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REPORTS

OF

CASES IN EQUITY,

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

North Carolina,

FROM DECEMBER TERM, 1857, TO AUGUST TERM, 1858, INCLUSIVE.

VOL. III.

BY HAMILTON C. JONES,

REPORTER.

Salisbury, N. C.

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1858.

JUDGES OF THE SUPREME COURT

DURING THE PERIOD COMPRISED IN THIS VOLUME.

HON. FREDERICK NASH, CHIEF JUSTICE.
HON. RICHMOND M. PEARSON,
HON. WILLIAM H. BATTLE.

JUDGES OF THE SUPERIOR COURTS.

HON. JOHN M. DICK,
" JOHN L. BAILEY,
" MATHIAS E. MANLY,
HON. DAVID F. CALDWELL,
" JOHN W. ELLIS,
" R. M. SAUNDERS,
HON. S. J. PERSON.

ATTORNEY'S GENERAL.

WILLIAM H. BAILEY,
WILLIAM A. JENKINS.

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TO THE NAMES OF CASES.

VOL. III.

CASES IN EQUITY

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

DECEMBER TERM, 1856.

THOMAS B. POWELL *against* SAMUEL M. COBB *and others.*

Where "impertinent" matter is introduced into the pleadings, it is, according to the course of the Court, to be stricken out at the expense of the party introducing it.

No matter is *impertinent*, however scandalous it may be, or however much it may tend to degrade, provided it bears upon the point about which the parties are at issue.

APPEAL from an interlocutory order of the Court of Equity of Caswell County, made by his Honor, Judge PERSON, directing certain parts of the defendants' answer to be expunged for scandal, impertinence and irrelevancy.

The bill was filed by the plaintiff, alleging that one Joel Cannon, the father of his late wife, Annie, by a deed in trust, dated in 1829, had conveyed to trustees certain negro slaves mentioned therein, for the sole and separate use and benefit of his said wife; that his wife had died, and that there was a surplus of the hires and profits of the slaves in the hands of the trustees, to which the wife was entitled at the time of her death, and which ought to have been received by her admin-

istrator (one of the defendants) and paid over to him. The trustees originally appointed in the deed in trust having removed from the State, the defendant Gunn was substituted in their place by the Court of Equity of Caswell county, and this suit is brought against him and the administrator of his late wife, praying an account of hires and profits of the slaves during the life-time of Mrs. Powell, and that the same be paid over to him *jure mariti*. The plaintiff, in his bill, further alleges, that the defendant Samuel M. Cobb, by false pretenses and imposition, had prevailed upon him to sign a paper, purporting to be a release of his right to the hires and profits of the slaves in question, but he insists that the same is void on account of the fraud practiced upon him, and he prays that it may be surrendered to be cancelled. The children of Annie Powell, to whom the slaves are limited in remainder after the death of their mother, and who, it was understood, were setting up claim to this fund, were made parties defendant also.

The answer sets forth, at large, the deed in trust, made in favor of Mrs. Powell by her father, and contends that by a proper construction of the same, neither the slaves nor their hires, or profits, could go over to the plaintiff; and that the plaintiff ought not to have the said slaves for other reasons, to wit: *that he had abandoned his family and taken up with women of ill fame; that at one time he had left his wife and children for eighteen months and gone to Louisiana, not having made any provision for them; that the plaintiff was dissipated, careless, and wasteful, and was a spendthrift; that he had beaten his wife with a horsewhip, and that a certain negro woman, named Peggy, had often protected her mistress from the brutal violence of the plaintiff.* The answer further states, that the release which the plaintiff had made, was fair and *bona fide*, and that he never heard of any dissatisfaction about it, until *the plaintiff had married one of his kept mistresses, when he became very anxious to get a negro to wait on his wife, and her children who had the misfortune to be born out of wedlock.*

The plaintiff's counsel filed exceptions to the defendants' answer, setting forth certain portions thereof as *scandalous*, *impertinent* and *irrelevant*, and specifying the matter above stated in italics as that excepted to.

His Honor referred the exceptions to a commissioner who reported, that the matter above specified, was *scandalous*, *impertinent and irrelevant*. On motion, the report of the commissioner was confirmed, and the said matter was ordered to be expunged from the record.

From this interlocutory order, the defendants prayed an appeal to the Supreme Court, which was allowed.

Bailey, for plaintiff.
Morehead, for defendants.

PEARSON, J. Where impertinent matter is introduced into the pleadings, it is, according to the course of the Court, to be stricken out at the expense of the party. This rule, and that requiring the pleadings to be signed by a solicitor of the court, is adopted for the purpose of excluding "scandal" and protecting a party litigant, from having his reputation assailed, or his feelings wounded, when the occasion does not call for it; and for the further purpose of relieving the Judge from that prejudice which such matter is apt to produce upon the best regulated mind, whereby it may, unconsciously, (and there is no telling to what extent) be influenced and drawn off from the merits of the case.

No matter is impertinent, however scandalous it may be, or however much it may tend to degrade, provided it be relevant and bear upon the point, about which the parties are at issue.

These principles are agreed on, and the only question made at the bar was as to the application.

It was conceded by Mr. *Bailey* for the plaintiff, that if the scope of the bill had been to call in question the legal effect of the deed of trust, executed by Joel Cannon, by denying that the trust was for the sole and separate maintenance of

the plaintiff's wife, and setting up a right to the property in himself *jure mariti*, then the allegations of the answer, which are excepted to, would have been relevant, and had a *bearing* upon the question of construction; but he insisted that as the bill expressly admits that the property was conveyed for the sole and separate use of the plaintiff's wife, and seeks only to set up a claim, on the part of the plaintiff, to such portion of the profits and hires as remained unexpended and unappropriated by the wife at the time of her death, and which has been, or ought to have been, received by the defendant Samuel M. Cobb, as her administrator, presenting a dry question of legal right, all the matter set forth in the answer in respect to the domestic relations of the plaintiff, is impertinent.

To this position, Mr. *Morehead*, for the defendants, was unable to give any satisfactory reply. We are entirely satisfied that this matter was introduced for the purpose of creating prejudice against the plaintiff and his cause, under the idea, that as he and his wife did not live happily together, he ought not to be allowed to claim the remnant of her estate, but should permit it to be enjoyed by their dutiful children.

There is no error. The interlocutory order of the Court below is affirmed. This opinion will be certified.

PER CURIAM. Decree below affirmed..

WM. P. GRIMSLEY *and others against* TRAVIS E. HOOKER *and others*.

Where an insolvent person purchased a stock of goods in a distant market, and immediately, on getting home, conveyed them in trust, partly to secure a feigned debt, and stipulated in the deed for his possession of them, for sixteen months, without any explanation or reason given to rebut the presumption of fraud arising from such provision, *held*, that the deed was void as against creditors.

A creditor, in order to reach property which has been fraudulently conveyed,

must take hold of the property by getting a judgment and seizing it under an execution. A second conveyance to such creditor, or for his benefit, by the fraudulent grantor, will give no lien or title to the property.

Where, after a creditor had commenced an action, and before he could get a judgment, a trustee in a fraudulent deed of trust sold the property, and put it out of the reach of the execution which afterwards issued, *held*, that such trustee was liable to the judgment creditor, to the amount of the property sold by him.

CAUSE removed from the Court of Equity of Greene County.

In the month of August, 1853, Tilman H. Dixon, by exhibiting forged letters of recommendation, obtained a credit, and purchased in the city of New York, goods to the amount of four or five thousand dollars from the several firms who are plaintiffs and defendants to this suit, all on time. He returned directly to Hookerton, his place of residence, in Green County, in this State, and soon after his arrival, to wit, on the ——day of September in the same year, made a deed in trust of the whole stock thus purchased in New York to the defendant Travis E. Hooker. The said deed of trust recited all the debts which he had lately contracted in the city of New York, also several which he owed in the neighborhood where he lived; among these latter, was a debt of $850 to the trustee, Travis E. Hooker, and in the said deed it was provided that, "if the aforesaid debts, and every part thereof, together with the lawful interest that may have accrued on the same, shall not be fully paid off and satisfied on or before the 1st day of January, A. D., 1855, then, and in that case, it shall be lawful, and it shall be the duty of the said Travis E. Hooker, trustee, being thereunto required by three or more of the creditors named in the first class," to advertise and sell the said goods, either for cash or *solvent bonds* carrying interest from the date. It is then provided that the several debts due in the neighborhood, including that to Travis E. Hooker, the trustee, should *form the first class*, and be paid in the first instance. Afterwards, that the several debts due to the New-York merchants, Bruce & Co., Mathews, Lewis & Co., and Farnham, Davis & Co., should form a second class, and be

paid in the next instance; and then, that the debts due to the other New-York merchants, Byrd & Co., Treadwell & Gould, Carrington & Orris, Rankin & Duryee, Mayhew & Co., McFarland & Bragg, and Wesson & Co., should form a third class, and be paid accordingly.

This deed in trust was made without the knowledge or approbation of the New-York merchants above named, and never was, in any way, put in use, set up or relied on, by the plaintiffs in this cause. The debt of $850 mentioned as being due to the trustee, except as to the sum of $50, was not a true debt, but entirely feigned.

The plaintiffs, Wm. Byrd & Co., Carrington & Orris, and Wesson & Co., caused suits at law to be commenced against Dixon, returnable to the November Term, 1853, of Greene County Court, and had him arrested. Shortly thereafter, the defendant Hooker, to wit, about the 25th of January, 1854, took possession of the stock of goods which remained on hand, and sold them at auction for about $1030. He also took possession of the notes and accounts due to Dixon for the goods sold by him.

On the 28th of January, 1854, Tilman H. Dixon, executed another deed in trust in favor of those merchants who had caused him to be arrested, and of the plaintiff Grimsley, who had become Dixon's bail in these cases, and who also had a claim against him for five hundred dollars, which was not included in the former deed in trust. This deed conveys the money and effects in the hands of Hooker, the former trustee, also various accounts on persons owing Dixon. It provides for the payment of these claims of Byrd & Co., Carrington & Orris, Wesson & Co., and W. P. Grimsley; also for the indemnity of Grimsley, as the bail of Dixon. Very soon after this latter deed in trust was made, Dixon absconded, and has never returned to the State. At the next term of Greene County Court, Feb. 1854, the plaintiffs obtained judgments for their debts as follows: Grimsley, for $501,28; Wseson & Co., for $109,21; Wm. Byrd & Co., $496,21; Carrington & Orris, for

$179,66. Executions were taken out and given to the sheriff, who returned thereupon *nulla bona.*

The prayer of the plaintiffs' bill was to set aside the first deed as fraudulent and void; to set up the seeond deed, and to hold the trustee to an account for the proceeds of the sale of the goods, and for the money collected, or which might have been collected; also for general relief.

The defendants answered, insisting upon their different views of the facts, but it is not deemed important to state them. There were replication and proofs, and the cause being set down for hearing, was sent to this Court for trial.

Dortch, for plaintiffs.
Rodman and *Stevenson*, for defendants.

PEARSON, J. The deed of trust executed by Dixon to Hooker, is fraudulent and void as against creditors. To say nothing of the forged letter of recommendation, and the other circumstances which throw suspicion upon the whole transaction, the deed of trust allows the debtor to retain possession of the goods for more than a year, and there is no evidence tending to explain this badge of fraud, or to rebut the presumption that the debtor was allowed to retain possession for his own use, and, in the mean time, the deed was intended as a cover to protect the property and keep it out of the reach of creditors. Indeed, the insolvency of the debtor, the nature of the goods, being ordinary merchandise, readily put out of the way, the feigned debt of $850 to the trustee, and all the circumstances, make out a case of bare-faced fraud. *Hardy* v. *Skinner*, 9 Ire. Rep. 191; *Hardy* v. *Simpson*, 13 Ire. Rep. 132; *Jessup* v. *Johnson*, 3 Jones' Rep. 335.

The plaintiffs cannot take the benefit of the deed of trust subsequently executed by Dixon to secure them, without allowing the true debts, set out in the deed to Hooker, to be first paid; for that deed, although void as to creditors, is good between the parties, and Dixon had nothing at the time he executed the last deed excepting his resulting trust. It is true,

the plaintiffs are creditors, and this deed was made to secure them, but under it they derive title from Dixon, and of course get nothing, for he had nothing except the resulting trust. A creditor, in order to reach property which has been conveyed by a fraudulent deed, void as to him, must "take hold" of the property by getting judgment and having it seized under execution. Until that is done, the debt is merely personal and gives no lien or title to the property. This is settled by all the cases. See *Green* v. *Kornegay*, 4 Jones' Rep. 66, decided at this term. A deed from the debtor will not answer the creditor's purpose. He must reach the property by a title paramount to that of the fraudulent donee.

But the case discloses other facts which give the plaintiffs an equity to hold the defendant Hooker to account for all the property which he took into his possession and sold, and the debts which he collected, or might have collected, and in this view of the case, the fraudulent deed, and the debts therein set forth, will be put out of the account, and such debts only will be considered as were reduced to judgments, and upon which execution issued. The plaintiffs took judgments and issued executions, which would have been levied on the property so as to give them "a hold on it," but for the fact that Hooker sold all the property, which he was enabled to do by reason of the fraudulent deed, *before executions could be issued.* This was a wrongful act of Hooker, and a Court of Equity, acting upon the maxim that no man shall take advantage of his own wrong, will consider the plaintiffs' right to be the same as if they had caused the executions to be levied. To subserve the ends of justice, Equity will consider that done which ought to have been done. This is a familiar maxim; and, on the same principle, unless the rights of innocent persons be affected, Equity will consider that as not done which ought not to have been done. In other words, it will deal with the parties as if the wrongful act had not been done.

There will be a reference for an account.

PER CURIAM. Decree accordingly.

SAMUEL S. SIMMONS *and others against* BENJAMIN A. SPRUILL.

The statute of frauds does not require a contract for the sale of land to be under the seal of the party to be charged therewith.

In a covenant to sell land, it is sufficiently certain to describe it as the land "whereon the vendor resides," or as the "A. B. farm," provided the tract thus called, is capable of being otherwise sufficiently identified.

When, by the terms of a covenant to convey land, it is provided that the vendor is "to make a deed when called for," the vendee may demand a deed before the purchase-money is paid.

Where, however, the vendee has sought the aid of the Court, and it appears there is danger of the purchase-money being lost by his insolvency, the Court will not permit him to receive his deed, until the money has been paid, or tendered.

CAUSE removed from the Court of Equity of Tyrrell county.

Benjamin A. Spruill, being seized in fee of a tract of land in Tyrrell county, sold the same to the plaintiff Samuel S. Simmons, and executed, in writing, the following receipt and undertaking, viz: "Received of S. S. Simmons three thousand three hundred dollars, in full payment of the tract of land whereon I live, known as the William Wynn farm; and I bind myself and my heirs to make him a deed for the same when called for." Dated October 24, 1853, and signed by the said B. A. Spruill.

Simmons afterwards conveyed his interest in this land to the other plaintiffs, Latham H. K. Spruill and Pettigrew, upon certain trusts mentioned in the deed to them, and, pursuant thereto, they prepared a deed of conveyance to them in fee simple for the said land, (the same having been surveyed in the mean time,) and requested that he should sign it, and proposed at the same time, if he preferred making the deed to Simmons, as required by the words of the contract, they would prepare a deed for that purpose, but the defendant declined to execute either. The prayer is for a specific performance of the contract.

The defendant, in his answer, insists that for the want of a seal to the said receipt, and for the reason that it does not

contain any description, by quantity or boundary, of the land in question, he cannot be compelled to make a deed therefor. In these respects, he says, he claims the benefit of the statute of frauds to the same extent as though it were specially pleaded. He says further, that although he gave the above receipt as for money, yet, in fact, no money was paid him, but plaintiff transferred to him certain notes on other persons for part of the amount, and gave his own note for the balance. Defendant admits, however, that all these notes have been paid, except a balance of $63,75, due on Simmons' individual note.

The defendant says further, that he purchased from one Basnight, notes on S. S. Simmons, which had been given for a tract of land, to the amount of thirty-eight hundred dollars, and took the same by endorsement, without recourse on Basnight; that since this purchase, Simmons has become insolvent for a very large amount, and has made deeds of trust of all his property for the benefit of his other creditors, excepting him, and says unless he can retain a lien on the William Wynn tract of land for his debts, he will lose the whole. He insists that he has a right to be substituted to the condition of Basnight in regard to the land sold by him to Simmons.

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

Heath, for plaintiffs.
Winston, Jr., and *Smith*, for defendant.

NASH, C. J. The complainants are entitled to the relief they ask for. The case is before us upon the bill and answer, and is a simple one. S. S. Simmons purchased from Benjamin A. Spruill a tract of land whereon he lived, called the William Wynn farm, for the sum of $3300, and the defendant executed at the same time a receipt in full for the purchase-money, and bound himself and his heirs "to make him a deed for the same when called for." The defendant denies that he is bound to make any deed to S. S. Simmons:

First. Because the instrument set forth in the bill, and which he admits is a correct copy, is not under seal.

Secondly. Because the instrument does not contain any description, by quantity or boundaries, of the land in question.

The *first* objection is not valid. The statute of frauds does not require a contract to convey lands to be under the seal of the vendor, but it does require "the contract, or some memorandum or note thereof, to be put in writing, and *signed by the party to be charged therewith*," &c.; Rev. Stat. ch. 50, sec. 8. The act in this case has been complied with.

The second objection is equally insufficient. The land sold has two descriptions: *First*, the land on which Benjamin A. Spruill then lived; *Secondly*, the William Wynn farm. *Id certum est quod certum reddi potest.* The bill states that the plaintiff S. S. Simmons had the boundaries of the William Wynn farm, or land, surveyed, and the bill sets forth the boundaries and the quantity of land, to wit, 200 acres. In his answer, the defendant admits that the William Wynn land is correctly described in the bill of complaint. With what propriety this objection is made, we cannot perceive.

The instrument set forth in the bill, states the price of the land and acknowledges full payment thereof at the time. The answer denies that any money was paid, but acknowledges the transfer to him by S. S. Simmons of notes upon others for the larger portion of the purchase-money, and his note for the balance, and that the defendant has collected all the transferred notes, and all the money upon Simmons' own note, except $63,75, which is still due and unpaid. In the argument, it was contended, that the instrument set forth ought to be considered in the nature of a bond to make title when the purchase-money was paid, and therefore that the defendant had a lien upon the land, and the Court of Equity will not decree a conveyance until the whole purchase-money is paid. The instrument set forth, cannot be considered in the nature of a bond to make title. The parties themselves, have, in the instrument, agreed when the title was to be made, to wit, "when called for,"—not when the purchase-money was paid.

In England, it is a well-established principle of Equity, that when a conveyance is prematurely made before payment of the price, the money is a charge upon the estate in the hands of the vendee. This doctrine has been repudiated in this State; *Womble* v. *Battle*, 3 Ire. Eq. 182; *Henderson* v. *Burton*, Ibid. 259. But, even in England, this equitable lien may be lost, if, from the contract, it appears that the parties did not rely upon it; Adams' Equity, 285. No such question can arise here. The parties have, in their contract, told us when the title was to be made, i. e., when called for. The plaintiff S. S. Simmons did call upon the defendant to make him a title to the land, at the same time tendering to him a conveyance of the land to be executed by him. This he refused to do.

The contract, as set forth in the instrument, not creating any lien upon the land for the purchase-money, much less can it create any lien for the payment of notes subsequently acquired by the defendant on Simmons.

Several other questions were brought to our notice, as growing out of the contract, but as they are no ways important in deciding the case upon the view we have taken of it, we do not notice them.

The plaintiffs are entitled to a decree for the conveyance of the land in question to S. S. Simmons from the defendant; but, as it appears that a small portion of the purchase-money is still due, the plaintiffs, before receiving the conveyance from the defendant, must tender to him, or pay him, the amount so due. Both the bill and answer state the amount to be $63,75; but the parties can have a reference to the master to ascertain the exact sum so due, in principle and interest, if they desire it.

PER CURIAM. Decree accordingly.

AMOS STACK *and another, administrators of* ABEL STACK, *against* J. WILLIAMS *and others.*

Where an administrator was compelled by a judgment of Court to pay over the assets in his hands to the next of kin, not being aware, at the time such judgment was entered against him, of an outstanding claim upon the assets, which he was compelled afterwards to discharge out of his own funds, a Court of Equity will relieve him, although he took no refunding bond.

CAUSE removed from the Court of Equity of Union County.

Abram Williams, the intestate of the plaintiffs' intestate, conveyed in fee simple by deed of bargain and sale, a tract of land lying in Chesterfield District, in the State of South Carolina, to one Christopher Dees, with a covenant of quiet enjoyment. Afterwards, certain parties in the State of South Carolina, set up title to a part of the premises so conveyed, and instituted an action in that State against the said Dees for the recovery of the same. Previously to the institution of this suit, having received information that it would be brought, the plaintiffs' intestate applied to Williams to defend the same, and, as he alleges in his bill, he, Williams, agreed that, if Dees would defend the action, he would indemnify him against all costs and expenses which he might incur in so doing. Dees did make a defense to the action, which was afterwards brought in the South Carolina Court, where it pended for several years, and was not determined until after the death of Williams, when a recovery was had therein against him for $259,31. Dees then brought suit in Union Superior Court against Abel Stack, the administrator of Williams, not only for the amount recovered, but for other large sums laid out and expended in making defense to this action in South Carolina, in all of which he averred that he had promised to indemnify and save him harmless. Stack, the defendant in this action, suffered a judgment by default to be entered against him, which was afterwards executed, and damages to the amount of $528,20 were assessed against him.

Before the commencement of this suit against the administrator, Abel Stack, he had settled with the next of kin of his intestate, and, under a judgment against him to that effect, had paid over all the assets in his hands to the guardian of these distributees, they being infants, so that he was obliged to pay the whole of this recovery out of his own funds.

The bill alleges that, because of the infancy of the defendants, and because of his not apprehending any such claim against the estate, the plaintiffs' intestate took no refunding bond.

The defendants are the heirs-at-law, and the next of kin, of the intestate, Williams, and the prayer of the bill is, that, out of the estate of the said Williams in their hands, they refund to him what he has been compelled to pay. After this suit was brought by Abel Stack, he died, and the present plaintiffs, as his administrators, were made parties.

The defendants insist that it was the duty of their father's administrator, Stack, to have resisted the recovery made by Dees in the Superior Court of Union County, and that by permitting a judgment by default to be entered against him, he showed that he was acting in collusion with the plaintiff Dees.

There were replication and commissions. Proofs were taken; and the cause being set down for hearing, was sent to this Court by consent of parties.

Wilson and *Jones*, for plaintiffs.
Ashe, for defendants.

BATTLE, J. An executor or administrator who parts with all the assets of his testator or intestate by the payment of legacies, or by a distribution among the next of kin, without taking refunding bonds, and afterwards is compelled to pay an outstanding debt out of his own funds, is not entitled, as a matter of course, to relief in Equity. It is his duty to keep regular accounts, and to retain the assets, or at least a sufficiency of them, in his hands, until all the known or apprehend-

ed debts are paid, and, even then, to take from the legatees, or next of kin, to whom he delivers over the residue of the assets, refunding bonds, for the benefit of such creditors as may still have valid claims against the estate. Rev. Code, ch. 46, sec. 24. To give relief to persons who have failed to perform their duty in these respects, would be to encourage such neglect, and to beget carelessness in the management of dead men's estates. *Alexander* v. *Fox*, 2 Jones' Eq. Rep. 106. But there are cases which form an exception to the general rule, and which, from their peculiar circumstances, will entitle the executor or administrator to call upon the legatees, or next of kin, by a suit in this Court, to refund. If debts be afterwards made to appear, or liabilities to exist, of which he had no notice, and could not have had any reasonable expectation, when he parted with the assets, or, if without any fault on his part, the assets retained for the payment of debts have been lost or destroyed, these matters, arising subsequently to his settlement with the legatees or next of kin, may entitle him to this relief. *Marsh* v. *Scarboro*, 2 Dev. Eq. Rep. 551.

The present case falls manifestly within the principle of one of the exceptions. The plaintiffs' intestate was compelled by a judgment, to settle with, and pay over to, the next of kin of his intestate, Abram Williams, all the assets in his hands. A suit was instituted about this time in another State, against the vendee of his intestate, for a part of a tract of land, which the latter had sold, and a recovery was had therein two or three years afterwards. The vendee then sued the administrator in this State, upon a promise made by his intestate, that if the vendee would defend the suit in South Carolina, he would pay all the costs and charges to which he might be subjected on account thereof. This latter suit was suffered to go by default, and, upon an enquiry of damages, the plaintiff therein recovered the amount which the administrator paid, and his representatives now seek to recover from the next of kin by the present suit. In the deed from the intestate, Williams, there was a covenant of quiet enjoyment, upon which his administrator was undoubtedly liable, and as

it does not appear, from the proofs, that he had notice of that liability at the time when he settled with the next of kin, or rather at the time when he had an opportunity to defend their suit against him, he has a clear equity to have a decree for the amount recovered against his intestate's vendee in South Carolina.

But in the suit against the administrator in this State, which he permitted to go by default, by omitting to plead to it, a much greater sum was recovered against him. That recovery is alleged by the defendants in their answer, to have been collusive, but they have not furnished us with any sufficient proof of it. The judgment against the admistrator, however, is not evidence against them, except as to its amount, because they were not parties to the suit. The burden of the proof, then, is upon his representatives, to show that the recovery was proper. This they have not done by the proofs now on file, except as to the amount recovered against the vendee in South Carolina. There is, indeed, some testimony tending to show, that the intestate, Williams, had made a parol engagement to be responsible for something more than what he was liable for on his covenant of quiet enjoyment. We are not satisfied, however, from that testimony, that the damages recovered of the administrator, were just and proper, and his not pleading to the action, creates some suspicion against him. Under these circumstances, we think a further enquiry ought to be made by a commissioner of this Court, to ascertain, as nearly as he can, what is the true amount for which the plaintiffs' intestate was liable, as the administrator of Williams, upon the contract made by Williams with his vendee, relative to the defense of the suit in South Carolina. An order may be drawn for that purpose; and the cause will be retained for further directions upon the coming in of the report of the commissioner.

Per Curiam. Decree accordingly.

AARON ELLIOTT *and others against* JOSEPH H. POOL *and others.*

Where the trustee of an insolvent purchased the trust property at his own sale, and procured the decree of a Court of Equity to validate such purchases, without making the unsecured creditors (who alone were really interested) parties to the suit, he will not be protected by such decree, but, at the instance of such creditors, the property will be decreed to be resold.

CAUSE removed from the Court of Equity of Pasquotank County.

Jesse L. Pool being greatly embarrassed with debt, and, as it afterwards appeared, being in fact insolvent, on the 30th of January, 1841, executed a deed in trust to the defendant Joseph H. Pool, which was duly registered, conveying to him a large real and personal estate, consisting of the tract on which he resided, containing 350 acres; also, an interest in a steam mill in the town of Nixonton, nineteen slaves, and all his stock of horses, cattle, sheep and hogs, all his farming tools, all his household and kitchen furniture, being in fact all he owned, in trust, that he should, when he might deem proper, advertise and sell the same, either for cash or upon a credit, and apply the proceeds of such sale to certain debts, recited in the deed, to which the said Joseph H. Pool was surety, and in the second place, to pay off a debt to one John Pool, and if, after discharging these liabilities, there should be a residue of property, the same was to be re-conveyed to Jesse L. Pool. In the year 1842, Jesse L. Pool died, and the defendant George D. Pool was appointed his administrator with a will annexed, but no assets came to his hands, either then or afterwards.

Shortly after the death of Jesse L. Pool, the defendant Joseph H., as trustee, advertised the property conveyed to him, for sale, and did make sale of the same. Much of this property, embracing all the real estate and the steam mill, also thirteen of the slaves, was bought by the agents of the trustee for his use and benefit, and the title being first conveyed to such agent, was conveyed back to him, and he immedi-

ately took possession thereof, and has retained and used it ever since.

The plaintiffs aver that this sale was at a great sacrifice, and that if it had been fairly conducted, it would have produced enough to pay the other creditors, among whom were the plaintiffs, as they showed by divers court-judgments, exhibited in the cause.

The prayer of the bill is that the property bought in by the defendant be resold, and that an account be taken of the defendant's administration of the said trust generally. The administrator *cum testamento annexo* is a party defendant to the bill.

At the Spring Term, 1843, of Pasquotank Court of Equity, the said trustee, Joseph H. Pool, filed a bill against the infant heirs-at-law of Jesse L. Pool, to which an administrator with the will annexed, afterwards appointed, was also made a party, setting forth that he had, for the purpose of preventing a sacrifice of the property, purchased the plantation, steam-mill, and divers slaves, (setting out the names and prices,) and that the sale was fair and for full prices. He proposes to surrender the said property to these infants, and to the personal representative of J. L. Pool, on being repaid the amount of his purchase, and he prays that these parties may be put to their election thus to redeem the property, or to stand concluded by this proceeding. An answer was filed by the administrator, professing to be satisfied with the sales, and answers *pro forma* were put in for the infants; and the matter being referred to a commissioner, he reported that the sales of the land were fair and for full value. It was therefore *decreed* that, as the personal representative of the estate professed to be satisfied that the price for which the personal property was sold was a fair one, that he be perpetually enjoined from setting up title to the same; and as the commissioner had reported the same as to the land, that the heirs-at-law should be enjoined from making claim to the land.

This proceeding in the Court of Equity of Pasquotank is

relied on, in the answer, as a bar to the plaintiffs' claim. There were replications, commissions and proofs.

The cause was set down on the bill, answers, exhibits, former orders and proofs, and sent to this Court by consent of parties.

Moore, for plaintiffs.
Heath, *Smith* and *Pool*, for the defendants.

PEARSON, J. The defendant Joseph Pool admits that he was liable to account for all the property purchased by him, directly or indirectly, at the sale made by him, as trustee, under the deed of trust executed by Jesse Pool; but he insists that he is protected by the decree which he obtained in the bill filed against George Pool, the administrator, and the heirs-at-law of the said Jesse; and he prays to have the same benefit of that decree as if it were specially pleaded in bar of the plaintiffs' Equity. So, the only question is in respect to the force and effect of that decree.

The defendant says "he was advised by an eminent member of the bar to institute the proceeding referred to, against the personal and real representatives of the maker of the deed of trust, being told by him that his purchases were *invalid* and *illegal*, at the election of the parties interested in the trust, who could either charge him with his bids, or compel a resale, should property advance. He accordingly filed the bill to compel the parties to make their election, which was done in good faith, to relieve himself from the embarrassment of his position, by which he might suffer, and could not gain, and he is now advised that this was a proper and rightful course on his part."

As the estate of Jesse Pool was greatly indebted, over and above the debts secured by the deed of trust, his personal and real representatives had, in truth, no interest to call for an account of the trust fund. The persons really interested were the creditors not secured by the trust. Their debtor was entitled to the resulting trust or surplus, after the pay-

ment of the secured debts; and this trust they had a right to reach, and "to work out their equity" through the representatives of the deceased debtor. Had they been made parties to the bill of the trustee, there would have been some show of justice in the proceeding; but to call upon the administrator and heirs-at-law, who were not interested in the matter, to make an election whereby to deprive the creditors of the deceased debtor of their right to subject this resulting trust, and to avail themselves of all incidental equities growing out of the *invalid* and *illegal* acts of the trustee, was a mere farce.

That a trustee can "relieve himself from the embarrassment of his position," growing out of a breach of duty, or fraud on his part, (for such the law considers it,) by putting any one to an election, is a novel application of that doctrine, for which no authority has been cited, and no reason could be assigned.

A mortgagee has a right to call upon the morgagor either to pay the debt, or have his equity of redemption foreclosed. This is put on the ground that the mortgage is only a security for the debt, and the mortgagee, being in no default, is not obliged to wait upon the pleasure of the debtor; but this principle has no sort of application to the case of a trustee who is in default, and has made himself liable by a breach of duty. The only mode of relief left open for him, is to make retribution by acting honestly, and having a fair, open sale of the property, so as *to get it out of his hands.* It is not for him to say that he will keep the property, unless the parties interested elect to have a re-sale.

If the creditors not secured by the deed of trust had been made parties to the bill, and offered no objection to the decree, possibly their rights would have been concluded by it; but it cannot be seriously contended that their rights are affected by a decree, in which the administrator and heirs-at-law of the debtor are made to surrender, without any consideration whatever, rights in which they had no interest, but which were valuable to creditors.

There will be a reference to take an account of the trust

fund, in which the trustee will be charged with the property actually sold by him at public sale, at the prices bid for it, and credited with the debts secured in the deed of trust which he has paid off. The trustee will also be charged with the present value of such of the trust property as he still has in his possession, together with the rents and profits thereof. He will also be charged with such of the trust property as he has since resold at the prices obtained, together with the rents and profits up to the time of such resale; and he will be entitled to interest upon such amount of the trust debts paid by him, as may exceed the amount of the proceeds of the property sold.

In reference to the steam-mill and the slaves, which the trustee conveyed to his father, John Pool, at the amount bid for them, there is evidence that that was not the real value; for they were afterwards sold for double the amount, including some small repairs. The trustee will be charged with the actual value of this property at the time he made the private sale to his father; and the cause will be retained for further directions.

PER CURIAM. Decree accordingly.

WILLIAM FAIRLY *against* ARCHIBALD PRIEST *and another.*

A bill is not multifarious because it alleges title to the same fund in two different rights, to wit, as administrator and as next of kin.

A demurrer which is bad in part is bad in the whole.

CAUSE brought from the Court of Equity of Richmond County by appeal.

The bill alleges that the plaintiff is the illegitimate son of Flora Priest, who afterwards intermarried with Daniel Lytch; that Angus Priest, her father, devised and bequeathed as follows: "I give and bequeath to my daughter, Sarah Priest,

my negro boy Tom, and to my daughter, Flora Priest, my negro boy Wilson, and to my daughter Elizabeth Priest, my negro boy Allen; and my will and desire is, that my negro woman Sylvia remain on the plantation as the common property of my son Archibald Priest and his three first-mentioned sisters, as long as any of them remain unmarried here; and should they all, at any time, marry or leave the place, then to be equally divided between them; and, in regard to the future increase of my negro woman Sylvia, my desire is that her first child be given equally to my three grand-children, Daniel Snead, Anna Snead, and Mary Snead; that her second child be given to my daughter Sarah, and all her future children belong equally to my son Archibald and his three sisters, Flora, Elizabeth and Sarah. My will and desire is, that the whole of my stock, not already mentioned, of horses, cattle, hogs and sheep, household furniture, and all the goods and chattels which I possess, shall be owned and possessed by my three first-named daughters and my son, Archibald Priest, in common, except one cow and calf, which I direct to be given to my grand-son, William Fairley; and should my son, Archibald Priest, or either of my three first-named daughters, die intestate, or without heirs of their own body, the estate of the deceased person or persons to be inherited by the surviving ones of them alone, or their legitimate heirs;" that previously to the marriage of the said Flora with the said Daniel Lytch, which occurred in the latter part of the year 1841, they entered into a marriage contract, dated in October of that year, by which they conveyed to the defendant, Archibald Priest, all the property bequeathed to the said Flora by the said Angus Priest, to wit, "one negro boy named Wilson, and feather-bed and furniture, and all the other property to which she might in future become entitled, according to the last will and testament of her father, in trust for her and her heirs, for the sole benefit and advantage of the said Flora Priest and her heirs, during her natural life, and, after her death, to descend to, and be enjoyed by, the heirs of the said Flora, in the same manner as if she had remained single and

unmarried;" which contract was duly proved and registered; that the said Archibald Priest accepted the trust, and undertook to discharge the same.

The bill further alleges, that Elizabeth Priest died intestate in the year 1853, whereby her interest vested in her brother Archibald, and two sisters, Flora and Sarah; that about ten days thereafter, the said Flora died intestate, possessed of the said slave Wilson and many other articles of personal property, which she held by virtue of her father's will, and of the marriage settlement, though the legal title of this property was in Archibald Priest, as trustee, and that the plaintiff administered on her estate.

The bill further alleges that Sylvia had, besides her first child, which was bequeathed to the Sneads, six others, all of which are in the possession of the defendant, Archibald, having been surrendered to him by the husband, Daniel Lytch; that he claims the same as belonging to himself and the said Sarah, in absolute right, and refuses to account, as trustee; that the plaintiff, in his character of administrator, and in his individual right, demanded his mother's interest in the said property, which was refused by the defendant.

Plaintiff, in his bill, sets forth his claim as the next of kin of his mother, to whom, he insists that, by the provisions of the said marriage contract, he is entitled to succeed. He also alleges his right, as her administrator, to the property.

Sarah Priest and the said Archibald Priest are made defendants.

The prayer of the bill is for an account and settlement of the trust.

The defendants demurred, and the Court below sustained the demurrer, from which judgment the plaintiff appealed.

Kelly, for plaintiff.
Leitch, for defendants.

PEARSON, J. The bill is not multifarious. The plaintiff claims the *same fund* in two rights: First, in his own right,

and secondly, as administrator of his mother, of whom he is the next of kin. So, it was proper to allege both titles; for if one fails, he may entitle himself to a decree under the other, and thus put an end to the litigation. It may be that Daniel Lytch will be a necessary party for the purpose of having his disclaimer set out in a manner to conclude him; but as the bill alleges a disclaimer on his part, which, at this stage of the proceeding, is admitted by the demurrer, that objection is not fatal.

In respect to the original share of the plaintiff's mother, there will be an interesting question of construction; but it is not necessary to enter upon it at the present time, for there is no doubt that the plaintiff is entitled to the share which accrued to his mother, as one of the survivors, upon the death of Elizabeth Priest, intestate and without issue. *Hilliard* v. *Kearney*, Bus. Eq. 221; *Payne* v. *Benson*, 3 Atk. Rep. 78. The demurrer being bad, as to this part, is bad as to the whole. This is a well-settled rule of Equity pleading. Adams' Eq. 335.

There is error. The demurrer is overruled, and the defendants required to answer.

PER CURIAM. Decree accordingly.

FREDERICK C. MILLER *against* J. B. CHERRY *and others.*

1. Where there is a provision in a deed of trust, that certain debts, naming them, are to be paid, and a further provision, that the debts shall be paid as they fall due, and some of the enumerated debts are due at the time of making the deed of trust, these latter are to be paid.
2. Where a surety assents to a deed of trust, which gives him a preference over other sureties as to a large part of his liabilities, and is insisting on this preference against other sureties, he shall not be permitted to diminish the fund, which, in part, consisted of a debt due by himself to the maker of the deed, by setting it off with other liabilities to him, not secured by the deed.

3. Where, a debt was truly described in a deed of trust, in every essential particular, except by its date, it will be permitted to come in, and will be considered as running to maturity from its true date, and not from the mistaken date set out in the deed of trust.
4. Where there are contradictory descriptions given of a thing, that description will be adopted, which, in its nature, is least liable to error.

CAUSE removed from the Court of Equity of Bertie county.

Willie G. Clary and B. J. Spruill, for several years before the year 1854, carried on the business of merchandise in the town of Windsor, under the name of Clary and Spruill. In that year, (1854) Clary died, and the business devolved on Spruill as surviving partner. On the 10th of February, 1855, finding the affairs of the partnership hopelessly insolvent, the latter, as surviving partner, executed a deed in trust to the plaintiff, Miller, and to Joseph B. Cherry and Samuel B. Spruill. They all accepted the trust, but shortly afterwards, Cherry and S. B. Spruill made a power of attorney, whereby the sole execution of the trust was committed to the plaintiff. The deed in trust conveyed large lots of staves, lying at different wharves and landings, and all the debts due to the late firm of Clary and Spruill, whether due by note, bond or account, with power and authority to ship the staves, and to collect the debts in the name of the surviving partner. The deed provides for the payment of a large number of debts which are specified. After this enumeration, it contains these words: "All which debts, shall be paid in the order in which they become due." Some of the debts, amounting to about $5100, were already due. Some fell due in a few days after the execution of the deed in trust, (10th of February, 1855,) and the remainder between that time and the 11th of April.

The fund realised under the deed of trust, only amounted to about $20,000, and would, if applied to the debts that were due, and to the others as they successively fell due, be exhausted by debts due and falling due before or on, the 10th of March. These first debts were chiefly those on which S. B. Spruill was the endorser. The defendant Joseph B. Cherry was on paper which fell due after the 10th of March, and the questions made

in his behalf were: 1st, Whether, as executed, it was not the meaning of the instrument, that all the enumerated debts were to be paid *pro rata*. 2nd. Whether if this were not so, the debts already due, could be taken into the list of debts to be paid, as in strictness, only the debts *to fall due* in the future, seemed to be entitled to a priority.

Samuel B. Spruill was indebted to Clary and Spruill for a store account, and, besides the several debts, secured by the deed of trust, he was liable for them on other debts not reached by it. He insists that he has a right to have this deducted from his liabilities for them, without regard to the trust, and that it ought not to go in as a part of the fund.

There was a draft described in the deed of trust, as being drawn by Benjamin J. Spruill, surviving partner, on Cherry, Cahill & Co. of Norfolk, Va., for thirty-one hundred dollars, endorsed by William P. Gurley, and dated the seventeenth day of December, 1854, and having ninety days to run. There was a draft corresponding with this description, in every thing, except its date, which was the *seventh* of December, and it was insisted by Gurley that this was the draft intended to be described, and that the variance was a mistake. If this draft was allowed to come in as being sufficiently described, another question was, whether it would have to run from the 7th or 17th. If from the former, it would fall due on the 7th of March, and would be reached by the funds realised under the deed in trust; if from the latter date, it would become due on the 17th March, and would not be secured at all.

The firm of Cherry, Cahill & Co., was also insolvent.

The bill was filed by the plaintiff, Miller, calling on the parties assuming these various positions, to interplead and have their conflicting claims settled by a decree of this Court, and prayed the Court to instruct him in the discharge of his duties in the premises.

Benjamin J. Spruill, Samuel B. Spruill, Joseph B. Cherry, Solomon Cherry, James Cahill, were made parties, and severally answered, insisting upon their claims as above stated. Replication to the answers.

The cause was set for hearing on the bill, answers, exhibits and former orders, and sent to this Court to be heard.

Winston, Jr., for plaintiff.
B. F. Moore and *Smith*, for defendants.

PEARSON, J. 1st. The deed of trust directs the payment of certain debts therein set out, and particularly described by stating the amount of each, to whom due, how due, when due, and the date thereof, and concludes with these words—"all which debts shall be paid in the *order in which they become due.*"

The fund turns out not to be sufficient to pay all these debts, and the order of payment prescribed, works an inequality to the prejudice of the defendant Cherry, who is liable, as surety, upon some of the debts which are the last to fall due. He insists that the debts shall be paid *pro rata*, under the maxim that "equality is equity."

With every disposition to yield to the force of this maxim, we are unable to find any ground which will justify a departure from the order of payment so expressly laid down.

It was then suggested that the words "become due" look to the future, and, consequently, exclude those debts which were past maturity and already due at the date of the deed.

We cannot give this effect to the words, because these debts are particularly enumerated as being among the debts which are to be paid, in the order in which they become due, which repels the idea that reference was made only to such debts as were not then due.

2nd. At the time the deed of trust was executed, the defendant S. B. Spruill was indebted to Clary and Spruill for a store account. The defendant S. B. Spruill insists that he has the right to deduct the amount of this debt from the amount of his liabilities for Clary and Spruill, without regard to the trust. This debt, among others, is transferred to the trustee, to be collected and paid out as a part of the fund, in the order prescribed. At law, the action would be in the

name of Benjamin J. Spruill, surviving partner; and Samuel B. Spruill, provided he has paid an equal amount of the debts for which he is liable as surety, would have a right to extinguish this debt and bar the action by the plea of set-off. But the parties are in a Court of Equity, where other considerations are involved. To say nothing of the fact that the defendant Spruill has made no payment as surety, and is, consequently, not as yet a creditor, there is the fact that the deed is made to him as one of the trustees, and the further fact that he is the person mainly interested and benefitted by its provisions; so, the question is, can he claim *under* the deed, and, at the same time, *against* it? We think it clear, in analogy to the doctrine of election, that while he is claiming under the deed, and insisting that the trust fund shall be collected and paid out in the order prescribed, it is against conscience to set up a right by which the fund will be diminished, and the security, which was executed in pursuance of an arrangement between him and others, for their mutual benefit, defeated *pro tanto*. As he is so largely benefitted, we assume that he elects to claim under the deed, and it will be declared that the store account due by him, constitutes a part of the trust-fund, which he is not entitled to diminish by way of set-off, or otherwise.

3rd. Among the debts enumerated, is one with this description—"A draft on the same, (Cherry, Cahill & Co., of Norfolk,) drawn by the same, (B. J. Spruill,) at ninety days; dated 17th December, 1854, with W. P. Gurley as endorser, for the sum of three thousand one hundred dollars." No debt answering this description precisely, exists. But there is a debt which answers every particular of the description, save that it is dated on the 7th of December, 1854, instead of the 17th day of December, 1854. The question is, must this debt be rejected? If not, must it be ranked as a debt becoming due ninety days after the 7th, or the 17th of December, 1854?

This is a latent, as distinguished from a patent ambiguity, and presents a question of identity, as distinguished from a

question of construction, which is fully discussed in *The President, &c., of the Deaf and Dumb Institute* v. *Norwood*, Bus. Eq. 65. The difficulty occurs in fitting the description to the thing. If a debt, answering the description in every particular, existed, that would be "the thing." But there is no such debt. That under consideration answers the description in six particulars out of seven, i., e., it is a *draft* on Cherry and Cahill, of Norfolk, by B. J. Spruill, at ninety days, with W. P. Gurley, endorser, for $3100. But it does not answer a part of the seventh particular, i. e., it is dated the 7th, not the 17th of December, 1854. So, it does not fit precisely; the figure 1 before the 7 being the discrepancy.

It would be strange if the legal effect of this slight variance were to render the deed inoperative in regard to this debt. It may be that, in *special pleading*, such a variance is fatal. But there is a distinction between pleading and deeds, wills, obligations and the like. In respect to the latter, the law gives them effect "*ut res magis valeat quam pereat.*" The reason of the distinction is a sound and practical one. "If the name be mistaken in a *writ*, a new writ may be purchased of common right, but if it were fatal in *leases* and *obligations*, the benefit of them would be wholly lost, and, therefore, one ought to be supported and not the other." *The Mayor of Linn Regis*, 10 Rep. 120; *Mayor of Stafford* v. *Bolton*, 1 Bos. and Pul. 41. We think it clear, under the maxim *ut res magis valeat* &c., that an error in a part of one, out of seven particulars of description, is not fatal, and that the debt in question is sufficiently identified by those particulars of the description in which there is no variance, and that the other particular, or the disagreeing part of it, may be rejected as surplusage.

We do not put our decision on the ground of correcting a mistake; for equity does not interfere for that purpose against creditors, but leaves them to stand on their rights. Our decision is made under the rule that where more than one description is given, and there is a discrepancy, that description will be adhered to, as to which there is the least likelihood

that a mistake would be committed, and that be rejected, in regard to which mistakes are more apt to be made. This is a rule of frequent application. If a tract of land be described by natural objects, or corner trees, and also by course and distance, and there turns out to be a discrepancy, the latter description is rejected.

So, if a father had made a parol gift of five negroes to his son, and in his will says, "I give to my son five negroes, to wit, (giving their names,) being the negroes I have heretofore put into his possession," and it turns out that the will names the wrong negroes, that description will be rejected, and the other description adhered to; for he is more apt to be mistaken as to the names, than as to the fact that they are the negroes which he had before put into his son's possession, as to which there can be no mistake; *Lowe* v. *Carter*, 2 Jones' Eq. 383. This does not conflict with *Barnes* v. *Simms*, 5 Ire Eq. 392; for in that case there was but a single description, to wit, the name. If that had been rejected there would have been no description at all. In *Knight* v. *Bunn*, 7 Ire. Eq. 77, the note of D. A. F. Ricks did not correspond with the description in the deed in a *single particular*, and by rejecting the particulars of description which did not correspond, no description would be left.

In our case we can reject one description—that in regard to the date—and still have six other particulars of description in regard to all which there is a full correspondence. So, the question is reduced to this—Is it more likely that there should be an error in *six particulars* than in *one*?

As the debt in question fits the description, the date being rejected as erroneous, it follows that it must be paid according to the true date.

PER CURIAM. Decree accordingly.

PATRICK PETERSON *against* JAMES T. MATTHIS *and another.*

An injunction to prevent the setting up of a fraudulent deed, embracing the whole estate of an old man past the age of active labor, is a special one, and the bill of the plaintiff may be read as an affidavit in reply to the defendant's answer.

The mischief in such a case is irreparable, and the injunction will be continued to the hearing.

APPEAL from the Court of Equity of Sampson county, DICK, J., presiding.

The bill was filed by the plaintiff, an old man aged about seventy years, alleging that the defendant Matthis had obtained from him, by fraud and circumvention, deeds for all his land, being two tracts, worth ten or twelve thousand dollars, and for sixteen slaves, worth ——— dollars; that the said deeds purport to be for natural love and affection, and, as to one, for the further consideration of five dollars, and as to the other, for one dollar; that the defendant Matthis is in no manner related to the plaintiff, by blood or marriage, and that there was no valuable consideration ever paid to him for this property, or agreed to be paid; that the deeds in question, if they are not entire forgeries, were executed at a time when the plaintiff was stupified with liquor and unconscious of the transaction, and that he had been seduced into that condition by the acts of the defendant Matthis and his co-operators, Register and Merritt, who witnessed the deeds; that the plaintiff is, beside being old, as above stated, entirely illiterate and much addicted to the excessive use of ardent spirits, and that if he signed the papers now put in use, it was done when he was entirely drunk and insensate, away from his immediate friends, neighbors and relations, of whom he had several living near him, and by a conspiracy between the defendant Matthis and his witnesses, the two latter of whom lived out of his neighborhood; that when these deeds were brought forward to be proved, which was out of term time, Matthis, in the presence of the witness Register, requested the clerk to keep the probate a secret.

He further alleges, that, after finding out that the said Matthis was setting up deeds of the description stated, the plaintiff demanded that the same should be surrendered to him for cancellation, and that he should disclaim an interest under them, which he refused to do.

The prayer of the bill is, that the said deeds be surrendered to be cancelled, and that the defendant Matthis be restrained, by an injunction, from commencing or prosecuting any proceeding at law to get possession of any of the property embraced in the deeds.

An injunction issued accordingly. The defendants answered, and on the coming in of the answers, moved that the injunction should be dissolved.

His Honor refused to dissolve the injunction, but ordered it to be continued till the hearing of the cause, from which order the defendants, by leave of the Court, appealed.

Shepherd, for plaintiff.
Strange, for defendants.

