless the mistake is admitted in the answer or established by clear and convincing proof.

CAUSE removed from the Court of Equity of CALDWELL, Spring Term, 1854.

The bill alleges that the negro woman in question was the property of Thomas Jones, the plaintiff, who put her into the possession of his daughter, Mrs. Gill, and her husband; that afterwards, the husband having become embarrassed in his circumstances, Jones, the father of Mrs. Gill, applied to a highly respectable practicing attorney and directed him to draw up an instrument to secure the property to the wife, Mrs. Gill, for life with a remainder to her children, in such a manner that her husband could not control it or his creditors reach it for his liabilities; that in pursuance of these instructions the said attorney prepared for him and he executed the following instrument:

"Know all men by these presents, that I, Thomas Jones, of the county of Caldwell and State of North Carolina, for and in consideration of my natural love and affection for my daughter, Elizabeth Dogan Gill, wife of William L. Gill, do give, grant, bargain and sell to her, my said daughter, and her heirs forever, one negro girl, Louisa, about (338) ten years old, valued about three hundred and seventy-five dollars, to be my said daughter's own right and property during her life, and at her death, the said Louisa and her increase to belong to the heirs of my said daughter, Elizabeth Gill, as their own right and property, subject to their own use and control, to be disposed according to their own free will and pleasure. In witness my hand and seal, 6 November, 1845."

The plaintiffs, who are the said Thomas Jones and his daughter, Mrs. E. D. Gill, and her children, insist that by a proper construction

of this instrument a sole and separate use in the said property is raised to the wife with a remainder to her children; but if the Court should be of opinion that such is not the proper meaning, they pray that the Court may order and allow that the same may be reformed so as to effectuate the intention of the parties. They allege that the defendants, who are judgment creditors, are about to have the property sold under execution for the satisfaction of their debts, and they further pray for an injunction and general relief.

The defendants answered, except William L. Gill, as to whom there was judgment *pro confesso*. Replication, commissions and proofs, and being set down for hearing, the cause was transmitted to this Court.

Gaither, for plaintiffs.
Avery, for defendants.

PEARSON, J. There was no written agreement between the parties or written instructions to the attorney who drafted the conveyance by which the alleged mistake can be shown.

Assuming that a court of equity has jurisdiction to reform a deed without some written evidence, it will certainly not do so unless the mistake is admitted by the answer or is established by clear and convincing proof, especially in cases where the conveyance is required by statute to be in writing.

For, although under this rule some few cases of apparent hardship may occur which the Court cannot relieve, it is better that it should be so than produce a general inconvenience and insecurity in
(339) the enjoyment of rights by permitting a deed under which property has been held for many years to be upset and the property transferred to others upon mere parol testimony which is not of the character above indicated.

The plaintiffs have failed to establish the two most important allegations of their bill, *i. e.*, that the attorney who drafted the deed was instructed, at the time he was employed, "to write it so as to secure the negro for the separate use of the wife, in such manner that the husband could not control it or his creditors reach it for his liabilities, with remainder to the children of the wife." The proof is that the attorney was instructed by the plaintiff Jones to draw "a deed of gift to his daughter and her children."

The other allegation, which the proof does not establish, is that Jones had reason to fear that his son-in-law Gill "was in doubtful circumstances and not doing well." The weight of the evidence leads us to the conclusion that in 1845, when the deed of gift was executed, Gill was in good credit and doing a prosperous business and that his circumstances did not become doubtful until some time in the year 1849.

The bill must be dismissed with costs as to the defendants Perkins and Avery.

PER CURIAM. Decree accordingly.

Cited: Kornegay v. Everett, 99 N. C., 34; *Pollock v. Warwick,* 104 N. C., 641.

EBZAN LOVE *against* PHILIP H. NEILSON.

The court of equity, having obtained jurisdiction upon the question of the specific performance of a contract to convey land, though it should refuse the relief prayed for because the contract was not in writing, yet under the prayer for general relief will decree an account for improvements made on the land under such contract.

CAUSE removed from the Court of Equity of MADISON, Spring Term, 1854.