BATTLE, J. This cause comes before us upon the appeal of the defendants, from an interlocutory order of the Court below, which over-ruled a motion to dissolve the injunction, and continued it until the hearing. In the argument here, the injunction has been considered by the defendants' counsel, as if it were an ordinary one, against a judgment at law. It is, in truth, a special one, the dissolution of which, might work irreparable mischief to the plaintiff; for what greater injury, in a worldly point of view, could be done to an old man, long past the age of active labor, than to take from him all his land and slaves, worth fifteen or twenty thousand dollars? In the cases of *Capehart* v. *Mhoon*, Busb. Eq. 30, and *Lloyd* v. *Heath*, Ibid, 39, and the cases therein referred to, the principles of the two species of injunctions, are fully discussed and settled. In an injunction, like the present, the bill may be read as an affidavit, in opposition to the answer, and the

Court will not dissolve the injunction, when the rights of the parties are contested, until an opportunity is given to the plaintiff to establish his case by proof.

This view of the case makes it unnecessary to consider whether the answers of the defendants are full, fair, and directly responsive to all the material allegations of the bill.

Our opinion, then, is, that the interlocutory order made in the Court below was right, and must be affirmed with costs.

PER CURIAM. Decree below affirmed.

SUSAN FALKNER *against* JAMES T. STREATOR *and another.*

A Court of Equity will not interfere to prevent a party from dismissing his own suit, although it may have been instituted to establish a second equity; for such claimant of a second equity can file a bill against both the parties to the former suit, and thus recover his interest.

The Court interferes to protect equitable interests in a suit at law, from necessity.

APPEAL from the Court of Equity of Anson County, his Honor, Judge DICK, presiding.

Mr. Hargrave produced in open Court the following power of attorney, and in pursuance thereof, asked that the suit be dismissed at the plaintiff's cost, viz:

"I, Susan Falkner, the plaintiff in the above stated case, do hereby authorise and direct Thomas S. Ashe and J. R. Hargrave, or either of them, to have the said suit dismissed at my cost, as the amount therein in controversy, has been settled. June 7th, 1856. Signed, SUSAN FALKNER."

This motion was opposed by Joseph W. Falkner, who, through his counsel, produced the following power of attorney: "Know all men by these presents, that I, Susan Falkner, have this day authorised, constituted and appointed, Joseph Falkner my true and lawful agent and attorney, in my name, behalf and stead, to sue for, and recover, from James

T. Streator the following negroes, to wit, Jack, Rachel and child Jane, Lydia and Lavinia; and to employ counsel, and to do all other acts necessary for the recovery of the said negro slaves, in as full and ample a manner as I myself could do, were I personally present; and the amount of recovery he is to hold and keep for the use and benefit of A. W. L. Falkner, his ward. And I hereby bind myself, my heirs and executors, to ratify and confirm all the acts and doings of my said attorney. Given under my hand and seal the 18th day of January, 1856. Signed, SUSAN FALKNER, [Seal.]"

His Honor being of opinion that the second power of attorney was a revocation of the first, ordered the bill to be dismissed, from which order the said Joseph W. Falkner appealed to this Court.

Dargan, for plaintiff.

No counsel appeared for the defendants in this Court.

PEARSON, J. Where an action at law is instituted in the name of one for the use of another, jurisdiction is frequently exercised in Equity to enjoin the plaintiff at law from dismissing the action. This is put upon the ground of necessity, for the right in controversy being a legal one, can only be established by an action at law; and unless the party entitled to the beneficial interest is allowed to use the name of the party in whom the legal title is vested, the *cestui que use* would be entirely without remedy.

This necessity does not exist where the right in controversy is an equitable one. For, if the party entitled to the first equity dismisses a suit in Equity brought in his name by the party entitled to the second equity, which can only be worked out through the first equity, or if he refuses to allow his name to be used upon a proper offer to indemnify against the costs, the party entitled to the second equity may file a bill against both plaintiff and defendant in the suit which was dismissed, upon a charge of collusion, and in that suit, provided he establishes his own equity, he may establish the equity of

the one defendant against the other, out of which his equity grows, and thus obtain complete relief. For instance, in this case, a bill may be filed by A. W. L. Falkner against the present plaintiff and defendants, and if the plaintiff in that bill is able to establish an executed trust in his favor, as distinguished from a mere executory voluntary trust, he may then, upon the charge of collusion, set up any equity which the plaintiff in this bill may have against the defendants. So there is, in cases like the present, no neeessity for calling upon the Court to prevent a party from dismissing *his own suit;* and no precedent can be found for the exercise of so stringent a jurisdiction. Indeed, the second equity can only be established by an original bill, and cannot be passed upon as is attempted by the present motion. For, as the matter is now before us, we are wholly unable to decide whether A. W. L. Falkner is entitled to an executed trust, or to a mere executory voluntary trust, which a Court of Equity will not enforce. In this proceeding the only evidence before us is the power of attorney which leaves open the very question upon which the right of A. W. L. Falkner to come into this Court depends. There is no error. The order of the Court below is affirmed.

PER CURIAM. Order below affirmed.

MARTHA E. BATEMAN *against* CHARLES LATHAM, *administrator*.

The proceeds of land, sold for partition under the provisions of our Act of Assembly, to which an infant is entitled, remain real estate until such infant comes of age and elects to take them as money.

The claim which a wife has against the administrator of her husband for money arising from the sale of her land which he had received, is a simple contract debt, and must be so treated in the course of administration.

APPEAL from the Court of Equity of Washington County, Fall Term, 1856.

Maria Gregory, by the will of her father, Samuel Gregory, became seized in fee as a tenant in common with Frederick Gregory, Mackey Gregory, and Mary Gregory, as tenants in common of a tract of land lying in Chowan County. The said Maria Gregory intermarried with Nathaniel J. Beasley, and died, leaving the plaintiff, Martha Elizabeth Beasley, her only child and heir-at-law, and the said Nathaniel J. Beasley became tenant by the curtesy to all the land, of which his wife, the said Martha, died seized. The said Martha Elizabeth, by her father and next friend, joined with the other tenants in common, in a petition to the Court of Equity of Chowan for the sale of the said land for the purpose of partition. A decree of sale was accordingly made, and the land sold, and, after paying the costs of the proceedings, there was paid into the office of the clerk and master of the said Court, the sum of one thousand dollars, as the separate share of the said Martha Elizabeth Beasley, subject to the life estate of Nathaniel J. Beasley as tenant by the curtesy.

At the August Term, 1836, the said Nathaniel J. Beasley became the guardian of his daughter, the said Martha Elizabeth, and, as such, entered into bond with sureties, and received the said sum of one thousand dollars from the clerk and master in Equity of Chowan.

Martha Elizabeth Beasley intermarried with Andrew J. Bateman, in July 1851, and in October of the same year her father, the said N. J. Beasley, died. Suit was then brought in the County Court of Chowan by plaintiff and her husband, for the money which N. J. Beasley had in his hands as plaintiff's guardian, and a recovery had for the sum of one thousand dollars, which was paid into the office of the said County Court by one of the sureties to the guardian-bond.

The bill alleges that it was agreed between the plaintiff and her husband, the said A. J. Bateman, that he should receive the said sum of money from the clerk's office and invest it in property for her sole and separate use; that he did receive it, and did invest four hundred and fifty dollars of the said sum in the purchase of a negro woman by the name of

Amy, and her child, and took for her the following instrument of writing, viz: "Received July 10th, 1853, of Andrew J. Bateman for Mrs. Elizabeth Bateman, four hundred and fifty dollars in the purchase of Amy and child." Signed,

"BERRY MEEKINS."

This instrument was never proven or registered, but the slaves were delivered to her husband at the time of the sale; and that her said husband frequently declared that he had purchased the said slaves with her money, and held them for her sole and separate use and benefit.

The bill further alleges that A. J. Bateman, her husband, died intestate on the 1st of July, 1855, and that the defendant, as administrator, took the slaves Amy and child into his possession, and sold the same against plaintiff's wishes, as a part of his intestate's estate for $1010. The prayer of the bill is, that the said administrator account and pay over to plaintiff the amount for which Amy and child were sold, also that he pay the balance of the thousand dollars which came to her husband's hands, but which was not invested, out of the assets.

The answer of the administrator does not profess to know anything of the matters set forth in the bill, and insists that the allegations be proven. He answers, however, as to the assets in his hands, and avers that there are not more than enough to pay the judgment and bond creditors, and insists that if plaintiff has any equity she is upon the footing of simple contract creditors, and her claim will not be reached.

There were replication, commissions and proofs; also an agreement of counsel, filed as evidence in the cause, "that there are bond debts of defendant's intestate sufficient to absorb the entire estate of the intestate in the hands of the administrator."

The cause was set for hearing upon the bill, answer, exhibits, agreement of the parties and the proofs, and heard below, when a decree was made for the whole sum, for which Amy and child were sold, and for the $550 which had not been invested; from which decree the defendant appealed.

W. A. Moore, for plaintiff.
Smith, for defendant.

BATTLE, J. The proceeds of land sold for partition under the provisions of the Revised Statutes, ch. 85, sec. 7, (Revised Code, ch. 82, sec. 7,) to which an infant is entitled, remain real estate until he or she comes of age and elects to take them as money. *Scull* v. *Jernigan*, 2 Dev. and Bat. Eq. 144; *Dudley* v. *Winfield*, Bus. Eq. 91. In the present case the plaintiff came of age before she married, but there is no testimony to show that she elected to take the proceeds of her land as money; on the contrary, it appears that her guardian had wasted them, and she and her husband were compelled to sue upon the guardian-bond for the purpose of recovering them. At the time when the amount recovered was received by her husband, she had no power, by her election, except upon her privy examination, to change the quality of the money from realty to personalty; because she was then under coverture. The money being hers, the slave in which her husband invested a portion of it became her property, still retaining, as between her and him, the quality of real estate. The identity of the money with which the slave was purchased and paid for, the testimony establishes beyond all doubt. Her right to follow the fund is a clear and well established principle of equity. See *Black* v. *Ray*, 1 Dev. and Bat. Eq. 443, which cites *Ryall* v. *Ryall*, 1 Atk. 59. The husband was entitled to the use of the slave during his life, but upon his death, the woman, and child which she had borne, belonged to the plaintiff, and she had the right to claim them from the defendant as the administrator of her husband. But, as he sold them, and has the proceeds in his hands, she may assent to the sale and demand the money. This, by her bill, she has done; and to that extent she has a right to have the decree, made in her favor in the Court below, affirmed. As to the residue of the money received by her husband from the proceeds of her land, and of which she cannot show the application by him, she has, indeed, a claim for it, against his es-

tate, but it is only in the capacity of a simple contract creditor. *Benbury* v. *Benbury*, 2 Dev. and Bat. Eq. 235. The decree, therefore, so far as it adjudges that this claim has the dignity of a bond debt, must be reversed. It is admitted by the counsel on both sides that there are bond debts outstanding against the estate of the intestate, more than sufficient to absorb all the assets in the hands of the defendant as his administrator. The decree in this Court must, therefore, be reformed in accordance with this opinion.

The reversal of the decree, in part, entitles the defendant to the costs of this Court. *Harris* v. *Lee*, 1 Jones' Rep. 225.

PER CURIAM. Decree accordingly.

GEORGE BOYD *and others against* JOHN H. SMALL *and another.*

A woman, in comtemplation of marriage, conveyed land and slaves in trust for her sole and separate use, with power to dispose of the same by will or deed, and in default of such disposition, then to her issue, and in default of issue, then to her *heirs-at-law and distributees*; she dies without having disposed of the property and without issue; *Held*, that the husband took the slaves under the above limitation in preference to the next of kin.

Under the statute of distributions, the word "distributees" is a word of limitation, and not a word of purchase, and, in its use under the statute, the rule in Shelly's case has a like operation with respect to personalty, as the word "heirs" has at common law with respect to land.

CAUSE removed from the Court of Equity of Beaufort County.

In 1835, Mary Boyd, being possessed of land and slaves, by deed, reciting that she was about to be married to one Samuel Smallwood, conveyed said lands and slaves to George Boyd in trust, after the marriage, for her sole and separate use, with power to dispose thereof by deed or will, and, in default of such disposition, to her issue, and in default of issue, "to hold in trust for the heirs-at-law and distributees of the said Mary."

The said marriage took place. After several years the wife died (leaving her husband) without having had issue, and without having executed the power, reserved in the said deed, of conveying the property by deed or by will.

George Boyd, the trustee, died intestate as to this trust property, and John H. Small was appointed his administrator, and certain moneys belonging to this trust-fund came to his hands.

Thomas Tuten was appointed administrator of Mrs. Mary Smallwood.

The bill is filed by the plaintiffs, who are the nephews and nieces of Mary Smallwood, being the children of deceased brothers, to recover the trust-fund which may be in his hands, and prays an account.

Answers were filed by the defendants, Small and Tuten, admitting the material facts as set forth, but the former states that Samuel Smallwood, the husband, has notified him that he claims the said fund, and has forbid him from paying it over to any one but himself, and he asks to be protected by a decree of the Court, in disposing of the amount in his hands.

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

Stubbs and *Rodman*, for plaintiffs.

No counsel for defendants in this Court.

PEARSON, J. A woman, in contemplation of marriage, conveys land and slaves in trust, after the marriage, for her sole and separate use, with power to dispose thereof by deed or will; in default of such disposition, to her issue, and in default of issue, "to hold in trust to her *heirs-at-law* and *distributees*." She dies without executing the power and without issue, leaving her husband surviving her, and also several nephews and nieces, who are her nearest of kin. The question is, are the nephews and nieces entitled to the slaves as purchasers under the word "distributees?" If not so entitled,

and the slaves vest in the administrator of the wife, does he, after payment of debts, hold them for her nephews and nieces, or for her husband?

The title to the land does not come in question, but the legal effect of the deed in regard to it will serve to illustrate the subject of the slaves. Suppose there had been no limitation of the land "to the heirs" of the grantor, there would have been a resulting trust to her in fee simple. So the addition of these words is merely an expression of what would have resulted to her by implication of law, at all events, by force of the rule in Shelly's case. The word *heirs* is a word of limitation, and not of purchase. So, she had a fee simple expectant upon the power and the other limitations in the deed, and her heirs take the land by descent and not by purchase. The word *distributees* has the same signification in respect to personal property, that the word *heirs* has in respect to land, and denotes the person, or persons, upon whom the estate devolves by act of law, upon the death of the absolute owner. So, if this limitation to her *distributees* had not been made, there would have been a resulting trust to the grantor of the absolute property in the slaves, and the addition of that word is merely an expression of what would have resulted to her by implication of law, and as it is settled that the rule in Shelly's case is applicable to a conveyance of slaves, it follows that, at all events, the word "distributees" is a word of limitation, and not of purchase. So, the grantor had the absolute estate, expectant upon the power and the other limitations in the deed, and her nephews and nieces, or nearest of kin, cannot make title to themselves as *purchasers*.

By way of further illustration, suppose the wife had survived the husband, can any motive be suggested why it should have been her intention to restrict her estate? We can conceive of none. On the contrary, in that event, it is reasonable to suppose she intended to be the absolute owner of her own property, the power to dispose of it by will or otherwise without the assent of the husband, being intended merely to secure a right, of which her coverture would deprive her.

This is manifest, from the fact that no words of special description, necessary to denote purchasers, are used—such as children, nephews and nieces, or individuals by name; but general terms, such as the law would have implied, are used; the legal effect whereof was to leave the absolute estate in her.

Upon the death of a feme covert, the husband is entitled to administration upon her estate, and, after payment of debts, he is entitled to the surplus for his own use. The statute of distributions, 22nd Charles 2nd, does not embrace the case; and if a third person takes out letters of administration upon the estate of the wife, it is settled that the husband is entitled to the surplus after the payment of debts, because the case does not fall within any of the provisions of the statute of distributions. In this point of view, it is difficult to see how the nephews and nieces, even if it be supposed that the word distributee is a word of purchase, could bring themselves within the description, because *a married woman has no distributees.*

Peterson v. *Webb*, 4 Ire. Eq. 56, is not in point. There the trust was for the husband and wife, during their joint lives, and if he survived her, "*then to him for life*, remainder to her next of kin, under the statute of distributions; and it was held, that as an estate for life was expressly given to him, he was thereby excluded from the absolute estate.

In *Davenport* v. *Hassell*, Bus. Eq. 29, it was held, that under the description "*nearest blood kin*," a sister takes, to the exclusion of nephews and nieces, the children of a deceased sister. "Next of kin," or "nearest of kin," does not include those who are entitled by representation. The statute of distribution uses the words "next of kin of the intestate who are in equal degree, and those who legally represent them," which is aptly expressed by the word "distributees." *Henry* v. *Henry*, 9 Ire. Rep. 278.

So, in our case, the very word is used which appropriately signifies those upon whom the personal estate devolves by law, upon the death of the owner of the absolute estate, and it fol-

lows, just as conclusively, that the word is one of limitation, and not of purchase, as that the word "heirs," in respect to the land, is a word of limitation.

It will be declared to be the opinion of the Court that the plaintiffs are not entitled to the slaves as purchasers under the deed; nor are they entitled to demand the slaves from the administrator of their deceased aunt, as the right to the personal estate does not devolve upon them by act of law. The bill will be dismissed with costs.

PER CURIAM. Decree accordingly.

RICHARD COUSINS *against* ROBERT WALL.

Where the vendor of a tract of land, who is bound, under a written covenant, to make title to A on the payment of the purchase-money, makes the title to B, who advances the money for the accommodation of A, and takes the conveyance under a parol contract, that he is to hold the land as security for the loan, A is entitled, on the re-payment of the money, to a conveyance, and this contract is not affected by the statute of frauds.

CAUSE removed from the Court of Equity of Beaufort county.

The plaintiff had agreed to purchase from W. B. Rodman, at the price of $200, the tract of land in question, together with a quantity of lumber, worth about $100, for which he gave his note for $200, due on the 1st of January, 1855, with interest from the date, also another note for $100, due on the 1st of January, 1856, with interest, in like manner, from the date, (which was sometime in 1853). At the time of the execution of these notes, plaintiff took a bond from Mr. Rodman to make him a fee simple title on the payment of the said notes, and at the same time he took possession of the land and put some small improvements on it.

About the 1st of January, 1855, when the first note became due, the defendant, at the instance and request of the plaintiff, paid not only the note for $200 then due, but also the

note for $100, and thereupon the land was conveyed by Rodman to the defendant, and the two notes, as well as the covenant for title, mutually surrendered and destroyed. The plaintiff, who had married a daughter of the defendant, continued to reside on the land, with his family, until about the month of June following, when, upon the occurrence of a rupture between the plaintiff and his wife, which resulted in a separation, the defendant, for the first time, denied the trust on which he had taken the title for the land, and brought suit for possession, to September Term, 1855, of Beaufort County Court.

The plaintiff avers that the money paid by defendant to Rodman was a loan to him (plaintiff) and that the conveyance from Rodman to him was understood, and expressly agreed, to be but a security for the said sum of money, and that according to the same agreement, whenever the plaintiff repaid that sum, with interest, the title was to be made to him (plaintiff). The plaintiff alleges that he had tendered the said sum, with interest, to the defendant, which he has refused to receive. The prayer of the bill is for an injunction, which was issued in vacation, and which awaits the result of the hearing; also, for a conveyance of the land to him according to the agreement.

The defendant, in his answer, denies that there was any trust, and says he purchased without any such understanding or agreement as that alleged by the plaintiff, but says he intended the land as a residence for his son-in-law and daughter, and after making the purchase, and taking the title, he did gratuitously, and without any consideration, tell the plaintiff that he might have the land if he would pay him back the money he had paid, with interest; and he relies upon the statute of frauds as a bar to the plaintiff's recovery.

There were replication to the answer, commissions and proofs.

The cause being set down for hearing, was sent to this Court by consent.

Rodman, for plaintiff.
Donnell, for defendant.

BATTLE, J. The material facts of this case are very similar to those in *Cloninger* v. *Summit*, decided at the last August Term in Morganton, and reported in 2 Jones' Equity Reports 513, and the principles announced in that case must govern the present. The testimony satisfies us, beyond a doubt, that the defendant advanced his money, and took a title to himself for the lot in question, upon a promise made to the plaintiff, that he would convey it to him whenever he should repay him the purchase-money, with the interest accrued thereon. Besides the circumstances of the possession retained by the plaintiff, and the improvements made thereon by him, we have the positive testimony of Mr. Selby, that such was the agreement between the parties. It is true, that this testimony was parol, and the defendant relies on the statute of frauds to prevent its effect. This objection is fully answered by the case of *Cloninger* v. *Summit* above alluded to. Changing the names, what is said in that case is directly applicable to to this: "By force of the contract, the plaintiff, in view of this Court, was the owner of the land. Rodman held the legal title, in trust, to secure the payment of the purchase-money, and then in trust for the plaintiff. Had Rodman sold the land to a third person, with notice, the purchaser would have been a trustee for the plaintiff. The substance of the arrangement was, that the defendant should be substituted in the place of Rodman as a trustee for the plaintiff." By paying his money and taking the legal title to himself, the defendant held the legal title, in trust, to secure the repayment of the purchase-money, and then in trust for the plaintiff. The defendant never contracted to sell or convey the land, or any interest therein, to plaintiff; for, at the time of agreement, he had no title or interest in the land, and it was only by the force of the agreement, that he was permitted to take the legal title, and by the same act he took it in trust for the plaintiff. It is manifest that the statute of frauds does not apply.

The plaintiff, upon the repayment to the defendant of all money advanced by him for the lot of land in question, with interest thereon, as to which there must be an account, is entitled to a conveyance of the said lot, and he may have a decree accordingly.

PER CURIAM. Decree accordingly.

JAMES HOLDERBY, *administrator, against* ANNE ELIZA WALKER *and others.*

Where a husband willed his whole estate to his widow for life, with remainders over, upon the expiration of such life-estate, and the widow, dissenting from the will, took a third of the estate, it was *Held*, that the remainders limited of the other two-thirds, vested in possession immediately.

(Construction of a will as to a charge for the maintainance and education of an infant.—Question of intention depending on the peculiar phraseology of the will.—Substitution of one trustee for another.)

CAUSE removed from the Court of Equity of Rockingham county.

The questions presented in this case arise on the will of James Currie, who died in the year 1835. The following are the clauses of the will, which are material to the enquiries involved, viz: "I devise and bequeath to my beloved wife, Mary Anne, for and during her natural life, all my lands, negroes and other property, of every description, including the money on hand at my death, as well as such as may then be due me, subject, however, to the debts and funeral expenses aforesaid.

"At the death of my beloved wife, I desire all the estate, real and personal, embraced in the above bequest in her favor, as well as the increase of the negroes from this date, to be divided into two equal parts; one of which, I devise unto William R. Walker and his heirs forever; or in case of his death, before that time, to such children of the said William

R. Walker as may be living at his death, and their heirs forever. The other of which parts, I devise and bequeath to Elizabeth Ellington, daughter of William M. Ellington, and her heirs for ever, in the event that she lives to be married; but in case of her death, without having married, then, I devise and bequeath the whole of this half, or part, unto William R. Walker and his heirs forever, or in the case of his death, before that event, to his children living at his death. In the mean time, between the death of my wife, and the marriage of the said Elizabeth, after the death of my wife, it is my wish and desire, that my executor, hereafter named, hold, use and apply, as trustee, that share or part of my estate, given unto the said Elizabeth Ellington, in fee simple, in the event that she marries, to the following uses, to wit: the comfortable and respectable maintenance and support of the said Elizabeth Ellington, and to the educating her in a style and manner suited to her sphere in life.

"It is my desire that the said Elizabeth Ellington, during the life of my wife, be educated out of the income from the property which I have given her for life, if the income shall suffice to defray this and the other expenses of my wife. But if the income of my wife shall be insufficient to discharge all her reasonable expenses and to furnish the means to educate suitably the said Elizabeth Ellington, then, I desire and direct my executor to appropriate a sufficiency of any monies belonging to my estate, to that purpose, or raise money for that purpose, by sale of property, such as my wife can spare with the least inconvenience.

"It is my will and desire, that in the event it shall be ascertained, by actual experiment, that my wife cannot so manage the land and other property, given her for life, as to defray her annual expenses, my executor shall sell the entire property, real and personal, and put the proceeds thereof, as well as any other monies belonging to my estate, to interest, and that he pay to my wife the interest thereon annually, to be used by her according to her pleasure, save and except, she

apply a sufficiency thereof to the educating of Elizabeth Ellington."

William R. Walker, the executor named in the above will, died in the life-time of the testator, and the plaintiff qualified as administrator with the will annexed. Mary Anne Currie, the widow, dissented from the will of her husband, and received her year's allowance and distributive share, as well as her dower, and it is admitted, in the pleadings, that, by her dissent, the life-estate of Mrs. Currie being removed out of the way, as to all the property not assigned to her, such property has, or will, by the assent of the executor, become vested in possession; and further, that under the limitations of this will, the part intended for William R. Walker, has, by his death, become vested in his children, who are made defendants in the cause.

The questions made by the executor, and on which he asks the instruction of the Court, are, whether the charge for the maintenance and education of Elizabeth is confined to her share, or whether it is imposed equally upon the share given to Mr. Walker's children?

If the amount is to be raised out of her estate, what amount will be deemed necessary for her comfortable and respectable maintenance and support, and for her education in a style suitable to her sphere in life?

Whether he will be justified in paying over the sums raised by him for the education, &c., of Elizabeth Ellington to Mrs. Currie, who has been appointed her guardian?

Answers were put in by Elizabeth Ellington and the children of Wm. R. Walker, in which the facts as above stated are admitted.

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

Gorrell, for plaintiff.

J. T. Morehead, for defendant.

BATTLE, J. It is admitted by the parties to this controversy, that the dissent of the widow to the will of her husband, discharges the share of his estate, which she takes under the law, from the burden of maintaining and educating the infant defendant, Elizabeth Ellington. It is admitted further, that as the life-estate intended by the will for the widow, is removed out of the way as to all the property which has not been assigned to her, such property has, or will, by the assent of the executor, become vested in possession. It is admitted, also, that the children of William R. Walker, in the event which has happened, take the share of the estate given by the will to him, and the only question presented to us is, whether the charge for the support and education of Elizabeth Ellington, is confined to her share, or is imposed equally upon that given to Walker's children. We have no hesitation in saying, that it is restricted to Elizabeth's own share. This is manifest, from two or three provisions of the will.

While the widow should live, the charge was imposed upon her life-estate, provided it yielded income enough for her support, in addition to what might be required for the maintenance and education of her niece. If the income were not sufficient for both purposes, then the executor was directed to sell such property as his "wife could spare with the least inconvenience." But if his widow should die before the marriage of Elizabeth, then the share which was given to her, was alone to be applied for her use. In other words, as soon as the estates given to the legatees in remainder should vest in possession, then each share was to bear its own burden. The same result which would have been arrived at by the death of the widow, had she taken under the will, must, in our opinion, be brought about by her dissent.

The executor is constituted a trustee for Elizabeth Ellington, but if it be desirable that her aunt, the defendant Mary A. Currie, be substituted in his place, we can see no objection; provided she be a suitable person; as to which, there must be an enquiry, if the parties desire it.

There must also be an enquiry as to the amount necessary

for the " comfortable and respectable maintenance and support of the said Elizabeth Ellington, and to the educating of her in a style and manner suitable to her sphere in life," which must be raised out of her share of the testator's estate. This will embrace what is necessary for her board, clothing and other usual incidental expenses, as well as tuition, while at school; *Lindsay* v. *Hogg*, 6 Ire. Eq. Rep. 3.

There must also be a reference for taking all necessary accounts appertaining to the plaintiff's administration; and the cause will be retained for further directions.

PER CURIAM. Decree accordingly.

BENJAMIN BARNAWELL *and wife against* GIDEON B. THREADGILL *and others.*

GIDEON B. THREADGILL *and others against* BENJAMIN BARNAWELL *and wife.*

Parties to a compromise must deal with each other upon an equal footing.

Where a party to a suit, with all the knowledge on his part, of the only doubtful matters in dispute, entered into an arrangement with the agent of the other party, by which the principal was to get not more than one-twentieth of his debt, and it was a part of the arrangement that it should be kept a secret from the principal's counsel and friends, it was *Held* not to be a compromise that would be supported in a Court of Equity.

Mere inadequacy of consideration will not defeat the compromise of a doubtful claim, when it is entered into fairly, and with deliberation; but where the parties were not in equal ignorance of their rights, and were not dealing on equal terms, inadequacy of price may fairly be relied on as proof that a party had been imposed on and defrauded.

A creditor may follow the assets in the hands of legatees and other persons claiming as volunteers, or fraudulent alienees of an unfaithful and insolvent executor. And such a volunteer is not protected by the fact, that the executor had sufficient assets to pay all the debts if he had not wasted them.

In a bill to follow assets fraudulently removed, as it does not proceed on the idea of punishing the defendant for a fraudulent removal of the assets, one who acted as a mere agent in running off and selling them, but who paid

over the price to his employers, is not liable for the value of the property, but such a defendant must pay costs.

Where an executor qualified in 1841, and a creditor commenced a suit against him in that year, which pended until 1845, when he obtained a judgment, and at the following Spring Term of the Court of Equity, filed his bill against a legatee to follow a part of the assets, (slaves) which he had removed out of the State and sold, *Held* that the statute of limitations did not protect, notwithstanding he had had possession, with the assent of the executor, for more than three years.

Where a person, standing in a confidential relation to an intemperate executor, who has wasted the estate, is found in possession of a part of the assets, upon a suit by the creditor to follow such assets, it is incumbent on him to show that he purchased fairly and paid the price.

CAUSE removed from the Court of Equity of Anson county.

These cases were heard and considered together, and are sufficiently stated in the opinion of this Court.

Winston, Sr., and *Ashe*, for the plaintiffs in the former case, and for the defendants in the latter.

Bryan, *Mendenhall* and *Dargan*, for the defendants in the former case, and for the plaintiffs in the latter.

BATTLE, J. The original bill was filed at the Fall Term, 1846, of the Court of Equity for Anson county, by Benjamin Barnawell and his wife, against Patrick B. Threadgill, (executor of Thomas Threadgill,) Gideon B. Threadgill, Thomas H. Threadgill, Wilson Allen, George Allen and Joseph W. Allen, in which was stated, substantially, the following case: Col. Thomas Threadgill died some time in the year 1836, leaving a will, which, after a caveat, was duly proved in 1841, and the defendant Patrick B. Threadgill, the executor therein named, was duly qualified, and took upon himself the burden of its execution. The plaintiffs, Benjamin Barnawell and his wife, commenced a suit in October, 1841, upon a bond given by the testator to the feme-plaintiff, who was his daughter, the trial of which was delayed until the Fall Term, 1845, of the Superior Court of law of Anson county, when they recovered a judgment for a large sum, to wit, $4950,83

and costs, the executor having admitted assets, and having, in truth, more than sufficient, in slaves and other property, to pay the said judgment. It was alleged that the defendants had previously, with the view of defeating the plaintiffs' expected recovery, combined together, and by fraud, procured an order from the County Court of Anson, at the instance of the executor, for a sale of some of the negroes belonging to the estate of his testator, under the pretence that the same was necessary for the payment of debts, and for distribution, and that the defendants, having great influence over the executor, who was a very intemperate man, by means of a sale, or pretended sale, got into their hands several of the slaves, and other assets, belonging to the estate of the testator. It was further alleged that, in expectation that the plaintiffs would obtain judgment in their suit at a special term of the Superior Court, which was appointed to be held for the county of Anson in May, 1845, the defendants, about that time, secretly carried off eighteen slaves belonging to the estate of the testator, to wit, Keziah, Tony, Beck, Charles, Smiley and child, Judy, Jinny, Franky and two children, Dinah, Edmund, Will, Laura, Rosanna, Mima and Polly, and sold them, or otherwise disposed of them, in the State of South Carolina. The prayer was that the defendants should, by an order of the Court, be compelled to bring back the said slaves, or to pay the judgment aforesaid, with costs.

The defendants severally filed their answers, in which they denied, each for himself, any combination or fraudulent purpose, to defeat the plaintiffs' judgment. They admitted that, at the death of the testator, Thomas Threadgill, the assets belonging to his estate, were amply sufficient for the payment of all his debts, (that of the plaintiffs included,) but that the assets were wasted by the executor, so that when the plaintiffs obtained their judgment, there was nothing wherewith to satisfy it. The defendant Gideon B. Threadgill stated, that at the sale, made by the executor in 1842, he bought and paid for three slaves, Keziah, Tony and Laura; that they were sold, at public auction, where many persons, able to

buy, were present, and that he purchased fairly, and for a full price, and further, that he did not then know of the debt for which the plaintiffs obtained their judgment. He stated further, that he purchased Jinny, from the executor, at a private sale, but that she was afterwards levied on by Joseph White, the then sheriff of Anson county, and sold, when he became the purchaser at $450, which he paid to the said sheriff. That these were all the slaves he bought of the executor, and he sent them all to South Carolina, but not in the manner, nor for the purpose charged in the bill. He also sent with them the slaves Smiley and her three children, which had been levied upon by George D. Boggan, who had become sheriff of Anson, and that he sold these slaves for the sheriff, for a fair price, and paid him the money. He stated further, that another slave, named Charles, was carried to South Carolina and sold by Thomas H. Threadgill for Patrick B. Threadgill, and that the price of $500 was paid by the said Thomas, to Young H. Allen and Hull Threadgill, to whom the slave had been conveyed by the said Patrick, as an indemnity for their suretyship for him. This defendant stated further, that the defendant Wilson Allen was his agent in carrying off the slaves aforesaid; and he denied that he had any agency or connection with the other defendants in carrying off their slaves, or that he had any intention to defraud the plaintiffs, or any other persons, by sending off his own.

The defendant Thomas H. Threadgill stated, that the testator, who was his grand-father, had, in his life-time, given him a negro named Will, and to his father, Hull Threadgill, two negroes, named Edmund and Franky, and by his will had confirmed the gifts; that his father had had possession of the said slaves many years, and at the testator's death, the executor had assented to the bequests; that he, the defendant, had, at the time stated in the bill, carried off the slaves Will and Edmund, and sold the former for $562,50; that while he was in South Carolina, his brother, Joseph Threadgill, brought out two slaves, Franky and her child Harriet, belonging to his father. He insisted that he and his father had held the

slaves aforesaid, adversely, for more than three years before the bill was filed, and he claimed the benefit of the statute of limitations. He denied that he had carried the slaves off to defeat the plaintiffs' recovery, but "to prevent being harrassed in the quiet possession of property," to which he was advised he had a good right.

The defendant George Allen stated, that he was present when the slaves, mentioned in the answers of the other defendants, were carried off; that about ten days before that time, he had sent off into South Carolina, a little girl named Dinah, the child of the woman Franky, and sold her for $300; that the said girl had been put into his possession by Hull Threadgill, whose daughter he had married. He denied all combination and connection with the other defendants, and claimed the benefit of the statute of limitations.

The defendant Wilson Allen, in his answer, denied any other connection with the transaction, than as the agent of the defendant Gideon B. Threadgill, to carry off his slaves, for which he was paid $50; that he sold the slave Judy for $430,25, and paid the money to Young H. Allen, who had a deed of trust for her.

Joseph W. Allen, the remaining defendant, denied that he had any connection whatever with the transaction; that he had no interest in any of the slaves carried off; and that he, being near the place from which they were about to start, went, as a mere spectator, to see them, and did see them carried off.

These answers were filed at the Fall Term, 1846, when they were replied to by plaintiffs, and the parties proceeded to take their proofs.

Subsequently, George Allen died, and Wilson Allen, his administrator, was made a party, and filed an answer as such, at the Fall Term, 1847.

At the Spring Term, 1853, the plaintiffs filed a supplemental bill, in which they set forth as supplemental matter, that, after the filing of their original bill, they removed to the State of Tennessee, leaving their son, Benjamin F. Barnawell,

with a power of attorney, authorising him to prosecute their suit; that he was a young man, not much versed in business; that the defendants, who were nearly all his relations, took advantage of his youth and inexperience, and, after having prevailed upon him to procure from his father and mother, the plaintiffs, a sufficient power of attorney for that purpose, artfully and fraudulently procured from him the following instrument, purporting to be a compromise of their suit:

"State of North Carolina, Anson County:

Articles of agreement, entered into this 12th day of July, 1852, between Benjamin Barnawell, of the State of Tennessee, of the one part, and G. B. Threadgill, T. H. Threadgill, Wilson Allen, and Wilson Allen, administrator of George Allen, all of the County of Anson, and State of North Carolina, of the other part, witnesseth: that whereas there is a suit pending in the Court of Equity, for the County of Anson, wherein Benjamin Barnawell and wife, Rebecca, are plaintiffs, and Gideon B. Threadgill, Wilson Allen and others, are defendants, in which a claim is set up by the plaintiffs against the defendants, for certain negro slaves, named in the plaintiffs' said bill, which are alleged to have been carried off to parts unknown by the said defendants; and whereas, the parties to the said suit, that is to say, the said Benjamin Barnawell, and the said Gideon B. Threadgill, T. H. Threadgill, Wilson Allen, and Wilson Allen, as the administrator of George Allen, have agreed to settle and compromise the said suit in Equity, and all the claim and right of the said Barnawell and wife as preferred in the said suit: Now, therefore, in consideration that the said Barnawell and wife will dismiss their said bill in Equity at their own costs, and release their cause of suit, the said defendants covenant and agree to pay to the said Benjamin Barnawell, or order, two hundred dollars in cash; and, in consideration thereof, the said Benjamin Barnawell, on his part, covenants and agrees, to, and with, the said Gideon B. Threadgill, Thomas H. Threadgill, Wilson Allen, and the said Wilson Allen, as administrator of George Allen, dec'd., that the said suit in Equity shall be dismissed at his costs, at the

next September Term of the Superior Court for Anson County; and he hereby appoints James L. Gaines his attorney to dismiss said suit at that time; and the said Benjamin Barnawell, in consideration of the premises, has released, and forever quit claim, and by these presents doth release and forever quit claim, unto the said Gideon B. Threadgill, Thomas H. Threadgill, Wilson Allen, and Wilson Allen, as administrator of George Allen, dec'd., all actions, demands, or cause of action at Law or in Equity, and all right to damages and claims of whatever nature, arising from, or growing out of, any matter or thing complained of, alleged or charged, in the aforesaid bill in Equity, brought by himself and wife against the said defendants and others. In testimony whereof they have hereunto severally set their hands and seals, the day and date above written.

BENJAMIN BARNAWELL, [Seal.]
by B. F. BARNAWELL, Attorney.
G. B. THREADGILL, [Seal.]
T. H. THREADGILL, [Seal]
WILSON ALLEN, [Seal.]
WILSON ALLEN, Adm'r., [Seal.]"

The plaintiffs state particularly, and in detail, the circumstances of fraud and circumvention, under which they allege that this instrument was obtained from their son; and, among other things, they say, that the defendants kept the whole transaction studiously concealed from the counsel of the plaintiffs, and from some of their friends, to whom they had assigned a part of the judgment at law. They state further, that the defendant, Wilson Allen, paid to their attorney $100 in cash; that the defendant, Thomas H. Threadgill did not pay any thing at the time, but, some days afterwards, gave his promissory note for the same sum, and that the defendant, Gideon B. Threadgill, paid nothing, but instead thereof, executed the instrument, of which the following is a copy: "Know all men by these presents, that I will pay to Benjamin F. Barnawell, as agent of Benjamin Barnawell, one hundred dollars, provided the said Benjamin F. Barnawell shall,

between this date and September Term of the Superior Court of Law and Equity, in the County of Anson, procure from Benjamin Barnawell, and deliver the same to me, a release, under the hand and seal of the said Barnawell to me, of my land lying adjoining the lands of Dr. Watkins, Simeon Pemberton and others, purchased from Thomas H. Threadgill, from all liability to execution at the suit of said Benjamin Barnawell and wife against Patrick B. Threadgill; or provided, before the said September Court, the said Benjamin F. Barnawell shall execute to me, in the name of Benjamin Barnawell, a release to the import aforesaid, under a duly authenticated power of attorney from the said Benjamin Barnawell to him, the said Benjamin F. Barnawell, authorising him to execute the said release to the import aforesaid. In testimony whereof, I have hereunto set my hand and seal, this, the 12th day of July, 1852. Signed,

G. B. THREADGILL, [Seal]"

The prayer of the bill was, that the defendants should be enjoined from setting up the said instrument, and that the same should be surrendered up to be cancelled, and for general relief.

The defendants all filed answers to the supplemental bill, and therein denied that the instrument of compromise and release was fraudulently or unfairly obtained, and insisted on being allowed the benefit of it.

And they, in their turn, at February Term, 1855, filed a cross-bill against the plaintiffs in the original and supplemental bills, for the purpose of setting up the said instrument as a bar to the relief sought by the plaintiffs, and praying that their bill might be dismissed. To this cross-bill, the defendants thereto filed their answer, in which they denied the material allegations of the said bill, as to the manner in which the instrument of compromise and release had been obtained, and reasserted the statements of their supplemental bill in relation thereto. A replication was put in, and the parties proceeded to take proofs, which being completed, both causes were set for hearing and transmitted to the Supreme Court.

These causes have been properly brought on to be heard together. They relate to the same subject matter, and the decision of one will, necessarily, determine the other. The right to the relief which is asserted by the plaintiffs in their original bill, is alleged by the defendants therein to have been subsequently compromised and released by an instrument, which it is the object of the supplemental bill to have set aside, and which the cross-bill seeks to have established, so that the defendants may have the benefit of it.

In this state of the litigation between the parties, it is manifestly the proper course that we should first consider whether the instrument which was executed on the 12th of July, 1852, by and between the plaintiffs, through their agent and attorney on the one side, and three of the defendants on the other, can be supported as a fair compromise and release of the rights of the former. "Where a compromise of a doubtful claim is entered into fairly, and with due deliberation, and upon consideration," it will undoubtedly be supported in this Court. This is clearly shown by the authorities to which we have been referred by the defendants' counsel: *Leonard* v. *Leonard*, 2 Ball. and Beat. Rep. 178; *Attwood's case*, 1 Russ. Rep. 353; *Nailor* v. *Winch*, 1 Sim. and Stew. Rep. 564; *Goodman* v. *Sears*, 2 Jac. and Walk. Rep. 262. The plaintiffs allege that the deed in question was procured from their agent by fraud and circumvention, and if this be so, it is equally clear that the Court will relieve against it.

The question then is, was it fairly obtained?

The counsel for the defendants insist that, in the examination of this question, the instrument is to be taken as a deed of compromise instead of one of release. He contends that there is a difference in the principle applicable to it, when viewed in the light of a compromise, from that which would be applied to a release, and for this position he relies upon what is said by Lord Chancellor Manners in the above cited case of *Leonard* v. *Leonard*: "This deed has been treated as a release. Now, that is not the precise description of the instrument. Between a mere release and a deed of com-

promise of this nature, there is this distinction—that in the former the parties know their respective rights, and the one surrenders his rights to the other; in the latter, both parties are ignorant of their rights, and the agreement is founded on that ignorance, and the party surrendering may, in truth, have nothing to surrender; and whether the uncertainty rests upon a doubt in point of fact, or a doubt in point of law, if both parties are in the same ignorance, the fairness of the compromise cannot be affected by a subsequent investigation and result." The instrument, in the present case, purports to be both a compromise and a release, but as the release is founded upon the compromise, and was intended to be a part execution of it, we think the instrument ought to be treated as a deed of compromise, and we shall so consider it in our examination of it, and of the circumstances under which it was obtained.

To show that the instrument was procured by fraudulent means, the deposition of one witness only has been taken by the plaintiffs. That witness is their son and agent, and his testimony is far from being sufficient, of itself, to prove the allegation of fraud. He admits that the deed was read over to him, and he knew the bill was to be dismissed, and that the plaintiffs' judgment was for a "big debt," but of what amount he was ignorant. He says that Wilson Allen paid him $100; that Thomas H. Threadgill gave his note for that amount, which he assigned to another person, and he understood that it had since been paid; and that Gideon B. Threadgill gave him a bond, with conditions, which had never been paid. He states further, that he did not understand "the effect of the compromise" until he was afterwards informed of it by his father's counsel, *George C. Mendenhall*, and that Gideon B. Threadgill charged him to keep it a secret from his father's friends, Dr. Watkins and William Allen, though he thinks he, also, proposed that the transaction should be kept a secret. In this last particular his testimony agrees with the answers of the defendants who were concerned in the transaction, but they deny positively that they enjoined se-

crecy upon the agent. Upon this part of the case the defendants have not taken any proofs, but rely altogether upon the allegations of fairness contained in their answers. As these are responsive to the charges of the bill, we should feel ourselves bound to hold those charges to be unsustained by the proof, were it not for the conclusive evidence of fraudulent practices furnished by the instrument itself, considered in connection with the other written testimony, about which there can be no mistake. The plaintiffs' judgment against the executor of Col. Thomas Threadgill, was obtained at Fall Term, 1845, of Anson Superior Court, for $4950,83, of which sum $2500 was principal, and bore interest from that time; and upon this judgment, it appears, that only $333,46 had been paid, so that, at the time of the compromise, the debt and interest amounted to about $5600. The instrument prepared by the counsel for the defendants at their instance, provides (according to the copy which is filed as an exhibit) for the payment, by the defendants, of $200 only, when all the answers admit that $300 was to be paid. Of this sum, only one hundred dollars were paid at the time, and a negotiable note given for a like sum by Thomas H. Threadgill, while the defendant Gideon B. Threadgill gave a bond for what he was to pay, on the condition for the performance, by the agent, of something, which shows clearly that he had strong misgivings that all was not right. Here, then, we have an agent agreeing to give up an undoubted claim of his principal for $5600, in consideration of two, or, at most, three hundred dollars to be paid him. We are aware that the authorities establish the principle that mere inadequacy of consideration will not defeat the compromise of a doubtful claim, where it is entered into fairly and with due deliberation. *Nailor* v. *Winch*, *Leonard* v. *Leonard*, *ubi supra*, and the other cases. Here, the only doubtful matter was the liability of the defendants for the slaves which they had carried off; and if liable, the extent of that liability. About that, the agent must have been profoundly ignorant; and as the transaction, while in progress, was kept secret from his father's counsel and friends, he had

no means of getting information, except from the defendants themselves. They do not pretend that they gave *him* any; and whether the secrecy was proposed by them, or him, the result was the same. If he proposed it, they acquiesced in it, and they thus had every advantage in settling the terms. Of this, the vast inadequacy of the consideration must furnish strong testimony, and raises in the mind a suspicion of a collusion between the agent and the defendants to defraud the plaintiffs, or, perhaps, those persons to whom they had assigned a portion of their judgment. We do not, however, rest the case on this ground, because it is not assumed in the bill. The basis of our opinion is that the defendants, with all the knowledge on their part of the only doubtful matters in dispute, entered into an arrangement with the agent, by which his principal was to get not more than one-twentieth part of his debt, it being a part of the arrangement, at the same time, that it was to be kept a profound secret from the principal's counsel and friends. In this view of the case we think that we are strongly sustained by what was said by the LORD CHANCELLOR in the case of *Leonard* v. *Leonard*, upon the suppression or misrepresentation of a fact by one of the parties: "Here there is a material fact suppressed or misrepresented by the defendants' agent, and by which the plaintiff, acting under a mistake, ought not to be prejudiced. The deed itself, though it does not represent these lands as being held in joint-tenancy, suppresses the fact of their being held by these brothers as tenants in common; and when it is made manifest that the compromise was entered into between parties under a misapprehension of fact, known to the one party, or his agent, and unknown, or misrepresented to the other, the compromise is deficient in that which is essential to its validity—that both parties were in equal ignorance. And then the value of the plaintiff's rights may fairly be relied upon, which, otherwise, I do not think could avail, unless it furnished, of itself, proof that the other party had been imposed upon and defrauded."

This extract shows clearly that inadequacy of consideration

may have some weight, when there are other circumstances of suspicion about the compromise; and it shows further, that the parties must deal with each other upon an equal footing, which was certainly not so in our case, where the defendants, as they themselves state, consulted with their counsel, but (to say the least) connived with the plaintiffs' agent in keeping the matter secret from their counsel.

Our opinion then, is, that the cross-bill must be dismissed with costs, and that the plaintiffs are entitled to have the instrument of compromise surrendered up to be cancelled, according to the prayer of the supplemental bill.

The alleged compromise being removed out of their way, the plaintiffs are entitled to the relief which is sought in their original and supplemental bills as against the defendants, or some of them. When this cause was brought before the Court, at a former term, upon a demurrer, (see 5 Ire. Eq. Rep. 86,) it was stated, as a clear principle of equity, "that a creditor may follow the assets into the hands of the legatees and other persons claiming as volunteers, or fraudulent alienees of an unfaithful and insolvent executor." The only difficulty is in ascertaining which of the defendants is liable, and whether they are liable for the acts of each other. The defendant Patrick B. Threadgill, the executor, has died, insolvent, since the cause has been removed to this Court, and we are not informed that there has been, or will be, any administration on his estate.

Joseph W. Allen, another defendant, denies that he has ever had any of the assets in his hands, or that he was concerned in any way with the removal of the slaves from this State, and there is no sufficient evidence to disprove the positive assertions of his answer. He admits that he was present as a spectator when the negroes were started, and the testimony shows that he went with them a mile or two. This is not sufficient to charge him, and its only effect will be to deprive him of the costs to which he would otherwise have been entitled upon having the bill dismissed as to him.

The plaintiffs charge a combination among the defendants

to deprive them of the fruits of their judgment, by carrying off all the slaves which would have been assets for its payment. Their counsel insist, therefore, that they are justly liable for the acts of all and each. The testimony has failed to convince us that there was any thing like a conspiracy, by which each was to assist the others in running the slaves out of the way, so as thereby to defeat the claim of the plaintiffs. Such may have been the fact; and though the evidence raises a suspicion of it, we cannot say that it has proved more than that each party, who had any of the slaves, which he had acquired under the will, or from the executor of Thos. Threadgill, deceased, resolved, and acted upon the resolution, to carry off such slaves, so that they should not be taken for the payment of the plaintiffs' debt. That much is almost avowed in their answers, and is very clearly established by the proofs. Several witnesses testify that they heard the defendants Patrick, Thomas, and Gideon, say, at different times, that the debt was unjust, and they would never pay it.

The defendant Wilson Allen denies that he had, and is not proved to have had, any connection with the transaction, except to carry off the slaves for the defendant Gideon B. Threadgill, as his agent. It seems that he sold a slave named Judy, and paid the price to Young H. Allen, who had a prior lien upon her. Under these circumstances, his counsel contends that no decree can be had against him, and in support of his argument, cited and relied upon the cases of *Bulkly* v. *Dunbar*, 1 Anstr. Rep. 37, and *Newman* v. *Godfrey*, 2 Bro. Ch. cas. 333; also Danl's. Ch. Pr. 344; Stor. Eq. Pl. sec. 252, 254, 838, and Mitf. Eq. Pl. 160. In bills, like the present, the Court does not proceed upon the idea of punishing the defendant for a tort, but upon that of following the assets in his hands, and making him responsible therefor, unless he be a purchaser upon an honest contract. As it is not shown that this defendant acted from any fraudulent purpose to hinder or delay the plaintiffs in the recovery of their debt, or that he had, at the time when the bill was filed, or has now, any of the slaves, or other assets of the estate of Thomas Thread-

gill, in his hands, no decree, except for costs, can be had against him. From his conduct, the plaintiffs had apparent cause for making him a party, and the authorities upon which his counsel relies, show that he is liable for costs.

George Allen was a defendant in the original bill, and answered it, admitting that he carried off, and sold, a little girl named Dinah, at the price of $300. He stated that this girl was the child of a negro woman, named Franky, whom the testator had given to Hull Threadgill, and confirmed the gift by his will, and that the said Hull had put the girl into his possession upon his marriage with his daughter. He denied any concert with the other defendants, and insisted on the benefit of the statute of limitations. Our opinion is that the statute cannot aid him. The debt upon which the plaintiffs' judgment was obtained, did not become due until the year 1840, and the issue of *devisavit vel non* was not decided until 1840. They commenced suit upon it in October, 1841, and recovered judgment in the Fall of 1845, and filed their bill at the Spring Term following. Under these circumstances, they, as creditors, were not barred by the adverse claim of the defendant and his father-in-law, under whom he claimed. Nor is he protected by the fact, that the executor had assets sufficient to pay all the debts of the estate, if he had not wasted them. The plaintiffs used all the diligence in their power in the prosecution of their claim, and they are entitled to have satisfaction out of the assets in the "hands of the legatees and other persons claiming as volunteers." They are entitled, therefore, to a decree against Wilson Allen, as administrator of George Allen, for the price of the girl Dinah, with interest thereon, and there may be an account taken, if the parties desire it, whether the said administrator has assets enough to pay it.

The reasons assigned for the liability of the defendant George Allen, will apply with equal force to the defendant Thomas H. Threadgill, so as to make him liable for the sum (to wit, $562,50) for which he sold the slave Will, and for interest on that sum. It does not appear from his answer, or

the proofs, that he has in his hands any other assets of the estate, unless his taking the slave Edmund into South Carolina and hiring him out there for his father, amounts, in the view of this Court, to his having him in possession. The only testimony in relation to this slave is derived from the defendant's answer. He says that his brother Joseph was carrying the slave into South Carolina, when, overtaking him, he sent him back, and carried the slave on himself, and hired him out in that country, "his father being in a paralytical condition, and unable to attend to his business." We think that, under these circumstances, he must be held responsible for the slave or his value, and his hires; as to which there must be an account, if the parties desire it.

The extent of the liability of the defendant Gideon B. Threadgill alone remains to be considered. He alleges, that at the sale made by the executor in 1842, he bought, at a fair price, and paid for the slaves Keziah, Tony and Laura, but he has not furnished us with any proof of such payment. Standing in the relation which he did to the executor, who was very intemperate and insolvent, or fast becoming so, it was incumbent upon him to prove that the sale was fair, and that he purchased fairly and paid the price. *Satterwhite* v. *Hicks*, Bus. Rep. 105. In the absence of such proof we must hold him responsible for the value of these slaves. He cannot be held liable for Jenny, nor for Smiley and her children, because the testimony shows that he purchased the first of sheriff White, and paid him for her, and he sold the others for sheriff Boggan, and paid him the proceeds. Nor can he be made liable for the price of Charles, who was sold by Thomas H. Threadgill, and the price (to wit, $500) paid to Young H. Allen and Hull Threadgill, who, it was proved, had a prior lien upon him.

The plaintiffs then may have a decree against this defendant for the value of the slaves Keziah, Tony, and Laura; to ascertain which, there must be a reference. This defendant will not be allowed the $100 for which he gave his bond to the plaintiffs' agent, as it appears it has never been paid. His

counsel said, on argument, that it had, or, at least, that the plaintiffs had a judgment for it. In this he was mistaken, as, upon a closer inspection of the exhibit, it appears that the judgment was set aside and a new trial granted, and that, afterwards, the plaintiff was non-suited. The other defendant, Wilson Allen, as administrator of George Allen, and Thomas H. Threadgill, will be allowed the sums which they paid the agent.

PER CURIAM. Decree accordingly.

HENRY W. PERRY, *trustee, and others, against* JAMES S. YARBROUGH.

Where a principal debtor, with money in his pocket, suffers the property of his surety to be sold, and himself becomes the purchaser, it is doubtful whether, *even at law*, the sale as against the surety, is not a mere nullity; but, certainly, in a Court of Equity, such a purchaser will not be allowed to set up a title thus acquired against his surety.

CAUSE removed from the Court of Equity of Franklin County.

The facts of this case are so fully set forth in the opinion of the Court, that it becomes unnecessary to state them here.

Winston, Sen'r., and *Gilliam*, for plaintiffs.
Moore and *G. W. Haywood*, for defendant.

PEARSON, J. On the 14th of August, 1846, Samuel Perry executed a deed, whereby, in consideration of natural love, he conveyed to his daughter, Mary B. Perry, wife of Gustin Perry, a negro slave, Isaac, for the separate use and maintenance of the said Mary, during her life, and after her death, to the heirs of her body. At Spring Term, 1847, of the Court of Equity of Franklin County, a bill was filed by the said Mary B., and Gustin Perry, Jun'r., Joseph Perry, and Eliza Perry, infant children of the said Mary B., by their next friend

Henry W. Perry, (the plaintiff in this suit,) against Gustin Perry, setting out the deed executed by Samuel Perry, and praying that a trustee might be appoined, to whom the said Gustin, who had *jure mariti* acquired the legal title to the slave Isaac, might be decreed to convey upon the trusts declared in the said deed. Gustin Perry answered at the same term, and such proceedings were had that a decree was then made, that the said Gustin should convey, by a proper deed, the said slave to Henry W. Perry, in trust, for the separate use and maintenance of the said Mary B. for life, and after her death, in trust for such of her children as should then be living; and if any child should be dead, leaving issue, such issue to take the share of the deceased parent.

On the 1*st of October*, 1847, Gustin Perry executed a deed conveying the slave to Henry W. Perry, for the use of the said Mary B. and her children, in pursuance of the decree.

After the decree, and before the execution of the deed, one Harris recovered judgment against Gustin Perry and others, for $———, and sued out execution, under which the slave was sold as the property of Gustin Perry, and purchased by the defendant, to whom he was conveyed by the officer, and possession taken accordingly. The defendant, at the time he purchased, had express notice of the claim of Mary B. and her children, and of the decree which had been made in their favour.

The prayer of the bill is, that the defendant may convey to the plaintiff, as trustee, according to the decree, and account for the hires and profits.

The answer alleges that, at the Spring Term, 1846, of the Superior Court of Law for Caswell County, one Richard Smith recovered a judgment against Gustin Perry, Samuel Perry, S. Broddie, and N. Patterson, upon which execution issued, *tested of said term* under which the slave was sold as the property of Samuel Perry, and was purchased and paid for by Gustin Perry, through an agent, and was by him taken into possession, and kept until he was sold as the property of said Gustin, and purchased by the defendant under the exe-

cution in favor of Harris against Gustin Perry and others, referred to in the bill.

Samuel Perry, Broddie and Patterson, were the sureties of Gustin Perry in the debt upon which the judgment was taken by Smith in Caswell Superior Court.

The question is, what right, if any, did Gustin Perry acquire by buying and paying for the slave under the execution against himself, Samuel Perry and others, his sureties?

Upon the reasoning in *Morris* v. *Allen*, 10 Ire. Rep. 203, *Dobson* v. *Erwin*, 1 Dev. and Bat. Rep. 569, it may be doubted whether Gustin Perry, as against Samuel Perry, acquired anything by his purchase, and whether it would not, *even at law*, be treated as a nullity, so as to leave the title in Samuel Perry. The money of Gustin Perry was applied to the payment of his own debt, and in the language of the Court in *Dobson* v. *Erwin*, "there was, in truth, no price and no sale; the sale which the creditor and sheriff thought they were making was a mere fiction. It is a perversion of the process of the law, forbidden alike by it and common honesty,—the making a sale under it to raise money which the debtor already had, and which he applied to the satisfaction of that very debt."

But suppose the legal title did pass to Gustin Perry by force of the sheriff's sale; without looking for authority, upon the reason of the thing it is manifest, that in Equity, he will be treated as having acquired the title for Samuel Perry. A principal debtor, with *money in his pocket*, suffers the property of his surety to be sold under execution, and becomes himself the purchaser! Can he, in conscience, set up any title to the property? Can he, with the same money, pay off his debt and acquire the property of his surety? The question is too plain for argument.

A purchaser at execution sale acquires only the interest of the debtor, and takes the property subject to all the equities to which it was liable in his hands; under the deed of Samuel Perry, Mary B. Perry succeeded to all of his rights; it follows that the defendant is bound to make title according to

the decree against Gustin Perry, and to account for the hires and profits.

For the purpose of this decision, we have assumed that the judgment of Smith against Gustin Perry and others, in Caswell Superior Court, was also against Samuel Perry; because, from the view we take of the case, it is not necessary to advert to the fact that the writ was returned *non est inventus*, and a *nol. pros.* entered as to him; or to the fact that the judgment, as to him, was vacated at a subsequent term.

It was insisted at the hearing, that Mary B. Perry and her children, the *cestuis que trust* were necessary parties, and that the suit could not be carried on in the name of the trustee alone, as it concerned the trust-fund. We incline to the opinion that the *cestuis que trust* should be parties; but as they are mere formal parties, for the purpose of concluding them by the decree, and the account which will be ordered, and as the amendment does not at all affect the merits, and does not make any other alteration in the proceedings necessary, it is allowed to be made in this Court without costs, under the recent act.

PER CURIAM. Decree for plaintiffs.

RAIFORD KENT *against* BRITTAN H. BOTTOMS.

Where a person was charged in a bill with concealing or destroying a deed, made by him to his mother-in-law, with whom he was residing when she died, and in his answer admitted that he had made such a deed, but said that he did not know what had become of it; that it was only taken as a security for money, that he had paid money and done services to the amount of the sum advanced, and that he believed that she had destroyed the deed, that his title might be revived; *Held* that the *onus* of proving these allegations rested with the defendant.

Under ch. 33, sec. 17, Rev. Code, a bill can be amended, as to parties, in the Supreme Court.

CAUSE removed from the Court of Equity of Nash county.

The facts of the case are set forth so fully in the opinion of the Court, that it is unnecessary to state them here.

Miller and *Lewis*, for plaintiff.
Moore and *Dortch*, for defendant.

BATTLE, J. The material allegations upon which the plaintiff founds his claim for relief, are, that he is the only legitimate child and heir-at-law of Mourning Kent, late of Nash county; that three or four years before her death, the defendant, who had married one of her illegitimate daughters, purchased and took an absolute deed, to himself, for a certain tract of land, lying in the said county, and called the Everett tract; but being unable to pay for it himself, he procured his mother-in-law to sell a negro girl, belonging to her, and applied a part of the proceeds as a payment for the land; that before she consented to do so, she required him to execute to her an absolute deed for the same land; and that some time before or after her death, he had got the said deed into his possession and had concealed or destroyed it, the same never having been registered, and that as to said land she had died intestate. The prayer is, that the deed, if in existence, may be produced and registered, or if lost or destroyed, that he may execute a new deed and surrender the land, and account for the rents and profits. There is also, the usual prayer for general relief. The defendant admits the purchase of the tract of land in question, and that he took an absolute deed therefor, to himself, from the vendor; that the purchase-money was paid out of the proceeds of a negro girl belonging to the plaintiff's mother, and that he executed an absolute deed to her for the same land; but he insists that the deed was intended to stand as a security only until he could pay her the money, or perform such offices of kindness and attention to her as would, in her estimation, be a satisfaction for the land; that he had paid for her in discharge of debts, which she owed, about the sum of $130 in money, and had, by attending to her business, and otherwise, so satisfied her

for the land, that he believes she had destroyed the deed which he executed to her; that at all events, she had repeatedly expressed herself satisfied; had disclaimed having any title to the land, and had spoken of it as his, the defendant's land, and that he had never found among her papers, nor seen any where else after her death, the deed in question. The answer denies that the plaintiff is the sole legitimate child and heir of his mother; on the contrary, it asserts that the wife of the defendant is also a legitimate child of the same mother. The plaintiff has filed a replication to the answer, and the cause comes on to be heard upon the pleadings and proofs.

In examining and deciding upon the effect of the testimony, in relation to the destruction of the deed from the defendant to his mother-in-law, it must be borne in mind that the burden of proof is upon him. He admits that it was once in existence, and alleges, in his defense, that she intentionally destroyed it for the purpose of preventing its being an incumbrance upon his title to the land. The *onus* of proof is also upon him to show that the deed was intended as a mere security for money, instead of being what it purported to be, an absolute conveyance of the title to her. In both respects he has entirely failed to sustain his case. Besides proof, not very clear, of her declaration, there is no evidence of facts *dehors* the deed, inconsistent with the idea of an absolute conveyance. It appears, from the testimony, that the defendant and his family lived with his mother-in-law upon another tract of land, which belonged to her, and there is no proof to show, that by his cultivation of it himself, or by receipt of rent from his tenants, he claimed the tract of land in dispute, adversely to her, during her life-time. The proof of the intentional destruction of the deed, by her, is equally defective. One witness only, Elizabeth Williams, says that she saw the old lady about three or four years before her death burn some papers, but of what kind they were, she does not say. This testimony, insufficient as it is, to prove the destruction of the deed, is rendered, if possible, still more valueless, by that of

Peter Eatman, who states that about a year before Mrs. Kent's death, he heard her say, that the right to the land was under the key, or keys, which she pulled out of her pocket. The defendant has failed, again, in proving that he had paid any money for his mother-in-law, or had done any thing for her in the way of services and attention, amounting to satisfaction of her claim against him. He has not shown that he ever paid a single debt for her, nor that his wife ever did more for her, in kindness and attention, than was sufficient to repay her for permitting them to live with her, in her own house, on her own land. In this state of the proofs, the plaintiff is entitled to have the deed in question produced, in order that it may be proved and registered, or to have another deed of the same import executed by the defendant.

Upon another part of the case, we think the defendant has been more successful in his proofs. The weight of the testimony is so far in favor of the legitimacy of his wife, that we think she ought to be made a party to the cause, as she is, if legitimate, directly interested in the subject-matter of the suit. We will not dismiss the bill for this cause, but direct it to stand over for further directions, in order that the plaintiff may take the proper steps for making her a party; *Hodges* v. *Hodges*, 2 Dev. and Bat. Eq. 72; *Watson* v. *Ogburn*, Ibid. 353; *Simpson* v. *King*, 1 Ire. Eq. 14; Story's Eq. Pl. secs. 236, 541, 885. This, we think, may be done in this Court, under the recent enactment in the Rev. Code, ch. 33, sec. 17. We will, after such amendment, direct further enquiry as to the legitimacy of the defendant's wife, with particular instructions to the commissioner to ascertain, as near as he can, in what year she was born, and at what time Mrs. Annie Lewis, wife of Wright Lewis, another daughter of Mrs. Kent, was born, and also to enquire and report such other facts and circumstances as either party may desire.

PER CURIAM. Decree accordingly.

WILLIAM A. BLOUNT *and others against* JAMES ROBESON, *administrator, cum. tes. an.*

One who has undertaken, in a covenant, to act as an agent to explore, survey and sell, a body of lands, and account at stated periods, and who took from his principal a power of attorney enabling him to make title, cannot, without taking steps to put an end to the trust, purchase *for himself* another title to the land thus entrusted to him.

The death of the principal in the above case, after the agent had bid off the land at a sheriff's sale, although it revoked the power of attorney to sell, did not affect the agent's duty under the covenant, and enable him to take an adversary position towards the heirs.

A sheriff's deed accompanied with possession, will operate as color of title to create a bar, only from the time of its actual execution, and will not relate back, for such a purpose, to the time of the sheriff's auction.

Where an act admits of two constructions, the one rightful, and the other wrongful, the rightful character will be imputed to it, and the party will not be heard to aver that he acted wrongfully, or be allowed to take advantage of his own wrong.

Where a confidential relation is established between parties, either by act of law, or by agreement, the rights incident to that relation continue until the relation is put an end to, and time will not operate as a bar during the existence of such relation.

CAUSE removed from the Court of Equity of Beaufort County.

The plaintiffs are the children and grand-children (heirs-at-law) of John Gray Blount. On the 24th day of January, 1806, Benjamin Smith being seized in fee of a certain large tract of land, in the County of Brunswick, containing about 60,000 acres, by deed of bargain and sale of that date, conveyed the same to the said Blount. On the 23rd of October, 1819, the said Blount entered into a certain covenant in writing with the defendant's testator, James J. McKay, duly signed, sealed and delivered by the said parties, in which, among other things, it was covenanted and agreed, that whereas the "said John Gray Blount has claim under a deed from Benjamin Smith for 60,000 acres of land in the Green Swamp, which he is disposed to sell, and hath this day executed to

the said James J. McKay a power of attorney to sell and convey all his right, title and interest in the said 60,000 acres of land, or any part thereof, and to warrant and defend the same against him and his heirs and assigns, and all persons claiming from, by and under them: Now, that no dispute shall arise between the said Blount and McKay with respect to any charge for transacting the said business, it is stipulated and agreed between them that the said James J. McKay shall, at his own expense, examine the said Blount's title to said land, explore, sell and convey, the same, or any part thereof, taking care to secure the purchase money for the same by bond and good security, or bond, and security on the land, as he may deem most advisable, and make return to the said John Gray Blount, in the month of February, of all sales and payments towards the same, and account with the said John Gray Blount, his heirs, executors, &c., for his one-half of the said sales; and the said John Gray Blount shall allow to the said James J. McKay, as a full compensation for all his expenses and trouble, and all individual charges relative thereto, one-half the gross sales of all the lands so sold by the said McKay."

At the time of the execution of this covenant, Blount delivered to McKay the deed of Benjamin Smith, made to him, which had been duly proved before a Judge of the Superior Court, and was subsequently registered. McKay resided in the County of Bladen, not far from these lands, and Blount in the County of Beaufort, at a considerable distance from them. At some time subsequent to this agreement, McKay put tenants on different portions of the land, but he made no sales before the one in 1855, set forth below, and he made no communication, in respect to the land, to Blount, in his life-time, nor to his representatives, after his death. He retained the title papers of Blount until July, in the year 1853, when he delivered them to one of his heirs.

In 1832 John Gray Blount died, having made a last will and testament, wherein he devised the land in question to the plaintiffs, who are also his heirs-at-law.

In 1853 McKay sold the land in question to a company composed of Doctrine W. Bagley and others, at the price of $10,000.

The plaintiffs allege, in their bill, that they demanded of the said McKay, in his life-time, one-half of the gross amount for which the said land was sold, and that he refused to pay the same, or in anywise to account with the plaintiffs for his administration of the trust created by the said covenant, asserting an exclusive title in himself for the lands thus sold.

The bill was filed Spring Term, 1854. The prayer is for an account, and for general relief.

The defendant answered, admitting the covenant as above set forth, but insisted that, by the death of Blount, in 1832, the power of attorney was revoked, and that, from that time, the confidential relation between his intestate and Blount was dissolved and put an end to, and that he was thus put in a position to assert an adverse possession. He adduced, as a color of title, a deed from the sheriff of Brunswick County to him, made the 11th of June, 1845, upon a sale made by him to McKay on the first Monday in June, 1830, under an execution issuing from the County Court of Brunswick, on a judgment in favor of one Robert Hare against Mary Grimke, devisee of Benjamin Smith, and he relied on the possession of himself, by his tenants, for more than seven years previously to the bringing of this suit. The defendant relied on the same facts by the way of plea, which were specially pleaded as a bar to the plaintiffs' right to recover. The sheriff's deed to McKay was filed as an exhibit.

Replication, commission and proofs; and the cause being set down, was sent to this Court for trial.

Rodman, for plaintiffs.

Donnell, for defendant.

PEARSON, J. In 1806, Benjamin Smith, having title to a large body of land in the County of Brunswick, (about 60,000

acres,) for a valuable consideration, conveyed the same to John G. Blount, the ancestor of the plaintiffs.

In 1819, Blount and James J. McKay, the intestate of the defendant, executed a covenant by which McKay agreed, "at his own expense, to examine the title of Blount to the said land, explore, sell and convey, the same, or any part thereof, upon such terms as he might deem advisable, and make return to the said Blount in the month of February, (in each and every year,) of all sales and payments towards the same, and *account with the said Blount, his heirs and executors*, &c., for his one-half of said sales," deducting expenses. Blount, at the same time, executed to McKay a power of attorney to make title, with warranty, to the land, in such parts or parcels thereof, as he might, from time to time, make sale of.

In 1830 the sheriff of Brunswick County sold the land under an execution upon a judgment in favor of Robert Hare against Mary Grimke, the devisee of the said Benjamin Smith, and McKay became the purchaser thereof at about the price of $49.

In 1832 Blount died, leaving the plaintiffs his heirs-at-law and devisees.

In 1845 the sheriff of Brunswick executed a deed to McKay for the land.

In 1853 McKay sold the land to one Bagley and others, for $10,000, and soon thereafter died.

McKay had put tenants on the land, who continued in possession for more than seven years before his sale to Bagley.

The bill was filed at Spring Term, 1854, alleging these facts, and praying that the defendant, as administrator of McKay, should account for the one-half of the amount of sales according to the covenant executed by Blount and McKay.

The defendant in his answer insists, admitting the facts as above stated, that, by the death of Blount, the power of attorney was revoked, and the previous relation existing between the parties thereby terminated; that under the sheriff's deed

as color of title, and the possession held under it, his intestate had acquired title, and he insists that he is protected by the statute of limitations and the lapse of time. He avers that his intestate, in the latter part of his life-time, claimed the land as his own, and sold it on his own account, and not on account of the plaintiffs, or in pursuance of the covenant and power of attorney. The parties lived a considerable distance from each other, and there was no communication between them in reference to the land, until after the sale, when defendant's intestate delivered up the deed of Benjamin Smith to Blount, which deed he had received at the time the covenant was executed, and had retained ever since, and refused to pay over any portion of the proceeds of the sale.

It is proved by the testimony of *Mr. Biggs*, that McKay sold the land as his own, and did not profess to act under the covenant and power of attorney. Mr. Biggs says that, "during the negotiation for the purchase of the land, General McKay alluded to Blount's claim, and showed him the covenant and power of attorney, and also the deed of Smith to Blount, and enquired who were the heirs of Blount," and "seemed to fear that if he completed the trade as proposed, he might have some difficulty with them."

The mere statement of the case is sufficient to show that the plaintiffs are entitled to the relief prayed for, unless their right is barred by the statute of limitations, or lost by the lapse of time. Mr. McKay, in his conversation with Mr. Biggs, *felt this*. He feared if he completed the trade as proposed, that he might have some difficulty with the heirs of Blount.

The purchase of McKay, at the sheriff's sale in 1830, was in Blount's life-time; the covenant and power of attorney were then in full force and effect, and of course, McKay could not thereby acquire any title in himself adverse to that of Blount. The purchase is referrable to the relation then existing between the parties, as a mode of removing an incumbrance, or quieting the title of Blount, at a small expense. This results from a principle familiar both at Law and Equi-

ty, i. e., when an act admits of two constructions, one rightful and the other wrongful, the rightful character will be imputed to the act, and the party will not be heard to aver that he acted wrongfully, or be allowed to take advantage of his own wrong.

So, the fact that McKay put tenants on the land, for the purpose of holding possession, is attributable to the relation between the parties; and although McKay, in 1845, took the deed from the sheriff in his own name, still the possession of these tenants cannot have the effect of defeating the title of Blount, which was good, and of ripening a bad title, which McKay, at that time, saw proper to take in his own name. It may be that he took this deed in his own name as a matter of convenience, not knowing who were the heirs of Blount. Such would be the natural inference, but for subsequent events.

Admit, however, that he had then formed the purpose of defeating the right of Blount's heirs, and to that end, took the deed in his own name, and then, for the first time, put tenants on the land, (although it does not distinctly appear, either from the pleadings or proofs, when possession was taken by these tenants,) still it required seven years' possession, under this deed as color, to perfect the title, and devest the legal title of the heirs. This brings it down to 1852, before McKay had the legal title, and at that time the heirs having, as is supposed, lost the legal title, would be forced into a Court of Equity, to assert the right of converting him into a trustee. This bill was filed within two years thereafter, so their right in Equity was not barred, and the question is, were they entitled, in Equity, to convert him into a trustee?

We think their equity very clear. By the death of Blount the power of attorney to McKay was revoked, but the *covenant*, executed by the parties, still subsisted, and the confidential relation, created thereby, continued. It is true, McKay had made no *returns* of *sales* and *payments*, and had held no communication, either with Blount or his heirs, for a long space of time; but there were no returns of sales and pay-

ments to make, as he had effected no sales, and the obligation, on the part of McKay, to account with Blount, his *heirs* and *executors*, for the one-half of the proceeds of sales, was still in full force, and had never been released, satisfied, or abandoned. It is familiar doctrine, acted upon both at Law and in Equity, that when a confidential relation is established between parties, either by act of law, as in the case of coparceners, tenants in common, &c., or by agreement of the parties as in case of a trust, or agency, the rights incident to that relation, continue until the relation is put an end to, and the statute of limitations and lapse of time, have no application. *Northcott* v. *Casper*, 6 Ire. Eq. Rep. 303; Adams' Equity.

The plaintiffs' equity, therefore, is not barred by the statute of limitations, or lost by the lapse of time, even upon the supposition that McKay had a right to assume an adversary position, and acquire title for himself under the sheriff's deed.

But we wish not to be understood as conceding that point. A lessee for years, after the expiration of the time, is not at liberty to turn upon his landlord and hold adversely, until he has first *surrendered* up the possession acquired by means of the lease. A bailee cannot, by an act of his own, make himself a wrong-doer, so as to acquire any rights incident to an adverse possession. The bailor may, at his election, treat him as a wrong-doer, but the bailee cannot make the averment, for no man shall take advantage of his own wrong.

It is upon this principle that the doctrine of "tenancy by sufferance" is based. After the determination of the estate, the tenant holding over, is still considered as a *tenant*, and can acquire no rights upon the footing of an adverse possession; he is required first to give back the possession, and put the landlord *in statu quo*.

Upon this principle, which is universal, (for it is one of common honesty,) McKay could acquire no rights by means of his deed and the possession of his tenants, until he had put an end to the confidential relation, created between himself and Blount, by force of the covenant. He took no steps for this purpose; on the contrary, he retained the title papers, allow-

ed the covenant to remain outstanding, and had it in his power at any time when he effected a sale, although the power of attorney was revoked by Blount's death, to compel Blount's heirs to make title to the purchaser, and divide the proceeds of sale according to the stipulation of the covenant. The idea that he, by remaining inactive in reference to Blount and his heirs, and making no communication to them, from 1819 to 1853, which he was under a positive obligation to do during that time, could contrive to acquire title in himself, and thereby have a right, when he did effect a sale, to appropriate the whole of the proceeds to himself, and repudiate his obligation to Blount, cannot, for one moment, be entertained, there being no allegation or proof, that Blount's title was not, in the first instance, good. It does not lie in the mouth of McKay or his representatives to say to the heirs of Blount, "You have forfeited your rights by your laches." Whose fault was it? Whose duty was it to make returns, and communicate, from time to time, with Blount and with his heirs?

PER CURIAM. There will be a decree for the plaintiffs.

EZEKIEL COLLETT *against* ALLEN M. FRAZIER, *administrator.*

Where the vendor of a slave, through mistake, surprise and ignorance, and without consideration, inserted in the bill of sale, a release of all the purchase-money, when he had only received a part, he is entitled to relief in Equity.

Where a person, on his death-bed, said to a bystander, he owed so much to the plaintiff, (mentioning the sum) as a balance for certain slaves, which he had theretofore bought, and that he wished it paid, it was *Held* a sufficient acknowledgment of the debt, to take it out of the statute of limitations.

CAUSE removed from the Court of Equity of Randolph county.

The plaintiff having a claim, under the will of his father, to one-fifth of a family of slaves, which had been bequeathed to him and four other brothers, to be possessed when the young-

est brother, Washington, should come of age, sold the same to his brother Ezekiel, the defendant's testator, for $350, and made a bill of sale, in the ordinary form, for his share of the property, in which was contained an acknowledgment that he had received the purchase-money and a release for the whole amount.

The plaintiff, in his bill (to which there was an amended bill) alleges, that he never received but one hundred dollars of the sum thus released; that being very poor and much in need of money, while his brother Washington was still under twenty-one years of age, he sold his interest in the property, which had been bequeathed to him by his father, to his brother Ezekiel for $350, and made the bill of sale as above stated; that on the day when he made the bill of sale, Ezekiel was to have paid him the hundred dollars and given his note for $250; that when they met for the purpose of concluding the bargain, Ezekiel said he had been disappointed in getting money, and therefore was not able to comply with his part of the agreement; he insisted, however, on plaintiff's executing the bill of sale, and by promising, in a few days, to pay the money and give his note as agreed, he was prevailed on to do so; that, shortly afterwards, he paid him the one hundred dollars, but they disagreeing about the amount for which the note was to be made, the plaintiff insisting that it was to be for $250, and his brother that it was to be for only $200, no note was ever given. The matter remained so until after three years had expired, but that the defendant's testator, within the three years before the bringing of this suit, had distinctly acknowledged the existence of the debt, and had promised to pay it. He particularly relies upon an acknowledgement and promise made in his last illness, a few days before his death, which was within one year before this suit was brought. The plaintiff gives as a reason for appealing to the jurisdiction of the Court of Equity, that if he had sued at law he would have been barred and estopped by his acknowledgment of payment and the release in the bill of sale, which he had given to his brother; that that acknowledge-

ment was inserted from mistake, ignorance, and a misapprehension of its effect upon his rights.

The prayer is for the payment of the balance due him upon the original contract for the sale of his interest in the slaves.

The defendant, who was sued as administrator with the will annexed, answered and denied the allegations contained in the bill. He also relied on the statute of limitations.

There were replication and proofs; and the cause being set down for hearing, was sent to this Court for trial.

Morehead and *Gorrell*, for plaintiff.

Bryan, for the defendant, cited *Milton* v. *Hogue*, 4 Ire. Eq. 415, insisting that the allegations in the amended bill were contradictory to those of plaintiff's original bill, and that, therefore, the Court could make no decree in his favor.

BATTLE, J. We do not find any such contradiction between the allegations in the original and amended bill, as is insisted on by the counsel for the defendant. There are, indeed, some omissions in the original which are supplied by the statements in the amended bill; for instance, in the original bill the slaves in which the plaintiff sets up an interest under his father's will, are spoken of as a "family of negroes," while in the amended bill, he gives, as an extract from the will, the clause in which the negroes are named. In the original, neither the death of his father, nor of the defendant's testator, leaving wills which were duly admitted to probate, nor the qualification of the defendant as administrator *cum testamento annexo* of Samuel Collett, are distinctly and positively averred; but in the amended bill these omissions are supplied. The case of *Milton* v. *Hogue*, 4 Ire. Eq. 415, referred to by the counsel, does not, therefore, stand in the way of the plaintiff's claim to relief, if he be otherwise entitled to it.

The ground upon which the plaintiff bases his title to relief in Equity, is admitted. See *Crawley* v. *Timberlake*, 1 Ire. Eq. Rep. 346. The only difficulties which he has to encounter

are the proofs and the statute of limitations. The defendant cannot resist the force of the proofs that his intestate took a bill of sale for the plaintiff's interest in the slaves in question, in which there was inserted an acquittance for the purchase-money, though it was not then all paid. The main reliance for defeating the recovery is the statute of limitations; this, the plaintiff admits, would bar him, but for distinct acknowledgements of the debt, and promises to pay it, made by the testator within less than three years before the bill was filed. Upon this part of the case, too, the proofs are clear and conclusive. The testator died in the month of April, 1849, and the bill was filed in 1851. While on his death-bed, and only a few days before his death, the testator admitted to his brother John that he still owed the plaintiff for the negroes, and said that John knew how much it was. John says, in his deposition, that he did not know how much the debt then was, but that, in 1841, when the parties attempted to settle, it was $250. The day before he died he told his sister, Mrs. Leach, that he owed the plaintiff a balance of $80 on the same debt, with some interest, which would make it amount to about $100; and that he wanted it paid. Here, then, is a distinct acknowledgement of a certain debt, if not a positive promise to pay it. This is clearly sufficient, according to all the authorities, to remove the bar of the statute; the court of equity, in this respect, following the rule in the courts of law. There is some other testimony of acknowledgements made at other times, which tend to corroborate the statements of the witnesses to whom we have particularly referred. We have not overlooked the testimony introduced for the defendant. It shows that the plaintiff, at different times, and to different persons, admitted that his brother, the testator, owed him nothing, while at other times, to one or more of the same witnesses, he insisted that his brother was justly indebted to him for the slaves. From the circumstances under which the admissions were made, it is manifest, either that the plaintiff was not serious in making them, or that he did it to avoid the payment of his taxes, or some other just claim about to

be made upon him. We cannot, therefore, give to them the effect of disproving the testimony of the solemn declarations made by the defendant's testator on his death-bed. Our conclusion is, that the plaintiff is entitled to a decree for $80, with interest thereon from the year 1841. As assets in the hands of the defendant have neither been alleged in the bill nor stated in the answer, there must be a reference, if the parties desire it, to ascertain whether any, and if any, what amount, is in the hands of the defendant, liable to the plaintiff's recovery.

PER CURIAM. Decree accordingly.

GEORGE SCARLETT *against* HENRY H. HUNTER.

In Equity, time is not of the essence of a contract for the payment of money.

Where there is a contract for the sale of land, the vendee is considered, in Equity, as the owner, and the vendor retains the title as security for the purchase-money.

Where the vendee is let into possession, it is taken for granted that each party is satisfied, until one or the other moves towards the execution of the contract by demanding a specific performance, and neither party, under such circumstances, has a right to insist on a lapse of time as a bar to a specific performance.

CAUSE removed from the Court of Equity of Mecklenburg County.

On the 25th of July, 1849, the defendant entered into a penal bond for five hundred dollars, payable to the plaintiff, with the following condition attached: "The above obligation is such that the said Hunter is to make a right and title to George Scarlett to thirty-four acres of land, whereon the said Scarlett now lives, joining the lands of Harvy Young and others, when the said Scarlett pays said Henry H. Hunter the sum of sixty-eight dollars, with interest from the date—the money to be paid on the 25th of December, 1850—then this

obligation to be void, otherwise to remain in full force and virtue."

In the fall or winter of 1853, the plaintiff having been up to that time in possession of the land, tendered the principal and interest due up to that time, and demanded that he (defendant) should make him a title, which he refused to do; whereupon the plaintiff filed this bill in 1854. The prayer is for a specific performance on the payment of the purchase-money.

The defendant answered, denying the plaintiff's right to have the land after the 25th of December, 1850, and alleging that the plaintiff had abandoned the contract.

Replication, commissions and proofs. Cause set down for hearing and sent to this Court.

Wilson, for plaintiff.
Osborne, for defendant.

PEARSON, J. In Equity, time is not of the essence of a contract for the payment of money. Upon this principle, after the day of payment according to a condition, is passed at law, this Court gives "an equity of redemption" and treats the property as security. The right of redemption is not affected by a failure to make payment; for the mortgagee may rest satisfied with his security as long as he chooses, and when he wants his money he may compel payment within a reasonable time, or foreclose the equity of redemption. Mere inaction by the parties will not raise a presumption of abandonment of the right of redemption under twenty years, according to the doctrine in England, or ten years, under our statute, in case of land, although the mortgagee has been in possession.

Where there is a contract for the sale of land, the vendee is considered, in Equity, as the owner, and the vendor retains the title as security for the purchase-money. He may rest satisfied with this security as long as he chooses, and when he wants the money, he has the same right to compel payment by a bill for a specific performance, as the vendee has to call

for title. The right to have a specific performance is mutual, and when the vendee is let into possession, and continues in possession, as in our case, it is taken for granted that the parties are content to allow matters to remain in *statu quo*, until a movement is made by one side or the other. These principles are fully discussed in *Falls* v. *Carpenter*, 1 Dev. and Bat. Eq. 237, which is decisive of this case.

McGalliard v. *Aikin*, 2 Ire. Eq. 186, is not in point. That case was decided upon its peculiar circumstances; there was an unequivocal act of repudiation or abandonment on the part of the vendee. The contract was made in 1813; the vendee never took possession, and moved to the State of Alabama in 1833, without having performed a single one of the stipulations on his part. In 1838, after a lapse of twenty-five years, he assigns his interest under the contract. The Court refuse, under the special circumstances, to decree a specific performance at the instance of the assignee.

The plaintiff is entitled to a decree for a specific performance, upon the payment of the purchase-money and interest. He is also entitled to his costs, as the refusal of the defendant to perform his agreement, made it necessary to institute this proceeding.

PER CURIAM. Decree accordingly.

D. TAYLOR *and others against* TEMPE DAWSON *and another.*

The statute of limitations will protect a person holding possession under the legal title, if the conveyance take effect to pass the legal title, and make it necessary to convert the party into a trustee against his assent.

Where, *therefore*, a deed in trust was made to secure *bona fide* debts, one who purchased and took the trustee's title is protected by the statute of limitations, however fraudulently he may have acted in suppressing competition, and although he bought in the property for the trustor.

CAUSE removed from the Court of Equity of Edgecombe County.

John H. Dawson, being largely indebted to his mother, the defendant Tempe, and to the defendant Jos. J. Williams, a relation, for debts and liabilities taken up and paid by them, and being in failing circumstances, on the 17th of April, 1842, at the instance of the defendant Williams, made a deed of trust to John L. Hyman, conveying a large amount of property, consisting of a tract of land in Halifax County of 900 acres, also thirty-four slaves, twenty-two mules, five hundred and fifty hogs, besides horses, wagons, carts, plantation tools, household and kitchen furniture, twenty-five thousand pounds of pork and bacon, and various articles and commodities incident to the farming business, in trust, to secure to his mother, the said Tempe, and to the said J. J. Williams, debts to the amount of nearly nine thousand dollars, part of which were due to her, and part to J. J. Williams, and part to the two jointly, most of which had been on interest for a short time; also, to secure to Whitmel Kearney $1500 and interest, to Wm. K. A. Williams $896 with interest, and to Samuel Williams $727 with interest, making in all, without interest, nearly $12,000. These debts were *bona fide*. Besides these creditors, the said Dawson owed the plaintiffs the several debts set out in their bill, and other persons, none of whom were included in this or any other deed of trust. Besides this deed of trust, the said Dawson had executed another to Thomas Jones, dated 6th of April, 1842, containing four slaves and other property, to secure one of the same debts to Mr. Williams, and one to Mr. Jones, which it is not material should be more minutely noticed. These two deeds conveyed all the estate, real and personal, and everything of value which the said J. H. Dawson owned. On the 23rd of May following, the trustee, Hyman, made advertisement and sold all the property mentioned in the deed to him. There were not many persons present at the sale, and not many persons bid upon the property. An agent for the defendant, Mrs. Dawson, bid it all off at low prices, and the trustee afterwards

made her a formal and proper title to the same. The amount raised by this sale, together with what was raised by the other trustee, Jones, did not equal the debts provided for in the deed of trust by several thousand dollars. The other creditors secured in the deed of trust agreed with Mrs. Dawson and Mr. Williams that if they would become personally bound for their debts, these creditors would not compete with her at the sale under the trust. The arrangement was made, therefore, that if Mrs. Dawson should get the property, they were to give her time, and she was to take up these debts with her own notes, with Williams as surety; and on these terms they agreed not to bid against her, and did not so bid. The same agreement was made with some others of the persons present, whose debts were not included in the deed of trust. A general impression prevailed amongst the persons present that Mrs. Dawson was purchasing for the ease and benefit of her son. One of the terms of the sale proclaimed was that cash should be paid, and that Virginia money would be taken at a discount. All the property, after the sale, remained at the plantation where Mrs. Dawson and J. H. Dawson lived, (where the sale was made,) and was managed and controlled by the latter, until his death, in 1845. He sold such of the property as he wished, bought other property, directed the farming operations, sold the surplus, and collected the proceeds, all, as the agent, and in the name of his mother, Mrs. Tempe Dawson, but of which he rendered no account.

The prayer of the bill is for an account, and for payment of their debts out of the property so conveyed to the defendant Tempe Dawson, or any other property of J. H. Dawson, that may have come to her hands, and that they, and the other creditors of the said John H., have all such other and further relief as their case may require, &c.

The defendants answered, denying the allegations, and relying on the statute of limitations. There were replications and proofs; and the cause being set down for hearing, was sent to this Court.

Moore, for plaintiffs.

Bryan, for defendants.

PEARSON, J. The bill alleges that the debts for which the deed of trust to Hyman was executed were feigned and covinous, and on this ground that deed is impeached as fraudulent and void against creditors. Upon the argument, the plaintiffs' counsel admitted that all the debts secured by the deed of trust were justly due. This relieves it from impeachment, and it stands as a *bona fide* conveyance, the legal effect of which was to devest the title out of the debtor, John H. Dawson, and transfer it to Hyman. So, the plaintiffs' equity depends solely upon the alleged fraud in the subsequent sale under the deed.

This brings up the second ground upon which the plaintiffs seek to subject the property to the payment of their debts, to wit, that John H. Dawson and his mother, the defendant Tempe Dawson, contrived, by collusion, to get the control of the other debts secured in the deed of trust, and thereby suppressed bidding, so that she was enabled, at her own prices, to purchase every single article of the property—land, negroes, horses, ploughs, hoes, &c., that was sold by the trustee, and acquire the title, to the prejudice of the other creditors whose debts could have been made out of the surplus of the property that would have remained unsold after selling enough to pay the debts secured in the deed of trust, had the property not been sold at an under-value by reason of fraud between the mother and son, whereby it was contrived that she was to get the title and become the ostensible owner, so as to keep off the son's creditors, but was to let him enjoy and have the use of it.

We are satisfied, from the pleadings and proofs, that there was this collusion between the mother and son, and that the defendant Tempe became the purchaser, and took the property, with the understanding that she was to hold in secret trust for him, in fraud of his creditors.

There is proof that the other creditors secured in the deed of trust were assured that their debts would be paid, and so did not bid. Some of the other creditors, not secured in the trust, were also satisfied, and in that way bought off. But

the fact that there was no serious competition, so that the defendant Tempe bought every single article that was sold, "speaks for itself," and leaves no doubt as to the collusion. It is true she took the title from the trustee, and ostensibly went into possession, but the son managed the property, and dealt with it as he saw proper. The fact that he did so in her name, and as her agent, is too flimsy a pretext to deceive any one; and the wonder is, that the plaintiffs and other creditors did not take legal steps at once in order to subject the property to the payment of the debts. For some cause or other they neglected to do so for nearly ten years. The trustee's sale was in 1842, the bill was filed in 1851. Are not the plaintiffs within the operation of the maxim, *leges vigilantibus non dormientibus factæ sunt?* Or did they have their own pleasure to proceed at any distance of time?—in other words, is not their equity barred by the statute of limitations?

The plaintiffs' counsel insisted that, as there is an expressed trust by which the defendant Tempe holds the property for the use of the debtor, the scope of the bill is to subject this trust to the payment of debts, and as there was no adverse holding as between the trustee and *cestui que trust*, the statute of limitations does not apply.

The bill cannot be maintained in this view, for that trust was fraudulent and "not fit to be enforced in any court, either in favor of the party, his creditors, or any one else;" and the equity of the plaintiffs, as creditors, is to follow the property in the hands of the holder, and to convert her into a trustee on the ground of fraud. This principle is so well settled that it is unnecessary to discuss it. *Dobson* v. *Erwin*, 1 Dev. and Bat. 569; *Gowing* v. *Rich*, 1 Ire. 553; *Page* v. *Goodman*, 8 Ire. Eq. 20; *Rhem* v. *Tull*, 13 Ire. R. 57. So it is clear that the plaintiffs' equity is to convert the defendant Tempe into a trustee; and the question is, does the statute of limitations apply to a trust of that kind?

All trusts are either *by agreement of the parties*, as where there is a declaration to that effect, or where a trust is implied or presumed, as a resulting trust, or where one buys land and

has the title made to a third person; or *against the assent of the party who has the legal title*, he being converted into a trustee on the ground of fraud, either express, as in our case, or by construction, as where one takes a title from a trustee with notice, and the very many cases of constructive fraud to be met with in our books. In the former there is no adverse holding, or conflict of claim between the trustee and *cestui que trust:* the one holds, by agreement, the legal title for the other, who has the *estate in equity.* In the latter there is an adverse holding, and conflict of claim: the one holds the legal title for himself, or some third person, who has a privity, or is in collusion with him (as in our case) and the other has but a right in equity or chose in action. This distinction is discussed and explained in *Thompson* v. *Thompson*, 2 Jones' Rep. 432; *Nelson* v. *Hughes*, 2 Jones' Eq. 33, and "needs no further explication."

In *Edwards* v. *The University*, 1 Dev. and Bat. Eq. 325, it is settled upon principle, and upon authority of the cases, that the statute of limitations protects one who has the legal title and is sought to be converted into a trustee against his assent. Such is assumed to be settled doctrine in *Uzzle* v. *Wood*, 1 Jones' Eq. 227. The Court say, "When a trust is not created by agreement of the parties, but the person having the legal title is converted by a deeree into a trustee, on the ground of fraud, he may insist that his possession was adverse, and protect himself under the statute of limitations." The opinion then shows that the plaintiffs are within the saving in favor of the femes covert. In our case the attempt is to convert the defendant Tempe into a trustee, on the ground of fraud, and why may she not insist that her possession was adverse to the plaintiffs, and protect herself from their right in equity, by the statute of limitations?

The fact that, in our case, the title was transferred from the debtor by a valid conveyance, distinguishes it from *Hawkins* v. *Alston*, 4 Ire. Eq. 137, with which, in the argument, it was assumed to be "almost identical," for there the deed of

trust was successfully impeached as fraudulent, and is treated by the Court as void against creditors.

This distinction is a complete answer to the argument of the plaintiffs' counsel, and makes *Dobson* v. *Erwin*, 4 Dev. and Bat. 201, *Foster* v. *Woodfin*, 11 Ire. Rep. 359, *Pickett* v. *Pickett*, 3 Dev. Rep. 6, and the other cases cited, inapplicable.

It is true, as established by these cases, that when a debtor makes a fraudulent deed, it cannot avail the donee as against creditors, either in respect to the statute of limitations, or in any other way; because, as against them, *it is void and of no effect*. Upon the same principle, a parol gift of a slave cannot be used so as to call the statute of limitations into operation; because the gift is void and of no effect. In all these cases the title remains in the donor; but in our case, the deed of trust, being valid, passed the title from the debtor and brings it within the principle of another class of cases where the title has passed out of the debtor, or has never been in him; and it is held that the statute of Elizabeth and the Act of 1812, have no application, and the creditor is left to his redress in Equity, by following the fund, and converting the holder of the legal estate into a trustee. *Gowing* v. *Rich*, 1 Ire. 553; *Gentry* v. *Harper*, 2 Jones' Eq. 177; *Jimmerson* v. *Duncan*, 3 Jones' Rep. 538; in which last case *Dobson* v. *Erwin*, 1 Dev. and Bat. Rep. 569, *Morris* v. *Allen*, 10 Ire. Rep. 203, are distinguished, on the ground that the sale by the sheriff being successfully impeached for fraud between the debtor and purchaser, it was void, and the legal title still remained in the debtor.

Upon the same distinction, all that was said on the argument, in reference to a supposed analogy to the doctrine by which, at law, a creditor, under certain circumstances, is enabled to reach property in the hands of a fraudulent donee, by the fiction of his being executor *de son tort*, has no application; for that doctrine only applies where the conveyance is void, as against the creditor, so as to leave the title in the debtor, and upon his death, the fraudulent donee is assumed

to be, as against creditors, an intermeddler with the property of the deceased debtor. But if the property is transferred, so that even, as against creditors, the title is out of the debtor, of course, creditors cannot treat it as still being his, by force of any statute, in his life-time, or under the doctrine of executor *de son tort*, after his death.

The fallacy of the argument consists in not adverting to the distinction above referred to, and in treating our case as if the title still remained in John H. Dawson as against the plaintiff and his other creditors, notwithstanding the deed of trust to Hyman; whereas, the legal effect of that deed was to devest the title.

The plaintiffs' counsel next assumed the position, that the statute of limitations is only allowed to protect one, who is sought to be converted into a trustee, on the ground of *constructive fraud*, and not one who has been guilty of wilful, *intentional and actual fraud*, and he refers to cases where a deed has been procured by fraud or undue influence, and to *Logan* v. *Simmons*, 3 Ire. Eq. 487, where a wife had executed a deed of gift, on the eve of her marriage, in fraud of the husband's marital rights, and the fraudulent donee was converted into a trustee, and not allowed the protection of the statute of limitations, although he had been in possession for many years.

This position is opposed to principle and to the authorities. The reason why the statute applies to trusts, against the assent of the party, is, that there is an adverse holding and conflict of claim, and the party in possession being exposed to the suit of the other, the latter is required, by the policy of the statute of limitations, to assert his right within a limited time. This reason applies with as much force, when the fraud is wilful and actual, as when it is raised by construction. In *Uzzle* v. *Wood*, *supra*, the fraud was wilful, actual, and deliberately carried out. In *Edwards* v. *The University*, *supra*, the legal title was obtained by gross fraud, i. e., by perjury, of which the defendant had notice; for notice to the agent, is notice to the principal. In short, no case recognises the

distinction upon which this position is taken. The cases referred to, in the argument, do not involve the doctrine of trusts, but the *conveyances were void* on the ground of fraud, and being void, could have no effect upon the principle above referred to, of a parol gift of slaves, or a gift void as to creditors. So, in *Logan v. Simmons*, the deed of the wife was void, and of no effect against the husband. *Blanchard* v. *McLaughlin*, 2 Car. L. Reps. 402, has no bearing on the question. The statute of limitations is not alluded to. The statement is not made in reference to dates, and the death of the administrator took place pending the action. *Foscue* v. *Foscue*, 2 Ire. Eq. 321, is not in point. The limitation over, after the life-estate, was void, and the delivery of the negro by John E. Foscue, the executor, to the guardian of Dorcas Foscue, being without consideration, did not pass the title, but merely amounted to a bailment, and the Court hold that the executor and his fraudulent alienee (bailee) were liable.