The allegations in the bill were that the defendant owned a water-power and site for a saw mill on the French Broad River, and that it was agreed between them *by parol* that plaintiff should build a sawmill at this site at the joint expense of the two, the plaintiff giving his personal attention and oversight to the work and defendant (340) to make no charge for the work of his hands; that the plaintiff had the work done according to the contract and paid towards its accomplishment $438, and the defendant $266, as was ascertained by a settlement thereafter had between them which is alleged to be in the handwriting of the defendant and is filed as an exhibit). The plaintiff further alleged that he had fulfilled his part of the contract and had called on the defendant frequently to comply with his part thereof, by making the conveyance for one-half as he had agreed to do, but that he has utterly failed to comply with his bargain as set forth above, and that he has got the sole and exclusive possession of the said mill, and is working and using the same as his exclusive property, and refuses to let plaintiff come into joint possession with him thereof, and altogether denies that plaintiff has any right or property therein.

To meet the requirements of the statute as to the necessity that he should show some note or memorandum in writing of the said contract, the two following letters were set forth in the bill, viz.:

"MR. EBZAN LOVE: "26 March, 1853.

"Mr. Smith informs me that you wish to buy my half of the mill: as I throw no obstacle in your way about the mill, you may have it for three hundred dollars; say you pay me $200 in lumber, and credit my

account with $100 as agreed with Mr. Smith. I allow you half an acre of land with the mill for the use of the miller, and give a bond to make a title as soon as the last payment is made." Signed by the defendant.

Also the following:

"31 March, 1853.

"You can have the mill on the terms agreed with Mr. Smith. An half acre of ground, beginning at the mill, coming down, and paid for in lumber." Signed by the defendant.

And it is further alleged that these letters relate to a contract made with a Mr. Samuel Smith as the agent of the defendant by which it was agreed that *plaintiff should have the whole interest in the mill by paying $300 to defendant in lumber,* and, farther, should have (341) half an acre of land with the mill; that the letter of 26 March was a proposal to modify this contract, which plaintiff having refused to accede to, the letter of 31st was written to recognize and affirm the contract as made with Smith.

He prays for a specific performance of the contract and for general relief as follows: "and that your orator shall and may have such other relief as the nature of his case shall and may require and shall be according to equity and good conscience."

At the term to which process was returned the defendant appeared and pleaded in bar of plaintiff's right to recover the act of Assembly made and passed in the year 1819 making void all contracts about land unless such contract shall be put in writing. The cause was set down for hearing and removed to this Court by consent.

N. W. Woodfin, for plaintiff.
Bynum and *J. W. Woodfin,* for defendant.

BATTLE, J. The defendant's plea must be sustained, unless the letters written by him to the plaintiff on 26 and 31 March, 1853, contain the terms of a contract for the sale of one-half of the mill site and mill mentioned in the bill sufficiently certain to entitle the plaintiff to a specific execution thereof in this Court. It is manifest that they do not; the letters taken together amount at most to a mere offer by the defendant to sell to the plaintiff his half of the mill, but there is nothing in them, or either of them, from which it can be inferred that he had contracted to convey to the plaintiff the other half of the said mill. The plea must therefore be sustained so far as the bill seeks a conveyance of one-half of the mill and the appurtenances.

But upon the authority of *Baker v. Carson,* 21 N. C., 381, and *Albea v. Griffin,* 22 N. C., 9, we think that the plaintiff is entitled in this Court to be paid for the improvements which, under his contract with the defendant, he by his work and labor put upon the defendant's land. As to obtain this he is entitled to answer from the defendant, and, as the answer cannot be filed in this Court, the cause must be removed to the Court below for that purpose. See *Smith v. Kornegay, ante,* 40.

Decree accordingly.

Cited: Sain v. Dulin, 59 N. C., 198; *McCracken v. McCracken,* 88 N. C., 284; *Breaid v. Munger, Ib.,* 300; *Wilkie v. Womble,* 90 N. C., 255; *Tucker v. Markland,* 101 N. C., 427; *Luton v. Badham,* 127 N. C., 100.

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