Tate v. *Conner*, 2 Dev. Eq. 224, was a bill for the specific performance of a contract, and to convert the assignee of the vendee into a trustee, on the ground of notice. There had been a delay of *thirty-four* years, which raised a presumption that the plaintiff's equity was satisfied or abandoned, and on this, the decision is put. The opinion has a dictum to this effect: "The statute of limitations does not protect the defendants. The case does not come within it, the *relief going* on the vendor's being a trustee, in this Court, for the vendee. But equity, itself, respects time, when the trust is not express, because it is difficult to ascertain the truth of old transactions." This dictum proves too much; for the fraud of the purchaser from the vendee, was *only constructive* on the ground of notice. After full research, no case is found, where it is held that the statute of limitations does not protect the person, holding possession under the legal title, if the conveyance take effect, so as to pass the legal title, and make it necessary to convert the party into a trustee against his assent.

It will be declared to be the opinion of the Court, that the

plaintiffs' right, in Equity, is barred by the statute of limitations, and the adverse possession of the defendant Tempe. Bill dismissed.

PER CURIAM. Decree accordingly.

JAMES CORNER *and Sons against* GEO. S. STEVENSON *and another.*

In a bill by a creditor, against a trustee, to subject the resulting trust arising after the *cestuis que trust* named in the deed of trust are satisfied, need not make such *cestuis que trust* parties.

APPEAL from the Court of Equity of Craven county, his Honor, Judge MANLY, presiding.

The bill alleged that the defendant Richard N. Taylor, was indebted to the plaintiffs in the sum of $1763,77, for which they had taken judgment in Craven County Court; that previously to the rendition of this judgment, he made two deeds of trust to the other defendant, George S. Stevenson, conveying therein all his estate, of every kind, making no provision for the debt of the plaintiffs; that these conveyances provided, that unless the debts, therein named, should be paid before the 1st of January, 1856, it should be the duty of the trustee to convert the property into money and discharge the same.

The bill further alleges, that the property conveyed in the said deeds of trust, will be more than sufficient to satisfy the debts therein mentioned, if the same is fairly sold.

The plaintiffs say they have taken out execution on their judgment, and the same has been returned *nulla bona.*

They insist, that as the day is passed, until which it was allowed the trustee to forbear from selling, it has now become his duty to do so; and as their right to have satisfaction out of the estate of their debtor, is uncertain, and cannot be ascertained until this trust is closed, the prayer is, that the said trustee may be compelled to make sale of the property so con-

veyed to him, and, after paying the several debts, mentioned in the deeds, that he either pay the balance (if the property has been converted) to the satisfaction of their debt, or if there be property left, that the same be delivered up, to the end, that their execution may be satisfied out of it.

The defendants demurred to the bill, upon the ground, that the *cestuis que trust* were not made parties defendant to the bill. There was a joinder in demurrer, and the cause being set down for argument, was heard by his Honor, Judge MANLY, who over-ruled the demurrer, and ordered the defendants to answer over. From this decree the defendants prayed and obtained an appeal.

Donnell, for plaintiffs.
G. Greene, for defendants.

PEARSON, J. The object of the bill is to subject the resulting trust of the debtor to the payment of the plaintiffs' debt. In this question, the *cestuis que trust*, i. e., the creditors secured in the deed of trust, are not concerned, because the bill is framed upon the supposition that their debts are first to be paid, and only claims the balance, after making the deduction, as a fund applicable to the plaintiffs' debts. In taking the account, in order to ascertain the amount of the fund, the trustee represents the *cestuis que trust.*

PER CURIAM. The decretal order over-ruling the demurrer is affirmed.

TIRZA SPRINGS *and others against* WILLIAM HARVEN *and wife.*

1. Where words of inheritance are omitted in a deed, by the ignorance or mistake of the draftsman, a Court of Equity will supply them.
2. Where an executor sells lands, under a mistake of his power, and the proceeds are applied to the payment of debts, and the purchaser is evict-

ed by the heir-at-law, the land, in Equity, will be subjected to indemnify the purchaser to the extent to which it was liable to the debts—the purchaser being subrogated to the rights of the creditor.

CAUSE removed from the Court of Equity of Mecklenburg county.

On the 29th of April, 1829, Thomas Kendrick borrowed of Robert I. Dinkins $1200, and gave his note, payable one day after date; at the same time he executed to James Dinkins, as trustee, a deed in trust for four hundred and fifty acres of land, lying on Sugar Creek, in Mecklenburg county, to secure the repayment of the same. The deed provides, that if the money is not repaid on or before the first day of the next January, it shall be lawful for the trustee to sell the premises and make the money; but if it shall be paid on or before that day, the trustee is to reconvey the same to the said Thomas Kendrick and *his heirs* and *assigns*. To which is added, a general warranty of the land to the said James Dinkins and *his heirs;* but there are no words of inheritance in the conveying part of the deed; so that only an estate for the life of the trustee was, in law, conveyed to him. Thomas Kendrick died in October, 1829, and Stephen Fox administered on his estate. James Dinkins, the trustee, died in 1830, leaving a last will and testament, in which Lewis Dinkins was appointed executor, who duly qualified.

The money secured by the deed in trust not having been paid in the year 1830, Lewis Dinkins, supposing that he had power, as executor, to act as trustee, advertised and sold the premises at public auction, when the *cestui que trust*, Robert I. Dinkins, bought the same at the price of $1660. He receipted the note held on Kendrick in full, for principal and interest, amounting to $1321,80, paid the remainder of the purchase-money, to wit, $338,20, (which was paid over to Fox, the administrator of Kendrick,) and took a deed in fee simple from Lewis Dinkins, the executor.

In 1832, Robert I. Dinkins sold the land in question and made a deed in fee for the same to Benjamin Person,

who took immediate possession thereof, and on the 12th of December of the same year, sold the same, by a deed in fee simple, to Eli Springs, the ancestor of the plaintiffs, who took possession, which he continued until his death in 1833, and the plaintiff Tirza, as the widow, and her children, as heirs-at-law of the said Eli Springs, have continued the possession ever since.

In 1845, the defendants, William Harven and his wife, Margaret, brought an ejectment against the plaintiff Tirza Springs, and having recovered judgment therein, were about to enforce a writ of possession, and to turn the plaintiffs out of possession. The plaintiffs, in their bill, allege that the omission of words of inheritance, in the deed from Lewis Dinkins to Robert I. Dinkins, was made by the ignorance or mistake of the draftsman, for that it was fully intended to convey the land in fee simple.

The prayer is for a correction of this deed so as to meet the intention of the parties, and for an injunction to stay the execution of the writ of possession, also for general relief.

The defendants answered. There was replication to the answer, also commissions and proofs taken. The cause being set down for hearing was sent to this Court.

Boyden and *Wilson*, for plaintiffs.
Osborne, for defendants.

Pearson, J. We are entirely satisfied that it was the intention of the parties to convey a fee simple estate by the deed from Kendrick to James Dinkins, and that the word "heirs" was omitted by ignorance or mistake on the part of the draftsman. Besides the stipulation that, upon the payment of the $1200, Dinkins is to reconvey to Kendrick and *his heirs*, and the covenant of warranty by Kendrick and *his heirs* to Dinkins and *his heirs* and assigns, the object of the deed, and the purpose for which it was made, speak for themselves and show that Dinkins was to have the fee simple, with the power to sell and raise the money in the event of default on

the part of Kendrick. If this was the only difficulty in the way of the plaintiffs, they would have a clear equity for the conveyance and perpetual injunction as prayed for, under a familiar doctrine of this Court.

But the sale of Robert Dinkins was not made by James Dinkins, the trustee, but by Lewis Dinkins, his executor, who had no power to sell, and, of course, Robert Dinkins acquired no title to the land. To mend this difficulty, the plaintiffs must have recourse to another well established doctrine of this Court, namely, that of "substitution." According to this doctrine, the plaintiffs are not entitled to *the land*, but have an equity to be substituted to the place of the creditors of Kendrick, whose debts were paid with the money received from Lewis Dinkins, arising from the sale of the land. That money discharged debts for which the land was liable, and as the defendants take the land, of course they take it subject to the repayment of the money, by means of which the land was exonerated. *Scott* v. *Dunn*, 1 Dev. and Bat. Eq. 425, is in point as to the application of the principle, and also as to the mode of redress. There it is said, "The doctrine of substitution is not founded on contract, but on the principle of natural justice; unquestionably the devisees cannot be injured by the mistake of the executor as to the extent of his power over the land, but that mistake should not give them *unfair gains*."

In our case, supposing the mistake in reference to the omission of the word "heirs" to be corrected, a resulting trust would have descended to the defendant Margaret, as heir of Kendrick, subject to the payment of the debt secured by the deed, and also to the other debts of Kendrick, which his personal estate was not sufficient to satisfy. As to the debt secured by the deed, the plaintiffs' right to substitution is unquestionable; but in regard to the balance of the purchase-money paid by Robert Dinkins to Lewis Dinkins, and by the latter paid over to Fox, the administrator of Kendrick, the right of substitution will depend upon the fact whether that fund was liable for the payment of the other debts of Ken-

drick, and that will depend upon the sufficiency of the personal assets.

These facts can be ascertained by a reference, and there will be a decree for the sale of the land unless the defendants elect to pay said amount, with interest from the time of the sale, after deducting the rents and profits of the land. In other words, the land must stand as a security for the debts from which it has been exonorated, and thus, "while the *defendants are not injured* by the mistake of the executor as to the extent of his powers, that mistake will not be made use of *to give them unfair gains.*"

There must be a reference for an account, and the cause is retained for further directions.

PER CURIAM. Decree accordingly.

WILLIAM GILLIAM *and another, executors, against* LITTLEBERRY UNDERWOOD *and others.*

The general rule is, that where several persons are named in a legacy with the children of another, they will all take, *per capita*, an equal share; but where these children are several times mentioned as a class in other clauses of the same will, and equality requires that they should be so treated in the clause in question, they will be decreed to take *per stirpes.*

CAUSE removed from the Court of Equity of Northampton County.

The questions made in this case arise upon the following will of William Underwood, viz:

"1st. I give unto my daughter Lucy one tract of land that I bought of Beithen Sykes, and also one hundred dollars, to be paid out of my estate.

2nd. I give to my daughter Leesy one tract of land that I bought of James Wright.

3rd. I give to my son Berry Underwood three hundred and twenty dollars.

4th. I give to my son John Underwood's children three hundred and twenty dollars. The land I bought from Charity Mann to be sold. The negro man Joe is to have support out of my estate as long as he shall live. * * After settling up all of my just claims, if anything remains it shall be equally divided between my daughter Lucy, my son John's children, and my son Berry Underwood."

The executor filed a bill in this Court, alleging that a controversy had arisen between the legatees therein mentioned as to the proper construction of the residuary clause, the children of John insisting on taking an equal share each with Lucy and Berry, and they contending that they were only entitled to one share (a third) between them, and praying the direction of the Court as to his duty in the premises, viz., whether he should distribute the residue *per stirpes* or *per capita*.

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

Barnes, for plaintiffs.

No counsel appeared for defendants in this Court.

BATTLE, J. The only question which the pleadings present arises upon the construction of the residuary clause in the will of the plaintiffs' testator. The clause is in these words, "After settling up all my just claims, if anything remains it shall be equally divided between my daughter, Lucy my son John's children, and my son Berry Underwood."

The question is, whether John's children take *per capita* an equal share of the residue with Lucy and Berry, or whether they are to be taken together as a class, and the fund divided *per stirpes* among the legatees. This question has been several times before the Court upon similar bequests, and it is settled that the general rule requires a division *per capita*, unless there be something in the will indicative of an intention that the legatees are to take by families, in which case the division must be *per stirpes*. See the recent case of *Bivens* v. *Phifer*, 2 Jones' Rep. 436, where all the others are re-

ferred to. In the will before us, we think there is a strong indication that the testator intended that the children of his deceased son John should stand in his stead, and take only what he would have done had he been living. In the first three items of his will, he gives to his daughter Lucy a tract of land and one hundred dollars; to his daughter Leesy a tract of land; to his son Berry three hundred and twenty dollars; and then, in the fourth item, he gives to his son John's children three hundred and twenty dollars. Thus we see that in the only other clause where John's children are mentioned they are referred to as a class, and, as such, have a legacy of an equal amount with the testator's living son, Berry. The two daughters, Lucy and Leesy, seem to be provided for mainly with land. Whether the value of the tract given to Lucy was inferior to that of her sister, we are not informed, and we do not know, therefore, whether the money given to her was intended to make her share of the estate equal with, or more than, that of her sister. Nor are we informed how the money bequeathed to Berry compares in value with the property given to each of his sisters; but we do learn from the will itself, that what he is to get, besides his share of the residue, is precisely the same with that of his deceased brother's children. We conclude from this, that his father intended *him* to have an equal share with them of the residue, his sister Lucy taking the remaining share.

PER CURIAM. Decree accordingly.

FANNY WEST *and others against* E. B. D. SLOAN *and others.*

Where a trustee has been guilty of a breach of trust by secretly buying the trust property at his own sale, in order to avail himself of the *cestui que trust's* acquiescence in his ownership as a bar to his rights, he must show that he fully apprised the latter of the nature and extent of the fraud practiced on him.

West *v.* Sloan.

A trustee who purchases at his own sale, and keeps the *cestui que trust* in ignorance of the fact, cannot rely upon the statute of limitations or the lapse of time as a bar to an account.

A trustee who has never settled his account with the *cestui que trust*, or closed the trust in any way, but still owes a balance, cannot be protected by the statute of limitations, or the presumption arising from the lapse of ten years.

CAUSE removed from the Court of Equity of Mecklenburg county.

Sarah Sloan died in January, 1825, having made a will, which was duly proved and recorded. In the 9th clause of this will, is the following bequest: "It is my will and desire, that immediately after my decease, that my son, James Sloan, take into his possession my negro woman, Hannah, for the use of my daughter, Fanny West, and dispose of her in such a manner, as he thinks best calculated to support the said Fanny West during her life, but in the event of the said Fanny's death, the said negro, or her value, is to be equally divided between the children of the said Fanny West." In pursuance of this will, the trustee, James Sloan, took possession of the woman, Hannah, and had possession of her and her offspring up to the time of his death, in 1847, and since that event the latter have been possessed or disposed of by the defendants, his children and legatees. Fanny West, with her husband and children, removed to Alabama, and thence her husband went further west; and there was much evidence tending to show that he was dead when the suit was brought. It was fully proved that he is now dead. Mrs. West and the family, while in this State, and after their removal, were in very necessitous circumstances, which was the case up to the filing of her bill; her husband was a very indolent, careless, and improvident man, and altogether abandoned the charge of his wife and children after going to Alabama. She was not able to read or write, and not acquainted with the transaction of business.

About the year 1829, James Sloan, professing to exercise the discretion given him by the will, advertised the negroes

Hannah and two children, and sold them at public auction, when the defendant Wm. M. Stinson became the purchaser at $440 for the three. He, immediately thereafter, without giving any note or paying any money, without taking any title and without taking possession, relinquished his purchase to the trustee, James Sloan, at the price he had bid, and Sloan took the slaves home with him from the place of sale. Stinson is now the son-in-law of Sloan, but was not so then.

The plaintiffs allege that this sale was fraudulent; that the property was bought by Stinson, as the agent of Sloan, and by a collusion with him. The prayer is for an account.

The defendants, in their answer, say that this sale was made for the convenience and benefit of Mrs. West; that the slave Hannah had become feeble, and, having two young children, she could not be hired for anything, and the best thing that could be done for her was to convert the slaves into money, and give her a portion of it for her support and maintenence; that, with this view, the slaves were sold and bought by the defendant Stinson, without any concert with the defendant Sloan, and that he bid for them a fair price; that, afterwards, he sold the slaves, at the same price, to James Sloan, who took them home with him. They say that Mrs. West gave to James Sloan divers receipts recognising the sale, of which the following is an example:

PICKENS, May 8, 1838.

"Received of James Sloan, executor of Sarah Sloan, dec'd., and agent of Fanny West, as left by the will of the said deceased, the sum of fifty-eight dollars and fifty-two cents, it being the interest of four hundred and forty dollars, the price of a negro woman slave Hannah and two children, the same being the interest on said amount from 2nd of Jan., 1836, 'till this date, after deducting five per cent commission. I say received by me." Signed by plaintiff, Mrs. West.

They showed receipts to the same purport, dated in 1835, 1836, 1843 and 1845, which are all the payments that were proved to have been made after Mrs. West went to Alabama. The defendants relied on the statute of limitations, also upon

the length of time, as evidence of abandonment, &c. They admitted, however, that there had never been a settlement of the trust, and that there was a balance due for interest.

Replication, commissions and proofs.

The cause was set for hearing and sent to this Court.

Guion and *H. C. Jones*, for plaintiffs.
Osborne, for defendants.

NASH, C. J. Sarah Sloan, by her last will, bequeathed to the plaintiff Fanny a negro woman named Hannah. The bequest is in the following words:

"It is my will and desire that, immediately after my death, my son James Sloan take into his possession my negro woman Hannah, for the use of my daughter Fanny West, and dispose of her in such manner as he thinks best calculated to support the said Fanny West during her life-time, but in the event of the said Fanny West's death, the said negro, or her value, is to be divided between the children of the said Fanny West."

James Sloan, the trustee, took the negro into his possession, and he, by his will, bequeathed the slaves in question among his children. The defendant E. B. Sloan, is the acting executor of James Sloan, and took into his possession the slaves in controversy, and delivered over to the legatees, under the will of James Sloan, the negroes respectively bequeathed to them, and some he has sold. All the proper parties are before the Court. The bill prays that some suitable person may be appointed trustee for her and her children, and a decree that the defendants deliver over the slaves in their respective possession, being the descendants of Hannah, and for an account, not only of their hires, but of the value of such as have been sold. Fanny West, with her children, removed from the State in 1827, leaving the negro Hannah in the possession of James Sloan. The latter occasionally remitted to her small sums of money, or paid them to her agent. The first of these payments was in 1835; the next in 1836; another in 1838,

and another in 1843. The last was in 1845, and it is admitted that there is still a balance due the plaintiffs. The will of Sarah Sloan is dated in 1825.

The answer of E. B. Sloan admits that his father received the negro Hannah into his possession, under the trust created by the will of Sarah Sloan, but being in delicate health, and having her children, and being satisfied that it would be more to the interest of the plaintiffs to have her sold, as in her present state she could do nothing towards plaintiffs' support, the trustee caused her and her children to be put up to auction at the most public place in the district, after due notice, when the defendant Wm. M. Stinson purchased the whole of them for $440.

If the sale was a fair and *bona fide* one, the defense is a substantial one. Under the provisions of the will of Sarah Sloan, James Sloan had an unquestionable right to sell Hannah, if he thought it best for the support of Fanny West, notwithstanding the ulterior limitations to her children. She was the primary object of the testator's bounty, and had a right to be supported by the slave as far as it would go. The testatrix evidently looked forward to such a result, for after creating a trust, she proceeds, "in the event of the death of the said Fanny, the said negro, or her value, shall be equally divided among her children." Independently of this provision, by the will creating the trust, the trustee had unlimited power over the slave Hannah, and, therefore, in the exercise of his discretion, had a right to sell her and her children for the purpose of executing his trust. But we cannot agree that James Sloan ever did actually sell Hannah and her children. The form certainly was gone through, but the device is too flimsy to deceive any one. Stinson, the pretended purchaser, is the son-in-law of James Sloan. He never paid a cent for the negroes, gave no note to secure the purchase-money, took no bill of sale, and the negroes went from the place of sale to James Sloan's, in whose possession they remained up to the time of his death. To call this a sale is a mere mockery. It is true Stinson swears that he purchased the negroes fairly and

for himself, but his oath cannot avail the defendants under the facts of the case. James Sloan, it is evident, was induced to make the sale, not for the better support and maintenance of the plaintiff and her family. The plaintiff was in great poverty, and mainly dependent upon the labor of Hannah for her support. She removed from the State in 1827. The first remittance of which we have any knowledge, was made in 1835; the next the year following, and then there is a gap of two years, the next payment being in 1838. The payments then ceased until 1843, a lapse of five years, and the next and last in 1845. Thus, after this pretended sale for her greater comfort, he suffers, in the first instance, several years to elapse from her removal, before he makes her any payment, then another lapse of five years. If the object was the better providing for Mrs. West, and the sale an actual one, why did he not regularly send her the interest of the money? James Sloan acquired the possession of Hannah as a trustee. She was never out of his possession until his death, and her children passed into the possession of his legatees, who, being volunteers, must be held to be trustees for the plaintiffs, of such of the issue of Hannah as are in their respective possessions. We are satisfied that the slaves were sold to enable the trustee to acquire the property for himself. This is proved by the testimony of Mr. Carroll.

It is said, however, that the plaintiff acquiesced in the sale of Hannah, and dealt with her trustee on that footing. If she did acquiesce in the sale, the trustee, to avail himself of it, must show that, after the breach of trust, he fully and plainly apprised her of it. If, with the full knowledge, she goes on to deal with him in this new capacity, Equity will consider her as having acquiesced in it. Adams' Equity, 62. The dealing with the trustee in this case is the reception of the interest of $440, the price bid by Stinson at the alleged sale. Where is the evidence that James Sloan ever communicated to the plaintiff the true facts of that transaction? She was poor and illiterate; unable to write or to read writing, living in another State, and a feme covert. No doubt he informed

her that he had sold Hannah. She knew that he had the power to do so; and believing everything to have been fairly done, she, from time to time, receives the interest. This is not such a dealing with the trustee as a Court of Equity will look upon as amounting to acquiescence, for a fraud was practiced upon her. The length of time, if it could be applied in this case, as presumption of payment, abandonment or satisfaction, is not what the statute requires to form a bar, for it was only seven years from the last payment to the filing of the bill.

It is further said, that the plaintiff has come too late to have an account. It is material in Equity that an account be claimed in a reasonable and proper time.

It is a sufficient reply to this objection that the trust is still open.

Our attention was called to the case of *Davis* v. *Cotten*, 2 Jones' Eq. 430. It differs materially from this. Roderick Cotten, by his will, after giving several legacies, directed that all the residue of his estate should be divided into two lots, one of which he gave to the children of his son Richard Cotten, and the other he lent to his son S. W. Cotten for life, making provisions for its distribution after his death. Among the slaves was one named Lavinia. Mrs. Cotten, the widow, was appointed executrix, and Thomas Snipes, executor, who duly qualified. In 1827, the executors, under an order of the County Court duly obtained, sold the woman Lavinia and her two children, and Mr. Charles Williams purchased them for Mrs. Cotten, into whose possession they returned. The defendants, in their answers, say, that, at February Term, of the County Court of Chatham, Thomas Snipes, the acting executor, made a settlement of his administration of the estate, with commissioners duly appointed, in which he was charged with the value of Lavinia and her children, to wit, the sum for which Williams bid her off. This money was, by Mr. Snipes, paid to the legatees. The bill was filed for a reconveyance of the interest of the plaintiffs in Lavinia and her children, and the settlement was made, in 1830. The Court say,

"If the executors had made no settlement, or had not paid over the balance, there was an express and unclosed trust, as to which the statute of presumptions does not apply; but if the executors *had closed up the business*, and the several legatees had received their respective legacies and filial portions, then there was no express trust, but a mere right to have the executrix converted into a trustee in regard to the slave Lavinia and her children, and the statute would apply." In our case there was no settlement between the parties, and no full payment; it is, therefore, an open trust.

The plaintiffs are entitled to a decree for a reconveyance of the descendants of Hannah, and to the appointment of another trustee, and to an account of the hires of the slaves, and of the value of such as have been sold to purchasers without notice.

There must be a reference to the clerk to take an account; in doing so, he will allow the defendants the several payments, and the expense of such as were a charge in their raising.

This being a proceeding for a fund for the separate use of the plaintiffs, the joining of the husband would have been merely formal. If he was not dead when the bill was filed, we are satisfied he is now dead.

PER CURIAM. Decree accordingly.

ISAAC D. FARMER, *administrator, against* JOSHUA BARNES *and others, executors.*

An acknowledgment and acquittance contained in a deed, is proof that the money was paid, for, and on account of, the property conveyed in the deed; but it is no evidence, upon the rescission of the deed, that the grantor was to pay the consideration back to the grantee.

Where there was a settlement of accounts between parties, with a view of

converting an absolute deed into a security, the amount settled and agreed upon, will be *prima facie* evidence of the correct amount intended to be secured.

CAUSE removed from the Court of Equity of Edgecombe County.

Absalom Farmer, the plaintiff's intestate, being entitled to one-ninth part of a number of slaves and other property, after the death of his mother, Elizabeth Farmer, sold and conveyed the same to the defendant's testator, Jesse Barnes, by deed, dated 2nd of May, 1828, for the sum of two hundred dollars, in which said deed is an acknowledgment and acquittance for that sum of money.

Six years afterwards, to wit, on the 10th of May, 1834, they (Farmer and Barnes) came to a settlement of their affairs, and the former gave the latter a note, under seal, for $179,57.

Shortly afterwards, to wit, on the 24th of the same month, the said Jesse Barnes (the defendant's testator) executed and delivered to the plaintiff's intestate, Farmer, the following deed, viz: "The bargain and contract is such, between Jesse Barnes and Absalom Farmer, that, after retaining enough property out of his part of Elizabeth Farmer's estate, to pay myself what the said Farmer justly owes me, then, if any thing coming, to pay over to said Farmer, or to whom he shall direct; this 24th May, A. D. 1834."

Witness, JESSE BARNES, (*seal.*)
JOSHUA BARNES.

Elizabeth Farmer lived until the year 1852, during which time the property remained with her, and was materially increased in value. In the same year, (that of her death,) by an order of the County Court of Edgecombe, the slaves were sold for a division, and the share of the intestate Absalom, to wit, $1203,47, went into the possession of the defendants, as executors of Jesse Barnes, who had died in the year ——. The amount, for which the slaves were sold, was $10,617,50.

The bill alleges that the plaintiff, as the administrator of Absalom Farmer, demanded a settlement with the defendants,

as executors of Jesse Barnes, and that the remainder, after deducting what was due them, to wit, the note of $179,57, with interest, should be paid to him; and that they had refused to make a settlement, pretending that there was nothing due the estate of plaintiff's intestate, and setting up exorbitant claims against his father's estate, far beyond the value of the share in question. The prayer of the bill is for an account.

The defendants, in their answer, admit the deed set forth above, and their liability to account for the sum of $1203,47, but they insist that there is a much larger sum due them than the $179,57 note, given by the plaintiff's intestate to their testator. They say, that on the 10th of May, 1834, the parties, the said Jesse Barnes and Absalom Farmer, had a settlement, preliminary, and with a view, to the deed of defeasance, which was made a few days thereafter, and their testator, having furnished the said Absalom with provisions, to the amount of 179,57, a note was taken for that amount; and at the same time, it was understood and agreed, that the $200, which was paid for the slaves, on their trade in 1828, with interest, was also to be settled and paid out of their share; and that inasmuch as the receipt of that sum was acknowledged by the said Absalom, in his deed of 1828, it was unnecessary to have any other evidence of that indebtedness.

Replication, commissions and proofs. Cause set down for hearing, and sent to the Supreme Court.

Upon the hearing, the liability of the defendants to account being admitted, it was referred to the clerk of this Court, as commissioner, to state an account between the parties, which was done. The commissioner made his report, wherein he allowed the defendants a credit for the sum of $200, with interest from 2nd May, 1828. To this particular of the account stated, the plaintiff filed an exception, and at this term the cause was heard upon the exception.

Dortch, for plaintiff.
Moore, for defendants.

PEARSON, J. *On the 2nd May*, 1828, the plaintiff's intestate, executed to the defendants' testator an absolute deed for his interest in certain property, therein described, in consideration of the sum of two hundred dollars, the receipt of which is acknowledged by the plaintiff's intestate, and we are to assume that the money was then paid by the defendants' testator.

On the 10th of May, 1834, the parties had a settlement, and the plaintiff's intestate executed his note to the defendants' testator for $179,57, expressed to be "due for value."

On the 24th May, 1834, the defendants' testator executed a deed, by which he agrees, after retaining out of the property enough to pay him "what the said Farmer" (the plaintiff's intestate) "justly owes me," to pay over the balance, if any, to Farmer. The deed of May, 1828, was then registered, to wit, at May Term, 1834.

The question is, what did the plaintiff's intestate *justly owe* the defendants' testator in May, 1834?

The note of $179,57, satisfied the words. But it is insisted that the $200, set out in the deed of 1828, should also be included. There is nothing in that deed to create a debt. The $200 was received as the price of the property. It may be, that in 1834, when the defendants' testator agreed to let the plaintiff's intestate have the balance, after retaining what the latter justly owed him, it was the intention to make a debt out of the $200. Such would be the natural inference, in the absence of any other facts, notwithstanding the silence of the deed of 1834, in regard to it, when it may reasonably be supposed it would have been expressed, if such had been the intention, unless the $200 had been paid or otherwise accounted for; but there is this further fact, that on the 10th of May, 1834, just before the execution of the deed, the parties had a settlement, and the note of $179,57, was then executed.

This settlement and note, closing the balance, raises a presumption, that all matters of charge and discharge were taken into the account, especially as it is admitted, that the settle-

ment was made in reference to the deed of defeasance, which was in a few days afterwards executed.

To rebut this presumption, the defendants allege that, in point of fact, the settlement only included provisions and the like, advanced to plaintiff's intestate after 1828, and that the $200 was not included in the settlement; and no evidence of it, as a debt, was required, because the parties supposed that the receipt in the deed of 1828, was sufficient for that purpose.

It is unfortunate for the defendants, that they are unable to offer any proof of this allegation. The original settlement might have served their purpose, but that is not produced; and in the absence of proof, being governed merely by the face of the papers, we are of opinion, that there is nothing to rebut the presumption arising from the settlement and the execution of the note.

We give no effect to the lapse of time, as the parties were not in an adversary position, and the fund was not received until 1852.

The plaintiff's first exception is sustained. The second is withdrawn. The report will be reformed accordingly.

PER CURIAM. Decree accordingly.

MARY MONTGOMERY *against* DAVID HENDERSON, *adm'r., and others.*

Ante-nuptial agreements, being peculiarly liable to misapprehension and misrepresentation, will not be enforced in our courts, unless they are entirely satisfied that they were made.

A bill, therefore, that alleged such a contract, but stated that it was not reduced to writing, *because the parties thought its provisions were already embraced in the will of a relation, from whom the property was derived,* was dismissed upon demurrer.

CAUSE removed from the Court of Equity of Mecklenburg County.

The case sufficiently appears from the statement in the opinion of the Court.

Wilson, for plaintiff.
Osborne, for defendants.

BATTLE, J. The bill is filed by the plaintiff against the administrator and next of kin of her deceased husband, for the purpose of setting up a parol ante-nuptial agreement, by which certain slaves were to be secured to her sole and separate use during coverture, and to become her absolute property in the event of her surviving her husband. She states that the slave Eliza, of whom the others are the increase, was bequeathed to her by the will of her father, with the following limitations over, "and in case the said Mary Porter (the plaintiff) should die without issue, then, and in that case, it is my will that the above-named negro girl, and her issue, be divided between my six sons," &c. She states further that she did not marry until she was about fifty years old, her husband being a widower, about the same age, with six children of his former marriage; that while the treaty for her marriage was pending, she, not expecting that there would be any issue thereof, showed her suitor the provision in her father's will, of which he approved, and then agreed with her that if the marriage was consummated, he would hold the girl Eliza and her issue, for the sole use and benefit of the plaintiff during coverture, he receiving the profits for their joint support, and in the event that she survived him, Eliza and her issue should be her exclusive property; and if he survived her, he would surrender the girl and her issue to the purposes designated in the will of her father. She then alleges that the marriage took place, and that "the understanding and agreement between them was not reduced to writing, for the reason that it was believed by the parties that the provisions in the will would be operative, in law, to carry out their purposes."

The prayer of the bill is, that the administrator be enjoined

from selling the slaves, and that he be declared a trustee for her of them, and for other relief.

The defendants filed a demurrer for the want of equity, upon which the cause was set for hearing, and transmitted to this Court.

In the argument before us, the defendants' counsel places his objection to the plaintiff's recovery upon two grounds: First, that the alleged contract related to the sale or conveyance of slaves, and was, therefore, void under the statute of frauds, (1 Rev. Stat., ch. 50, sec. 8,) for not being in writing. Secondly, that the pretended contract was never completed but, after being discussed between the parties, was abandoned; because they both thought that, by virtue of the provisions in the will of the plaintiff's father, the law would operate to carry out their purposes.

It is unnecessary to consider the first objection, as we think the second is fatal to the plaintiff's claim. In the case of *Dunn* v. *Sharp*, 4 Ire. Eq. Rep. 7, the Court say that, but for the statute of frauds, 29th Chas. 2, in England, their Courts would enforce parol agreements, in consideration of marriage, when clearly established, as well as if they were manifested by writing. The reason why the statute required them to be in writing "was to prevent their unguarded expressions of gallantry and improvident promises, thoughtlessly made, or artfully procured during courtship, being perverted into deliberate and solemn engagements, conferring a right to compel performance." Our statute of frauds has never extended to contracts of this kind, as between the parties to them. (We speak of contracts not embracing land or slaves, for such as do embrace them, may, perhaps, on that account, come within the statute.) Hence, there can be no objection to the enforcement of them in our Courts, because of their not being in writing. But, "as an agreement peculiarly liable to misapprehension and misrepresentation," the Courts ought to be entirely satisfied that it has been made, before they proceed to enforce it. In the present case we think that the statements of the plaintiff, herself, show that the contract which

she seeks to set up, was, indeed, talked of between the husband and herself, but was not finally agreed upon, because they came to the conclusion that it was unnecessary. She says, indeed, that it was not reduced to writing, because they thought the will was sufficient to carry out their intentions. The reason given shows, conclusively, that there was no final contract of any kind, parol or otherwise, between them. They thought it unnecessary, and did not rely upon it. If it were, at any time, contemplated, it was abandoned before it was completed. They chose rather to trust to the efficacy of the will, and whether that choice proceeded from ignorance or not, the plaintiff cannot now claim the benefit of a contract which she never entered into. Her case may be a hard one, but the Court cannot, on that account, first make a contract for her, and then decree its specific execution.

PER CURIAM. Bill dismissed.

WILLIAM P. RICHARDSON *against* J. J. WILLIAMS, *administrator.*

A non-resident who has not a sufficiency of property or effects within this State, to make good damages for the breach of a covenant for quiet enjoyment, will be enjoined from collecting the purchase-money for land, where the title is defective.

This Court will not drive a party to seek redress in the Courts of another State, when a less circuitous and better remedy can be given in our own Courts at less cost.

It is against conscience to enforce the collection of a bond, when nothing has been received for it.

CAUSE removed from the Court of Equity of Union County.

Thomas W. Huey, the defendant's intestate, made a deed to the plaintiff, of which the following is a copy, viz:

"This indenture, made on the 9th day of January, in the year 1852, between T. W. Huey, of South Carolina, and Lancaster District, of the one part, and W. P. Richardson of the

County of Union, and State of North Carolina, of the other part, witnesseth—that the said T. W. Huey, for, and in consideration of, the sum of $800, to him in hand paid by the said W. P. Richardson, the receipt whereof is hereby acknowledged by the said T. W. Huey, hath given, granted, bargained and sold, and by these presents do give, grant, bargain and sell, alien and confirm, into the said W. P. Richardson, all that tract, piece or parcel of land, situate, lying, and being in the County of Union, and State of North Carolina, on the waters of Richardson's Creek, containing eight hundred acres, more or less, and more fully represented by reference to the accompanying certified copies of the original grants, Nos. 1386 and 1458, &c., unto the said W. P. Richardson, his heirs and assigns, forever." With a covenant of *general warranty*. The certified copies, each, described tracts of land lying in Union County, on Richardson's Creek; that designated as 1386 purported to convey to one Edward Richardson five hundred acres, and that as 1458, to the same person, three hundred acres.

The plaintiff, in his bill, alleges that, at the time of the execution of the said deed, he paid to defendant's intestate five hundred dollars in cash, and gave his note, payable twelve months after date, for the remainder of the purchase-money, to wit, $300; that he immediately went into possession of the five hundred acre tract, and has had undisturbed enjoyment of it ever since; but when he proceeded to locate the three hundred acre tract, embraced in grant 1458, he discovered that it was in the adverse possession of one Hilliard Helms, who had a title to the same; for, that the said Helms, and those under whom he claimed, had had actual adverse possession of it, claiming it as their own, for more than thirty years; that the said Huey lived in the State of South Carolina at the time the deed was made, and continued to reside in that State until his death, which occurred in 1853 or 1854, and had no property in this State except the note sued on; that the defendant, having administered on his estate in Union county, brought a suit against plaintiff in the County Court of that

County, and at October Term of that Court, took a judgment against plaintiff on the three hundred dollar note, with interest, and threatened to collect the amount against him by execution.

The prayer of the bill is for a perpetual injunction, and for general relief.

The defendant demurred to plaintiff's bill, and assigned as a cause of demurrer, that the plaintiff had an ample remedy at law on his covenant for quiet enjoyment. He also answered, insisting that, according to a proper construction of the deed, one tract was intended to be conveyed, and that was the one actually conveyed and enjoyed by the plaintiff, and that the reference to the two grants numbered 1386 and 1458 was only intended to fix and identify that one tract more certainly; but that if the description happened to fail as to the 1458 tract, it would be rejected as surplusage, and that this view was fortified by the fact that the one tract, which the plaintiff admits he got, contained in quantity nearly eight hundred acres. He says further, that another construction of the agreement between the plaintiff and the defendant's intestate, was, that the land should be sold at one dollar per acre; that it was to be surveyed afterwards, and that the plaintiff was to pay the sum determined by the ascertainment of the number of acres at that rate; that a survey was subsequently made, and that the one tract which the plaintiff obtained was found to embrace upwards of seven hundred acres; and he submits that if the Court should not concur in his former view, that, according to the latter, the plaintiff would only be entitled to have the judgment enjoined for the value of the deficiency, to wit, the difference between the number of acres conveyed and eight hundred.

The cause was set down for hearing upon the bill, answer and exhibits, and for argument upon the demurrer at the same time, and sent to this Court.

Wilson, for plaintiff.
Osborne, for defendant.

PEARSON, J. Upon the facts admitted by the demurrer, the plaintiff is entitled to the relief prayed for. *Green* v. *Campbell*, 2 Jones' Eq. 447, is directly in point. It is true that the plaintiff, having taken a covenant of quiet enjoyment, could maintain an action at law, and recover damages, but that remedy would be inadequate, and this Court will not force the plaintiff to resort to it for two reasons: If the plaintiff sued the defendant, as administrator of the warrantor, the only assets with which he could charge him, would be the amount of the note in controversy, and the defendant might discharge himself by proving a payment of the assets to a debt of equal dignity, and thereby sustain the plea of "no assets;" and if that was not done, then the only result of allowing the defendant to collect the judgment on the note, would be to entitle the plaintiff to recover it back in his action on the warranty, which would be a useless multiplication of actions, and a vexatious accumulation of costs; or if the plaintiff resorted to his right of action against the heirs-at-law, who are non-residents, upon the warranty of their ancestor, he might be met with the plea "*riens per descent;*" and, at all events, this Court will not, without a reason for it, drive the plaintiff to seek redress in the Courts of another State, when a less circuitous and a better remedy can be given in our own Courts at less cost.

But, in the second place, as to the tract in grant No. 1458, containing three hundred acres, there is an entire failure of consideration, and it is against conscience to collect the note of $300, when, by the demurrer, it is admitted that the plaintiff received nothing therefor.

The allegations set out in the defendant's answer, if consistent with the proper construction of the deed, would have met the plaintiff's equity. But such is not the fact. The legal effect of the deed is to convey all the land contained in the grants which are referred to, viz., Nos. 1386 and 1458, for the sum of $800, and this construction of the deed cannot be varied by proof, *dehors*, that the parties intended to sell the land at one dollar per acre, so that if more than eight hun-

dred acres were conveyed, an additional sum, corresponding with the increase in acres, at the rate of one dollar per acre, was to be paid, and if a less quantity, then a similar deduction from the sum of $800.

The plaintiff is entitled to a decree for a release and a perpetual injunction, and to his costs.

PER CURIAM. Decree accordingly.

SOLOMON APPLE, *ex'r., against* JAMES M. ALLEN *and wife and others.*

1. Where an estate in slaves and other chattels is limited in remainder after the expiration of a life-estate, an executor may safely deliver the property to the life-owner without qualifying his assent. The ulterior devisee who fears the removal of the property, can protect his interest by applying to the courts of equity.
2. The words "for her sole and separate use" when applied, in a will, to an unmarried female, do not create any such separate interest as upon her marriage afterwards, will prevent the property from vesting fully in her husband.
3. A provision in a will that "all the money that I have on hand, or loaned out," shall accumulate for ten years, will embrace all the funds of the testator from whatever source arising; especially where such a construction is necessary to prevent an intestacy as to a part of the estate.

CAUSE removed from the Court of Equity of Caswell County.

James Stuart, late of the county of Caswell, died about the month of ——, 1854, having made and published a last will and testament, of which the following is a copy of the material parts, viz:

"1st. I loan to my daughter Frances A. Taylor, eight negroes, that is, Bill, Eliza, Stephen, Ellen, Atkinson, Lewis, Andrew and Eliza's baby, which has no name, with all their future increase during her natural life, for her sole use and benefit, and at her death, to the heirs of her body; and if at her death she should have no children, nor grand-children, nor descend-

ants from her body, then, and in that case, the property above-named, to go to my children then living, and the rest of my grand-children then living; and if none of my children should then be living, all the property I have loaned to my daughter Frances A. Taylor, my grand-children shall have such part as their mother would be entitled to were she then living.

"2d. The property I have heretofore loaned to my daughter Adeline T. Newman, six negroes, viz., Lewis, Martilla, Henry, Emily, Bob and John, I now loan to her daughter, Mary Allis Newman, during her natural life, for her sole use and benefit, and at her death, if she has no heirs of her body, all the above property that I have loaned her is to come back into my family, and be divided as above-named in my daughter Frances Taylor's property.

"3d. I loan to my daughter Mary R. Moore, five negroes, viz., Reuben, Sarah, Elizabeth, Matthew, and William, with all their future increase, for her sole use and benefit during her natural life; but if she should leave no child or children, nor lawful heirs of her body, then the property I have loaned her to return back to my family, and be divided in the same manner as the above-named property I have loaned my daughter Frances A. Taylor.

"4th. I loan my beloved wife, Amy Stuart, all the balance of my negroes, with all their future increase, and all my lands and tenements, all of my stock of all kinds, house-hold and kitchen furniture, crop, &c., plantation tools, &c., during her natural life; nevertheless, my executor is to see that my lands are kept in good repair, and all moneys arising from said property I have loaned to my wife, after decently and plentifully supporting her, are to be loaned out annually, and the interest annually paid, and that loaned out again, and all the property I have loaned my wife, with all future increase, after her death, to be equally divided among my children and Mary Allis Newman, my grand-daughter; and if either of these heirs should die, leaving no lawful heirs of their bodies, then their part of the said property shall return back to my

family, and be divided as I have provided for the other property I have loaned my children.

"5th. All the money I have on hand, or loaned out, my executors shall take in hand and loan out for ten years, and the interest collected annually, and that applied to the same use, and at the expiration of ten years, the money, with all the interest arising therefrom, shall be divided among my children, grand-children, &c., in the same manner as the other property I loaned my wife.

"6th. All the property, negroes, &c., that I have loaned to my children, &c., and they have them in their possession, as long as they keep them, they are to pay all the taxes that is required by law for them; nevertheless, they are to be considered my property until such time as I have before stated."

Frances A. Taylor, named in the first clause of the will, died in the life-time of the testator, leaving children, Thomas and William K. Taylor; these, with Mary Allis Newman, and Mary R. Moore, now Mary R. Allen, having since inter-married with the defendant James M. Allen, are made parties defendant to the bill.

The bill is filed by the executor, asking the advice of the Court as to several questions that arise upon the different clauses of this will, about which there are conflicting claims among the several legatees, and some suggesting themselves to his own mind, which are of doubtful solution, and the decision of which may personally involve him.

1st. Whether he is to give to the several legatees immediate possession of their legacies, with an unqualified assent thereto, or whether, taken in connexion with the 6th clause, wherein it is declared "the property is still to be considered as mine until such time as I have before stated," it may not be his duty to retain the possession and control of the property, and pay over to the legatees only the proceeds, or to give only a qualified assent, with the right reserved of taking possession of the property, as future contingencies might require.

2nd. A question arises between the children of Frances A.

Taylor, and James M. Allen and wife, as to the meaning of the limitation over, and in the event that she should die without issue, the said children contending that the executor is to provide for the security of their contingent interest in such property.

3rd. Whether the expression "sole and separate use," &c., gives a separate interest to Mary Allis Newman and Mary R. Moore, after their marriage, they being single persons when the will was made; or does the husband of Mary R. Moore, defendant Allen, take the property without incumbrance, *jure mariti?*

4th. Whether Mrs. Amy Stuart has a right to work the negroes, land, &c., and sell the crops, and after taking enough of the proceeds for her comfortable subsistence, loan out the balance herself; or is it made the duty of the executor to supervise these operations, sell the crops, and loan out the money?

5th. Whether the executor is to take in hand for accumulation, only the money "loaned out," or is it his duty to manage all the funds of the testator in the same way, irrespective of the source from which they may have arisen?

The defendants answered, not disputing any of the facts set forth in the bill, but each alleging his peculiar views of the several provisions in question.

Cause set for hearing on the bill, answers and exhibits, and sent to this Court.

Hill and *Bailey*, for plaintiff.

No counsel appeared for defendants in this Court.

BATTLE, J. The bill is filed by the plaintiff, as the executor of James Stuart, for the purpose of getting the advice of the Court upon the construction of the will of his testator, and as to his duty in relation to several particulars which he mentions.

The first, second and third enquiries which he proposes,

and upon which he seeks the direction of the Court, involve the same principle, and may be answered together.

There is no doubt that he may give his unqualified assent to the bequests contained in the first three clauses of the will. If the contingent remaindermen should have reason to fear that the slaves are, at any time, about to be carried out of the jurisdiction of the Court, they may take such steps as they may be advised are necessary to secure their interests. No trust to that effect is imposed by the will of the executor. The sixth clause clearly indicates that the legatees are to have the possession of the property—negroes, &c.; and the qualification annexed, that "they are to be considered my property until such time as I have before stated," if taken literally, is senseless and void. A dead man cannot be considered the owner of property, and the expression is too vague and uncertain to be allowed the effect of confering the title upon the executor, in opposition to the plain bequests of the legatees, contained in previous clauses of the will.

A contest between the remaindermen as to their respective rights, may be raised and settled by them at the proper time. The executor has nothing to do with it.

If the female legatees, Mary Allis Newman and Mary R. Moore, had been married women at the time when the will was made, the expressions contained in each of the second and third clauses, "for her sole and separate use and benefit," would have conveyed a separate interest to the wife; (*Adamson* v. *Armitage*, 19 Ves. Jr., 419; *Goodrum* v. *Goodrum*, 8 Ire. Eq. Rep. 313;) but as they were not, we can see no reason why they do not take the negroes and other property in the usual manner, and subject, of course, to the rights which the husband, whom either of them has married, or may hereafter marry, may acquire therein *jure mariti*. In the case of *Miller* v. *Bingham*, 1 Ire. Eq. Rep. 423, it was decided in this Court that, where property was conveyed to a trustee for the *sole and separate use* of a woman, then married, and she survived her husband and married again, she no longer held the property to her *sole and separate use*, but the whole inter-

est in the personal property vested in her second husband. The case before us is not so strong, because, in addition to the fact that the legatees were, when the will was made, single women, there is no expression indicating a trust for them.

4th. The widow is clearly entitled to the possession of the property given to her for life, and, as an incident thereto, she has a right to sell the crops, and apply a sufficiency of the proceeds for the comfortable support of herself and family. What is not so needed she must lend out, from time to time, according to the provision to that effect in the will. That duty, in relation to the money arising from this source, is not imposed upon the executor in express terms, as it is with regard to the other moneys in the next succeeding clause. Hence, we conclude that the testator intended that his widow, who was to have the possession of, and a portion of, the profits arising from the land, negroes, &c., should herself accumulate the balance for the benefit of the children, after her death.

5th. A fair construction of the fifth clause will vest in the executor, for the purpose of accumulation, all the money due the testator on any account. We can hardly suppose that he intended to die intestate as to any part of his estate, and money "loaned out" may, to prevent such an effect, very well be construed all other debts due him, as well as those created by loans made by himself. The period of accumulation directed for this fund, is ten years, without respect to the death of the widow. As she may die before the expiration of that period, the question whether the division should be postponed beyond it, may never arise, and it would be premature to declare an opinion upon it now. It is sufficient for us to declare, at present, that it is the duty of the executor to pursue the direction of the will for the accumulation of the fund for ten years from the death of the testator. If the widow shall be then living, the Court will then be prepared to give further directions, should any be desired. An account may be ordered, should the parties wish it.

Per Curiam. Decree accordingly.

FRANCIS E. RIVES *against* EDWARD B. DUDLEY, *trustee, and others.*

A corporation whose term of existence is limited to a number of years, may, nevertheless, purchase and hold land in fee simple, when authorised by its charter.

Where the purchaser of an equity of redemption, tendered the mortgage-money upon a condition which he had no right to make, he cannot, on its being refused, insist on an abatement of the interest.

Where an incorporated company entered upon the land of a feme covert with the consent of her husband, and built a bridge on the same, without any conveyance from her, and without any condemnation by legal proceeding, and without any compensation, she, and her heirs, had a right to convey such bridge and its appurtenances, with the land.

Where the owner of land sells lots along a space held out by him as being intended for a street or public square, and people build houses and make improvements along or about the same, relying on such assurance, there is forthwith a dedication of such space to the public use, and he will be estopped from hindering its use in that way.

But a permission, by the owner of land, to an incorporated company to build a toll-bridge on his land for their gain, does not come within the principle of such dedication by estoppel.

CAUSE removed from the Court of Equity of Northampton County.

Under an act of the General Assembly of this State, passed in 1831, a company was organised, called the Weldon toll-bridge company, with power to build a bridge across the Roanoke river, at Weldon, and to charge and receive toll from passengers. It was further empowered by subsequent acts, to borrow money, and to issue bonds and other evidences of debt.

In 1832, an act passed the Legislature of Virginia incorporating a company called the Portsmouth and Roanoke rail-road company for sixty years, which, in the same year, was sanctioned and adopted by the Legislature of this State, and, under the two acts, the company by that name was duly organised.

In 1833, an act was passed by our Legislature, authorising this rail-road company to subscribe to the stock of the bridge

company, and to extend their rail-road across the river upon the said bridge.

These two companies continued to use the bridge jointly until 1840, when the General Assembly of this State, in that year, passed an act authorising the transfer of the rights and property of the bridge company to that of the rail-road, and a merger of the corporate existence of the former in that of the latter; which transfer was duly made, according to the terms of the act, and thence-forward the Weldon toll-bridge company ceased to exist as a corporation. One of the terms upon which this transfer was made, was, that the rail-road company should pay all the debts of the bridge company.

Among the debts owing by the Weldon toll-bridge company was one to the Board of Internal Improvements of this State for $7945, with interest. On the 20th of May, 1842, the Portsmouth and Roanoke rail road company, by a deed in trust of that date, conveyed to Edward B. Dudley, the said bridge and every part thereof, to secure the said debt due and owing to the Board of Internal Improvements.

The Weldon toll-bridge company was also indebted to Rochelle and Smith, for work done on the bridge, in the sum of $16,000, for which the Portsmouth and Roanoke rail-road company gave their note. This not being paid at its maturity, suit was brought upon it in the Superior Court of Halifax county, and at Fall Term, a judgment was obtained for that amount with interest. Upon this judgment an execution was taken out, directed to the sheriff of Northampton, by virtue of which, the equity of redemption in that part of the bridge, lying in that county, was levied upon, and duly sold to the plaintiff for the sum of $10,000, he having, in the mean-time, purchased the said judgment from Rochelle and Smith.

In 1848, by concurring Acts of the Legislatures of Virginia and this State, adopting and combining previous Acts upon the same subject, the Seaboard and Roanoke rail-road company was incorporated, with power and authority to construct a rail-road from Portsmouth, in the State of Virginia, to the

Roanoke river, in this State. Under these Acts, this company was forthwith organised.

Under an Act passed in 1846, the debt due to the Board of Internal Improvements, with others similarly situated, was transferred to the public treasury of the State.

In 1850, the Legislature passed an act, by which the public treasurer was authorised "to transfer and surrender to the Seaboard and Roanoke rail-road company, the mortgage held by the State on the Weldon toll-bridge, on condition that the said company execute to the public treasurer, for and in behalf of the State, the bonds of the said company, bearing interest at not less than six per cent."

Accordingly, the bonds of the company were executed to the public treasurer, and he, on 21st of January, 1851, formally endorsed and assigned the deed in trust, made to E. B. Dudley, to the said company, whereby this company succeeded to all the rights of the Board of Internal Improvements and of the State, in respect to this debt and deed in trust or mortgage.

About the year 1846, the Portsmouth and Roanoke rail-road company ceased to exercise the franchises conferred upon it by law, and became extinct as a corporation.

On the 4th day of August, 1851, E. B. Dudley, having made due advertisement, sold the bridge under the deed of trust, at public auction. This was done at the instance and request of the Seaboard and Roanoke rail-road company. At which sale, the plaintiff bid off the property at the sum of $19,000. Afterwards, on proceeding to comply with the terms of the sale, he insisted on retaining all the surplus bid by him, after paying the sum secured by the deed in trust, but this was objected to on the part of the defendants, and the whole sum of $19,000 was paid, and a deed was accordingly made to him by the said trustee. Before the mortgage or deed in trust was transferred from the Board of Internal Improvements to the State treasury, but after the plaintiff had purchased the equity of redemption, he applied to the Governor of the State, who was *ex officio* president of the board, to pay

up the amount then due on the mortgage, and tendered him the money for that purpose, demanding, at the time, that a conveyance should be made by him of the bridge as now contended for by him. This was refused by the Governor. On the occasion of the sale above stated, on paying the money to the trustee, Dudley, the plaintiff gave him notice of this tender to the president of the Board of Internal Improvements, and warned him not to pay interest on that debt after such tender, and that he should contend for the whole balance minus the value of the small part in Halifax, after deducting the debt and interest up to the time of the tender.

The prayer of the bill is for an account of the fund in the hands of the trustee, and that, after discharging the debt, with interest, he may have a decree to his portion of the overplus, and for general relief.

In behalf of the defendants it was shown that the Weldon bridge, which is now the bridge of the Seaboard and Roanoke rail-road company, is about five hundred and ninety yards long, and that the larger part of the same is over an island in the Roanoke river, called Carter's or Burke's island; that this island is formed by a small shallow and rocky channel, called Little river, which leaves the main stream some distance above the site of the bridge, and unites with it again below; that the whole of this island, as also the land covered by the water of Little river was, at the time this bridge was constructed, the property of Mary Carter, the wife of John Carter, who, by virtue of his marriage, had a tenancy for their joint lives in the same; that Carter consented that the bridge in question might be erected upon his wife's land, but that there was no such permission given by her; that she made no conveyance of any privilege, easement or right to, or in, the same, received no equivalent in the way of damage, and that there was no judicial proceeding had to condemn the land to the use of the said company; that Carter died in the year 1843, and his wife in 1847; that her estate in this property descended to William R. T. Williams, and Martha, the wife of John J. Bell; that Williams, on the 6th

of March, 1848, sold his moiety thereof to Bell, who, with his wife, by deed, properly authenticated, conveyed all the land upon which the said bridge stands, from the low-water mark, on the main river to, and beyond, the northern butment, with a space of eighty-feet on either side of the bridge, throughout this extent, to the defendants, the Seaboard and Roanoke rail-road company, in fee simple; that the southern butment of this bridge, and a small portion of the superstructure, lying in the county of Halifax, are the undisputed property of this company, purchased under a judgment and execution issuing from the Superior Court of Warren county.

The defendants, the Seaboard and Roanoke rail-road company, in their answer, say, that when the said bridge was sold by the trustee, he only professed to sell such right as he had acquired by the deed of trust, and that as the part above described was vested in them, only the part spanning the main channel from the island to the Halifax shore vested by such sale in the plaintiff; they insist that the surplus of the money, therefore, ought to be divided between them and the plaintiff, in proportion of their respective interests in this property, as above set forth.

The plaintiff, in an amended bill, admitting the facts in reference to the title, contended,

1st. That there was a presumed dedication of the land in question, to the use of the public, the same having been used by the bridge company, and their assignee, the rail-road company, for ten years.

2nd. That the deed from Bell and wife to the defendants, the Seaboard and Roanoke rail-road company, passed only the land, and did not pass the piers, butment and superstructure of the bridge.

3rd. That when the bridge was sold by the defendant Dudley, the whole of it was offered (as the whole had been advertised) for sale; that this sale was made at the instance and for the benefit of the Seaboard and Roanoke rail-road company, and that the president and one of the directors of that company were present, controlling the sale and bidding for

the property, and that no suggestion was made by them, or any other person, that less than the entire property, in the bridge, was offered and sold; that these defendants said nothing of any title derived from Bell and wife, and that he had no knowledge of such claim until after the sale and the payment of his money, when these defendants seized upon it, and have, under that claim, held it ever since. He says it would be against conscience for them now to set up that title, and he prays, in addition to his other prayers, that they may be compelled to convey this title to him. He also prays, that in the ascertainment of the surplus, he may not be charged with interest on the debt, secured by the deed in trust, from the time that he made a tender to the president of the Board of Internal Improvements.

But if the Court shall be of opinion that he is only entitled to the title of the defendants, on the condition of paying all the money bid by him, he prays that a decree may be made in his behalf on those terms.

The defendants answered, severally, the amended bill, denying the allegations, and insisting that the trustee sold only the right vested in him by the deed in trust, and averring that the deed from Bell and wife, was not only spoken of, and its contents discussed in the presence of the plaintiff, but that the deed itself was produced on that occasion, before the land was cried off to him. They, therefore, aver that he had express notice of this title, and that there was no suppression or other unfair means used to entice the plaintiff into the purchase.

There was replication to the answers, and proofs taken, and the cause being set down for hearing, was sent to this Court for trial.

Badger, for the plaintiff.
Moore and *Barnes*, for defendants.

PEARSON, J. 1. The plaintiff alleges, that by his purchase at the sale, made under execution, by the sheriff of North-

ampton county, in January, 1843, he became entitled to the equity of redemption in all the bridge, except that part lying in the county of Halifax, the equity of redemption in which part, he admits, belongs to the defendants, the Seaboard and Roanoke rail-road company; and he insists, that the excess of the proceeds of the sale, made by the defendant Dudley, in August, 1851, after deducting the amount secured by the deed of trust, should be divided between the defendants, the Seaboard and Roanoke rail-road company, and himself, in the proportion of their respective interests in the equity of redemption, that is, in the proportion of the value of the part lying in the county of Halifax, to the value of the part lying in the county of Northampton.

The defendants, the Seaboard and Roanoke rail-road company, oppose this claim, by denying that the plaintiff acquired the equity of redemption in that part of the bridge lying in the county of Northampton, by his purchase at execution sale; for, as they insist, the Portsmouth and Roanoke company, the maker of the deed of trust to Dudley, owned but a "term of years" in the bridge, and the equity of redemption therein was not liable to execution sale.

We are of opinion that the estate of the Portsmouth and Roanoke company in the bridge, was not a "term of years," but a fee simple, and consequently, the equity of redemption was subject to sale under execution. The company was authorised, by its charter, to purchase land or have it condemned for the purposes of the road, and there is an express provision that the land, so acquired, should be held and owned by the company in fee simple; so that although the existence of the company was limited to sixty years, yet the land, acquired by it, was owned in fee, and the company could transfer an estate in fee therein.

By the amended charter in 1840, it is provided, that "the Weldon toll-bridge, shall vest in, and be owned and possessed by, the Portsmouth and Roanoke rail-road company, in the same manner that all other property, real and personal, which

has been acquired by said Portsmouth and Roanoke rail-road company, is owned, held and possessed."

It follows, that the deed to Dudley, having apt words therefor, conveyed an estate in fee simple, and that the equity of redemption of the company, was subject to sale under execution, by force of the Act of 1812; indeed, the title of the defendants to the equity of redemption, to that part of the bridge lying in Halifax, was acquired by a sale, under an execution issued from the Superior Court of Warren county; so, both parties claim in the same mode; and if the title was not valid, the Portsmouth and Roanoke rail-road company having lost its corporate existence, there would be no one to call upon the defendant Dudley to account for the excess of the trust fund. As both parties assume that an equity of redemption is divisible, and may be sold in separate parcels, it is unnecessary to express an opinion upon the question; it is alluded to merely to say that we have formed no opinion in regard to it.

2. The defendants, the Seaboard and Roanoke rail-road company, oppose this claim by denying that the plaintiff, (if by his purchase at execution sale, he acquired the equity of redemption in any part of the bridge,) acquired it in that part lying in the county of Northampton, which is erected over the land, from low-water mark at the north side of the river, across the island and Little river to the north butment; for, as they insist, this part of the bridge was not owned by the Portsmouth and Roanoke rail-road company, and, consequently, did not pass by the deed to Dudley; and they contend that the plaintiff, if entitled to any part of the excess, is only entitled to such part as is in proportion to the value of that part of the bridge lying over the channel of the main river, compared with the value of the part lying in the county of Halifax (about which there is no dispute), and also the value of that part lying over the land on the Northampton side, from low-water mark to the north abutment; in other words, as the value of the middle section (as it may be termed) is to the value of the rest of the bridge.

In support of this position, it is averred, that the land, upon which the "*north section*" of the bridge is erected, belonged, at the time of its erection, to one Martha Carter, the wife of John Carter; that said John died in 1843, and Martha in 1847, leaving, as her heirs, one Williams, and Martha, the wife of one Bell; that Williams sold to Bell in 1848, and Bell and wife, in 1849, sold to the defendants, all the land covered by the bridge, and a slip, eighty feet wide, from low-water mark to the north butment, whereby, these defendants insist, the title to this part of the bridge vested in them. It is admitted, that the bridge was built on said land by the consent of John Carter, but it is denied that there ever was any judicial condemnation of the land to the use of the company, nor was there ever any conveyance of the same, or any grant of the privilege to erect the bridge, made by Martha Carter to the company, but the bridge was built without her consent, and without any damages paid or secured to her.

To meet this objection, the plaintiff, by an amended bill, admitting the facts in reference to the title of the land, and the deed made by Bell and wife to the defendants, the Seaboard and Roanoke rail-road company, insists, in the first place, that there was a presumed dedication of the land to the bridge company, the bridge having been used by that company and the Portsmouth and Roanoke rail-road company, from 1837, until about 1845, when the company lost its corporate existence, say eight years in all, and two years after the death of John Carter, during which time, Martha Carter, was not under the disability of coverture. 2nd. That the deed to Bell and wife, (if there was no dedication,) passed only the land, and did not pass the piers, butment and superstructure of the bridge. 3rd. That the president and some of the directors of the company were present, and bid for the bridge, at the sale made by the defendant Dudley, and did not make known, in any manner, that the company claimed the bridge, or any part thereof; but concealed the fact that any claim was set up, other than that which Dudley was about to sell, whereby the plaintiff was induced to bid, and become the

purchaser, under the belief that he would acquire title to the whole bridge; and the prayer is, that the defendants, the Seaboard and Roanoke rail-road company, may be decreed to release to the plaintiff any title that may have been acquired under the deed of Bell and wife.

As to the question of a dedication: The *user* of the easement, by the bridge company and the Portsmouth and Roanoke rail-road company, after it succeeded to the rights of the former, was continued but for *eight years.* This is too short a time to raise a presumption of a grant, or in which to acquire title to an easement by prescription. Twenty years is the shortest period that is allowed to have that effect. This was admitted by the counsel for the plaintiff; but he insisted, that the principle of a dedication to the use of the public, was altogether different from that of prescription; the former is not based on the idea of presuming a grant, and no particular length of time is necessary to give it effect; it may, under peculiar circumstances, have effect *immediately.*

The plaintiff cannot sustain himself upon the principle of a dedication to the use of the public. John Carter, at the time the bridge was built, had only a *particular estate;* the fee was in Martha Carter, his wife. It is settled, that a dedication by the owner of a particular estate, will not bind those in remainder or reversion, or prevent them from stopping the way dedicated, when the estate comes into possession; *Wood* v. *Teal*, 5 B. and A. 454. But we will waive this objection, for the sake of avoiding the point presented by the fact, that the bridge was used for two years after Martha Carter was discovert, and put our opinion upon the broad ground, that the principle of dedication has no application to the case.

What is the principle? It is this: if the owner does an act, whereby he signifies his intention to appropriate land to the use of the public, as a highway or street, or square, to be used by the public as a pleasure ground, or the like, and *individuals, in consequence of this act, purchase property, or build houses, with reference to its being so used by the public, and become interested to have it so continue,* he is precluded

from resuming his private rights of property over the land, because it would be *fraudulent* in him to do so. When individuals have become interested in reference to the use of the land by the public, the dedication takes effect *immediately*. Without such particular showing, lapse of time, as in cases of prescription, raises a presumption that a resumption of the private right would be injurious to interests acquired on the faith of its continuing to be used by the public, and the resumption would, therefore, be fraudulent. The dedication to public use does not operate as a *grant*, but as an *estoppel in pais*. The doctrine is adopted, *ex necessitate*, because there can be no *grantee*, and regarding it, not as transferring a right, but as operating to preclude the owner from resuming his right of private property, on the ground that it would be fraudulent in him to do so. We are freed from the necessity of inventing an anomalous interest, which passes without any legal ceremony, and vests without any legal owner. See notes to *Dovaston* v. *Payne*, 2 Smith's Leading Cases, 90, where the English and American cases are examined with great ability, and the above principle is clearly deduced.

By way of illustration: If the owner of land makes a street opening into ancient streets at both ends, and builds a double row of houses, and sells or rents the houses, this is instantly a street or highway; *Woodyer* v. *Hadden*, 5 Taunt. 125. So, if the owner of a tract of land lays it off into streets and a public square and lots, and sells the lots, this is forthwith a dedication of the streets and square; *City of Cincinnati* v. *White*, 6 Peters 431; *New Orleans* v. *The United States*, 10 Peters 662.

In our case, there is not a single element upon which the principle of dedication rests. The land was not *appropriated by the owner to the public use*. On the contrary, the bridge company entered and appropriated the land to its own purposes. The suggestion, that the company intended the bridge to be used by the public as a "toll-bridge" has no bearing on the question. The same may be said of every rail-road. The point is, this property was not to be that of the public,

but was to be the private property of the company, to be used by it for gain; and the circumstance, that its use would be of public convenience, is entirely collateral. So, the dedication was not to the public.

No *individuals had acquired property or interests*, in reference to this land, as having been dedicated to the public, and without "that *particular showing*," as we have seen, the dedication can only be perfected by lapse of time. In the last place, here was a company capable of purchasing and taking by grant; so the necessity, because there could be *no grantee*, did not call the principle of dedication into operation, or justify any departure from the ordinary modes of acquiring title to land.

It was the folly of the company to build the bridge without securing the title to the land, and the interest is so large, that we cannot help being astonished at the negligence or ignorance of its agents.

2. If one enters upon the land of another, and builds thereon a house, bridge or other fixture, the owner of the land is entitled to the house, bridge or fixture. This is familiar learning. Whether the party can, in equity, recover compensation from the owner, who stands by, and sees him expend his money, depends on circumstances. *Albea* v. *Griffin*, 2 Dev. and Bat. Eq. 9. But this is beside our question. We are of opinion that the deed of Bell and wife, did pass to the defendants, the Seaboard and Roanoke rail-road company, the piers, butment and superstructure of the bridge, as well as the land on which it was situate.

3. This is a question of fact. The defendants, in their answer to the amended bill, aver, that the plaintiff had full notice of the existence of the deed of Bell and wife, before he became the purchaser; that the defendant Dudley, at the opening of the bidding, stated, in the presence of the plaintiff, that he sold only such right and interest as he had a right to sell, under the deed of trust to him, and that Bell, at the time, produced, and either read or recited, the contents of a copy of the deed, which had been executed by himself and wife, to

the defendants, the Seaboard and Roanoke rail-road company, in the presence and hearing of the plaintiff. These facts are proven by the witnesses Simmons, Crowder and Bell, and fully establish that the plaintiff had notice of the claim of the defendants, under Bell and wife, before he purchased. It is true, the purpose avowed by Bell, and his reason for reading a copy of the deed, was to assert his own rights, if he had any; but nevertheless, the plaintiff, was thereby informed of the fact, that the defendants had procured the execution of that deed. Whether the defendants had thereby acquired any rights, and to what extent, was a question which could not then be determined; but notice of the existence of the deed, was sufficient to prevent the plaintiff from having the aid of the principle of equity, which he invokes for the purpose of being relieved from the effect of that deed. He had notice, and was, therefore, not deceived; although he may have been mistaken as to the legal effect of the deed.

It must be declared to be the opinion of the Court, that the plaintiff has no title to the "northern section" or that part of the bridge on the north side of the river, from low-water mark to the north butment.

3. Having decided that the plaintiff is not entitled to the north section of the bridge, it follows that the mode of dividing the surplus suggested by him must be rejected. We also reject the mode suggested by the defendants. As the Portsmouth and Roanoke rail-road company did not own the north section, it did not pass by the deed of trust to the defendant Dudley, and was not sold by him, and must consequently be put out of the case.

The excess of the fund, after deducting the debt secured by the deed of trust, together with interest, will be divided between the plaintiff and the defendants, in the proportion of the value of the middle section, to that of the south section or part lying in the county of Halifax; for this purpose a commissioner will be appointed to make the valuation and division. The cost will be paid out of the fund. No abatement of interest upon the debt secured by the deed of trust, is al-

lowed; because the plaintiff, at the time he made the tender, required, as a concurring stipulation, that a release of the lien in the whole bridge should be executed to him; whereas, the defendants, the Seaboard and Roanoke rail-road company, had the equity of redemption in the south section.

PER CURIAM. Decree accordingly.

MEMORANDUM.

*** WILLIAM A. JENKINS, Esquire, of Warrenton, was elected Attorney General, from and after the end of the session of the last Legislature.

MR. BATCHELOR, who had been appointed by the Executive, to the office of Attorney General, until the end of the Legislature, resigned the same at an early day of the session; whereupon, WILLIAM H. BAILEY, Esq., of Hillsborough, was elected *ad interim*, and attended to the State causes during this term.

NOTE.—His Honor, the CHIEF JUSTICE, was detained at home for several days during this term, by the extreme illness of one of his family.

CASES IN EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

JUNE TERM, 1857.

J. G. LEA *and others against* THOMAS J. BROWN *and others.**

A bequest of slaves, with a provision by which they may be supported without working like other slaves, is a violation of the policy of the State and void.

A bequest of two hundred acres of land and three thousand dollars, with a family of slaves, who were valuable, with a provision that on the death or insolvency of the legatee, one of the slaves should select an owner, who was also to take the land and money, with an injunction that the slaves should be treated kindly and humanely, is manifestly for the ease and benefit of the slaves and against the public policy.

Where a devise of land fails, because it is void, or by reason of the death of the devisee, the subject devolves upon the heir-at-law, and the residuary devisee is not entitled to it.

Where there is no express general gift of the residue, and it appears from the the face of the will that certain slaves, intended to be liberated, were not intended to be included in a clause bequeathing a restricted residue, such slaves will not pass by such restricted clause, but will go to the next of kin under the statute of distributions.

CAUSE removed from the Court of Equity of Caswell.

The bill was filed by the plaintiffs, to wit, the next of kin

* This and the next case, *Graham* v. *Little*, were decided at the last term, but accidentally omitted in the reports of that term.

and heirs-at-law of Nathaniel Lea, against his executor, and against the legatees mentioned in the 5th and 6th items of the will. The ground of claim was that, as to Fanny, Mariah, Mary Anne, &c., and as to the land, given for their comfort and assistance, and as to the sum of $3,000, the legacies were void, as being against the policy of the law with regard to the emancipation of slaves, and asking for an account and distribution.

The defendants answered, setting forth the fact, that the slaves in question were not able to work and earn profits; some being passed the years of labor, and the others children, and insisting that it was only intended that they should be dealt favorably and humanely by as slaves, and that the land and money was not an unreasonable compensation for taking care of unprofitable slaves. They also contended, that if the said provisions were declared void, the property would not go to the next of kin and heirs-at-law, for that there was a general residuary clause that embraced it.

The following is the material portion of the will of Nathaniel Lea, viz:

"Item 2nd. I desire my executor to pay all my just debts.

"Item 3rd. The negroes bequeathed in this clause of my will, having been faithful to me and served me well, attended and nursed me in my long and painful sickness, I hereby bequeath to my friend Thomas J. Brown, of Caswell county, my servant Milly, Mariah and two children, Nat and Dilla, Mary Anne and her child Milly, Vic and old Fanny, and such other children as they, or any of them, may have after the date of this my will, and I hereby enjoin on my friend Thomas J. Brown, to take care of the said slaves, treat them kindly and humanely, as they have been to me faithful and obedient servants. It is further my will, in regard to the slaves mentioned above, that the said Thomas J. Brown shall have the use and benefit of the said slaves only during his life, and at his death, or in the event he should ever become so insolvent and unable to pay his debts without the sale of the aforementioned slaves, then, on the happening of either

of the said events, the said Milly, if alive, shall select a master, and all of the above-mentioned slaves I hereby bequeath to the person she so selects; and should she be dead, then I desire Mary Anne to make the selection, and should she be dead, I desire Mariah to make it; each one to select in order as I have named, and all of the said slaves, and their increase, mentioned in this clause, to go together; my chief aim and object being to give the aforesaid slaves good masters, if possible, or a small reward for their faithful service to me. I further bequeath to my friend, Thomas J. Brown, three thousand dollars, to be paid out of any moneys I may have, to enable him to pay the expense of keeping the said slaves, they being women, and can yield no profit of great amount. But should the said Brown become insolvent, or should die, then I bequeath the said sum, or such portion as remains unexpended by him, to the person that may become the master of the slaves as provided for above, my desire being, and I so will it, that the said money, or the portion of it remaining, shall go to the person owning the slaves, as a compensation to them for their trouble in part. I give to my friend, Thomas J. Brown, two hundred acres of land, at the south end or side of my home tract, beginning, &c., (describing it). My will is, that the said Brown shall have the said land during his life only, or in case he remains solvent; but should he die, or become insolvent, then my will is, that the said land shall go, and it is hereby given, to such person as shall be, upon the happening of either of the said events, the master or owner of said slaves mentioned above. I bequeath to Thomas J. Brown my dining tables, all my silver-ware, castors, glass and earthen ware, knives and forks, and all the furniture of every description belonging to my table; one carryall, one cow and calf, one horse, one two-horse wagon and harness.

"Item 4th. I give to Dr. Nathaniel S. Graves five hundred dollars; to Nathaniel L. Johnston, to Nathaniel L. Lindsay, to Nathaniel L. Lea, son of Thomas Lea, each two hundred and fifty dollars.

"Item 5th. I give and bequeath the remainder of my slaves

not herein specifically bequeathed, to the children of (my) deceased sister, Rebecca Williamson, wife of George Williamson, to the children of my deceased sister, Delila Graves, wife of Jerry Graves, to my sister Elizabeth Graves, to my brother Thomas L. Lea; my will being that the said slaves shall be divided into four equal parts, and Thomas L. Lea to take one part, Elizabeth Graves to take one part, the children of my sister Rebecca to take one part, and equally divide the said part among themselves, but in no event to sell them for a division. The children of my sister Delila to take one part, and equally divide them among themselves, but in the division of this share, the children of A. C. Lindsay by his first wife, Elizabeth, are to have the share their mother would take were she living; but in this division there must be no sale for a division, as my desire is that all my slaves are to be kept in families as far as possible, and not to separate them unnecessarily.

"Item 6th. I desire that all my personal estate, not herein bequeathed, be sold, and the proceeds, after payment of my debts and special legacies, to be equally divided among the same persons, and with the like equality as my slaves are, as mentioned in the fifth clause of my will. I desire, and hereby bequeath, all money arising from any source to be divided in the same way, but I hereby release to each and every person that may have any account on my shop-book, the respective sums that may be charged in the said book against them, and I hereby enjoin upon my executor not to collect any of the said charges on the said shop-books, for the reason that I am certain they have not been kept accurately, and as my health has been too feeble to give to it the close attention it deserved: I therefore release all the claims to the persons who stand charged.

"Item 7th. I give to my friend, Dr. James E. Williamson, sen'r., five hundred dollars.

"Item 8th. I devise to my nephews, James Williamson, John L. Williamson, George Williamson, Ben. Williamson, Thomas L. Williamson, Weldon E. Williamson, sons of Geo.

Williamson, all my real estate, of every kind, wherever it may be, except what is herein specifically bequeathed to Thomas J. Brown, to be equally divided among them, share and share alike.

"Item 9th. I hereby strictly enjoin upon my executor to see that in the division of my slaves, families are to be as little separated as possible.

"Item 10th. My will and desire is, and I so declare it, that should any of my next of kin, either directly or indirectly dispute, or in any way attempt to set aside, this my last will and testament, then, should they fail, the said party or parties, if they take any legacy under this will, for their unkind way in trying to defeat my intentions, shall forfeit all interest and legacies hereby given them, and the part so forfeited shall be divided among my next of kin and legatees named in the fifth clause of my will; but should either, or any of the parties mentioned in said clause, be the party so attempting to defeat my intentions, then my desire is, and I hereby so devise and bequeath it, that the part so forfeited, shall go to the others mentioned, who do not join in defeating my will.

"Item 11th. I hereby nominate and appoint my friend Thomas J. Brown, the executor of this my last will and testament, being fully assured that he will faithfully execute my last will, as far as he has the power; and for the purpose of giving him a full compensation for his trouble, I hereby bequeath to him, in addition to the commissions that may be allowed him by the court, five hundred dollars."

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

Miller and *Morehead*, for plaintiffs.
Moore, *Norwood* and *Hill*, for defendants.

PEARSON, J. It may seem hard that one is not allowed to dispose of his own property as he pleases; but private right must yield to the public good. The policy which forbids emancipation, unless the freed negroes are sent out of the State,

and the policy which forbids *quasi emancipation*, by which particular negroes are to be allowed privileges, and are not to be required to work like other negroes, but to some extent are to have a discretion either to work or not to work, as they may feel inclined, is fully settled by the numerous cases which have been before our Court, and is strongly enforced by the Legislature. Rev. Code, ch. 107, sec. 28: "No person under any pretence whatever shall hire to his slave, or to a slave under his control, his time, on pain, &c." "It shall be the duty of all grand juries to make presentment of any slave who shall be permitted by his master to go at large, having hired his own time, &c." Sec. 29: "No slave shall go at large as a free man exercising his own discretion in the employment of his time; nor shall any slave keep house to him, or herself, as a free person, exercising the like discretion in the employment of his or her time; and in case the owner of the slave shall consent to the same, or connive thereat, he shall be deemed guilty of a misdemeanor."

In our case had the testator tried *on purpose*, he could not have more directly violated the provisions of this Statute, or more effectually contravened the fixed policy of the State. Here we have a family of negroes with two hundred acres of land, and three thousand dollars in money, to provide for their support, *so that they may not be made to work like other negroes.*

But it is said for Mr. Brown, the slave Fanny was near sixty years of age, Milly, forty-five, Mariah and Mary Anne, each, twenty or twenty-five, and the rest small children, and the bequest being to him only for life, during which time they would probably be a charge, the use of the land and money was not an unreasonable provision. Concede that, if the matter had stopped here, this provision would not have been much out of the way, how is it to be accounted for, that upon the death or insolvency of Mr. Brown, he is to have a successor, who is to be chosen by Milly, if alive, if she be dead, by Mary Anne, and in case of her death, by Mariah? Such a provision is unusual, and proves that the object was to confer a benefit upon the slaves, and that neither Mr. Brown nor his successor were the

objects of the testator's bounty, and were but "nominal donees:" *Sorry* v. *Bright*, 1 Dev. and Bat. Eq. 113. Add to this, that the successor so to be chosen is to have the two hundred acres of land, and $3000 in money, for, and in consideration of, his accepting the *absolute ownership* of some ten or a dozen slaves. Under these circumstances, could Mr. Brown, or his successor, with a clear conscience towards the testator, make the negroes work like other negroes do? The thing is too plain for discussion.

The testator betrays a consciousness that his purpose was questionable by denouncing a forfeiture against all who should oppose his wishes. But his was a mistaken charity which the law forbids. The result, if his intentions are to be carried out, will be to establish in our midst a set of privileged negroes, causing the others to be dissatisfied and restless, and affording a harbor for the lazy and evil disposed.

We had some difficulty as to the construction of the will in regard to "the dining tables, silver-ware, glass, and carryall, &c.," given to Mr. Brown. Were they intended for the use of these negroes, or a beneficial gift to him? They are put in the same clause with the bequest of the negroes, and the land and money intended for them, and there is a distinct legacy of $500 given to him as a compensation for his trouble, in addition to the commissions allowed by law; but on the other hand, he was an intimate friend of the testator, as appears from several parts of the will. Articles like these are such as one usually leaves to his friend, and are not at all suitable for negroes; besides, they are not made subject to the provision by which to follow them, and do not pass with the land and money to the successor of Mr. Brown. These considerations satisfy us that the beneficial use was intended for him, and such will be declared to be the opinion of the Court.

The disposition which the testator attempts to make of these slaves, money and land, being void, the question is presented, does the right devolve upon the next of kin and the heirs-at-law, for whom Mr. Brown will be declared a trustee? or are the lega-

tees named in the 5th item, entitled to the slaves and money, and the devisees named in the 8th item, entitled to the land?

In regard to the land there is no difficulty; for it is a well settled rule that all real estate which is not effectually disposed of by the will, devolves upon the heir-at-law, and a residuary devisee can take nothing except what appears from the will it was intended for him to take. So that, if a devise fails to take effect because it is void, or by reason of the death of the devisee, the subject devolves upon the heir, and the residuary devisee is not entitled to it—there being no reason for substituting a presumed general intention in place of the particular intention which has failed.

But it was insisted that in regard to the personal estate, a different rule is well settled by the courts of England, and has received the sanction of several cases in our own courts, by which the residuary clause is enlarged so as to embrace all property not effectually disposed of, and thereby give to the residuary legatee the benefit of all legacies that failed either by reason of lapse, or of being declared void on the ground of a presumed general intention against intestacy; and it was contended that, according to this rule, the legatees named in the 5th item became entitled to these slaves and the money by force of the 6th item. As the intention of the maker of a will ought to govern its construction, both in respect to personal and real estate, it would seem that the same rules of construction ought to be applied without reference to the different kinds of property, and the conclusion that, according to the rules which have been adopted in respect to personal property, these slaves, whom it was specially the intention of the testator to favor, are to be sold to the highest bidder, like so many horses and hogs, in pursuance of his *presumed general intention*, is so monstrous as to furnish an instance of the *reductio ad absurdum*. From these considerations we held the question under an *advisari*, for the purpose of examining the cases and reflecting upon the reason of the thing.

In case of intestacy, the whole personal estate devolves upon the administrator, and by the old law, after paying the funeral

expenses and debts, the administrator kept the surplus for his own use. So, in case of a will, the whole devolved upon the executor, who, after paying the funeral expenses, debts and legacies, kept the surplus for his own use. The law was changed in respect to administrators by the 22, Charles II, (called the statute of distributions), and by it administrators were required to divide out the surplus among the next of kin. But this statute did not apply to executors, and they still kept the surplus for their own use in this State until 1789, when they were required to divide the surplus among the next of kin; Rev. Code, ch. 46, sec. 24. The law remained unchanged in England by any statutory provision until 1832, Will. IV, when executors were required to divide the surplus among the next of kin.

But, in the mean time, the Chancellors in England, upon the idea that it was not just for executors to keep the surplus for their own use, took the matter in hand, and exerted their ingenuity, when there was no residuary clause, to convert executors into trustees for the next of kin whenever it was possible to do so; and where there was a residuary clause they enlarged it so as to include every thing that was not effectually disposed of by the other parts of the will, for the purpose of preventing the executor from keeping it for his own use. This was done upon a principle similar to the doctrine of *cy pres*, according to which, if the particular purpose intended cannot be carried into effect, the fund will be applied to some other purpose as near like it as may be. So, if the particular individual, for whom a legacy was intended, could not take it because of his death in the testator's life-time, or because the legacy was void, it was held that it should pass to the *next object* of the testator's bounty and fall into the residuum, upon the presumption that the testator had a general intention to give this additional bounty to the residuary legatee, rather than die intestate in respect thereto, and let it remain in the hands of the executor for his own use. Under the operation of this rule, residuary legacies, which are usually intended to embrace such small matters as may have been forgotten, or were *too tedious* to

mention, oftentimes become an important part of the will and passed the bulk of the estate; *Cambridge* v. *Rous*, 8 Ves. 14, is an apt instance. This reasoning may be sound in regard to lapsed legacies, on the ground that the will speaks at the death of the testator, when he may be supposed to have been made aware of the death of the legatee, and for that reason, to have an intention to include the subject of the lapsed legacy in the residuary clause, but it is not sound in regard to legacies declared void; for at the death of the testator he supposes that he has made an effectual disposition of the subject to one, and cannot be presumed to intend to give it to another.

But, our courts having discarded the doctrine of *cy pres*, we will not stop to inquire how far every corollary, or emanation from it, is affected. Nor will we stop to inquire how far the act of 1789 renders the rules of construction, adopted in England prior to 1832, inapplicable here; (*Ralston* v. *Telfair*, 2 Dev. Eq. 255, shows that the act of 1789 affects the English rule to some extent, and *Kirkpatrick* v. *Rogers*, 6 Ire. Eq. 130, *Hudson* v. *Pierce*, 8 Ire. Eq. 126, *Pippin* v. *Ellison*, 12 Ire. Rep. 61, *Lowe* v. *Carter*, 2 Jones' Eq. 377, all make exceptions to the general rule,) because the doctrine, if it be unimpaired and of full authority in our courts, has no application to this case; for in the will now under consideration, there is no *general residuary clause*, or as RUFFIN, C. J., expresses it in *Sorry* v. *Bright*, "no express general gift of the residue," which is necessary in order to make the doctrine applicable; and this will has, upon its face, full proof to rebut the presumption of any intention that these slaves and money were to pass under either the 5th or the 6th items.

The testator, having given the slaves in controversy, and the money and land, to Mr. Brown, and made other specific and pecuniary legacies, divides the residue of his estate into four classes, 1st: His slaves; 2nd, his personal estate, that is, such as he intends to be sold, viz: horses, cattle, farming tools, &c.; 3rd, debts due to him, viz: notes, accounts, &c.; 4th, his land.

By the 5th item he gives the "*remainder of my slaves not hereinspecifically bequeathed*," to certain legatees—among whom

he directs they shall be divided so as not to separate families, and "*in no event to sell them for a division;*" and in providing a subdivision, he again repeats, "in this division there must be no sale," &c. This is not a general residuary clause, and the mind rejects at once the suggestion that it was intended to include in it the slaves in controversy. They are as clearly excluded from it as if the testator had specially excepted them by name.

By the 6th item, "I desire that all my personal estate not *herein bequeathed* be *sold*, and the proceeds, after paying debts and special legacies, to be divided among the same persons *as my slaves are*, as mentioned in the 5th clause." This is not a general residuary clause. The words "as my slaves are," referring to the 5th item, prove that this only includes articles of personal property, other than slaves—such as he intended to be sold; and the fact that he directs these articles of personal property to be sold, demonstrates that it was not his intention to include in it the slaves that he intended to favor more than his other slaves. In fact it demonstrates his intention to be to *exclude* them. For if he is so regardful of his other slaves as to separate them from the rest of his property and put them in a class to themselves so as to have them divided without being sold, although the same persons are to have them as are to get the proceeds of the sale, much more must it have been far from his intention to class with these articles his favorite slaves. In *Pippin* v. *Ellison*, supra, and *Lowe* v. *Carter*, supra, it is held that a direction *to sell* the residue excludes from a general residuary clause *choses in action*, because such things as accounts, debts, &c., are not the subject of sale by executors and administrators. The principle applies here, because the testator expressly declares that even his less favored slaves *are not to be sold.*

In the same item he adds, "I desire all money arising from any source to be divided in the same way," except the accounts due on his shop-books, which he releases. This exception shows what is meant by "money arising from any source," and proves this not to be a general, but a restricted, residuary

clause, having reference only to what was due him on bonds and accounts, (other than shop accounts), but certainly having no reference to the money that might be made by the sale of his favorite negroes; in the same way that the 8th item, "I desire all my real estate of every kind, whatever it may be, except what is herein specifically bequeathed to Thomas J. Brown, to be equally divided between" certain devisees, cannot, by any effort or ingenuity, be made to embrace the 200 acres devised to Mr. Brown.

The legacy of $3000 is given to Mr. Brown on account of the slaves, to attend them as an incident; it follows that that amount is likewise excepted out of the above items on the ground that the *incident follows the principal.* For as there is a plain intention that the legatees, named in the 5th item, shall not take the negroes, there is the same intention in respect to the money.

There will be a decree declaring that Mr. Brown holds the negroes and money in trust for the next of kin, and the land in trust for the heirs-at-law.

PER CURIAM, Decree accordingly.

EDWARD GRAHAM *against* THOMAS P. LITTLE *and another.*

Where a young man, living with near relations who had great influence over him, was induced by the misrepresentations of these relations as to the nature of a decree in the Supreme Court theretofore rendered between them, to execute a bond for a large sum of money by way of correcting such decree, the Court of Equity enjoined the collection of the bond and ordered to be cancelled.

APPEAL from the court of Equity of Wake County.

A bill was filed in the year 1847, in the court of Equity of Wake County, by the plaintiff in this suit, and his two brothers,

Charles Graham and Hamilton C. Graham, against Thomas P. Little, executor of William P. Little, and of Mrs. Anne Little, widow of the said Wm. P., Charles E. Skinner, who had married a daughter of said Wm. P., and others, the object of which bill was to ascertain judicially what was due and owing to the plaintiffs in that suit from the estate of Wm. P. Little, who was their maternal grandfather, their mother, the daughter of Wm. P. Little, and Mrs. Anne Little, then being dead; which suit, when properly constituted, was set down for hearing, and sent from the said court of Equity of Wake County, to the Supreme Court. At December Term, 1851, of this Court, a report was made of the administration of the assets and the state of the claims of the various legatees under the will of Wm. P. Little, and there being no exception to this report, a decree was passed, commanding, among other things, that Thomas P. Little, as executor of Wm. P. Little, should pay to the use of the plaintiff and his said brothers, Charles and Hamilton, the sum of $2,922,28, with interest from the 11th of January, 1851. By the same decree it was ascertained that the executor of Wm. P. Little was indebted to George Little, another son of Wm. P. Little, in the sum of $2,995,03; to Mrs. Mary Mosely, a daughter of the same parents, in the sum of $2,345,03; to Charles E. Skinner, husband of Susan Skinner, another daughter of the same, $2,052,53; to William Little, jr., in the sum of $2,540,03; to Edward Tarry, husband of Lucy, another daughter, in the sum of $4,093,02.

The controversy in this case (see 5 Ire. Eq. 407,) turned materially upon the will of Wm. P. Little, which was as follows: "In the first place, I give to my wife, Anne, all the negroes which came by her, and all their past as well as future increase. Secondly, I lend to my wife, during her natural life, all the residue of my estate, real and personal. Thirdly, at the death of my wife, I give to all my children, who may be then living, an equal part of the residue of my estate, both real and personal, and in case any of them die previously, leaving issue, I wish said issue to have the portion which their parents would have drawn if living, due regard being had to such as may

have received any advances either from me or their mother, at any time previous to her death, out of my estate." He appointed his wife, Mrs. Anne Little, the defendant, Thomas P. Little, and George Little, his executors, *with full power to sell any part of his estate, either real or personal, without any order or decree of any court.*

The said executors sold a large real estate for the payment of debts, and the question was, whether the executors had a right to do so before the personal estate was first exhausted, and the court decided that they had not, but that the personal estate was the primary fund for the payment of debts, and that the real estate having been improperly sold for that purpose, the personal property, including the legacy of Mrs. Little, should be substituted for the land, and that its proceeds should be distributed in the same way as the land would have been had it not been sold. This decision materially augmented the share recovered by the plaintiff and his brothers.

Sometime in the year 1854, E. G. Haywood, Esq., having been appointed guardian of the plaintiff, Edward Graham, and his brothers, caused an execution to be issued against the said Thomas P. Little, for the amount decreed his wards, and on the 12th of September, 1854, the sum of $1,202,23 was paid by the said executor to the said Haywood as guardian.

The plaintiff alleges, in his bill, that about March, 1853, he went on a visit to his aunt Mrs. Susan Skinner and her husband Dr. Skinner; that he was at that time an infant of about nineteen years old without parents, and that he remained mostly in the family of Dr. Skinner until about the time of his arrival at age, on the 24th October, 1854, and during that time considered that as his home; that while so residing at the house of Dr. Skinner, he frequently represented to this plaintiff that the recovery which he and his brothers had obtained against their uncle Thomas P. Little, was unjust and iniquitous, and ought never to be collected, and that in this representation, Thomas P. Little, from time to time, concurred, although he (plaintiff) could never understand why the said recovery was unjust and iniquitous. The plaintiff fur-

ther alleges, that he was young and utterly ignorant of matters of business, and had the fullest confidence in his uncle T. P. Little, and Doctor Skinner, who was also his uncle by marriage, and he gave into the belief that this recovery, for some reason that he did not understand, ought not to be collected. He alleges that the said Skinner very frequently referred to this subject, and made many statements and representations to convince him that the executor, Thomas P. Little, had been greatly wronged by the decree that had been made against him in the Supreme Court, in favor of the plaintiff and his brothers; among other things, he mentioned certain claims for the boarding of plaintiff's father and mother after their marriage, and like claims for the boarding of their children, which ought to have been deducted from the amount of said decree, and certain large debts which he, as executor, had paid for the estate of William P. Little, which were unjustly excluded from his credits; that he, the said Skinner, never intended to take any part of the recovery in his favor, from the said estate of T. P. Little, and had released, or would release, the same, and that he believed all the other legatees of his father-in-law intended to do the same, or had done so. He alleges further, in his bill, that the said Thomas P. Little, although he did not often speak of the matter to the plaintiff, yet, when he did so, always referred to Doctor Skinner as being intimately acquainted with the circumstances, and referred plaintiff to him for information concerning them. He always, however, asserted, as of his own knowledge, that the debt was unjust and ought not to be paid.

The plaintiff, in his bill, further alleges, that about this time he was a good deal dissipated and addicted to the use of spirituous liquor, and that from this cause he was often in a nervous and suffering condition; that about the same time he applied to the defendant, T. P. Little, for his share of the recovery above spoken of, and proposed to him if he would advance to him that amount he would take it as a loan, and although he was not of age, he would give his note for the same, and would return it when he arrived at full age; that

his uncle, the said T. P. Little, assented to this proposition, but failed to comply with it by advancing to him the money; that this was in the year 1854, some short time before the payment made to E. G. Haywood, in September of that year.

The plaintiff further alleges, that he arrived at full age on 24th of October, 1854, while still residing in the family of Dr. Charles Skinner, and that a few days after arriving at age, it was proposed by either Dr. Skinner or his uncle Thomas, who was present, that he should sign a note to refund the $1200 collected by Mr. Haywood; that the same arguments, as before stated, were again urged upon him, and he was reminded of his willingness to sign a note before he was of age; that Dr. Skinner was again prominent in thus urging him, but that the defendant, T. P. Little, was present, assenting to his assertions; that plaintiff had never examined the proceedings in Equity of which his uncles complained, and was totally ignorant of the grounds upon which the decree was made; that his guardian was absent, and he had no opportunity of getting the advice of counsel; that he was greatly attached to his uncle Thomas P. Little as well as to Dr. Skinner, his uncle by marriage, and had great confidence in their knowledge of business and fair dealing, and though extremely reluctant, he gave his note to the said Thomas P. Little for $1200, payable twelve months after date; that very shortly after these events the plaintiff came to Raleigh and informed his guardian, E. G. Haywood, of what had been done, and his reasons for entering into the note, when, for the first time, he was informed of the true nature of his claim, and became aware of the total illusion under which he had acted. He then gave notice, both to Thomas P. Little and Charles Skinner, that he should resist the payment of this note, and his then guardian, Mr. Haywood, informed them to the same effect.

Dr. Charles Skinner, in his answer, admits that he had an intimate knowledge of the affairs of the estate; that he was advised by counsel learned in the law, and never doubted that it was the purpose of the will of Wm. P. Little to secure,

if possible, the specific legacy to the widow, and throw the payment of the debts on any and every other portion of the estate.

Entertaining this opinion very firmly, and knowing that it had been adopted and acted on up to the death of the widow, by the consent of the children who were of age, he was unwilling, and had so declared to the rest of the family, to avail himself of any advantage, which a different interpretation might give; that he is satisfied, if William P. Little's estate had been divided on the basis laid down in the decision of the Supreme Court, the amount of the testator's indebtedness would have exhausted all the personal property, and so far consumed the real estate as to have left a scanty provision for the widow; and he thinks it fortunate for all that the executors adopted and acted upon the construction which they did.

He says that, in 1853, the plaintiff became an inmate of the defendant's house; that both the defendant and his wife entertained the kindest feeling, and every proper sentiment of affection which attaches to the relation between them. In reply to some remarks made by the defendant, complaining of his uncle T. P. Little, for not paying him and his brothers the amount of the decree, he thinks, in February, 1854, he did say to the plaintiff, that, in his opinion, the debt, though a legal one, was unjust; that he then gave the plaintiff an explanation of the whole matter, and said that he did not mean to profit by the decree, and he did not believe any of the other children would; that admitting the decree to be just as well as legal, as to all the children of Mr. Little, there were reasons why the plaintiff and his brothers should be both lenient and liberal towards the defendant in finally adjusting the matter, namely, that while all the other children of Mr. Little had accounted for their board while they remained with Mrs. Little, neither the plaintiff's mother, nor her husband, nor children, after the marriage of their mother, had accounted for any thing; that if such a charge had been allowed against them, the plaintiff and his brothers would have fallen in debt to the estate; that at the close of this conversation the plaintiff

remarked, if these things were so, he would certainly repay his uncle his share of the debt on coming of age, and would advise his brothers to do the same; that if his uncle should pay the decree he would regard it as a loan, and would give him bond, with security, for its re-payment.

He further states, in his answer, that in no great while after the conversation above stated, he mentioned to the defendant Little the promise which the plaintiff had made in relation to refunding his share of the decree, when they both concluded that all offers of this kind should be postponed until plaintiff arrived at full age; that early in the fall of 1854, the plaintiff had been to Raleigh, and on his return referred to the matter and said, his guardian, Mr. Haywood, had informed him that what he (defendant) had said about the matter was not so, and was contradicted by the records of the Supreme Court, and that the other parties had not released; to which this defendant replied, in substance, that it was not true that his statement was contradicted by the records of the Supreme Court, for that he had seen the bill, the answers of the executor, and of some of the members of the family, the accounts rendered and the decision of the court, and that none of these contradicted what he had stated; that the record could not contradict him unless it stated what did not belong to it; that he had not said the other children had released, but that they had settled with the executor, and the whole amount had been regarded in that settlement as released, and was so, practically. In this conversation, this defendant again explained to the plaintiff, as fully as he could, the circumstances attending the case—the construction which the family had put upon the will of Mr. Little—the construction which the Supreme Court had put on it—the manner in which the estate had been administered—how the land had been sold to pay debts, instead of slaves—how the children had lived with the widow, and how the plaintiff's family had lived there, and which of them had accounted and which had not, and this defendant left nothing unsaid which was calculated to affect the plaintiff's conclusion on the subject, and doing this, he

was actuated with no other feeling than an impartial sense of justice; and it seemed to this defendant, at the end of this conversation, that the plaintiff was satisfied in regard to the facts of the case, and was inclined to execute his original purpose as avowed to this defendant before. He had no further conversation with the plaintiff upon the subject of the decree and the settlement, until the day on which the note was executed. On that occasion, both the plaintiff and defendant Little were at defendant's house, the plaintiff being then of full age; this defendant admits, in his answer, that he did introduce the subject by enquiring of him if he had made up his mind to repay his uncle Little the amount received on the decree, saying, that if he had it might be arranged then. The plaintiff hesitated for a moment, as if he were not prepared to answer, and remarked, that it was a hard case for his uncle to pay the money, and he would be willing to give up his share if he knew his brothers would do so when they came of age, and if they should not follow his example, they would receive just that amount more than himself; that immediately after making this remark, the plaintiff, as if convinced it was unjust to regulate his conduct by such a standard, said he did intend to repay his uncle the whole sum, but he was unwilling to give his note, for that his uncle was embarrassed for money, and he was afraid he would be pushed for the money if he gave a note, but said, if the note was made payable twelve months after date, and transferred to this defendant, who could, and he believed would, indulge him, he would execute it, and said at the same time, that he relied on the good offices of this defendant to get him into some profitable business whereby he could pay off the note without impairing his estate. That they both went into a small house where the defendant Little lodged, and then the whole proposal of the plaintiff was mentioned to the defendant Little, who assented to the terms and the note was executed.

That in accordance with this arrangement, this defendant took the note by a transfer to him from the defendant Little, and, the latter being indebted to him, gave him a credit for

the amount; but understanding by a letter from the late guardian of the plaintiff, Mr. Haywood, that the plaintiff was dissatisfied, and that he intended to controvert the note given, being loth to be involved in a law-suit, he surrendered the note to Mr. Little, and since then has not considered himself as having any interest in it.

That at these several interviews, and at the time and occasion of executing the note in question, he does not believe the plaintiff was at all under the influence of spirituous liquor; that this defendant never attempted to acquire any influence over the plaintiff for the purpose of effecting this arrangement, and what he did in the matter was for no benefit to himself.

The answer of the defendant Little, refers to Dr. Skinner's, and is substantially the same in its history of the transaction. Motion to dissolve the injunction. Motion refused. Appeal to the Supreme Court.

E. G. Haywood and *Fowle*, for plaintiff.
Bryan and *B. F. Moore*, for defendants.

NASH, C. J. The bill is filed to enjoin the defendants from collecting a bond executed by the plaintiff, to Thomas P. Little, under the following circumstances: Wm. P. Little, sr., died in the year 1827, greatly indebted, and possessed of a large real and personal estate. The last clause in his will is as follows: After appointing his sons, Thomas P. and George Little, and his wife, Mrs. Anne Little, his executors and executrix, they "are hereby vested with full and ample power to sell any part of my estate, real or personal, whenever they may think proper to do so, &c." Under this power, the executors and executrix, acting by the advice of counsel, sold the land which the testator owned in Tennessee, and some in this State, believing that, as negroes were low in value in this State, and the lands were held at high prices in Tennessee, it was the best course to pursue to pay the debts of the estate. Subsequently, a bill was filed by the legatees of Wm. P. Little, of

whom the plaintiff was one, for a settlement of the estate, and an account of the disbursement of the assets by the executors. In that case the court declare that the land was not charged in the will in exoneration of the personalty, but that the latter was the primary fund for the payment of the testator's debts, and decreed an account. A reference was made to the clerk to take the accounts, and he reported that the defendants owed the plaintiff and his brothers on the 11th of January, 1851, $2,922,78. This report was confirmed, and a decree rendered in accordance thereto. This decree is still in force, unreversed. Of the sum so decreed, the defendant Thomas P. Little paid to Mr. Haywood, the guardian of the plaintiff, $1,200. The plaintiff was then a minor. A year or two before he come of age, he went to the house of the defendant Dr. Skinner, who had married his aunt, which he made his residence. Dr. Skinner was of the opinion that the legatees had all been equally benefitted by the sale of the land instead of the slaves. In February, 1854, while the plaintiff was at his house, finding, as he says in his answer, that he indulged in unkind feelings towards his uncle T. P. Little, on account of his delay in paying the decree, he (Skinner) determined to give him a full explanation of the whole business, and told him he did not regard the decree against his uncle T. P. Little as just; that he did not intend to profit by it, and he did not believe any of the other children would, and that there were reasons why the plaintiff and his brothers should be liberal as well as lenient towards Thomas P. Little—namely, that while all the other children of Wm. P. Little had accounted for their board, &c., while they remained with their mother, Mrs. Little, neither plaintiff's mother, nor his father, nor their children, had accounted for any thing; and if they had so accounted, they would have been largely in her debt, and he believed all the other legatees had executed their releases. The plaintiff observed if these things were so, if his uncle paid the decree, he would consider it as a loan, and give his bond to refund when he came of age.

In a subsequent conversation, after the plaintiff had been to

Raleigh, he said to Dr. Skinner, he had had a conversation with his guardian, E. G. Haywood, who informed him that what he, Skinner, told him, was not so, and was contradicted by the record of the Supreme Court, and that the other parties had not released. This statement the defendant Skinner denied, and then repeated over to the plaintiff what he had said in the previous conversation. At this time, the defendant Little was at the house of Dr. Skinner, and the latter thought the plaintiff was satisfied, and introduced the subject again by inquiring of him if he had made up his mind to repay to his uncle Little the amount received on the decree, "saying that if he had, it might be arranged then." The plaintiff hesitated for a moment as if he were not prepared to answer, and then remarked it was a hard case for his uncle to pay the money, and he would be willing to give up his share if he knew his brothers would do so when they came of age, but it was uncertain what they would do then. Finally, after some reflection, he said he did intend to repay his uncle, and he would execute his note for his share of the decree, and the note was executed, Little being present. After its delivery, the defendant Skinner took the note from T. P. Little, with an endorsement in blank, and gave him credit for the amount. This is the statement taken from the answers of Dr. Skinner and T. P. Little.

The question is, will a Court of Equity suffer an obligation, executed under such circumstances, to be enforced against the plaintiff?

It is admitted that a voluntary bond is as binding between the parties in a Court of Equity as in a Court of Law. This is emphatically a voluntary bond, there being no consideration. Will the court suffer it to be enforced under the peculiar circumstances of the transaction? A nephew is induced by one uncle, with whom he was residing at the time, to make a donation to another uncle, of a bond for a large sum of money. The plaintiff was a young man just emerging out of his minority, unacquainted with business, ignorant of the facts of the case, addicted to the too free use of spirituous liquors, in the

house with his two uncles, T. P. Little and Dr. Skinner, urged by the latter to execute a bond to the former for a large sum of money, when, at that moment, it is very clear that the uncle T. P. Little was indebted to the nephew in a much larger sum.

The case bears a strong analogy to the class of cases in which trustees and others, acting in a fiduciary character, are forbidden to contract with their *cestuis que trust*. But it properly belongs to another class mentioned by Mr. Adams, p. 184, where there is no technical fiduciary relation existing between the parties, but one stands in the relation of special confidence towards the other, so as to acquire an habitual influence over him, where he cannot accept from him a personal benefit without exposing himself to the risk, proportioned to the nature of their connexion, of having it set aside as unduly obtained. Even where the only relation is that of friendly and habitual reliance on advice and assistance, care must be taken that no undue advantage shall be obtained; *Hunter* v. *Atkins*, 3 M. and K., 113; *Dent* v. *Bennet*, 4 M. and C., 269. The proper jurisdiction of a court of Equity is to take every one's act according to conscience, and not to suffer undue advantage to be taken of the strict forms of law, or of positive rules; 1 Stor. Eq. sec. 331. Hence, says Justice STORY, if there be no proof of actual fraud or imposition, yet, if upon the whole circumstances, the contract appears to be grossly against conscience, or grossly unreasonable and oppressive, courts of Equity may, and will, grant relief; *Nott* v. *Hill*, 2 Vern. 167, 211; *Cole* v. *Gibbons*, 3 P. Williams, 290. Here, the court cannot but see that the contract in question is against conscience, and grossly unreasonable; *Suttles* v. *Hay*, 6 Ire. Eq. 124. Upon this point the case of *Archer* v. *Hudson*, 29, E. Ch. Rep. 360, is very strong. There, a Miss Kendray executed a note payable to a bank, as surety for her uncle, McDaniel, and for his benefit. She had been residing with her uncle but two months. The object of the note was fully explained to her by the agent of the bank, in procuring her signature, and she fully understood it. The Master of the Rolls says, "The relation between the

parties is undoubted. She, by signing the note for the benefit of her uncle, standing *in loco parentis*, without any consideration or advantage to herself, became subject to this liability. This is a transaction which, under ordinary circumstances, this Court will not allow." Again, the court say, "Nobody ever asserted that there could not be a pecuniary transaction between a parent and a child, the child being of age; but every body will affirm in this Court that, if there be a pecuniary transaction between a parent and a child just after the child attains twenty-one years of age, and prior to what may be called complete emancipation, without any benefit to the child, the presumption is, that an undue influence has been exercised to procure that liability on the part of the child, and it is the duty and the business of the party who endeavors to maintain such a transaction, to show that the presumption is adequately rebutted." The answers in our case furnish the only evidence in the case, and from them we mainly derive the true character of this transaction. The two defendants were the uncles of the plaintiff. They were both present when the bond was executed, and the answer of Dr. Skinner shows plainly the influence he possessed over the plaintiff. He went to the house of Dr. Skinner an inebriate, and during the short time he sojourned there, the uncle succeeded, in some measure, in rescuing him from this degrading and inveterate habit, and if the Doctor has succeeded in his kind and benevolent effort, it will be worth to the plaintiff more than double the amount of his bond. But this is beside the present question, except in showing Dr. Skinner's influence over him. Ignorant and incapable of judging of his rights, he trusted to his friend and connection, Dr. Skinner, took his advice and information about the business, in preference to that of him who had lately been his guardian, his guide and director. For when, upon his return to the house of his uncle, he informed him that Mr. Haywood had told him that he (the Dr.) had not given him a correct view of the decree obtained by him and the other legatees, as appeared from the record of the suit, and the decree, the Doctor did not hesitate to tell him Mr. Haywood was

wrong, that he had examined the record and it was as he had represented it to him. He chose to trust to the opinion of Dr. Skinner in preference to that of his late guardian. All this shows the influence which the uncle had acquired over the nephew. But it turns out that Mr. Haywood was right, and Dr. Skinner was wrong. Under this ignorance of his rights and obligation, he executed the bond, distant from all his other friends and relatives with whom he might have counselled. Another fact disclosed by the answer is important: when, on his return to Dr. Skinner's, the plaintiff did not advert to the note which he had promised to give, until reminded of it by Dr. Skinner, he was then reluctant to execute it, but after some time did so. We do not mean to say that any actual fraud was perpetrated by Dr. Skinner, or any intended. He, no doubt, believed what he stated. But where an individual pronounces a decree of a court of justice unjust, he ought to be very certain he is right. Here, however, the question is not one of direct and actual fraud, but of undue influence used to the injury of the plaintiff by the defendants; I say the defendants, for they were both present at the execution of the bond, and after its execution it was handed to Little, who immediately transferred it to Dr. Skinner, who gave him a credit for it on his account. We consider Dr. Skinner as standing throughout this transaction in the relation of a parent towards the plaintiff.

It was said in the argument that there was a moral obligation on the plaintiff to refund the money paid by Mr. Little to his guardian, because he had been injured to a large amount by being made to account for the value of lands improperly sold by him. We cannot perceive how that has worked an injury to him, for the slaves that had belonged to William P. Little had been sold to replace the landed fund. If he suffered by that transaction, he suffered in company with all the rest of the legatees. In truth, his suffering was contingent upon the amount of personal property Mrs. Anne Little might have to dispose of at her death.

Upon these grounds, we are of opinion that the injunction

ought to have been continued until the hearing. There is no error in the order appealed from.

PEARSON, J. It is admitted that while the plaintiff was a minor, living as a guest with the defendant Skinner, a near relative, he was told by Skinner that the decree of the Supreme Court, under the peculiar circumstances, operated *unjustly* upon his uncle, the other defendant; and that the views of the case that had been given to him by his guardian, with whom he had consulted, were *erroneous*, and that the plaintiff was thereby induced, in ten days after arriving at full age, to execute the note in controversy. I put my opinion on the ground of "equity confessed by the answer."

Conceding to the defendant perfect sincerity and honesty of purpose, which I cheerfully do, it was surely incumbent on him, after taking the responsibility of opposing his view of the case to that of the Supreme Court, and of the plaintiff's guardian, in regard to the justice of the decree in its operation on the other defendant, to set forth the grounds upon which his opinion was based, and by which it could be supported; this he failed to do. On the contrary, according to the facts admitted, the decree gives to the plaintiff no more than he was, in conscience, at liberty to take, and does not take from the defendant Little one cent that he could in conscience keep. The testator gives certain of his slaves and other personal property, together with his land, to his widow *for life*, and *then to his children*. Certain others of his slaves he gives to his widow *absolutely*, and charges his whole estate with the payment of debts, with power to sell both the real and personal estate for that purpose. After his death, the widow and the other executors agree that, owing to the peculiar circumstances, it was most advisable to pay off the debts by a sale of the slaves, in which she had but a life estate, and of the land in which, also, she had but a life estate. The slaves in which, under the will, she took the absolute estate, were in this way exonerated. She had no right in conscience to take any benefit from this peculiar state of things, other than that which was

common to herself and the others interested in the property; and by a well-settled principle of equity, the justice of which no one can call in question, and which was acted upon as the basis of the decree referred to, inasmuch as the slaves in which she had the absolute estate, although primarily liable, were exonerated by a sale of the land in their stead, they were charged with the amount raised by the sale of the land. The result thus produced, so far from being *unjust*, was in strict accordance with the most refined notions of justice, and as such would strike any one who had not some preconceived prejudices to the contrary. It is true that this view of the case may not have presented itself to Mrs. Little, and she distributed her bounties and hospitalities among her children according to her own good pleasure, considering herself the absolute owner of those slaves; and the principle of substitution, announced by the decree which required the *land-money* to be replaced by a sale of slaves, made her estate that much less than she and those members of the family who had imbibed impressions from her, supposed it to be. Still this does not even give color to the allegation that the decree worked injustice to the defendant Little. It is admitted that the slaves on hand, which had belonged to the testator, were more than sufficient to replace the "land-money." So, the individual estate of no one of the executors was charged with one cent by reason of the decree, and how the decree operated unjustly in respect to the defendant Little, is not shown or suggested. I concur the opinion that the injunction ought to be continued until the hearing.

PER CURIAM, Decree to be certified.

JOSEPH KNIGHT *and others against* JOHN L. KNIGHT *and others.*

A limitation by will, to the *heirs* or *the heirs of the body* of one known by the testator at the time of the making of the will to be alive, is construed

to mean the children, and the descendants of deceased children, of such person.

Where a legacy is given to a class, if there be no intermediate estate, the class is enumerated at the death of the testator; but where there is an intermediate estate, the class is enumerated at the end of such intermediate estate.

The next of kin of one of the class, who is since dead, whether born before the termination of the intermediate estate, or after that event, are entitled to his share.

CAUSE removed from the Court of Equity of Edgecombe county.

In the last will and testament of Lewis Barlow is contained the following clause:

"I leave to my son Billy Blount Barlow, during his natural life, the following negroes, namely: Paul, Frank, Maria, and Sam, and increase of any; and should my son aforesaid have a lawful *heir* or *heirs* begotten of his body, then the above-named negroes to them and their heirs forever; but in case my son aforesaid die without lawful heirs as aforesaid, the above-named negroes I give to the heirs lawfully begotten of the body of my daughter Louisa Knight, to them and their heirs forever." In another part of the will is a bequest to Louisa Knight.

The legatee for life, B. B. Barlow, received the said slaves, with the assent of the executor, and held them for several years, when he died intestate, without leaving any issue or the descendants of such. At the death of the tenant for life, Mrs. Louisa Knight had the following children, who were all then alive, to wit, John L. Knight, David B. Knight, Sarah L. Knight, Luther B. Knight and Peter E. Knight; but, after that event, the said Peter E. died, and Joseph Knight administered on his estate. These children of Mrs. Knight, and the administrator of the deceased, P. E. Knight, are made defendants.

The plaintiffs are the children of Mrs. Louisa Knight also, but born since the death of the holder of the life-estate, Billy B. Barlow.

The bill seeks for the plaintiffs, as constituting part of the class described, a share of the said slaves, and a share of the part of Peter E. Knight, deceased, of whom they, with the defendants, are the next of kin.

The defendants answered, insisting that only such children of Louisa Knight as were born when B. B. Barlow died, can, by the rules of interpretation applicable to this will, come within the description of the persons entitled.

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

No counsel appeared for the plaintiffs in this Court.
B. F. Moore, for defendants.

PEARSON, J. It appears by the will that the testator knew that his daughter Louisa was alive, hence the limitation to the heirs of her body must mean her children or descendants, (so as to take in a grand-child, if the parent be dead). This is a familiar rule of construction, as a consequence of the axiom *nemo est hæres viventis*.

We have then, a limitation of slaves to Billy B. Barlow for life, remainder to the children of Louisa Knight. Barlow is dead. The defendants are children of Mrs. Knight, who were born at the time of his death; the plaintiffs are children born since his death. The question is, do all the children take, or only those who were *in esse* at the time the particular estate terminated? Where a legacy is given to a class, e. g. to the children of A, and no particular estate is interposed, so that the question of ownership must be determined at the death of the testator, only such children of A who are *in esse* at the time and can answer to the call for an owner, are entitled to the property. This results from the fact that property, at all time, must have an owner, so as to belong to some one. After personal property once vests in possession, the ownership is fixed and cannot be divested without the act of the owner. A different rule has been applied to land, which is allowed, in the case of a descent cast upon a presumptive heir,

to pass from his possession if a nearer heir be born, or to open and take in an heir of equal degree as a co-parcener. But this rule has no application to personal property.

Where, however, a particular estate is interposed, as in our case, the taker of the first estate answers the purpose of filling the ownership, and holding the possession; so, although the limitation over is vested, there is no absolute necessity of fixing the ownership in regard to it. With a view of taking in as many of the class as possible, so as to carry into effect the intention, as far as the rules of law will allow, the call for the owners of the ultimate estate is not made until the first estate falls in, and all who answer the description at that time, are entitled. This doctrine is stated in all of the text writers. By it the children of Mrs. Knight born after the death of Billy B. Barlow are excluded.

It is set out in the bill that Peter E. Knight, who is dead, and of whom Joseph Knight is the administrator, was a child of Mrs. Knight, and was living at the death of Barlow. It does not appear at what time this child died. Of course any of the children of Mrs. Knight, who were living at the death of Peter E. Knight, although born after the death of Barlow, are entitled to a share of his share as his next of kin, if he left no children. As to this there may be a reference to ascertain the facts, so as to supply the omission in the pleadings.

PER CURIAM, Decree accordingly.

THOMAS LEARY *administrator, against* ALEXANDER CHESHIRE *individually, and as administrator of N. E. Beasley.*

If one surety, by any means, gets a fund belonging to the principal, he is not at liberty to take the entire benefit of it, but must share it with his co-surety.

CAUSE removed from the Court of Equity of Chowan County. At August Term, 1836, of Chowan County Court, Nathl.

J. Beasley became the guardian of his daughter, Martha Elizabeth, who was a minor, and the defendant, and James Norcom, the plaintiff's intestate, became his sureties by executing a guardian bond jointly with him. Martha E. Beasly was entitled, at the time this guardianship was conferred, to the sum of one thousand dollars arising from the sale of her mother's land, her mother being dead, and she being the only child, and the said N. E. Beasly was entitled, as tenant by the curtesy, to the interest on that sum during his life, that is, to sixty dollars per annum. The said Beasly received the said sum of one thousand dollars, due his ward. A few years after entering into the guardianship, Beasley became embarrassed in his business, and his sureties above mentioned, being apprehensive of loss on account of their suretyship, induced him to surrender the guardianship of his daughter, and the defendant, Cheshire, was appointed in his stead, who entered into bond with plaintiff's intestate and another as his sureties.

At the instance of the defendant, a suit was brought in behalf of M. E. Beasley, on the guardian bond, against himself, the said Cheshire, and the plaintiff's intestate; a judgment was rendered against them and a recovery had for the said sum of $1000, with costs, of which intestate paid, under execution, five hundred dollars and the costs of the suit, after which no execution issued on the judgment.

Beasley died in 1851; the defendant administered on his estate. He was utterly insolvent, and had been so from shortly after surrendering the guardianship as above stated, and never repaid plaintiff any part of the amount paid for him.

The plaintiff insists that he is entitled to one half of the interest arising from the said sum of one thousand dollars during the life of N. E. Beasley, together with interest thereon, since the same came to the hands of the defendant, Cheshire.

The prayer is for an account, &c.

The defendant answered, admitting the above facts, but contending that he was entitled to hold the full benefit of the accumulations of interest due his testator. He alleges further in his answer, that his intestate, N. E. Beasley, was largely

indebted to him on a judgment obtained against him in his life-time, for which he was entitled to retain from assets in his hands, and that this sum would more than cover the amount in his hands, arising from the source designated.

There was replication to the answer, commissions, proofs, and exhibits filed.

The cause was set down for hearing, and sent to this Court.

No counsel appeared for the plaintiff in this Court.
Heath and *Hines*, for the defendant.

PEARSON, J. The allegation of the defendant that he holds a judgment against his intestate, besides that upon the guardian bond, is not supported by proofs, and must be put out of the case.

We have, then, this question: A principal becomes insolvent, and his sureties are forced to pay the debt; one of them afterwards gets into his hands a fund belonging to the principal, and, upon his death, by taking out letters of administration, acquires the right to *retain* the fund, can he claim the whole benefit, or must he share with his co-surety?

Among co-sureties, "equality is equity." This is a well-settled principle, "If one surety, by any means, gets a fund belonging to the principal, he is not at liberty to take the entire benefit, but must share with his co-sureties; *Barnes* v. *Pearson*, 6 Ire. Eq. 482; *Allison* v. *Davidson*, 2 Dev. Eq. 79.

PER CURIAM, Report confirmed, and decree for the amount reported.

HENRY M. SHAW *and others against* WILLOUGHBY McBRIDE *and another.*

Unless otherwise provided in the will, general legacies will be taken for the payment of debts before specific legacies, and the legacies of personal property will be taken before those of real estate.

Where a fund was ordered by will to be raised for the payment of debts by the hire of certain slaves named, with a limitation over when the necessary amount was raised, and it turned out that the indebtedness was greater than the whole value of the slaves thus set apart, the court ordered them to be sold *in toto*, and their values applied to the payment of the debts.

A house ordered by a will to be removed from one tract of land to another and given with the latter tract to a legatee, was held to become personal property when it was removed, and must abate with the specific legacies of personal property.

CAUSE removed from the Court of Equity of Currituck county.

The questions considered in this case, arise out of the will of Alfred Perkins, the material portions of which are as follows:

"*First*, I give and bequeath to my beloved wife, Lovey Perkins, the plantation on which I live, containing about one hundred and sixty acres; negroes Jim, Billy, Willis, Joe, Albert, Ailiff and her two children, Henry and Amelia, Jenny and her boy, and Miles; all my household and kitchen furniture; all my farming utensils, &c.; negro Harriet and her three children; and all the woodland situated on the Comer Gum farm, (describing it), for the purpose of furnishing the farm, already given her, with fire-wood and rail timber; the whole of the foregoing I give and bequeath to my beloved wife forever.

"*Secondly*, I give and bequeath to Molly Frost my Skillet-Handle farm, containing about one hundred and forty-five acres, provided she has an heir begotten of her body, and provided she is willing to release my estate from any amount I may owe her as guardian; but if she has no heir begotten of her body at her death, I give and bequeath the foregoing to her two brothers, Thomas Frost and Alfred Frost, to them and their heirs forever.

"*Thirdly*, I give and bequeath to Alfred Frost so much of my Comer Gum farm as is not given away to my wife, and so much of it as is not cut off by Caleb Bell's lead-ditch, to him and his heirs forever. I also give to said Alfred Frost my negro boy Alfred, to him and his heirs forever.

"*Fourthly*, I give to Thomas Frost the Biggs farm, &c.; * * also the piece of land adjoining it that was separated from the Comer Gum farm by Caleb Bell's lead-ditch, to him and his heirs forever.

"*Fifthly*, I give and bequeath to John Frost my negro boy Haywood, to him and his heirs forever.

"*Sixthly*, I leave negroes Tom, Tatum, Lydia, Jane, Eliza and her children, to be sold by my executor on a credit of six months, with interest from date; and the fund arising from the sale, together with the notes and money I may leave, I want applied to the payment of my just debts, and the deficiences I want made up by hiring out negroes Willoughby, Billy, Cuffee, Major, George and Edward, as long as may be necessary.

"*Seventhly*, After the payment of my just debts, I give to Willoughby McBride the negroes above directed to be hired out, (naming them again), to him and his heirs forever.

"*Eighthly*, I give and bequeath to Mary Parr, orphan of David Parr, the sum of three hundred dollars. * * *

"*Ninthly*, I leave the house now used as a school house, near the Baptist church, to be moved by my executor, at the expense of my estate upon the Skillet-Handle farm, for the use of the same, and the land it is now on, I give to Dr. Henry M. Shaw, provided he pays thirty dollars to my estate."

By the last clause of this will, H. M. Shaw who was appointed executor, qualified and took upon himself the burthen of executing the same. The executor took possession of the assets, and it has turned out that the funds and means provided for the payment of his debts, were inadequate to the purpose by nearly, or quite, twelve thousand dollars, and that the slaves ordered to be hired out, will be insufficient, even if sold, to raise the required amount.

The bill is filed by the executor, and by Alfred Perkins, Mary Parr, Molly Frost, Thomas Frost, and John Frost, against Lovey Perkins, and Willoughby McBride, praying for a construction of the will, and that the executor may be directed by this Court in the payment of the debts, particularly as to the mode in which the residue of the indebtedness is to be paid after the fund provided by the will is exhausted; the plaintiffs contending that the slaves directed to be hired out, are primarily liable, while the legatee McBride contends that his is a specific legacy as well as the other, and that it ought not to be sold in whole, but should abate in the proportion of the other specific legacies; and further that the court will declare their several rights in the particulars above set forth; also for general relief.

The defendants answered, admitting the facts as above stated, and insisting on their different views which are above stated.

The cause was set down for hearing on the bill, answers, and exhibits, and sent to this Court by consent.

Heath, for plaintiffs.
Winston, jr., for defendants.

BATTLE, J. The difficulties suggested in the construction of the will of the testator, arise, not so much from its terms, as from the effect upon it of his indebtedness, of the extent of which he appears to have been so lamentably ignorant. The pleadings show that, in addition to the funds set apart by the testator himself for the payment of his debts, there will have to be raised out of other property belonging to the estate, the sum of about twelve thousand dollars. The question is, out of what part of it, given as it is to different devisees and legatees, this large amount is to be raised.

We suppose it is undeniable that the personal estate is to be first applied before any part of the realty can be taken for the payment of the debts.

No authority need be shown for the well known principle, that unless it be otherwise ordered by the testator himself, the

personal estate is the primary fund for the payment of debts, and we cannot find any such order in the present will. It is equally clear that general legacies must be applied before specific legacies are taken, unless otherwise directed by the testator. A question might, under other circumstances, be raised, whether the specific legacy of certain slaves to the defendant Willoughby McBride, were not charged with the debts prior to the general legacy of three hundred dollars to the plaintiff Mary Parr. The legacy to McBride is, "after the payment of my (the testator's), just debts," and if the question were a practical one, it might be contended that the debts were all to be paid out of the hires or proceeds of these slaves before any other legacy, general or specific, could be touched. But as both these legacies will be exhausted, it is unnecessary to decide which must first be taken. We are clearly of opinion that both these legacies must be applied before any of the other specific legacies can be taken. The intention of the testator that McBride was not to have the negroes bequeathed to him until all the debts were paid, is too plain to admit of his claim to stand on a footing of equality with the other specific legatees. Nor can we assent to the construction for which he contends, that the slaves given to him are to be hired out for an indefinite period, until out of the hires the debts may be paid. The creditors are not bound to wait, and the other specific legatees ought not to be subjected to the risk of the death or depreciation in value of the said slaves. Besides, it is admitted that the proceeds of their sales even, will not be sufficient for the payment of the debts, and no construction can be admissible which postpones to an indefinite period the ascertainment of the liability of the other legatees.

The gift of the house, with the expense of removing the same to the Skillet-Handle farm, must be taken as a specific legacy to the devisee of that farm. By separating it from the land on which it stood, the testator made it a chattel, so as to pass as such to the legatee, though when placed on the land to which it is ordered to be removed, it will again become a part of the realty. As a specific legacy it must contribute *pro rata*

with all the other legacies of that kind for the payment of the remainder of the debts. A decree may be drawn to provide for the settlement of the estate upon the principles here stated.

PER CURIAM, Decree accordingly.

WILLIAM GAUSE *against* CHURCHILL PERKINS.

A bill alleging that a trespasser was about to commit irreparable injury by boxing and working turpentine trees, and by cutting timber and making staves on land fit only to be cultivated for these products, without an averment of the defendant's insolvency, will be dismissed on motion.

APPEAL from the Court of Equity of Brunswick county, Judge DICK presiding.

The plaintiff in his bill alleged that he was the owner in fee simple of the land in question, and that for several years past he has been in possession of a part of it by building, fencing, and cultivating such part continually up to the date of his bill; that the most of the land is fit for the production of turpentine, staves and timber, and for but little else; that the defendant, in 1852, by his agents and servants, against the will of the plaintiff, entered upon the premises and boxed the pine trees for procuring turpentine, and has carried on the business of making turpentine on this land, and carrying it off and selling the same in large quantities; that he has boxed some 25,000 trees; that he is overworking these trees, and that in a few years they will be worn out, useless and unfit for making turpentine; that "he is now engaged in committing other waste, spoil and destruction upon the said land, and is thus doing an irreparable injury to the said land, and will render the same utterly useless and valueless, unless he is restrained by the injunction of this Honorable Court." It also charges, that the defendant has no interest or title in the land, or any part of it; that the plaintiff had instituted an

action at law for the trespasses above-mentioned, and that the same was still pending, but that no amount of damages he may recover, at law, will compensate for the injury threatened to his property.

The prayer of the bill is for an injunction and for an account.

The answer of the defendant denies that the plaintiff has title to any part of the land used by him, but says that all thereof is his own property by a valid title. He denies that the process of cultivation, as conducted by him, is calculated irreparably to injure the land, but that he is pursuing the business in a prudent manner. He avers also, that he is entirely solvent, and worth much more than the whole value of the land claimed by the plaintiff, so that there would be no difficulty in obtaining remuneration, at law, for whatever he might recover from defendant by the way of damages.

Defendant moved to dismiss the bill for want of equity, which motion was refused by his Honor, Judge DICK; whereupon the defendant appealed to this Court.

Strange, for plaintiff.
London and *Moore*, for defendant.

PEARSON, J. The general rule is, Equity does not extend its jurisdiction either to offences against the public, or to civil trespasses. In reference to the former no exception has ever been made; but in reference to the latter an exception has been allowed after much hesitation, and jurisdiction assumed for the *prevention* of *torts* or injuries to property, by means of the writ of injunction, under certain restrictions, namely, two conditions must concur in order to give jurisdiction—the plaintiff's title must be admitted, or be established by a legal adjudication, and the threatened injury must be of such a nature as will cause irreparable damage.

The ground of the first restriction is obvious; a court of Equity cannot pass upon the legal title; to do so would convert a bill in Equity into an action of ejectment. It is not necessary, however, that the legal title should be established

before the aid of a court of Equity is asked for, because the injury may be committed before a trial at law can be had, and when the bill sets out that an action has been, or is about to be, instituted for the purpose of establishing the title, Equity will exert its power of injunction in aid of the action at Law, by taking care of the subject-matter of the action, but without assuming jurisdiction to decide the question of title. *Irwin* v. *Davidson*, 3 Ire. Eq. 316.

The ground of the second restriction is equally obvious. If a court of Equity interfered to prevent an alleged trespasser from doing ordinary acts of ownership, such as cultivating the land, clearing and opening new fields, &c., a bill for an injunction would accompany a declaration in ejectment, almost as a matter of course, causing not only much private loss, but great detriment to the public. Fields already cleared would lie idle, woodland that, in a country like ours, ought to be cut down and cultivated, would stand wild and unproductive, and the valuable products of our forests would no longer swell the tide of trade.

In the application of this restriction, much difficulty occurs in defining what injury is irreparable. The word means that which cannot be repaired, retrieved, put back again, atoned for. The most absolute and positive instance of it is the cutting down "ornamental trees," such as the noble oaks in our State-House grove. "A tree that is cut down cannot be made to grow again." But the meaning of the word "irreparable" pointed at by this example, is not that which has been adopted by the courts either in England or in this State. *Grass* that is cut down cannot be made to grow again, but the injury can be adequately atoned for in money. The result of the cases fixes this to be the rule: the injury must be of a *peculiar nature*, so that compensation in money cannot atone for it; where, from its nature, it may be thus atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be considered irreparable.

In England, analogies drawn from the doctrine of *destructive waste* are resorted to for the purpose of aiding in the ap-

plication of the rule. It is there held, that if an alleged trespasser is about to pull down the dwelling-house, an injunction will lie, without an averment that he is insolvent; for, although with money enough, as good, or a better house can be built, still it involves a matter of *feeling*—there is an attachment to the house in which our ancestors lived. This feeling is certainly not as vivid in this country as it is in England. How far our courts will follow their decisions, is not now for consideration. There may be a distinction between pulling down a house merely for destruction, and doing so for the purpose of improvement. So, it is there held, that if an alleged trespasser is about to work a mine, an injunction will lie without an averment of insolvency, because it is *destruction*, and takes away the substance of the land, and there is no mode of ascertaining the value, or the quantity of the copper, tin, or other mineral that is extracted from the bowels of the earth. Our courts have shown a disposition not to interfere, unless there be an averment of insolvency. In *Falls* v. *McAffee*, 2 Ire. 239, it is suggested that instead of an injunction, the proper course was to appoint a receiver, so as not to stop the working of a gold mine; for that was alike "opposed by public policy and private justice." This suggestion is adopted in the *Deep River Gold Mining Company* v. *Foe*, 4 Ire. Eq. 61; in which case, as well as in *Irwin* v. *Davidson*, supra, there is an averment of insolvency. The subject of working mines is, however, not now under consideration.

So, it is there held, that if an alleged trespasser is about to cut down timber trees, as distinguished from ornamental trees, an injunction will lie, without an averment of insolvency; because it is *destruction*, and takes away the substance of the land, and would be waste if committed by a particular tenant. Our question is, how far the English doctrine is applicable here in regard to clearing the land, cutting timber for shingles, and staves and working trees for turpentine?

The analogy taken from the doctrine of destructive waste fails; for it is settled with us that a widow, or other tenant for life, may clear a reasonable quantity of land, and is not

confined to the use of timber as "house-bote," "fire-bote," "hay-bote," but may sell or otherwise dispose of the wood on the land so cleared. So, the widow may cultivate the pine-trees in her dower-land for the purpose of getting turpentine, and if dower is assigned on land fit for nothing but to afford staves and shingles, it is difficult to conceive what other use she can make of it.

Putting this analogy out of the way, the naked question is: in the present condition of our country, does the cultivation of pine-trees for turpentine, or the cutting down of oak-trees for staves, or cypress trees for shingles, cause an irreparable injury?—one which cannot be compensated for in damages? The very purpose for which these trees are used by the owners of land is to get from them turpentine, staves and shingles, *for sale.* It follows, therefore, as a matter of course, that if the owner of the land recovers from a trespasser the full value of the trees that are used for these purposes, he thereby receives compensation for the injury, and it cannot, in any sense of the word, be deemed irreparable. So that private justice and public policy, which calls for a full development of the resources of the country, alike forbid the interference of a court of Equity, except in cases where, from the insolvency of the alleged trespasser, the compensation in money cannot be had. Accordingly in *Lloyd* v. *Heath*, Bus. Eq. 41, the bill avers the insolvency of the defendant, and it is treated of in the opinion as a necessary part of the plaintiff's equity. So, in the other cases in reference to timber, and in the gold-mining cases, this averment is always made as a necessary part of the plaintiff's equity. Indeed, in *Thompson* v. *Williams*, 1 Jones' Eq. 178, it is said that an injunction against clearing and opening land, as is usual among farmers, would not be sustained, although there is an averment of insolvency. "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."

In our case, the injury, against which the plaintiff asks for the protection of an injunction, consists in the cultivation of trees in procuring turpentine, and in getting staves for barrels. It is not necessary to decide whether the cultivation of turpentine and, as an incident thereto, the getting of staves and hoop-poles for the barrels necessary to put it in, is not such an ordinary use of it, in the course of agriculture, as does not come within the jurisdiction assumed by the courts of Equity in reference to the prevention of civil trespasses, even although there be an averment of insolvency, for the bill does not make that averment, and on that account is fatally defective. The bill contains a general allegation that the acts complained of will be productive of irreparable injury, but the allegation must be attended with such a statement of facts, as enables the court to see that such would be the result; *Bogey* v. *Shute*, 1 Jones' Eq. 180. As instances where there is such a statement of facts as enables the court to see that the damage will be irreparable, and where an averment of insolvency is not necessary, we may refer to *Purnel* v. *Daniel*, 8 Ire. Eq. 9; *Troy* v. *Norment*, 2 Jones' Eq. 318. The injuries complained of in these cases were, in their natures, destructive. But ours is a new country; our policy is to subdue the forest and develope its resources, and we decide, that to work trees for turpentine, or to cut down trees for staves, is not destruction, and the court cannot see that the injury will be irreparable, unless there be an averment of the insolvency of the defendant.

Upon the coming in of the answer, a motion was made to dissolve the injunction, which was allowed. Afterwards, at a subsequent term, a motion was made to dismiss the bill, which was disallowed, and the defendant appealed to this Court. We have seen that, upon the plaintiff's own showing, he had no equity. After the answer came in, alleging the defendant's solvency, and the consequent dissolution of the injunction, there was an additional ground for dismissing the bill. It could only then be held over as an original bill for discovery, and on account of the turpentine and staves which the defendant had disposed of; in other words, as a bill for an

account against a trespasser. This would certainly be a bill of the "first impression." Where Equity has jurisdiction to prevent a wrong by injunction, if there has been loss before the injunction is sued, the court will direct an account of the profit that the defendant has made, as incident to the jurisdiction assumed for the purpose of injunction, so as to prevent circuity and expense. After a plaintiff has established his right to come into one court for an injunction, he will not be required to resort to an action in another court to recover his damages. But the equity for the account is *strictly incident to the injunction*, and therefore, if an injunction is refused, an account cannot be given, but the plaintiff must resort to a court of law. Adams' Eq. 219.

The motion in the court below to dismiss the bill, ought to have been allowed.

PER CURIAM, Decree accordingly.

HOWARD WISWALL *and others against* THE GREENVILLE AND RALEIGH PLANK ROAD COMPANY.

A charter of incorporation creating a company for the purpose of effecting a communication by a plank road between designated points with the privilege of taking tolls, does not authorize the company to establish a stage line upon their road, nor to contract for carrying the United-States mail.

CAUSE sent from the Court of Equity of Beaufort County.

The bill in this case set forth that the plaintiffs are stockholders in the Greenville and Raleigh plank-road company, which was chartered by the General Assembly at its session of 1850, and was duly organized by complying with the terms of the said Act; that the said company was incorporated for "the purpose of effecting a communication by means of a plank road from within the limits of the town of Greenville in Pitt County, to the city of Raleigh;" that in accordance with the said charter a plank road has been built from the said town

of Greenville to the town of Wilson in Wilson county, which is in the most direct and practical line towards the city of Raleigh, but that the same has not been extended further, for the want of the necessary funds. The bill goes on to recite the various clauses of the act of incorporation, prescribing the nature and extent of the duties of the company, the extent of its powers and privileges, and the object of its incorporation, which clauses are fully set forth in the opinion of the court, and therefore need not be stated here. It further sets forth that the said company has been for several years in operation, and has, from the tolls received, accumulated a fund of about $4000; that the individuals named in the bill are the president and directors of the said road for the time being, and as such have the control and management of the affairs of the said company; that the said president and directors, or a majority of them, with the sanction and approbation of a majority of the stockholders, have adopted a resolution to purchase with the said funds a line of stages with the necessary appurtenances, to be run as their property upon the said road, and further to procure a contract from the U. S. government for carrying the public mail by such stage line upon the said road; and that they have appointed one of their number, the defendant Johnston, an agent, to effectuate these purposes, and that the said president and directors, through their agent, the said Johnston, are taking measures to accomplish both these purposes. They insist in their bill that this would be a misapplication of the funds which are needed for the repair of the road, which is in a worn and dilapidated condition, or should be divided amongst the stockholders; that such enterprises are foreign to the purpose for which the company was instituted, and not authorized by their charter; that besides exposing the company to the risk of loss from the undertaking, these measures will expose them to the danger of a forfeiture of their corporate privileges; they, therefore, pray for an injunction.

To this bill the defendants demurred. There was a joinder

in demurrer; and the cause being set down for argument, was sent to this Court.

Donnell, for the plaintiffs.
Rodman, for the defendants.

PEARSON, J. It was conceded in the argument that a corporation has a right to restrain by injunction the corporators from doing any act which is not embraced within the scope and purpose for which the corporate body was created, and which would be a violation of the charter; not only on the ground that such act would operate injuriously upon the rights and interests of the corporators, but on the further ground that a forfeiture of the charter would be thereby incurred.

So, the only question made by the demurrer is this: Has the company power to purchase stages and horses to be run upon the said road?—and has it likewise power to enter into a contract to carry the United States mail on the road by means of such stages?

This question must be decided by a construction of the charter. We have examined it, and declare our opinion to be, that no such power is given to the company.

The first section sets out the object of the incorporation, to wit, "for the purpose of effecting a communication by means of a plank road from Greenville to Raleigh."

The third section grants the franchise of incorporation, and gives all the powers, rights and privileges necessary "for the purposes mentioned in this act."

The ninth section invests the president and directors of the company "with all the rights and powers necessary for the *construction, repairs and maintaining* of a plank road to be located as aforesaid."

The fourteenth section provides for the erection of *toll-houses and gates.*

The fifteenth section provides for the collection of toll to be "*demanded and received from all persons using the said plank*

road," with a proviso that the tolls shall be so regulated that the profits shall not exceed twenty-five per cent on the capital in any one year.

These sections contain the substantive provisions; the others merely embrace the details necessary for the formation of the company, &c.

The mere statement makes the question too plain for observation. If, under the power to construct, repair and maintain a plank road, a power can be implied to buy stages and horses and become a mail contractor, the company, by a parity of reasoning, has an implied power to set up establishments at convenient points along the road for the purchase of produce to be carried over its road. Besides, how are tolls to be demanded and received, and how are the profits of this enlarged operation to be regulated? How are losses from such speculations to be guarded against?

It may as well be contended that a turn-pike company, from its power to construct, repair and maintain the road, has, by implication, power to embark in the business of mail contractor, or in buying and selling horses, cattle, or produce, under the suggestion that the road would be subservient to these purposes.

Let the demurrer be overruled.

PER CURIAM, Decree accordingly.

MARY E. STEWART *against* WADE H. HUBBARD.

Where a party to a suit in court, falsely represented to another party, an ignorant female living out of the State, that a certain question had been decided against her, and thus obtained from her an assignment of her interest which was worth $1200, for sixty dollars, the Court of Equity will enjoin him from taking from the clerk's office more than he paid for the claim with interest.

CAUSE removed from the Court of Equity of Anson County. The facts of the case are fully stated in the opinion of the court.

No counsel for the plaintiff in this Court.
Bryan, for the defendant.

NASH, C. J. Very clearly the plaintiff is entitled to the relief which she seeks. Jason Meador, jr., died in the year 18——, intestate, leaving Stephen L. Meador, Samuel Odom, Mary E. Stewart, the plaintiff, and Hulda, the wife of the defendant, his heirs-at-law. At the time of his death he was seized and possessed of a tract of land which the defendant took possession of, claiming it as the property of Jason Meador, sr., dec'd., the father of Jason Meador, jr. A petition was filed in the proper court by Stephen L. Meador, Saml. Odom, and the plaintiff, against the defendant and his wife Hulda, for the partition of the said land. At Sept. Term, 1852, a decree was made by the Court that the land was the property of the said Jason Meador, junior, and that the said parties were his heirs-at-law, and the land was ordered to be sold, and an account taken of the rents and profits while in the possession of the defendant, and the proceeds divided among the heirs. The land was sold, and brought the sum of $4,550, and the rents and profits reported against the defendant were $218,94. This amount was paid into the office of the clerk and master, and the share of the plaintiff, which is about $1200, is still in the office. The plaintiff resided in South Carolina. At Fall Term, ———, of the Court of Equity of Anson county, the defendant filed in his name, and that of the plaintiff, a petition to have paid to him as assignee of the plaintiff, her share of the money then in the office. Of this petition the plaintiff had no notice. The bill was filed to enjoin the defendant from receiving the money in the clerk's office.

To this statement the defendant answered, that he purchased from the plaintiff her interest in the land, before the sale, and before the decree therefor, at the price of $60, of which he paid her $30 in cash, and gave his note for the remainder, and he produced her deed, dated 4th of March, 1852. The plaintiff, in her bill, admits she executed that deed, but charges it was obtained through the fraudulent representations of the

defendant. She alleges that sometime before the decree of sale was obtained, the defendant came to her residence in South Carolina, and falsely and fraudulently told her that the suit for the partition of the land had been decided, and that the Court had decided the land to belong to Jason Meador, sr., the grandfather of the plaintiff, and that she was entitled to one fourth of one sixth of the land, and that when she executed the conveyance she thought and believed she was conveying away her interest in the land as one of the heirs of her grandfather. To this allegation the defendant opposes a total denial. He denies he made any such statement as that set out in the bill, and that the plaintiff well knew, when she executed the deed, she was conveying her interest in the property of her father, and that she so executed it because she preferred the present possession of the sum he offered, to her share in the land. That Jesse J. Nash, who lived in Alabama, went with him to the residence of the plaintiff when the conveyance was made. Subsequently, he went to the plaintiff's and took with him one Michael C. Nash and the deed, and requested the plaintiff to acknowledge the deed before the said M. C. Nash, to enable him to have it proved in this State, which she at first refused to do, saying that she had found out that the land was worth much more than she expected. This was before the sale. Her mother was present, and told the plaintiff she ought not to deny her hand-writing, for she knew she had signed the deed. She then acknowledged it before Michael C. Nash, who attested it, and he offered to pay her the $30 due upon his note, which she refused to take.

The defendant further stated in his answer, that, at the time the petition for partition was filed, the land was worth no more than $2000, and that it was run up to the price at which it was sold, from a spirit of rivalry among the bidders.

It would be difficult to deny to the plaintiff the relief she asks if the case were tried on the bill and answer; but when the testimony is examined, it discloses as base a fraud as can be well conceived. The defendant places his defence upon the deed of the 4th of March, and denies positively the charg-

es of fraud in its procurement. He denies that he told the plaintiff that the suit for partition had been decided against her, and that the Court had decreed that the land belonged to Jason Meador, sen'r., her grand-father. He denies that he told her that she was in consequence entitled to but one-fourth of one-sixth of the land. Three witnesses contradict him directly, *Gatsey Hodge*, *Lydia Meador* and *Mr. Campbell.*

The first swears that she was present at the trade, and heard Hubbard tell the plaintiff her suit was thrown out; and heard Jesse Nash, who was present, tell her that the law-suit was decided in favor of Jason Meador, sen'r., and that she was entitled to one-fourth of one-sixth of the land, and that the plaintiff bargained to sell the defendant her interest in the land as belonging to her grand-father.

Mrs. Meador the same.

Mr. Campbell says the defendant told him that the suit for the partition had been decided in favor of Jason Meador, sr., and each of the heirs was entitled to one fourth of one sixth, and he heard the defendant make to the plaintiff the same statement. The defendant's witness, *Jesse J. Nash*, in his statement, says the plaintiff sold her interest in the land, which was stated to be one fourth; and that he believes she so understood it. He does not say any thing about the statement as testified to by the plaintiff's witness, but he does state that Hubbard told the plaintiff that the land was believed to be worth $2000. *Michael C. Nash's* statement is, that he went with Hubbard to the residence of plaintiff to witness her acknowledgment of the deed, in order to its probate and registration in Anson County. Now it is impossible for any one to read this statement without at once coming to the conclusion that the conveyance from the plaintiff to the defendant was obtained by fraud. The defendant was the brother-in-law of the plaintiff, and lived in this State where the cause was pending, he being a party interested in it; it was natural, therefore, that she should have confidence in him, and had a right to expect of him a true and honest statement of the progress of that suit. His representation to her was

false throughout. The suit was still undecided; no decree had been made; and no declaration by the court that the land belonged to the estate of Jason Meador, sr.; and all this he knew. He knew that as one of the heirs of her father, Jason Meador, jr., whose right to the land was subsequently declared by the Court, she was entitled to one fourth, and not to one fourth of one sixth.

In argument it was insisted that whatever might have been the mistake of the plaintiff, when the deed was executed, she was acquainted with the facts when she acknowledged the deed before Michael C. Nash, and by such acknowledgment she confirmed it. It is evident that such was not her intention. She did not mean a confirmation. When she was requested to acknowledge the deed she refused. When her mother remarked, "you can't deny that you signed the deed," she acknowledged it, but observed, as is testified by M. C. Nash, "if I had known as much as I do now, I never would have signed it." And in his answer, the defendant states, after she had acknowledged it, he offered to pay the residue of the money, to wit, $30, for which she had his note, but she refused to accept it. Why did she so refuse if she intended to confirm the conveyance? Her land was gone; why, then, not take what would have been, and what was in that case, hers? She was old and poor. No, by acknowledging the deed she meant simply, in the language of her mother, that she could not deny her signature, and that was all she did acknowledge.

There is another feature in this case which merits attention. The land was sold under a decree of the Court of Equity, on a credit of twelve months, and brought $4550; of this sum the plaintiff was entitled to $1,137,50, and if to that be added the fourth of the rents decreed against the defendant, she was entitled to $1,192,24. She was old and in destitute circumstances, and the defendant would have us believe that she was willing to sell that interest for $60. It is true that inadequacy of price is not *per se* fraudulent; but it is often strong and pregnant evidence of the existence of fraud in a transaction.

I have said that, if the case rested upon the bill and answer,

it would be difficult to refuse the plaintiff the relief she asks. It is a well-settled principle of equity that, though there is no fraud or illegality in a transaction, yet if it be carried on in ignorance, or mistake of facts material to its operation, a court of Equity will rescind any contract so entered into. Adam's Eq. 188. Aside, then, from the positive proof of fraud and imposition, it is impossible to believe that the plaintiff knew of the true situation of the case depending for the partition of the land. As the case resulted, the land was actually worth $4550, and her share near $1200. The plaintiff is entitled to be relieved.

It must be declared that the deed of 4th of March, 1852, was obtained by fraud, and is void and of no effect, and must be surrendered to the plaintiff; that she is entitled to receive from the clerk and master of Anson Court of Equity, the sum now in his hands, being one fourth of the proceeds of the sale of the lands of her father, Jason Meador, jr., and also her share of the rents and profits decreed against the defendant, deducting the sum of $30, the amount paid her by defendant. She, the plaintiff, delivering to defendant the note for $30, which she holds.

PER CURIAM, Decree accordingly.

CHARLES HAMLIN *against* WILLIS A. HAMLIN, *administrator.*

Where a Court of Equity has acquired jurisdiction of a cause by the obligor in a bond's getting possession of the paper and pretending it was destroyed, it will not lose it afterwards by his personal representative producing the obligation.

A creditor who takes a dividend of the effects of a bankrupt, surrendered to the assignee, under a petition filed by him, is not thereby estopped from collecting the remainder of his debt, if the debtor fails to get his certificate.

The payment of a part of a bond within ten years, by an assignee in bankruptcy out of the funds and with the assent of the obligor, revels the presumption of payment arising from the length of time.

CAUSE removed from the Court of Equity of Randolph County.

The intestate, William A. Hamlin, being indebted to his brother Charles Hamlin, the plaintiff, and to many other persons, made application to the District Court of the United States to be permitted to take the benefit of the bankruptcy act of Congress; and the assignee for the county of Randolph, in which the said William A. resided, having notified him, among other creditors, to bring in his claims, he enclosed in a letter to his brother William, two bonds—one for $414,65, dated 10th of January, 1833, and the other for $224,88, dated 6th of August, 1834; in which letter he also enclosed a power of Attorney for Willis A. Hamlin, the defendant, son of the intestate, appointing him agent to receive any dividends which might accrue to him from the estate surrendered by the petitioner. The said William A. Hamlin, defendant's intestate, proceeded in his application to the court of bankruptcy, and took all the preliminary steps to entitle him to a certificate in bankruptcy, but never, actually, obtained one. The defendant, as agent of the plaintiff, received from the assignee in bankruptcy, on the —— of July, 1851, as his share of the proceeds of the property surrendered by the defendant's intestate, for the use of his creditors, $190.

In March, 1852, the plaintiff applied to the defendant's intestate, shortly before his death, to know what had become of the bonds sent to him, when he informed him he had burnt them.

The plaintiff alleges that, after the appointment of defendant as administrator, he demanded payment of the amount due on the said bonds from him, but he refused to pay the same. He alleges the loss of the bonds, and that sufficient assets have come to the hands of the defendant, as administrator of his father, for the payment of his debts; and he prays for a decree to that effect.

The defendant, in his answer, admits the facts above stated, except that the bonds in question were not burned, but avers their present existence in his hands, and offers to file the same in court. He insists, therefore, that the plaintiff, having a

complete remedy at law, has no right to proceed with his suit in a court of Equity.

He further contends that the plaintiff, having come in under the proceedings in bankruptcy, and having received a *pro rata* of the amount raised by sale of the bankrupt's property surrendered to the assignee, is estopped by such proceedings from recovering upon the said bonds.

He further relies on the presumption of payment arising from the length of time, which was more than ten years from the time the causes of action accrued. The defendant admitted assets.

There were replication to the answer, commissions, and proofs; and the cause being set down for hearing, was transmitted to this Court for trial.

Haughton and *B. F. Moore*, for plaintiff.
Morehead, for defendant.

BATTLE, J. The defendant objects to the plaintiff's recovering, upon three grounds: 1st. Because the bonds have been found, and, therefore, the plaintiff may have complete redress at law. 2ndly. Because the plaintiff is estopped from denying that the intestate was duly discharged as a certificated bankrupt, under the bankrupt law of 1841, the said plaintiff having applied for and received a dividend out of the effects of the intestate as a bankrupt. 3rdly. Because the bonds upon which the suit is brought are, from length of time, presumed to have been paid, more than ten years having elapsed between the time when they became due, and the commencement of the suit.

1. We are of opinion that the first ground of defence is untenable. At the time when the bill was filed, the Court undoubtedly had jurisdiction of the cause as a suit upon a lost bond. The plaintiff states, and the defendant admits, that the intestate told the plaintiff that the bonds had been burnt. The intestate had not, in fact, destroyed them, but he had them concealed from the plaintiff, and the latter had, therefore, the

right to proceed in Equity to recover upon them as lost bonds. The Court having thus rightfully acquired jurisdiction of the cause, surely the intestate would not have been allowed to defeat it by producing the bonds which he stated that he had destroyed; and what would not have been allowed to him, cannot now be done by his personal representative. No authority upon this point has been produced by the counsel on either side, but we cannot hesitate in deciding that the jurisdiction of the Court of Equity in such cases cannot be thus defeated.

2. We are not aware of any such ground of estoppel as that contended for by the defendant. The plaintiff was proceeding lawfully when he presented his claim for a dividend out of the effects of the defendant's intestate assigned to a commissioner under the bankrupt law. It was not his fault, but the fault of the intestate that the latter did not use the necessary means for obtaining his certificate of discharge. As, under the provisions of the bankrupt law, nothing short of his obtaining a decree discharging him as a bankrupt, could discharge his debts, we cannot perceive how the plaintiff, by receiving a part of what was due to him, can be prevented from claiming the residue. The defendant has failed to produce the only proper evidence of the discharge of his intestate as a bankrupt, and the plaintiff has not done anything to relieve him from the necessity of so doing, or to bar himself from the relief which he now seeks.

3. The defendant cannot, under the circumstances, avail himself of the lapse of time as a presumption of payment. It is well known that an express acknowledgment of a debt, or one implied from a part payment of it, will prevent the presumption from arising. Here, a part of the debt was received by the plaintiff's agent from the commissioner in bankruptcy by the assent of the intestate, and after that it was too late for him to allege that it had been paid, and rely upon the presumption as evidence of the fact. Without adverting to the other circumstances relied upon by the plaintiff's counsel to

repel the presumption, we hold the one just adverted to, to be sufficient for that purpose.

The plaintiff is entitled to a decree for the amount due on the bonds in question, after allowing all just credits.

PER CURIAM, Decree accordingly.

JOHN McLERAN *and wife against* JAMES K. MELVIN *and another.*

The writ of *certiorari* will lie to bring up a cause from a court of Equity to the Supreme Court, where a sufficient reason is shown for not appealing.

Where the person really interested in a cause in Equity was a feme covert, upon a statement made by her husband, who had joined her in the suit, showing that an injunction to restrain an execution levied on her property had been improperly dissolved; that he was absent from court upon urgent business when the decree was made; that his attorney had told him his presence would not be required at the trial; that his attorney had endeavored to procure surety for an appeal without success; and that he would have appealed if he had been present; it was *Held* to be a sufficient cause for granting a certiorari.

One who has entered into a deed, as a trustee, will not be heard to gainsay the title of the property conveyed to him by the deed.

CERTIORARI to bring up a cause from the Court of Equity of New Hanover.

John Melvin, of the county of Bladen, bequeathed, amongst other provisions, a negro girl, Eliza, (the subject of this suit,) to his daughter Mary Eliza, with a proviso that her mother should keep possession of the said slave until her said daughter arrived at the age of twenty-one. The testator died in 1844. The will was duly proven, and the executor therein named was qualified.

In the month of January, 1846, the feme plaintiff, Mary Eliza, then eighteen years old, intermarried with the other plaintiff, John McLeran, but previously to such marriage, and in contemplation thereof, all the property belonging to her as well as all that she might thereafter acquire from her

mother, and especially the slave Eliza and her child, Harris, were, with the consent of the executor, conveyed by a deed of settlement, dated 11th day of January, 1846, to the defendant James K. Melvin, her brother, in trust, that he should hold the said property for the sole and separate use of the said Mary Eliza and her children, free from all liability to the debts of her intended husband, but that he might remain in possession of the property, he devoting the profits to the use of the intended wife and her children, if any should be born of the marriage. The said deed of settlement was also executed by the intended husband and by the defendant James K. Melvin, and duly proven and registered.

The plaintiff McLeran becoming indebted to the defendant Melvin, gave his bond for the amount due, to wit, $595, which, without consideration, was endorsed to the defendant McDougald, in order to facilitate the collection of it. A suit was brought in McDougald's name against the plaintiff McLeran and against Melvin as endorser, and judgment recovered in the County Court of Bladen for the debt and costs, and a fi. fa. being directed to the sheriff, at the instance of the defendant Melvin, the same was levied upon the slave Eliza and one of her children, she having had several after the conveyance. It is averred by the plaintiffs, and admitted by the defendants, that the endorsement to McDougald was merely formal, and that the entire interest in the judgment is in the defendant Melvin, and that he has directed the whole proceeding against the property in question.

The prayer of the bill is for an injunction and for general relief.

The defendant Melvin, in his answer, insists that Mary Eliza Melvin being an infant when she executed the deed, the same is invalid, and that the property, notwithstanding such deed, vested in the husband, and is liable to his debts. He also contends that Mrs. McLeran took a contingent interest in the slave in question, which did not become vested until after the marriage, and which did not pass by the deed in question,

but went to the husband *jure mariti*. The answer was, otherwise, irresponsive to the allegations in the bill.

McDougald disclaimed any knowledge or interest in the matter.

On the coming in of the answers, his Honor, Judge PERSON, ordered the injunction to be dissolved and an appeal was prayed, but no surety was given.

The plaintiff McLeran applied to the Supreme Court for a certiorari, alleging that he was not present when the cause was heard upon the motion to dissolve; that he was absent upon urgent business and did not return to Wilmington where the Court sat, until after the final adjournment of the Court; that he was informed by his counsel that his presence would not be required at the hearing of the cause, and that he therefore took no pains to provide surety for an appeal; that his counsel, in his absence, made exertions to procure security for an appeal to the Supreme Court, without success. The writ was ordered, and the case brought up under it. On opening the cause for further proceedings, it was contended by the defendants' counsel, that the cause was improperly brought up, for that this Court had no power to issue the writ of certiorari to bring up a cause, and moved to dismiss the proceeding. The motion to dissolve the injunction was also debated at the same time.

W. A. Wright, for plaintiffs.
E. G. Haywood, for defendants.

BATTLE, J. The first question which this case presents is, whether it is properly constituted in the Court. The counsel for the defendants contend, that the writ of *certiorari* will not lie to bring up any cause from the Courts of Equity to the Supreme Court, but that if it will, this is not a proper case for its application. The ground of objection to the use of the writ in an equity cause is, that there is no such necessity for it, as there is in a suit at law, and that, therefore, it ought not to be allowed; and further, that no instance of its allowance

heretofore can be shown. The reason alleged, to show that there is no necessity for its use is, that if there be error in any order or decree in Equity, it may be corrected upon a petition to rehear, or a bill of review. The obvious reply is, that except in the highest tribunal for the decision of equity causes, these remedies are inadequate, because the parties will still have a right to carry the cause up to the highest court, and it will be an unnecessary and unreasonable delay to prevent their doing so, in the first instance by an appeal, or, if that be lost without the default of the party seeking it, by a proceeding in the nature of an appeal. This delay, in a case like the present, of an order dissolving an injunction, will often put the party to a serious, if not fatal, inconvenience, and ought to be avoided, if possible. We think it may be avoided by giving a fair construction to the provisions of the Revised Code upon this subject. In the 6th section of the 33rd chapter, (the act which establishes the Supreme Court) it is enacted that "the court shall have power to hear and determine all questions at law brought before it, by appeal, or otherwise, from a Superior Court of law, and to hear and determine all cases in Equity by an appeal, or removal from a court of equity;" and in another paragraph of the same section, it is declared that the Court "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, &c." The 22nd section of the 4th chapter, provides that "appeals shall be allowed from any final judgment, sentence or decree of the Superior Court of law, or court of equity, court of oyer and terminer;" and the next succeeding section declares that "the Superior Court may, whenever it shall be deemed proper, allow an appeal to the Supreme Court from any interlocutory judgment, sentence, or decree, at law, or in equity, at the instance of the party dissatisfied therewith, upon such terms as shall appear to the Court just and equitable." The 25th section of the same act makes it the duty of the clerk of the Superior Court

of law, and the clerk and master in equity, to file with the clerk of the Supreme Court, in proper time, a transcript of the record and proceedings of the causes in their respective courts, in which appeals have been taken; though by the section which next follows, the appellant himself may file the transcript if he chooses. It is seen by a reference to these enactments, that the right of appeal from the judgments or decrees final or interlocutory, of the Superior Courts of law and the Courts of Equity, to the Supreme, is put upon the same footing in every respect. If this right be lost in any case in a Superior Court of law, without any default of the appellant, it is admitted that he may take his case up by the writ of *certiorari*, and we cannot perceive any sufficient reason why he may not have the same mode of taking up a case from a Court of Equity under similar circumstances. Suppose that, upon a petition to rehear, or a bill of review, the cause were decided against him a second time, and he should, without the slightest negligence, make another ineffectual attempt to appeal, would he be without redress? Can any other mode than that by a writ of *certiorari* be devised for him to have his cause reviewed in the highest tribunal of the State? Until such be brought to our attention we shall feel ourselves bound to give to the party praying an appeal, and prevented by unavoidable obstacles from availing himself of it, the benefit of that writ. The circumstances of the present case fully entitle the party to the favour of the Court. It is in truth the case of the wife, and if the husband had been less attentive than he was, we should think that her interest ought to be protected so far, at least, as to have it passed upon by this Court.

The cause being thus properly before us, we have no hesitation in saying that the order dissolving the injunction was erroneous and ought to be reversed. The counsel for the defendants have contended in support of the order, 1st, that at the time of her marriage, Mary Eliza Melvin was under age, and could not, on that account, make a valid conveyance of her slaves so as to prevent their becoming the property of

her husband. 2ndly. That she took a contingent interest only in the slaves under the will of her father, which did not pass by the conveyance to her trustee, and that when they became vested, it was after her marriage, and that thereby they became the property of her husband, and liable to be seized for his debts. The first of these propositions is directly opposed by the cases of *Freeman* v. *Cook*, 6 Ire. Eq. Rep. 373, and *Satterfield* v. *Riddick*, 8 Ire. Eq. Rep. 271, and the reason given for the decisions is unreasonable, to wit, "that it cannot be to her prejudice, but must be to her advantage, if it secure to her or her issue any thing; since, without the settlement, the whole would go to her husband, absolutely, on her marriage." The other proposition we deem it unnecessary to decide, because the trustee cannot be allowed to urge it, even supposing it were true, and the consequence deducible from it legitimate. The defendant Melvin has, by his solemn deed, agreed to accept the conveyance, and to hold the slaves, in trust, for the sole and separate use of his sister; and it would violate every principle of justice and fair dealing to allow him now to repudiate the title in himself, and treat the slaves as the property of the husband by subjecting them to the payment of his debts against the husband. The interlocutory order from which the appeal is taken, must be reversed, with costs against both defendants, which will be certified to the Court of Equity below.

PER CURIAM, Decree accordingly.

JAMES McKIMMON *against* WILLIAM A. ROGERS *and another.*

A conveyance of property in trust to hold the same, and receive the profits and apply them to the sole and exclusive benefit of a son who was greatly indebted, does not place it beyond the reach of creditors in a Court of Equity.

CAUSE removed from the Court of Equity of Wake County.

Daniel Rogers, the father of William A. Rogers and Isaac Rogers, devised and bequeathed as follows: "I do appoint Isaac Rogers as trustee during the natural life of my son William, until his heirs may arrive at the age of maturity, and, therefore, I give and devise unto said Isaac Rogers, a certain tract of land, bounded, &c., containing 254 acres; also one negro man named Virgil, to have and hold the said land and negro, to the said Isaac H. Rogers, his heirs, executors, administrators and assigns, in fee simple forever; in special trust and confidence, however, that the said Isaac H. Rogers, his executors, &c., shall and will hold and keep, use and apply the same, to the uses and in trust following, and none other, that is, shall, after paying the annual taxes that shall be assessed, and become due, on said land and negro, shall apply rents and profits arising from the rents and leases of said land, and hire of said negro, to the sole and exclusive benefit of my son William A. Rogers, for and during the term of his natural life, and then to the use and benefit of his children, or heirs."

The bill sets forth, that William A. Rogers was indebted to the plaintiff for merchandise sold him; and that having taken his promissory note for it he brought suit on the same in Wake County Court, and obtained judgment for the sum due; that he took out a *fieri facias*, but the same was returned by the sheriff, and that the defendant had no goods or chattels, lands or tenements in this county; and the bill further alleges, that the said William A. Rogers had no property in Wake county whereby to satisfy said execution. The prayer is, that Wm. A. Rogers' interest in the land and negro may be sold to satisfy the debt.

The defendants answered, but did not vary the state of facts as above given. Isaac, the trustee, says that he has paid out considerable sums of money for fees and legal advice in defending this property from the efforts of William's numerous creditors, to subject it to the payment of their debts, which he thinks should be returned to him out of the fund.

The cause was set down on bill, answer and exhibits, and sent to this Court for trial.

Winston and *J. Guion*, for the plaintiff.
Battle and *Busbee*, for the defendants.

PEARSON, J. Under the will of Daniel Rogers, the land and slave mentioned in the pleadings vested in the defendant Isaac, in trust to hold the same and receive the profits, and after paying the annual taxes, "to apply the residue of the profits to the sole and exclusive use and benefit" of the other defendant, William. It was, no doubt, the wish of the testator to bestow this bounty upon his son in such a manner that the creditors could not reach it, but he has failed of his purpose, for William takes a trust estate which is recognized and enforced by law. It is a universal rule that whenever a man is entitled to an estate, either *legal* or *equitable*, it may be subjected to the payment of debts. There will be a decree for the plaintiff.

Whether the defendant Isaac is entitled to retain a portion of the fund by way of refunding the amount he has expended in "defending the many law-suits against William, and for advice in the management of the fund," may be presented on a motion for further directions after the fund is brought in.

PER CURIAM, Decree accordingly.

JAMES L. BROWN *and wife against* WM. N. PRATT *and others.*

Where a bill sets up a title in remainder to slaves, under a deed made in another State, there not being any allegation that the common law does not prevail in such State, the presumption is that it does prevail, and therefore, that there can be no limitation in remainder of personal property.

An answer filed to a bill after there has been a demurrer, or at the time of demurring, over-rules the demurrer as to such answering defendant; but if he be a merely formal party, against whom no relief is prayed, the cause will not be retained on his account, if the demurrer of the others were sufficient to overthrow the equity of the bill.

CAUSE removed from the Court of Equity of Orange County.

The bill alleges, that one James Brown of Virginia, gave to his daughter Stacy, wife of Reuben Carden, two slaves, Asa and Rebecca (or Becky) for life, remainder to her four daughters, to wit, Patsey, Sarah, Polly and Nancy. Patsey intermarried with one Harris Woods; Sarah intermarried with Benjamin Johnson; Polly with Person Chisenhall; and Nancy with James L. Brown, the plaintiff; that the two slaves were brought from the State of Virginia to the county of Orange by Carden and his wife; that they also brought with them a bill of sale from the said James Brown to Reuben Carden and wife, with a limitation over as above stated. The bill states that Carden and his wife retained possession of the slaves many years, until Becky was stolen from them by their daughter Patsey; that after several ineffectual attempts to get the negro Becky away by the said Patsey and Harris Woods, whom she afterwards married, the said Reuben Carden sold the slaves absolutely to one John Lockhart, who sold Rebecca and three of her children, to Calvin, alias Carter, Waller, of Granville county, who claims, not the life-estate only, but the absolute title, either from John Lockhart or from some one to whom John Lockhart has sold them, and he expresses a fear that the said Waller will run the slaves out of the State. The prayer is for a writ of sequestration and for general relief.

The defendant Carden filed an answer, and he and the other defendants, at the same term, filed a demurrer to the bill for the want of equity. There was a joinder in demurrer, and the cause being set down for argument, was sent to this Court.

Phillips, for plaintiffs.
Graham, for defendants.

BATTLE, J. It is very clear that the plaintiffs have not, by their bill, shown any title to the slaves, with respect to whom they seek relief. They claim under a bill of sale which they allege was executed in Virginia, by which the female slave,

of whom the others are the children, was limited to the defendant Mrs. Carden for life, with remainder to her four daughters, of whom the feme plaintiff is one. There is no allegation that the common law, by which a limitation over, by deed, of personal property, after a life-estate, is void, does not prevail in that State. We must, therefore, presume that it does, and that, consequently, the plaintiffs have no title under the limitation. In support of this conclusion, the case of *Griffin* v. *Carter*, 5 Ire. Eq. Rep. 413, is a direct authority.

The only difficulty which the case presents arises from the state of the pleadings. All the defendants have joined in a demurrer, and at the same time one of them has filed an answer. The answer certainly overrules the demurrer as to the party who put it in; Cooper's Eq. Pl. 113, citing 3 P. Williams, 80, 2 Atk. 282; but we think it does not affect the demurrer as to the other defendants, for the reason that if several join in one demurrer to a bill, it may be good as to one defendant and bad as to the others. Cooper's Eq. Pl. 113; 8 Ves. jun. 403; Stor. Eq. Pl. sec. 443. In this respect a demurrer in Equity differs from one at Law. Stor. Eq. Pl. *ubi supra*. If the answering defendant, in the present case, were any other than a mere formal party, the result would be that, upon the demurrer upon which the cause is set down for argument, the bill would be dismissed as to all but him, leaving it to be decided as to him upon the hearing; but as he is a mere formal party, against whom no relief is prayed, it would be useless to retain the cause, and the bill must, therefore, be dismissed altogether. As the plaintiffs sue *in forma pauperis*, no costs are given.

PER CURIAM, Decree accordingly.

JOSEPH G. LOCKHART *against* BENJAMIN LOCKHART, *administrator, and others.*

Where a testator, in one part of his will, uses words which describe certain objects of his bounty as a *class*, and in another part of the will refers to them by the same words of description, the presumption is that, in both instances, he uses the words in the same sense, and in both instances intends them to take as a class.

PETITION to rehear a cause.

The petition was to rehear the cause for the purpose of modifying a decree which was made erroneously at the Spring Term, 1856, of the Court of Equity of Northampton county. The primary object of the bill in this cause, was to have a partition of certain slaves bequeathed to the plaintiff and to defendant Benjamin F. Lockhart, and the children of Joseph J. Lockhart, by the will of Sarah Lockhart; and a decree to that effect was passed by Judge Person at the Spring Term, 1856, wherein it was adjudged and decreed, that the children of Joseph J. Lockhart, were entitled to take the said slaves *per capita* with Benjamin and Joseph G. Lockhart; that is, that they should take, together, three fifths of the same, while the plaintiff, Joseph G., and the defendant, Benjamin F., should take but one fifth each ; whereas, it is insisted by the plaintiff, the proper mode of division would have been for the children of Joseph G. Lockhart to take, together, one third of the said slaves, allowing to Benjamin and Joseph G. one third each.

The petition was set for hearing, at the Spring Term, 1857, of the Court of Equity of Northampton, and sent to the Supreme Court by consent.

The following are the two clauses in the will of Sarah Lockhart, upon which the question in the cause arises, viz:

"Item 2nd. I give unto the children of my deceased son, John J. Lockhart, the following named slaves and their increase, Amis, Cherry and Peter.

* * * * * * * * *

"Item 5th. It is my will, after paying my just debts, that all my property of every kind and description not disposed of in the above items of this will, be equally divided between the children of my deceased son, John J. Lockhart, and my sons Benjamin F. Lockhart and Joseph G. Lockhart."

Of the property mentioned in the latter item, a large part of it consisted of slaves, who are the main subject of this controversy.

B. F. Moore, for the plaintiff.
Badger, for the defendants.

PEARSON, J. In *Bivens* v. *Phifer*, 2 Jones' Rep. 436, some pains are taken to collate the cases upon the subject of taking "*per capita*" and "*per stirpes*." The general rule is admitted to be that legatees take *per capita*. But an exception is made "if there be any thing in the will indicative of an intention that they shall take as families." When such an intention is indicated as to all or a part of the legatees, the division will be *per stirpes*. For reasons there given, the case was held to fall under the exception. So, *Lowe* v. *Carter*, 2 Jones' Eq. Rep. 377, is held to fall under the exeeption. So, *Gilliam* v. *Underwood*, ante 100, is held to fall under the exception.

The principle to be deduced from these last two cases is this: Where a testator in one part of his will uses words in a sense about which there can be no mistake, and the same words are used in another part of the will, the presumption is that he uses them in the same sense. So, where in one part of the will he treats the objects of his bounty as a *class*, and in another part of the will he refers to them by the same words of description, the presumption is that he uses the same words in the same sense, and intends them to take as a class, and the division of the fund will be *per stirpes* as to them, treating them as a class, because the will in another part treats them as a class. Thus, in *Lowe* v. *Carter*, by the 8th item, the testator lends certain slaves to his daughter Sarah for life, with a remainder to her

bodily heirs, *meaning her children;* by the 9th item, he makes the same disposition of certain other slaves to his daughter Catharine, and her bodily heirs; by the 10th item he directs his executor to hire out certain other slaves and pay over the proceeds to *the children* of his daughter Elizabeth, until the youngest arrives at the age of twenty-two, and "then to be equally divided among them;" by the 13th item he directs his personal property to be sold and the proceeds of sale to be equally divided between the *bodily heirs* of Elizabeth, Sarah and Catharine; "bodily heirs" was taken to mean *children*, as the daughters were living, and as the slaves were given to them "as classes;" and it was held that the testator in using the same words in reference to personal property as distinguished from slaves, meant to treat them as classes, and the division was to be *per stirpes*. It may be well to remark that the reference to *Hill* v. *Spruill*, 4 Ire. Eq. Rep. 244, was made inadvertently, as is evident from the fact that, in that case, the division was *per capita*. So it is in opposition to the conclusion for which it was cited. The Court had put the decision on *Bivens* v. *Phifer*, decided but two terms before, where the subject is discussed at some length.

So, in *Gilliam* v. *Underwood*, by the 4th item, the testator gives a legacy to "*his son John Underwood's children*," *treating them as a class;* and when, in the residuary clause, he directs a division between his daughter Lucy and his son John's children, and his son Berry, it is decided that, having, before, treated his son John's children as a class, the presumption was, by using the same words, that he intended to treat them as a class.

So in our case; the testatrix by the 2nd item gives to *the children* of her deceased son, John, certain negroes, treating the children of her son John *as a class;* and when by the 5th item she directs the residue of her estate to be equally divided between the children of her son John, and her sons Benjamin and Joseph, the presumption is that she uses the same words in the same sense, and having, before, treated her son John's

children as a class, she intends also to treat them as a class in the division of the residue.

The justness of this principle of construction is made the more apparent in reference to its applicability to a residuary clause, by its analogy to the distribution which the law makes of property not disposed of by the owner. Under the statute of distributions, if all be in equal degree, the division is *per capita;* if some are under the necessity of resorting to the right of representation in order to bring themselves up to an equality, then as to them the division is *per stirpes*—that is, they take the share of the person whom they represent. In our case, John's children bring themselves up to an equality with their uncles by representing their father, and the testatrix having, in the specific legacy to them, treated them as a class, they must take in the same way when they are referred to by the same terms of description in the residuary clause. The decretal order is reversed.

A decree will be drawn in pursuance of this opinion, and the cost will be paid out of the estate.

PER CURIAM, Decree accordingly.

GEORGE PATTERSON, *administrator with the will annexed of* DAVID PATTERSON, *against* NANCY McMASTERS *and others.*

The general rule is that in a bequest to several they take *per capita*, but where the words *each an equal share* are used in the designation, there cannot be any doubt but that such was the intention of the testator.

CAUSE removed from the Court of Equity of Alamance county.

The administrator, with the will annexed of David Patterson, applies to the Court for advice on the following clause in the will, viz: "After the death or marriage of my widow, my property to be sold, and after what is above named, and expenses paid, the balance to be equally divided among my brothers

and sisters or their heirs, and Martha P. Elliott and her son David Patterson Elliott, each an equal share."

The administrator suggests that there is a disagreement among the legatees as to the share which Mrs. Elliott and her son shall take; whether it is a share between them, or whether she takes a full share, with the other next of kin, and he another.

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

Hill, for plaintiff.
Bailey and *W. J. Long*, for defendants.

NASH, C. J. The bill is filed by the personal representative of George Patterson, to obtain a decree of this Court upon his will, settling the construction of the following clause contained in it: "After the death or marriage of my widow, my property to be sold, and after what is above named, and the expenses paid, the balance to be equally divided among my brothers and sisters or their heirs, and Martha P. Elliott and her son, named David Patterson Elliott, each an equal share." The administrator with the will annexed, the plaintiff, informs us that a difference of opinion exists among those who are interested as to the true meaning of the testator, as to the portion of the estate to which his sister Martha P. Elliott and her son David are entitled: Whether one share is to be divided between the mother and the son, or whether he intended to give a full share of the property, directed to be sold, to his sister, and one full share to her son. It is difficult to perceive upon what the doubt rests. The testator has made his meaning so obvious by the language used, that it cannot be made more plain by any use of other terms. He directs in the first part of the clause, the proceeds of the sale shall be equally divided among his brothers and sisters or their heirs; and when he comes to his sister, Mrs. Elliott, fearing that his meaning might possibly be misunderstood, he separates his bounty to her from that to her son, and gives to *each* a share; the same as if he

had said, she shall have one, and her son one, share. To avoid this repetition, with grammatical taste, he uses the relative pronoun *each*, and his reason for giving to David Patterson Elliott a full share, may be found in the fact, that he bore his name in full.

It must be declared that, by the will, Mrs. Elliott and her son David Patterson are each, in the language of the testator, to receive one share of the fund in question.

It must be referred to the clerk of this Court to take an account of the plaintiff's administration of the estate of David Patterson the testator. The plaintiff will pay all the costs of the suit, except that of taking the account.

The cause will be retained for further directions.

PER CURIAM, Decree accordingly.

JOHN IRWIN *and another against* JOSEPH H. WILSON, *trustee, and others.*

A provision in a deed of trust to secure certain persons in sums due them, and against certain existing liabilities as sureties, also against future liabilities which they may incur as sureties, and future debts that may be justly due them, there being no allegation or proof of fraud, is valid, and will be enforced in a Court of Equity.

PETITION to rehear a cause, transmitted from the Court of Equity of Mecklenburg County.

On the 17th of January, 1833, William Davidson conveyed to Washington Morrison, a large amount of real and personal property, in trust to secure the payment of certain debts therein mentioned, and in trust to indemnify certain individuals against liabilities as his sureties. Among other provisions in this deed of trust, is the following: "And whereas it may become necessary for the said John Irwin, Samuel McComb, Jane Emmerson, D. T. Caldwell and James H. Blake, for the purpose of enabling me to meet the instalments due H. M. Miller, as

agent of the bank of Newbern, Raleigh office, or for other purposes, to enter into other and further liabilities for me, it is, therefore, the intent and meaning, (and I do hereby declare it to be such), of this trust, to indemnify the said John Irwin, Samuel McComb, Jane Emmerson, David T. Caldwell and James M. Blake, not only in all matters for which they are now bound as my security, and to secure them the amount I now owe them individually, but to secure them against all future liabilities which they may incur as my surety, and further debts that may be justly due them."

After the execution of this deed of trust, William Davidson executed another deed of trust, dated 17th of January, 1837, to John J. Blackwood, in trust to secure a debt of $15,000, due to the agency of the bank of the State of North Carolina at Charlotte, which was contracted on the 13th of January, 1837, with William F. Davidson, James H. Blake and David T. Caldwell, as sureties. He also executed another deed of trust to Blackwood, dated 8th of February, 1838, to secure a debt to the same bank of $15,000, created 25th of Oct., 1837, with the same sureties as the one last mentioned. All these deeds of trust conveyed the same property.

On the 21st of April, 1838, William Davidson executed a deed of trust to James W. Osborne, conveying several tracts of land, with all the stock of horses, cattle, &c.; all the grain, hay, fodder, &c.; blacksmith tools, farming tools, wagons, carts; also seventeen slaves in trust, to secure John Irwin two notes, in amount about $1400; Irwin and Elms two notes about $1300, and to indemnify James H. Blake and David T. Caldwell as his sureties to the State Bank for $1100, with several other debts not material to be mentioned. By this deed the two first named debts were entitled to satisfaction in preference to the others. The following clause is contained in this deed of trust, that is to say, "This trust is not intended to diminish, in any way, the validity of a trust executed by and between William Davidson and Washington Morrison, on 17th of January, 1833, the purposes of which trust were partially satisfied by borrowing money on the faith thereof;

for that purpose, part of the property was sold, part put into a new trust to the State Bank, and part of the debts remain unsatisfied. The present trust is to secure some debts not satisfied in the former trusts."

The property contained in this deed of trust to Osborne, had been previously conveyed in the deeds of trust mentioned. Mr. Wilson, in his report of sales, &c., mentions that the debt due by Davidson to the agency of the State Bank at Charlotte, originated on 30th of Dec., 1835, and that to Irwin on the 1st of January, 1837, and that it was assigned to Irwin when the trust was made to Osborne.

A bill in equity was filed by one John R. Williams and other creditors of William Davidson, alleging that the amount of property in the hands of the trustees, was greatly beyond the debts and liabilities intended to be secured, and praying the Court to compel the trustees to make sale, so that it might be ascertained whether their debts would be reached. Under this proceeding, the said trustee, Blackwood, and Wilson, the executor of Morrison, the other trustee, were directed to sell and pay off the debts mentioned in the several deeds to them. This they did, and reported to August Term, 1842, of Mecklenburg Court. At that term the nature of the debt to Irwin and Elms, and that due to the agency of the State Bank, being set forth by the trustee Wilson, he reports that he had not paid either of them, whereupon the Court "ordered also that the said Joseph H. Wilson pay and satisfy the debt due the bank of the State of North Carolina, in his report mentioned, amounting to $1,385,64." This payment, and some others ordered in the same decree, exhausted the fund in the hands of Wilson, so that nothing came to the hands of Osborne.

At the Fall Term, 1855, of the Court of Equity of Mecklenburg, Irwin and Elms filed a petition to rehear the decree, alleging that there was error in ordering the debt to the bank of the State to be paid in preference to their debts; for that the overplus in the hands of Wilson ought to have gone into the hands of Osborne, so that these debts which had the preference by the terms of that deed might have been paid.

The defendants answered, insisting that there was no error in the decree sought to be reheard, for that the deed of trust executed in 1833 was intended to provide a security for the note in question; that this note was given in lieu and in the way of renewal of some of the liabilities embraced in that deed, and that but for the protection which was provided in that deed, the defendants Blake and Caldwell would not have signed that note.

They say further that the plaintiff Irwin, after having sanctioned the provisions of that deed by taking benefits under it, ought not to be heard to impugn it. Replication.

The cause being set down for hearing upon the petition, answers, and exhibits, was sent to this Court.

B. F. Moore, for the plaintiffs.
Boyden, for the defendants.

PEARSON, J. Under the deed of trust to Osborne, (1838,) the two notes to "Irwin and Elms," assigned to Irwin, had priority over the debt due to the State Bank, with Blake and Caldwell as sureties. But no funds came to the hands of Osborne, being anticipated by the decree which directs payment of the debt due the State Bank, to be made by Wilson, the administrator of Morrison, under the deed of trust of 1833, whereby the fund was exhausted. The petition alleges there was error in that decree in this—that the residue of the fund, after paying certain debts, which it is admitted had priority, and among others, a large debt to the Bank, $15,000, secured by the deed of trust to Blackwood, (1837,) ought to have been allowed to pass into the hands of Osborne, to be applied under the deed to him, and ought not to have been applied under the deed to Morrison.

This assignment of error is based on the position that the deed of trust to Morrison, without any charge of fraud, or want of bona fides, is *inoperative in respect to debts contracted after its execution*, and consequently that the debt due the State Bank, with Blake and Caldwell as sureties, which was con-

tracted after that time, but by reason of the provision made in the deed for all subsequent debts, to which Blake and Caldwell might become sureties, was not secured by the deed of trust to Morrison, and did not attach to the funds in his hands or in the hands of his administrator, and the residue of the fund ought to have passed to Osborne, he being entitled to the resulting trust of Davidson, under the deed of trust to him, to be paid out according to the provisions of the latter deed.

It appears by the report of Wilson, that the debt in controversy, that is, the debt to the State Bank, with Blake and Caldwell as sureties, was contracted prior to the execution of the deed to Osborne. That deed contains this clause: "This trust is not intended to diminish in any way the validity of a trust executed by, and between, William Davidson and Washington Morrison, on the 17th of January, 1833, the purposes of which trust were partially satisfied by borrowing money on the faith thereof." The deed to Morrison contains this clause: "And whereas it may become necessary for the said John Irwin, Samuel McComb, Jane Emmerson, D. T. Caldwell and James C. Blake, for the purposes of enabling me to meet the instalments due H. M. Miller, as agent of the Bank of Newbern, Raleigh office, or for other purposes, to enter into other and further liabilities for me, it is therefore the intent and meaning (and I do hereby declare it to be such) of this trust to indemnify the said Irwin, McComb, Emmerson, Caldwell and Blake, not only in all matters for which they are now bound as my security, and to secure them the amounts I now owe them *individually*, but to secure them against all *future liabilities which they may incur as my security and future debts that may be justly due them.*" The two notes to "Irwin and Elms" were not an individual debt due to Irwin, and did not become so until the assignment to Irwin, made at the date of the deed to Osborne. So the debt to the State Bank, with Blake and Caldwell as sureties, was entitled to priority as a future liability incurred by them as the sureties of Davidson, upon the faith of the provision made in

the deed of trust to Morrison, unless that provision was inoperative. The point is, putting out of the case all question of fraud in regard to this provision, (which is the more proper, because Irwin is expressly entitled to the benefit thereof, as well as the other persons named, and concurred in this mode of enabling Davidson to sustain his credit,) did this debt to the Bank, with Blake and Caldwell as sureties, attach to the trust fund in the hands of Morrison or his administrator, so as to become a charge thereon at and from the time of its creation? In other words, was the provision of the deed valid for the purpose for which it was intended, or was it void and of no effect?

We are at a loss to perceive any ground upon which it can be assailed, putting fraud out of the consideration.

It was suggested on the argument that such a provision should be held void, because it evades the policy of registration, the object of which is to enable every one to see on the face of the deed, as well the property conveyed as the amount of the *debts secured*. This is stating the object for requiring the registration of deeds of trusts and mortgages too broadly. One purpose is to prevent fraud. That is out of our case. Another is to give notoriety to the fact, that certain property is incumbered in such a way as to put purchasers, and others who may be concerned, *on enquiry*, and it is sufficient if the deed furnishes *data* by which these enquiries may be satisfied. To require precise *figures* and *dates* to be made in the face of the deed would be attended with great inconvenience, and in many cases be impossible; e. g. a trust to secure sundry debts—amounts unknown, or a debt of *about* the sum of ——; such trusts have frequently passed without exception; or to secure a principal against any loss by reason of the acts of his deputy and the like; or, as in our case, to secure Blake and Caldwell against any liability which they may incur by becoming the sureties of the maker of the trust.

It was further suggested, that such a provision should be held void, because there is no way of putting an end to it, and the property would be tied up indefinitely, so that even an

act of the Legislature could not set it free without impairing the obligation of a *contract.*

It is certain that the operation of this provision could be stopped by the trustor's assigning his resulting interest by a deed to secure specific debts, as was done by the deed to Blackwood and the deed to Osborne—such debts thereby having priority, except against debts previously contracted on the faith of the provision; and it is also certain that it could be stopped by a creditor's bill, as in this case, to *force the trust*, that is, to compel the trustee to satisfy the debts secured, and allow the excess of the fund to be applied to the debts not secured.

The idea of impairing the obligation of a contract is a fallacy. There is no contract to be impaired. Irwin, Blake, Caldwell and the others, were *not bound* to become sureties for Davidson. The provision was merely an inducement for the purpose of removing any objection they might have to becoming bound for him. If this inducement was taken away by an assignment of his resulting trust to secure other debts, or by the intervention of the creditors, they were at liberty to decline any further liability.

PER CURIAM, Petition to rehear disallowed with costs.

JOSIAH AND GEORGE H. YOUNG, *Executors, against* BENJAMIN YOUNG *and others.*

The words "which negro I design for the benefit of A. Y. (a married woman) and her children, and not to be subject to any debt or debts which J. Y. (the husband) may contract, or have contracted," were *Held* sufficient to give a sole and separate estate to the wife and a remainder to her children.

Where a negro woman was given by parol to a married daughter, and after the woman had a child, the owner willed the woman and *her increase* to the daughter, reciting that the testator had mentioned the said woman in a bill of sale made by him to the husband, and at the time of making the will, executed a bill of sale for her to the husband, dating it back to the

time of the parol gift, it was *Held* to be a confirmation of such gift, and passed the child as well as the mother.

The words "*all of every* thing on hand," in immediate succession to a bequest of a horse, house-hold and kitchen furniture, shop and plantation tools, were *Held* not to pass notes and other choses in action.

CAUSE transmitted from the Court of Equity of Stokes county.

The bill was filed by the Executors to obtain the advice of the Court upon the following clauses in the will of Robert Young, deceased, viz:

"Item 3rd. I will and bequeath to my daughter Anna Young, to her and her bodily heirs, my negro woman Mariah, aged about forty-four years, which negro I desire for the benefit of Anna Young and her children, and not to be subject to any debt or debts which Jesse Young may contract, or have contracted."

"Item 9th. I will and bequeath to my son John Young, in addition to what I have had to pay for him, a horse, if there should be one on hand, also one side-board, one book-case, two beds and furniture, one clock, my shop tools, and all my plantation tools, and my kitchen furniture, two old carryalls, all the house furniture not heretofore mentioned, also the stock, and all of every thing on hand not otherwise mentioned."

"Item 10th. I will and bequeath to my daughter Mary A. Powers, a certain negro girl, named Manda, which she has heretofore taken in possession, and the increase of said negro, which girl is mentioned in a bill of sale to B. F. Powers, to have and to hold to her, her heirs and assigns forever."

The first point upon which the plaintiffs desire to be advised is, whether the words in the 3rd item of the will are sufficient to secure to Mrs. Anna Young a separate estate in the slave Mariah, or whether it goes to the husband Jesse Young.

Shortly after the execution of the will, the testator placed some notes, on divers persons, in the hands of the plaintiffs, requesting them to collect them, and apply the proceeds thereof to the payment of his debts, but he died before they had time to collect them. As there is no residuary clause in the

will, the defendant John Young claims these notes by virtue of this expression in the 9th clause, "all of every thing on hand not otherwise disposed of;" while the next of kin insist that these notes are not disposed of at all by the will, and that the proceeds of them must be distributed among them according to the statute of distributions.

The remaining question grows out of the 10th item: The woman Manda, after being put into the possession of Mrs. Powers and her husband, had a child named Sam, which is not mentioned specifically in the will; but it is pertinent to the question to state, that the testator made the deed, conveying Manda to B. F. Powers, contemporaneously with the execution of the will, but antedated it so as to make it reach back to the time of putting the slave Manda in the possession of his son-in-law Powers, which was before the birth of Sam.

John Young claims Sam as not being disposed of in other parts of the will, and as coming under the clause of the will above recited, under which he claims the notes.

Powers claims Sam either by force of the word increase, in the will, or by virtue of the bill of sale, or by virtue of the original parol gift of Manda, confirmed subsequently by the will and bill of sale, which he contends will act retrospectively and reach to a period before the birth of Sam; while the next of kin contend that there is an intestacy as to this slave, and that he is distributable according to the statute.

There is no disagreement as to the facts, and all parties submit that the Court shall decide the points as stated by the executors.

No counsel appeared for the plaintiffs in this Court.
Morehead and *Miller*, for the defendants.

NASH, C. J. The bill is filed by the plaintiffs as the executors of Robert Young, dec'd., to obtain constructions of the 3rd, 9th and 10th clauses of the will. The 3rd clause is as follows: I will and bequeath to my daughter Anna Young, to her and her bodily heirs, my negro woman Mariah, aged about

forty-four years, which negro I design for the benefit of Anna Young and her children, and not to be subject to any debt or debts which Jesse Young may contract or have contracted. The authorities on the subject are abundant to show that there are no technical words peculiarly appropriated to the creating of a separate estate in a married woman. The Court in the construction of such instruments look to the intention of the donor; if that be clear, the Court will execute it, keeping in mind that the governing principle is that the husband is not to be deprived of his *jus mariti*, except by express words, or by a just inference. Lewin on trusts, 150; *Ashcraft* v. *Little*, 4 Ire. Eq. Rep. 238. The words here are, "and not to be subject to any debt or debts which Jesse Young may contract, or (may) have contracted." Here is a plain and manifest intention on the part of the donor, that the slave Mariah shall be for the sole and separate use of the wife and her children. The husband, Mr. Young, has no interest in the slave.

The 10th item is as follows: "I will and bequeath to my daughter Mary A. Powers, a certain negro girl named Manda, which she has heretofore taken in possession, and the increase of said negro, which girl is mentioned in a bill of sale to B. F. Powers, &c." There is no contest as to the right of Mrs. Powers to the woman Manda. It appears that previously to the making of the will and the execution of the bill of sale, while the woman was in the possession of Mary A. Powers, Manda had a child born named Sam. To whom does he belong? Mr. Powers claims and holds him as his property under the term *increase* in the will; and if not under the will, under the bill of sale. We think he passed to Mr. Powers by neither instrument. We will dispose of the bill of sale first. That instrument which is an exhibit in the case, bears date the 14th of February, 1846. The will was made on 8th of Sept., 1855, and the testator died on 2nd of December of the same year. The bill of sale was executed and delivered at the same time the will was. The deed takes effect from its delivery, and not from the date mentioned in it. It disposes of nothing but the woman Manda. It makes no mention of Sam, who

was the property of the testator. The claim, therefore, of Mr. Powers under the deed, is not well founded. Neither is it under the will. It is well settled that wills take effect and speak from the death of the testator, unless a different intent is expressed; consequently, a gift of a negro woman and her increase is taken to mean such as she may afterwards have. *Turnage* v. *Turnage*, 7 Ire. Eq. Rep. 128. This is fully to the point before us, and, therefore, it is not necessary to cite other authorities of which there are many. Sam, then, passed to Mr. Powers neither by the will nor by the deed. But he did pass by virtue of the parol gift; the will and the deed operating as a confirmation of the gift. The fact of antedating the deed proves incontestably that he did intend to confirm it. *Woods* v. *Woods*, 2 Jones' Eq. Rep. 420; *Lowe* v. *Carter*, *Ibid*, 327.

The 9th item of the will is as follows: "I will and bequeath to my son John Young, in addition to what I have had to pay for him, a horse if there is one on hand; also one side-board, one book-case, two beds and furniture, one clock, my shop-tools, and also my plantation tools, and my kitchen furniture, two old carryalls, all the house furniture not heretofore mentioned, also all the stock, *and all of every thing on hand not otherwise mentioned.*" Under this clause John Young claims the boy Sam, and also all the notes and bonds put by the testator in the hands of his sons Josiah and George H. Young.

This claim cannot be allowed for several reasons. *First.* Where the words, goods, chattels and other general terms are used, coupled with words of a limited signification, they will be restrained to things *ejusdem generis;* 2 Wms. on Ex'rs., 752. Thus, where the testator bequeathed to his niece all his goods, chattels, household-stuff, furniture and *other things* which should be in his house at A., it was decided that cash found there in the testator's house did not pass, for the words other things, should be intended of like nature and species with those before specified. *Trofford* v. *Berridge*, 1 Eq. Cas. abr. 201; Ambler, 612. The clause which we are now considering is to be confined to all such things as the testator had at his death, of the nature and species of the goods with which the words

other things are coupled. We have disposed of the question as to Sam, but John Young also claims, under this clause, all the notes and other choses in action, and all the estate not specifically bequeathed to others. He is entitled under that clause, to every thing belonging to the testator at the time of his death, which are *ejusdem generis* with the other property with which they stand connected in the clause, and which is not specifically bequeathed; for instance, if he had more beds, or more bureaus, than are bequeathed in the will, he is entitled to them. He is not entitled to the notes and the choses in action, nor the money on hand at the time of the testator's death. The notes and choses in action do not pass under the will, there being no residuary clause. As to them, the testator died intestate, and they are to be divided among the next of kin under the statute of distributions.

PER CURIAM, Decree accordingly.

WILLIAM W. VASS, *Adm'r.*, *against* HARRIET FREEMAN, *Executrix.*

Where slaves, or other property, are bequeathed to two or more persons immediately, as tenants in common, with a limitation over to the survivors, or in case that one or more of them die, it is settled that unless the contrary intent appear from other parts of the will, those who survive the testator will take absolutely.

But where, from special circumstances and express words in other parts of the will, it appears that the testator referred to a survivorship to take place between legatees after his death, the above general rule does not prevail.

Where A gave a joint estate, for life, to his mother and sister, with an absolute estate to the survivor, expressing a belief that he would soon die, and that these two objects of his bounty would survive him—appointing them his executrices—giving them minute instructions as to the management of the estate and the selection of their agents—their place of residence, and cautioning them against imposition, it was *Held* that the testator meant to give the property to the survivor of the two who should become so by the death of one of them after his death.

CAUSE removed from the Court of Equity of Wake county.

The bill was filed to recover a legacy bequeathed to Amanda G. Freeman in the will of William G. Freeman. The following are the material clauses of the said will, bearing upon the question:

"3rd. I give and bequeath to my mother, and Amanda G. Freeman, the whole of my estate, jointly, and upon the demise of either, the survivor to have the whole in fee simple, forever."

After describing the situation of his mercantile effects and funds deposited in several places, the will proceeds, "and my negroes, perhaps they had better keep, and my goods, perhaps they had better dispose of on as good terms as they can. They were purchased for cash, and perhaps can be disposed of with advantage to the purchaser and my estate, which disposition can be public or private; but I would not advise them to carry on the business, as they know nothing about it, and would likely be prejudiced in the financial affairs; but think my mother and sister might qualify as my executrix, and employ William T. Dortch to settle the business up for them as their agent. In consideration of the persons, I now nominate my mother, Harriet Freeman, and sister Amanda G. Freeman, my executrixes, to execute and carry out my will in as full and ample a manner as I could, were I personally present." He then notices that his brother Bryan had left a child, but declares, in violent terms, his unwillingness for that child to have any part of his estate. The will then proceeds: "Perhaps it would be best for mother and Amanda to invest the bonds, notes and accounts, &c., in State bonds, if you could do so, as it would be a safe investment, and you could get the interest semi-annually. I do not know what to advise relative to living. Perhaps you prefer going to Raleigh to live, or perhaps to Franklin; but exercise your own discretion and will as to that."

He then suggests that many persons may affect a sympathy, "and want to marry Amanda," but he advises them to repel

all such advances, and to consult their lawyer as to their affairs.

Both the executrices qualified, and undertook the burthen of administering the estate.

Amanda, the sister, mentioned in this will, intermarried with the plaintiff and died about a year afterwards, and the plaintiff took out letters of administration on her estate.

The plaintiff contends, that by the provisions of the said will, the limitations over on a death, are confined to a period within the life of the testator, and that on his death the interests of the legatees became absolute, and that as the administrator of Amanda, he is entitled to the personal estate bequeathed to her, and that by the *jus mariti*, he is entitled to hold the same. The prayer is that the defendant, as executrix, account and pay the said legacy to him.

The defendant answered, not disputing the facts, but insisting on the whole estate as belonging to her, claiming that of Amanda by survivorship.

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

B. F. Moore, for the plaintiff.
Phillips and *Green*, for the defendant.

BATTLE, J. When slaves or other personal chattels are bequeathed to two or more persons, immediately, as tenants in common, with a limitation over to the survivors or survivor, if, or in case that, one or more of them die, it is settled that, unless a contrary intent appear from other parts of the will, those who survive the testator will take absolutely. The rule which thus refers the period of survivorship to the death of the testator, was first laid down by Lord Chancellor *Cowper* in the case of *Lord Bindon* v. *The Earl of Suffolk*, 1 Peere Will. 99, was followed by many cases in England, and has been recognised in this State in the cases referred to by the plaintiff's counsel, of *Hogg* v. *Cox*, 2 Dev. Eq. Rep. 121; *Hilliard* v. *Kearney*, Busb. Eq. Rep. 222; and *Biddle* v.

Hoyt, 1 Jones' Eq. Rep. 159. The reason of the rule is given by sir JOHN LEACH Vice Chancellor, in *Allen* v. *Farthing*, (reported in 2 Jarman on Wills, 688, 689,) "that where a testator refers to death simply, the words are necessarily held to mean death in his (the testator's) life-time, the language expressing a contingency, and death generally being not a contingent event." If there be any time subsequent to the death of the testator, to which the period of survivorship can be referred, as, for instance, the death of a tenant for life, or the time when the property is to be divided, that will be adopted instead of the death of the testator, unless a special intent to the contrary can be found in the will. This was decided by Sir JOHN LEACH in *Cripps* v. *Walcott*, 4 Madd. Ch. Rep. 11, and has been sustained by many subsequent cases in England and this State. See 2 Jar. on Wills, 648; *Biddle* v. *Hoyt*, *ubi supra*. Analogous to these cases of survivorship, are those where bequests are made to a person, with a limitation over *in case of his* death. The question is whether the testator uses the words "in case of" in the sense of *at or from*, so as to restrain the prior bequest to a life-estate with a remainder over, or uses them to substitute another bequest in lieu of the prior one, should that fail by the death of the first legatee in the life-time of the testator. "The difficulty in such cases, (says Mr. Jarman,) arises from the testator having applied terms of contingency to an event, of all others, the most certain and inevitable, and to satisfy which terms it is necessary to connect with death some circumstance, in association with which it is contingent; that circumstance, naturally, is the time of its happening; and such time, where the bequest is immediate (*i. e.* in possession) necessarily is the death of the testator, there being no other period to which the words can be referred." But though it is an established rule, that where there is a bequest simply to A, and *in case of his death, or if he die*, then to B, A will take absolutely upon surviving the testator, (*Lowfield* v. *Stoneham*, 2 Strange's Rep. 1261, *Trotter* v. *Williams*, Pre. in Chan. 78,) yet where there is another point of time to which such dying may be referred, as is ob-

viously the case when the bequest is to take effect in possession at a period subsequent to the testator's decease, the words in question are considered as extending to the event of the legatee dying in the interval between the testator's decease and the period of vesting in possession. See *Hervey* v. *McLaughlin*, 1 Price's Rep. 264; *Home* v. *Pillans*, 2 Myl. and Keen's Rep. 24. Thus it will be seen that, whether in the case of survivorship, or in that of a bequest to one person with a limitation over, where the death of the legatee is spoken of as an uncertain event, it can be so only in reference to some other event, and that the death of the testator must, of necessity, be assumed as the event referred to when no other is mentioned in the will. But even where there is no subsequent time to which the death of the legatee, spoken of as contingent, can be referred, and where the bequest is immediate, special circumstances will induce the Court to construe it to mean the death of the legatee at *any* time, and not restrict it to the death of the testator. See *Billings* v. *Sandom*, 1 Bro. Ch. Cas. 393; *Nowlan* v. *Nelligan*, *Ibid* 489, and *Lord Douglas* v. *Chalmer*, 2 Ves. Jun. 501. In the last mentioned case a testatrix bequeathed her residuary personal estate for and to the use of her daughter, Frances Lady D., and in case of her decease, to the use and behoof of her (Lady D's) children, share and share alike, to whom her trustees and executors were to account for and pay over and assign the said residue. By a codicil, the testatrix gave a ring to her daughter Lady D. Lord *Loughborough* treated the notion, that the testatrix intended to provide for the event of Lady D's. dying in her (the testatrix's) life-time, as contrary to the natural import of the words, and the distinction between the expression used and *at or from* her decease, as too subtle. He also relied upon the bequest of the ring, as being inconsistent with the supposition of her taking the whole interest in the residue; and he observed that, under the circumstances which had happened, there was no other way by which the bounty of the testatrix could reach the children, but by giving the residue to Lady D. for life, with the remainder to her children. The remarks of

Sir WILLIAM GRANT in *Webster* v. *Hale*, 8 Ves. Jun. 411, upon this case, would seem to show that the circumstance of the gift of the ring ought not to have influenced the decision.

From the cases to which we have just referred, it appears clearly, that special circumstances will prevent the application of the general rule which, in immediate bequests, refers the contingent terms, in which the death of the legatee is spoken of, to the event of the testator's death. Much more will this be the case when such special circumstances are attended by words indicating certainty in the death of the legatee, or one of the legatees.

In such a case there is no necessity to restrict the death of the legatee to that of the testator, a restriction which Sir R. P. ARDEN, M. R., in *Russell* v. *Long*, 4 Ves. Jun. 551, called an unnatural construction, because, as Sir WILLIAM GRANT said in *Brown* v. *Bigg*, 7 Ves. Jun. 279, the testator generally supposes that the legatee will survive him. The death of the legatee, therefore, where there is a limitation over after an immediate bequest, or where a survivorship is provided for, may be construed to mean, what it is in fact, a certain event without reference to any other event. The intention of the testator will then be carried out by giving effect to the ulterior limitation, or to the survivorship, after the death of the legatee, instead of being defeated by holding the interest of such legatee to be absolute, in case of his being alive at the death of the testator. Applying this rule to the case before us, it gave a joint estate for life to the testator's mother and sister, with an absolute estate to the survivor, and the whole scope of the will proves clearly, as the defendant's counsel contended, that such was the testator's intention. In every part of his will he shows that he expected to die soon, and that both the objects of his bounty would survive him. He gives minute information of the then existing state of his affairs; and being a merchant as well as a slave owner, he advises his mother and sister (whom he appoints his executrices), how they shall dispose of his goods and slaves. He selects a professional gentleman, whom he directs them to employ; points out the

best investment for their money; and suggests one or two places for their choice of a future residence. The terms of the bequest are as follows: "I give and bequeath to my mother and Amanda G. Freeman, the whole of my estate jointly, and upon the demise of either, the survivor to have the whole in fee simple forever." It will be observed that the words of bequest import a joint tenancy, by which the legatees may still hold in North Carolina, though the incident of survivorship was abolished by the act of 1784. (1 Rev. Stat. ch. 43, sec. 2; Rev. Code ch. 43, sec. 2.) There is nothing to indicate the wish or expectation of the testator that his mother and sister would divide the property, and he had the undoubted right to limit the whole absolutely to the longest liver. What is there, then, to prevent his manifest intention from being carried into effect? Only one plausible objection has been, or can be, urged against it. Had Mrs. Vass (who was the legatee, Amanda G. Freeman), left children, they would, in the event which has happened, of their mother's death before her mother, have been excluded by this construction from any part of the testator's estate. This is admitted to be an important consideration, and would, in a case of doubtful intent, have great weight in restricting the survivorship to the death of the testator. But we think the intention of the testator is expressed in terms too plain to admit of doubt. Besides the circumstances to which we have already adverted, it will be noticed that the death of the legatee is spoken of as a certain event. It is *upon* her death that the survivorship is to take place. There is no contingency either expressed or implied, and there is, therefore, no place for the application of the general rule which, in a case of necessity only, refers it to the death of the testator. In addition to this, the testator shows himself, that he had no particular wish to provide for any body except his mother and sister. He expressly excludes the only child of his deceased brother, and he warns his sister against the advances of suitors, in terms which shows that he did not wish her to marry, and that he had very little idea of providing for her children. His disposition of his property

may not be such as we can approve, but it was his own, and he had the right to give it to whom he pleased, and upon what terms he chose, provided that in doing so he violated no rule of law. We are bound to say, that the only fair construction of which the language of the will is susceptible, is not opposed by any rule of either the common or statute law, and that it is our duty to give effect to it. The plaintiff, as the administrator of his wife, is not entitled to any part of the testator's property, and his bill must, therefore, be dismissed.

PER CURIAM, Bill dismissed.

JAMES GARRISON *and another, executors, against* POLLY ANN EBORN *and another.*

Where a testator, having a wife and two daughters, directed in his will that certain slaves, and other property, should be divided "between his wife and children," and in a subsequent clause directs that, in case of the death of one of his daughters "*leaving no heir of her body*, then, and in that case, it may go to my remaining child or children," one of the daughters having died in the life-time of the testator, it was *Held* that her share went to her sister, and that the widow took but one-third.

Where it is provided in a will, that the widow should take of certain articles as much *as she wanted*, it was *Held* that she was vested with unlimited discretion as to the quantity she might take, even to the amount of the whole of the articles mentioned.

The Act of Assembly in relation to the time when a will "shall speak and take effect," applies only to the property named in it, and not to the legatees.

CAUSE transmitted from the Court of Equity of Beaufort county.

The bill was filed by the plaintiffs, as the executors of Samuel C. Eborn, suggesting that there are conflicting claims arising out of the several provisions of the will of the said Samuel C. Eborn, and praying that the legatees may be ordered to interplead, so that these different interpretations and assertions of claim may be considered and determined by a

decree of this Court. The following are the material clauses of the will, out of which these questions arise:

"Item 1st. My will and desire is, that all my real estate, of every name and character, may be sold within one or two years after my death, at the discretion of my executors hereinafter named, upon a credit of from one to five years, taking notes with approved security, with interest from day of sale; and the fund arising from the sale of my real estate, together with all the funds, (money and notes,) which I have on hand, as well as all such as may come into the hands of my executors, I desire to be equally divided between my wife and children, share and share alike.

"Item 2nd. My will and desire is, that all my negroes may be equally divided between my wife and children, and in case of the death of one of my children leaving no lawful issue of her body, then, and in that case, it is my will and desire, that it may go to my remaining child or children, as the case may be. And in case of the death of all my children, leaving no lawful issue of their bodies, then, and in such case, I leave them all to my wife during her life-time, with power to convey, at her death, one half of all my negroes, which I own, to such persons as she may think proper, and the other half I desire to be equally divided between my two brothers, William and Robert, and my sister Mary Elizabeth Davidson, and the funds mentioned in item 1st, I desire to be disposed of in like manner as the slaves mentioned in this item 2nd.

"Item 3rd. I loan to my wife as much of the house-hold and kitchen furniture, also as much of the corn and fodder, pork and bacon, as she may want; also as many of the horses and mules, also as many of the riding vehicles and carts, together with as many harness of each as she may desire, and as much as she does not want, I desire to be sold."

At the date of this will the testator had a wife, the defendant Polly Ann, and two children, Cora, who died afterwards in his life-time, and the other defendant, Elizabeth.

The plaintiffs state, in their bill, that they have sold the land in obedience to the directions of the will, and have the slaves in

their possession; that they have allowed the widow, Polly Ann, to make choice of such house-hold and kitchen furniture, mules, vehicles and harness, and of as much pork, bacon, corn and fodder, as she desired, and have filed a list of the same, with their values.

They state also, in their bill, that on the part of Polly Ann, it is contended that, by a proper interpretation of the will, under the circumstances that have happened, she is entitled to one half of the proceeds of the sales of the land, and one half of the slaves, also to all the furniture, &c., which she has chosen.

That on the part of Elizabeth, it is contended that her mother, Polly Ann, is entitled to only one-third part of the proceeds of the sales of the land, and the like proportion of the slaves; that she is not entitled to take as much of the furniture as she pleases, but that a reasonable quantity must be set off to her, and that the amount taken by her (although not all of any one kind) is excessive and unreasonable.

Answers were filed by both of the defendants, asserting their views, and insisting upon the several interpretations as attributed to them in the plaintiffs' bill, and each asking the Court to decree in her behalf accordingly.

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

Rodman, for the plaintiffs and for defendant Elizabeth.
Donnell, for the defendant Polly Ann.

BATTLE, J. We are of opinion that the testator's widow had the right to take all the articles of the kind mentioned in the 3rd item of his will. The testator makes no restriction upon her "want" or "desire," and this Court has no right to do so; but as she has made a choice of a part only of the articles designated, she must be content therewith.

Under the 2nd item of the will, the widow claims one half of the negroes, upon the ground, that at the time of his death the testator had but one child, and the direction is that the

negroes shall be equally divided between his "wife and children." Had the testator added nothing else, the widow's claim might have been difficult to resist, because the children are spoken of as a class, and the death of one in the testator's life-time would have left the survivors or survivor to answer the description. But at the time when he made his will, he had two children, one of whom died afterwards in his life-time, and he has provided for that event, by saying, that "in case of the death of one of my children, leaving no lawful issue of her body, then, and in that case," her share shall go to the remaining child or children. By using the feminine pronoun "her," the testator recognises that all the children he then had were females, but as he might have more, he makes the limitation over to them, not as a daughter or daughters, but as children. The death of one of his daughters being spoken of as a contingent event, it must necessarily be so in reference to some other event, and as no other is mentioned, the death of the testator must be taken as that event. The daughter having died before the testator, the will gives her share to her surviving sister, to the exclusion of her mother. See the case of *Vass* v. *Freeman*, decided at the present term, (ante 221,) where the subject of the period to which the survivorship shall be referred is fully discussed. The late act which declares that "every will shall be construed, with reference to the real and personal estate comprised therein, to speak and take effect, as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will," cannot aid the claim of the widow, because it applies only to the property named in it, and not to the legatees.

The fund to be raised from the sale of land, the collection of notes, &c., which the first item requires to be divided equally between the testator's wife and children, share and share alike, is, by the 2nd item, "to be disposed of in like manner as the slaves mentioned in this item." By this, we understand that it is to be subject to the same limitations and restrictions, and of course, in the event, which has occurred, of the

death of one of the daughters in the testator's life-time, her share will go to her surviving sister.

The articles mentioned in the 3rd item, not taken by the widow, were directed to be sold, but the proceeds arising therefrom, are not disposed of, unless they can be construed to form a part of the fund bequeathed in the first item. Whether it is so included or not, it is unnecessary to decide, for if it be a lapsed legacy it will be divided in the same manner as the other property; that is, the law will give to the widow one-third, and the remaining two-thirds to the child.

A decree may be drawn in accordance with this opinion, and the executors will pay the costs of the suit out of the estate in their hands.

PER CURIAM, Decree accordingly.

CASWELL LEA *and others against* REUBEN McKENZIE *and others.*

A bill charging that the defendant, by false representations and other fraudulent means, had prevailed on a party to convey to him a valuable copper-mine, which party had, by parol, agreed to convey it to the plaintiff, cannot be sustained in Equity.

CAUSE removed from the Court of Equity of Ashe county.

One Jesse B. Reeves was the owner of a moiety of fifty acres of land, including a highly valuable point called, "Ore Knob," supposed to be very rich in copper ore, which he contracted by parol to sell to the plaintiff Lea, for himself and the other plaintiffs, mentioned in the case, upon the following terms: The said Reeves was to lease to the plaintiffs his whole interest in the said copper mine and tract of land for three years, and they, on their part, by examination and mining, were satisfactorily to test the value of the said mine, after which he was to convey to them one half of his interest for the expenses and services which they might bestow upon

the property, and the other half for $4000, if they elected to purchase the remaining share. These terms were conclusively agreed upon, but were not reduced to writing; but to enable said Reeves to acquire the entire property in the mine, that he might convey that upon like terms, it was agreed that the execution of the writings should be delayed for three weeks. The bill alleges, that shortly after this parol agreement, the defendant McKenzie having found out that this contract was entered into, fell in company with the said Reeves, and by falsely and fraudulently representing that the plaintiff Lea had abandoned his contract, that he had lately seen him and heard him say so, and that the said Lea had returned to Tennessee, and did not intend to comply with his engagement, and by other fraudulent means, had induced the said Reeves to make a conveyance of the Ore Knob tract and all his mining interest to him, the said McKenzie, for the use and benefit of himself and the other defendants.

The plaintiffs further state, in their bill, that through their agent, the said Lea, they applied to the defendants, and offered to repay to them what they had expended in prosecuting the mining business since taking such conveyance, and demanded a conveyance to them, which was refused.

The prayer is for a conveyance of the said property to them, and for an account; also for general relief.

The defendants demurred.

There was a joinder in demurrer, and the cause being set down for argument, was sent to this Court.

Boyden, for plaintiffs.
Lenoir, for defendants.

NASH, C. J. Jesse B. Reeves was the owner of an undivided moiety of a tract of land, lying in Ashe county, containing fifty acres. The bill states that the plaintiffs, through their agent, Caswell Lea, one of the plaintiffs, made a parol contract with Reeves, to purchase one half of his interest in the said tract, at $4000. The stipulations of the contract,

as set out in the bill, were, that Reeves would lease to the plaintiffs, for the term of three years, all his said mineral interest in said tract of land, and they, within that term, would, by examination and mining, satisfactorily test the value of the said mine, after which he would convey to them in fee simple, an undivided half of his interest and right in the same, in consideration of these expenditures and services in the experiments done for testing, and the other half for $4000. The bill states the writing and execution should be postponed for a term not exceeding three weeks, at or before the expiration of which time, the execution of the contract by deed was to be done. The plaintiffs, in their bill, state that their agent Lea, having business in Grayson county, went there, and fell in with the defendant McKenzie, to whom he stated his contract with Reeves, and that McKenzie, without his knowledge, immediately came to Ashe county and proposed to Reeves that he should sell his interest in the land to him and his company, which Reeves refused to do, stating his contract with the plaintiffs, and to induce him to do so, fraudulently and falsely told him he had seen Lea in Grayson, and that he intended to give up his contract, and that he, Lea, was then actually on his return home to Tennessee. Influenced by these false and fraudulent representations, Reeves sold and conveyed to him, McKenzie, by deed, the premises in question, or his entire interest therein. The deed bears date 26th of April, 1854, before Lea returned from Grayson county. The bill alleges that the representations, by which the defendant McKenzie induced Reeves to sell to him and his company his interest in the lands, which he had previously contracted to sell to the plaintiff and his company, were utterly and entirely false. The bill alleges the willingness of Reeves still to comply with his contract with the plaintiffs, if he could, and that they have demanded from the defendants a conveyance of the interest so procured by them, proffering to pay all the expenses which they may have incurred, all of which they have refused. They pray that the defendants may be declared trustees for them; that they may be decreed to reconvey

to them; and for a general account. The lease mentioned in the contract is a lease for mining purposes, and by the act of 1844, Rev. Code, ch. 50, sec. 11, is void if not reduced to writing as a contract for an interest in land.

The defendants have filed a general demurrer. The object of a general demurrer is to supersede the necessity of an answer, and when a defendant thinks that, upon the statement made in the bill, the plaintiff has shown no equity, a demurrer shortens the litigation, and brings the contest down to a single point. When the bill fails to show that plaintiff has an equity, which a Court of Chancery can recognize, the defendant may avail himself of the defect upon the hearing, or as in this case, demur, which is the better course, as it relieves the Court from the labor of investigating the facts, as it confesses all the facts which are properly set forth in the bill. It submits, that on the plaintiff's own showing, his claim is bad. Adams, 332. The defendants admit that the plaintiff Caswell Lea made with Reeves the contract set forth, and that they procured from Reeves, by false representations, the conveyance to themselves. The contest is narrowed down to the question, does the bill set forth any equity against the defendants? We are of opinion that it does not. In order to ascertain this fact, it is necessary to ascertain what equity is stated in the bill against Reeves; for if the plaintiffs could not compel Reeves to convey to them the premises, that is, if the contract was of such a nature that Equity cannot enforce it against him, neither can they enforce it against his assignee. The statute of frauds makes *void* all contracts for the sale of land and slaves, which are not evidenced by some instrument, in writing, signed by the party to be bound. Here, the whole of the contract stated in the bill is in parol, and further, it was a part of the agreement, that the execution of the necessary writings and conveyance should be postponed for three weeks. Against Reeves, then, the plaintiffs, by their own statement, have no equity to compel from him a conveyance. This is a principle so plain, and so repeatedly decided by this Court, and so familiar to the profession, as to need no author-

ity to be cited. Upon what then rests their equity against the defendants? It is simply upon the ground of the fraud practiced by them, or their agent, the defendant McKenzie, in procuring their conveyance. How does this fraud assist their equity? What right have they in a Court of Equity, which has been injured by them in their purchase? None whatever. They had no right which could be enforced against Reeves. They, therefore, have no right which could be recognized in this Court either against Reeves or the defendants.

PER CURIAM, The demurrer is sustained, and the bill dismissed.

JAMES ALLISON *and others against* ROBERT W. ALLISON *and others.*

All personalty which is not effectually disposed of by a will, whether it be acquired after the making of the will, or whether it fall in by the lapse of a legacy, will pass by a general residuary clause, unless it appear from the context that such was not the testator's intention.

A lapsed legacy is more readily included in a residuary clause than one that is void as being against the policy of the State.

CAUSE removed from the Court of Equity of Cabarrus county.

The main question in this case arose upon the construction of the will of Thomas Allison; the 5th clause of which is as follows:

"5th. I will and bequeath to my son John G. Allison, the negro boy named Nat, one horse named Jim, and one colt, Sam."

The 12th clause is as follows:

"12. The balance of my property not herein devised, I will to be divided equally between my four children, John G. Allison, Robert W. Allison, Silas Y. Allison and Elizabeth Allison."

John G. Allison died in the life-time of the testator, and there arose a question whether his share should be included

in the residuary clause, or whether it should go as undisposed of property to the next of kin according to the statue of distributions.

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

Jones, for the plaintiffs.
Wilson, for the defendants.

BATTLE, J. The residuary clause in the will now under consideration is of the most comprehensive character. It embraces the balance of the testator's property of every kind not otherwise bequeathed. It must, therefore, comprehend, as was said by the Court in *Sorrey* v. *Bright*, 1 Dev. and Bat. Eq. Rep. 113, "all the personalty which is not otherwise effectually disposed of by the will, whether it be acquired after the making of the will, or whether it fall in by the lapse of a legacy, or by the particular gift of the thing being illegal and void." This settles the question in the present case, unless there be something in the will to make it an exception to the general rule. We will proceed to consider whether such an exception can be established. In the same case of *Sorrey* v. *Bright*, it is said that the extent of the rule may be restricted by the special wording of the will. If the residue given is partial, that is, of a particular fund, the rule has no application. So, where it is clear from the residuary clause itself, or other parts of the will, that the testator had in fact a contrary intention, namely, "that the residue should not be general, and that things given away, or which the will professed to give away, should not fall into the residue." The cases cited by the plaintiffs' counsel of *Kirkpatrick* v. *Rogers*, 6 Ire. Eq. Rep. 135; *Hudson* v. *Pierce*, 8 Ire. Eq. Rep. 126, and *Lea* v. *Brown*, decided at the last term, (ante, 141,) all recognize the general rule, but are held to be exceptions from it, on account of the special circumstances of intent apparent in the will. In the case before us, the only circumstance that can possibly be relied on to take it out of the genaral rule, is, that the legatee whose legacy lapsed by

his death in the life-time of the testator, was himself one of the residuary legatees. Had the legacy given to him been void on account of its being contrary to law, and had he survived the testator, then it might have been contended, perhaps, with success, that the legatee could not have taken as a residuary legatee, or as one of the residuary legatees, what had been declared void when given to him as a specific or general legacy. See *Hudson* v. *Pierce*, *ubi supra*. But there is no such inconsistency in the other residuary legatees taking under a general and unrestricted clause, what turns out to be otherwise undisposed of, by reason of the death of a legatee before the will took effect. The law favors the construction that a lapsed legacy of the latter kind falls into the residue, more readily than it does one which lapses because it is void. The reason for the distinction is stated in *Lea* v. *Brown*, and need not be here repeated. Our opinion then is, that the legacy to John G. Allison, which lapsed by his death in the testator's life-time, fell into the residue, and must be equally divided between the other residuary legatees, and a decree may be drawn accordingly.

PER CURIAM, Decree accordingly.

CATHARINE OSBORNE *and others against* MARTIN WIDENHOUSE *and others.*

Where land was devised to a grandson by his paternal grandfather, and the devisee died in the life-time of his father, it was *Held* that the devisee not being *an heir, or one of the heirs*, of the devisor, the estate passed to his uncles and aunts on the mother's side as well as those on the side of the father. (*Burgwyn* v. *Devereux*, 1 Ire. Rep. 586, cited and approved.)

CAUSE transmitted from the Court of Equity of Cabarrus county,

This was a petition for the partition of several tracts of land amongst the heirs-at-law of one Noah Furr, and for the purpose of ascertaining the respective interests of the plaintiffs and defendants in the premises. The land in question was origi-

nally owned by Paul Furr, who devised the same as follows: "I give and bequeath unto the bodily and lawful heirs of my son Henry Furr, the tract of land whereon he now lives," (describing it). Previously to the death of the testator, his son Henry Furr had intermarried with Elizabeth Linker, by whom he had one child, the said *Noah*. Shortly after the death of the testator, Noah died without having had issue, and without brother or sister, or the issue of such. Henry, the father of Noah, then died; and Elizabeth, the mother, also died, and the only question in the case, is whether the brothers and sisters of Henry Furr, (the paternal uncles and aunts of Noah), are entitled to have the proceeds of the land divided amongst them, or whether the brothers and sisters of Elizabeth Linker, (the maternal uncles and aunts), are entitled to participate in the fund, the former class being represented by the plaintiffs, and the latter by the defendants. The facts of the case are not contested by the defendants, who concur in praying a sale for partition, but insist that they are equally entitled with the paternal uncles and aunts of Noah Furr, under the statute of descents.

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

Fowle and *Jones*, for the plaintiffs.

No counsel appeared for the defendants in this Court.

PEARSON. J. Noah Furr acquired the land in controversy as devisee under the will of his grandfather Paul Furr. At the death of the devisor, Henry Furr, the father of Noah, was living, and would have taken the land as his heir, had he died without making a will; so Noah at the death of Paul, his grandfather, was not "his heir or one of his heirs," and, necessarily, took the land as a *purchaser* in its general sense, and not in the peculiar mode which, under the statute, is made to have the like effect as a *descent*. He took by devise, and could not have claimed as heir of his grandfather, had the latter died intestate. This is settled in *Burgwyn* v. *Devereux*, 1 Ire. Rep.

586, where the matter is fully elaborated, and the construction of the rule of descent is fixed. It follows that the land must be treated as a *new acquisition* by Noah Furr, and is transmitted to his uncles and aunts on the mother's side as well as those on the side of the father. Let a decree be made for a sale and partition according to this opinion.

PER CURIAM, Decree accordingly.

LYDIA MARGARET TAYLOR *against* ALEXANDER KELLY *and others.*

Where a vendor, after a contract of sale, sold at an advanced price to another person who had no notice of the former sale, *Held* that the seller was bound to account to the former purchaser for the advanced price.

Constructive notice arising from the first purchaser's being in possession, must be taken to extend to all the circumstances attending the equity, and where these are such as do not affect the conscience of the second purchaser, the Court will not vacate his purchase.

But where the second purchaser protects himself under the defense that the first purchaser gave way to him, on condition of receiving the increased price, which was obtained in the second sale, he is bound to see that such increased price is made good to the former purchaser.

A purchaser from one who had purchased without notice of a prior equity, although he had notice of it himself, at the time of his purchase, is nevertheless protected by the want of notice in his vendor.

A tenant for a term, who holds over, is not in adverse possession to his landlord, so as to prevent him from conveying the land, although the landlord has been compelled to bring an action for the possession, which is still pending.

The pendency of an action of ejectment brought by the seller against the purchaser who had been let into the possession, is no notice of such former purchase to a second purchaser.

CAUSE removed from the Court of Equity of Moore County.

The bill was filed against the defendants, for a specific performance of a contract to convey a tract of land, which is alleged to be contained in the following written instrument, viz:

"January 25th, 1850. Received of Mrs. Lydia Margaret Taylor, an order on Col. S. J. Person, for two hundred dollars, with interest from the 25th of April, 1849, which, when paid to me, is to be in full satisfaction and payment for the land on which she now lives, and I am to give her a deed for the same.

Test, Wm. Wadsworth. ALEXANDER KELLY."

Previously to the execution of the above instrument, to wit, on 4th day of August, 1849, the plaintiff and her father, one Carroll Brady, entered into a sealed obligation "to pay to Alexander Kelly $12, as the rent of the land in question, until the 25th of the next December, and to surrender the possession of the land to him on that day, unless they should pay him $200, with interest from the 25th of April last past, and should get a title before that time." It was to carry into effect this latter stipulation that the order was given upon Col. Person, and the instrument first above recited was made by Kelly. The plaintiff's husband had been a soldier in the Mexican war, and was killed in that service, which entitled his widow to a pension. This pension was secured to her through the professional aid of Mr. Person, (His Honor S. J. Person), and he was, by her, constituted agent to receive it. He did not formally accept the order, but on the 28th of January, 1850, paid to Kelly $109, which was duly endorsed on said written instrument. Afterwards the plaintiff directed Mr. Person not to pay any more of the pension money to Mr. Kelly, but to pay the remainder to her.

Subsequently to this, to wit, about January, 1851, a conversation took place between the plaintiff and the defendant Kelly, about the rescision of the contract of purchase, which was renewed at various other times during that year, in which the defendant expressed his willingness to pay back to plaintiff the money he had received from her for the land, (deducting the rent), upon the plaintiff's surrendering to him the possession of the premises. She, on these occasions, professed her willingness to revoke the contract, admitting her inability to pay the remainder of the price, but objected to the payment of rent, and alleged that she could not give him the pos-

session, because her father lived on the land, and refused to surrender it.

The defendant Kelly instituted an action of ejectment against Mrs. Taylor and her father, Carroll Brady, returnable to October Term, 1851, of Moore County Court, and obtained a judgment at October Term, 1852.

At that term, plaintiff tendered Kelly the unpaid balance of the purchase-money and the costs that had accrued in the action of ejectment, and required of him to execute a deed for the land, which had been prepared for that purpose, and was then produced for him to sign, but he refused to take the money, or execute the deed, and offered instead thereof, to settle the matter by paying back the money he had received from the plaintiff.

While the action of ejectment was pending, to wit, on 16th day of April, 1852, Kelly sold and conveyed the land in question, with warranty, to Thomas Dixon, David Dixon, Solomon Dixon, John Dixon, Caleb Dixon, and Joseph Dixon, for the purpose of erecting mills upon the same. They took possession of a mill-seat on the premises, and proceeded to erect buildings and machinery on the same; and after operating there for a year or so, they sold the land and works to the defendants, Woody and Thomas Dixon, for $4000. This was on 4th of Nov., 1853.

While the Dixons were erecting their works, the plaintiff expressed her willingness that they should do so, and offered them a bond to make them a title, provided she succeeded in recovering from Kelly the increased amount which they had paid him. This they declined to receive, preferring to rely on Kelly's warranty.

The plaintiff alleges in her bill, and in an amended bill, that the defendants, the Dixons, had express notice of her claim at the time of their purchase, but that, at any rate, her residing on the land, and the pendency of the action of ejectment in the Court of law, amounted to constructive notice. And, in a second amended bill, she alleges that Thomas Dixon

and Woody had express notice at the time of their purchase from the Dixons.

The prayer is for an injunction to stay the proceedings in the Court of law, also for a conveyance of the land upon the payment of the purchase-money, and for general relief.

The defendant Kelly, in his answer, insists that the unreasonable delay of the plaintiff in paying the purchase-money, and at last her inability to do so, are equivalent to an abandonment of her right to a specific performance of the contract, and that if she has any claim upon the agreement, it can be more properly asserted in a Court of law. He also contends in his answer, that the evidence shows the plaintiff had revoked and rescinded the contract. Finally, that believing the plaintiff had abandoned and revoked the agreement, he had, bona fide, conveyed the land in dispute to the defendants, the Dixons, and that it was, therefore, impossible for him to convey it to the plaintiff.

The Dixons answer that they had no notice of the plaintiff's equity at the time they purchased from Kelly; that they never heard of it until a few days afterwards, when, after they had got possession, and were proceeding to clear the foundation for their structures, the plaintiff exhibited to them Kelly's written promise to make title; that she did not even then require them to desist, but encouraged them to go on with their buildings, and declared that she did not want the land, but would look to Kelly for the enhanced price he had got, over what she was to give him.

Woody and Thomas Dixon admit that when they purchased from the Dixons, they were aware of the plaintiff's claim, but contend that as their vendors had no notice when they purchased, they, the Dixons, being protected in their purchase, they also are protected under that equity.

There were replications to the answers, commissions and proofs, and the cause being set down for hearing, was sent to this Court.

Haughton, for the plaintiff.

Winston, sr., *Kelly* and *Strange*, for the defendants.

PEARSON, J. The defendant Kelly opposes the plaintiff's right to a decree, on three grounds. 1st. He contends that the failure of the plaintiff to pay the purchase-money, within reasonable time after it was due, her direction to Person not to make any further payment on the order, and her receiving the money from Person, and subsequent inability to pay the balance of the purchase-money, amounted to a repudiation of the contract on her part at least so as to take from her the right to come into a Court of Equity for a specific performance, and put her to an action at law for a breach of the contract. The defendant retained the order on Person, and could at any time have sued the plaintiff for the balance, so as to force her into measures. This he neglected to do. *Scarlett* v. *Hunter*, 3 Jones' Eq. 84; *Falls* v. *Carpenter*, 1 Dev. and Bat. Eq. 237, are decisive against the defendant. "In Equity, time is not of the essence of a contract for the payment of money." 2nd. He alleges that the contract was rescinded by mutual consent. It is not necessary to decide whether a written contract to convey land can be rescinded by a parol agreement; for this allegation is not sustained by the evidence. The parties talked about rescinding the contract, and both were willing to do so, after the plaintiff had received and used her pension money, which was the only fund ever looked to for the payment of the purchase-money; but they could not agree upon the details. The defendant insisted upon being allowed occupation rent, by way of deduction from the amount that had been paid, and required as a condition precedent, that the possession of the land should be given up to him. The plaintiff seems to have objected to the allowance of rent, and, in particular, stated her inability to give up the possession, because her father was living on the land, and she could not get him to leave it. This, we have no doubt, was the principal difficulty, but it is sufficient that, for some cause or other, the parties never did come to a positive and absolute agreement to rescind. 3rd. He avers that, before the bill was filed, he had sold and conveyed the land, for a valuable consideration, to the other defendants, and so a specific performance by him is impracticable. Admitting

this allegation, the plaintiff insists that, if she is not able to get the land from the other defendants, who are made parties by the amended bills, on the ground that they had notice of her equity, then, she is at liberty, under the general prayer for a relief, to fall back upon her secondary equity, and by ratifying the sale, charge the defendant Kelly with the price he received for the land, deducting the amount of the purchase-money, with its interest, that is still due on her contract.

It is held in *Scarlett* v. *Hunter*, and is, in fact, a familiar principle, that where there is a contract for the sale of land, the vendee is considered in Equity as the owner, and the vendor retains the title as a security for the purchase-money. So, the effect of the contract was, that the defendant held the land as trustee to secure the balance of the purchase-money, and then in trust for the plaintiff. This brings the case within another familiar principle: that where a trustee converts the fund, the *cestui que use* has a right to follow the fund and take it in its changed shape; as, where a guardian invests the ward's money in the purchase of land, the ward may elect to have the land; so here, we can see no reason why the *cestui que use* may not, if she chooses, have the price which was realized by a sale of the land. What right has the trustee to say that he should be allowed to retain the profit made by his sale? It was a breach of trust. Can he take advantage of his own wrong, and ask a Court of Equity to drive the injured *cestui que use* to her action at law, for damages on the contract?

In *Cheshire* v. *Cheshire*, 2 Ire. Eq. 569, one entitled to slaves, after a life estate, (the slaves having been run out of the State and sold by the particular tenant), was allowed to elect to take the fund in its changed form; that is, the money for which the slaves had been sold.

In *Daniels* v. *Davidson*, 16 Ves., jr., 249, where a seller, after a contract for sale, sold at an advanced price to another person, the bill filed by the first purchaser prayed that, if the second purchaser bought without notice, so that the land could not be reached, the seller might account to the plaintiff for the advanced price. It was not necessary to decide the point,

but Lord ELDON seems to have had no doubt about this secondary equity of the plaintiff. Such was clearly the opinion of Sir EDWARD SUGDEN. See 1 Sugden on Vendors, &c., 277. In fact, "the reason of the thing," is so clear, that no authority is necessary to establish it.

The other defendants oppose the plaintiff's right to a decree against them, on the ground that they purchased without notice. As there is no suggestion that the defendant Kelly is not able to pay the amount for which he is liable, it would be unnecessary to decide the matter as to these defendants, except for the fact, that the plaintiff insists upon her right to have the land, together with extensive improvements that have been put on it, provided she can fix them with notice. She charges that they had notice in three ways. 1st. By express notice of her contract. 2nd. Under the doctrine of *lis pendens*. 3rd. Constructive notice, by reason of the fact, that she was in possession as tenant of Kelly at the time they took the conveyance from him.

It may be well to simplify the case, by disposing of the defendants Woody and Thomas Dixon, who are brought in by the second amended bill. They admit that when they purchased of "the Dixons," they had notice of the plaintiff's alleged equity under Kelly's contract, but they insist that "the Dixons" had purchased from Kelly without notice; and claim the benefit of the want of notice to their vendors. It is settled, that a purchaser from one who purchased without notice, is entitled to the benefit of that fact, although such second purchaser had notice when he bought; in other words, he is in no worse situation than his vendor, and stands or falls with him; *Harrison* v. *Forth*; Prec. Ch. 51; *Brandlyn* v. *Ord*, 1 Atk. 571; 2 Atk. 242; Sugden on Vendors, 314.

1st. The defendants, "the Dixons," deny that they had notice before they took the conveyance from Kelly, and say the first intimation they had of the contract by Kelly to plaintiff, was some days after the conveyance was executed, when, having entered on the land in order to clear up a foundation for the erection of the mills, plaintiff showed them the con-

tract. This allegation is responsive, and there is no proof to the contrary; indeed we are satisfied by the evidence that it is true.

2nd. The plaintiff alleges that, before the sale by Kelly to "the Dixons," Kelly had commenced an action of ejectment against her and her father, who was living with her on the land, and that this action was pending when they bought of Kelly, and insists upon the doctrine of "*lis pendens.*" There is a total misconception as to the application of this doctrine. Where one purchases from a *defendant* the subject-matter of a suit which is pending, he takes, subject to the plaintiff's recovery, and is bound to know, or rather is presumed to know, of its pendency. This presumption is made to prevent evasion, and to ensure to plaintiffs the fruit of their recovery; for "unless regard should be paid to it, all decrees and the justice of the Court might be wholly evaded; since the defendant, pending the suit, might alien to one who, after the bill should be amended, might alien again, by which means suits and decrees in this Court would be rendered vain." *Sorrell* v. *Carpenter*, 2 P. Will. 482. It is no more than an adoption of the rule in a real action at common law, where, if the defendant aliens after the pendency of the writ, the judgment will over-reach such alienation; *Murray* v. *Ballou*, 1 John. Ch. Rep. 577. "The Dixons" bought of the plaintiff in that action. There is no ground for a legal presumption, that they knew of its pendency, and that the plaintiff, in this suit, was resisting a recovery at law, when she had no pretence of more than an equitable title.

3rd. The plaintiff had entered into possession as the tenant of Kelly for one year, and then held over, under the contract of sale. This prevented her possession from being adverse, otherwise the deed from Kelly to the Dixons would have been inoperative, and the legal title would have remained in him, and had a very important bearing on the rights of the parties. The fact that Kelly had instituted an action of ejectment against the plaintiff, who was holding over as his tenant at sufferance, did not make her possession adverse so as

to render his deed inoperative; for she was estopped, having entered as his tenant, from denying his title until she had surrendered the possession up to him; accordingly, the fact of the plaintiff's being in possession is not relied on as having the effect of making the conveyance of Kelly inoperative; but, the bill charges that the legal title passed to the Dixons, and relies on her possession as amounting to constructive notice, so as to put them on enquiry, and fix them with notice of such facts as a full enquiry would have put them in possession of; that is to say: plaintiff held Kelly's contract, but was unable to pay for the land; she and Kelly were both willing to rescind the contract, but differed as to the allowance of rent; and the plaintiff was unable to give up the possession, as Kelly insisted she ought to do, because her father would not leave the place; the plaintiff was willing for Kelly to sell and pay himself in that way, but insisted that she ought to have the benefit of the resale; at one time she agreed that Kelly might sell to one Ritter, but a sale was not effected, in consequence of the obstinacy of her father. With a knowledge of these facts, the Dixons were not guilty of a fraud in buying from Kelly, so as to affect their consciences and give the plaintiff an equity to call on them for the land; on the contrary, the imputation of fraud rests on her; for when informed that they had bought of Kelly, she did not object to the sale, but was willing, and, in fact, urged them to go on with the contemplated improvements, assuring them that if she succeeded in establishing her right, she would let them keep the land, upon being paid the price they had paid Kelly. This was all she insisted on, and offered to give them a bond to make title on that condition, which they declined to accept, as they relied on Kelly's warranty, and did not believe her title could be established. After thus urging them to make expensive improvements, we say the imputation of fraud rests on her attempt, now, to take from them the land, together with the improvements. Her sense of equity was more accurate at the first, when she insisted, that she

ought to have the benefit of the price obtained by Kelly. That, we think, is the relief to which she is entitled.

It has, in several cases, been intimated by this Court, that the English doctrine, that a purchaser is bound to see to the application of the purchase-money, has never obtained in this State. We wish not to be understood as favoring that doctrine, and yet, under the particular circumstances proven in this case, if the defendant Kelly is unable to pay the part of the price to which the plaintiff is entitled, we are of opinion that the other defendants are liable for it, secondarily. They protect themselves under the allegation that the plaintiff had authorised Kelly to sell, and then induced them to make expensive improvements. Of course then, they are bound by the condition under which she agreed that Kelly might sell, and under which she induced them to make the improvements, which was, that after Kelly was paid for the land, the benefit of the increased price should enure to her.

There will be a decree for plaintiff, and a reference to ascertain the amount of the price received by Kelly, and the balance of the purchase-money with its interest still due by plaintiff, so as to fix the sum to which the plaintiff is entitled.

PER CURIAM, Decree accordingly.

WILLIAM H. WHEELER *and wife against* WILLIAM PIPER.

Where a party is converted into a trustee on the ground of fraud, the statute of limitations will run against the claim of the *cestui que trust*.

Where a father took advantage of the dependent condition of his daughter, the day after her coming of age, to obtain a conveyance from her of a slave, although the Court would probably disallow the benefit of the statute of limitations while that dependent condition continued, yet upon the termination of that condition by her getting married, if three years elapsed before she and her husband brought suit, there is no ground for the Court's preventing the statute from taking its course.

A plea in abatement is not required to be supported by an answer, except where the bill, by way of charge and in anticipation of the matter relied on in the plea, alleges some new matter to avoid its effect.

CAUSE transmitted from the Court of Equity of Wake county.

Nathaniel Harriss, of the county of Orange, on the —— day of September, 1834, by a deed of gift, properly executed, gave to his grand-daughter, Sarah D. Piper, since intermarried with the plaintiff William H. Wheeler, a negro slave, described as being in the possession of the defendant, the father of the said Sarah D. She was an infant when this slave was given to her, residing with her father in the county of Wake, where she continued to reside until she intermarried with the plaintiff Wheeler, in October, 1853. Sarah D. Piper became of age on 6th day of February, 1853, and on 7th of the same month she executed a deed, conveying the said slave to the defendant, in absolute property, which was duly proved and registered. This bill was filed on 9th of February, 1857.

The bill alleges that the defendant fraudulently availed himself of his daughter's dependent condition, and his parental authority, to obtain from her, against her will, on the day after her arrival at full age, the deed conveying the slave in question; that he exacted from her a solemn promise, at the time of making this deed, not to disclose its existence to any one; which promise, she strictly kept until the knowledge of it reached her husband from other sources. The plaintiff Wheeler states, that in the fall of 1856, he first learned from the defendant that he claimed the slave and her children, she having had two since the conveyance; that he then enquired into the nature of the defendant's title and claim to the slaves, but he refused to disclose it, stating in reply to his interrogatories, concerning the matter, that it was none of his business, as the slaves belonged to him.

The defendant, without answering, pleaded the statute of limitations in bar of the plaintiffs' right of recovery.

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

Miller and *Phillips*, for plaintiffs.
Moore, for defendant.

PEARSON, J. The relation of the parties, and the dependent condition of the feme plaintiff at the time she executed the deed to her father, gives her a right, upon well-settled principles of equity, to have the defendant converted into a trustee. But the deed passed the title, and Equity does not proceed upon the idea that it is void, but that the party procuring its execution, on the ground of fraud, either actual or constructive, shall be converted into a trustee. So this is a trust *against the agreement* of the parties, and he may avail himself of the statute of limitations. *Taylor* v. *Dawson*, ante, 86. We are inclined to the opinion, that, as the same relation continued, and the feme plaintiff was dependent on her father up to the time of her marriage, on the same principle by which the defendant is converted into a trustee, Equity would restrain him, or rather, not allow him the benefit of the statute of limitations during that time. But the marriage took place in October, 1853, and the bill is filed in February, 1857, more than three years.

Upon her marriage, the feme plaintiff was no longer dependent on the defendant. It then became her duty to put her husband in possession of all the facts, and if, by failing to do so, she has lost her right, it is her own fault. It is true, she says, her father exacted from her a solemn promise not to tell any one of the execution of the deed. This cannot excuse her in the eye of the law. It ought to have had the effect of exciting her vigilance, so that as soon as she was free from his control and had another protector, her rights could have been vindicated.

It is said, up to the time of the marriage, her dependent condition prevents the bar of the statute, and after that she was under the disability of coverture, so that there was an accumulation of disabilities. This case is plainly distinguishable. Before her marriage, there was no *legal disability;* her right of action had accrued; and although a court of Equity will *not count* that time against her, yet it does not fall under the principle of accumulation, where one legal disability follows another. Equity may aid her by not allowing

her right to be barred in consequence of supposed laches while she was dependent. That is as far as it can go. It cannot declare that her right of action had not accrued prior to her marriage, or prevent the statute from taking its course as soon as the ground upon which it was induced to interfere, to wit, her state of dependence, no longer existed. The plaintiff Wheeler alleges, that in the fall of 1856, (the time is not stated, so that it does not appear whether the three years had then expired or not) the defendant, in answer to questions concerning the slaves, told him "it was none of his business, as the slave belonged to him." He also alleges, that some year or so after his marriage, he was told of the conveyance from Harriss to his wife. This ought to have excited his vigilance. It is his misfortune not to have commenced his suit in time.

Upon the argument, exception was taken to the plea, because it is not supported by an answer. This is only required where the bill, by the way of charge, and in anticipation of the matter relied on in the plea, alleges some matter to avoid its effects. Here, in reference to the time after the marriage, to which we confine ourselves, no such matter is alleged, and there is nothing, giving to the plaintiffs the benefit of all their allegations, which avoids the force of the plea. *Eaton* v. *Eaton*, 8 Ire. Eq. Rep. 102.

The plea is allowed; but the plaintiffs may, if so advised, file a replication, and go to a hearing on the question of its truth. Adams' Equity, 342.

PER CURIAM, Decree accordingly.

THE TRUSTEES OF DAVIDSON COLLEGE *against* THE EXECUTORS AND NEXT OF KIN OF MAXWELL CHAMBERS.

Where an Act of Assembly, incorporating the trustees of a college, provided that their property should not, at any time, exceed a certain amount, in a suit brought for a legacy exceeding that amount, it *was Held* that only so much as was necessary to make their whole property amount to the limit specified in their charter, could be recovered, and that the overplus of the personalty vested, at the testator's death, in his next of kin.

THIS was a suit commenced in the Court of Equity of Rowan, and removed to this Court by consent.

The bill set forth the charter of incorporation of Davidson College, and plaintiffs' authority as trustees under the same, to receive sums of money due and owing, or in anywise arising, to them; that by the will of Maxwell Chambers, legacies to a large amount, were bequeathed to them, and that assets to an amount sufficient to pay and discharge the same, had come to the hands of the executors; and prayed that the defendants might be decreed to pay over the same.

The defendants admitted the bequests, and professed a willingness to pay the same, but adverted to the provision in the charter of incorporation, limiting the amount of the plaintiffs' property to two hundred thousand dollars. They stated that the amount of the said legacies, added to the amount already owned by the plaintiff, would largely overgo two hundred thousand dollars, and that they deemed it unsafe for them to pay more than that sum, unless so directed by the Court. They accordingly prayed the advice and protection of the Court in the premises.

The cause was set down for hearing upon the bill, answer, and exhibit, and sent to this Court by consent, and was heard at June Term, 1856.

Graham, *Osborne*, and *Wilson*, for the plaintiffs.
Winston, *sr.*, for the defendants.

PEARSON, J. After giving to the able argument with which

we were favored, full consideration, we are satisfied, that the heirs-at-law and next of kin of the testator, ought to be parties to this proceeding, and that the State and trustees of the University should also be represented, in order to have the matter presented in all its bearings, so that the action taken in regard to it may be conclusive.

Without intending to intimate any opinion, and, in fact, without having formed any, it may be well at this time to make some general remarks, for the purpose of directing attention to the questions that may be involved, as well as to show the ground upon which we think other parties ought to be made.

If a corporation has capacity *to take*, but not *to hold*, property, and a gift be made to it by an "executed conveyance," in an action or other proceeding to recover the property, the donor, or in case of his death, his heirs or next of kin are not necessary parties; for they have no interest, inasmuch as the capacity of the corporation to take, gives effect to the conveyance, so that the title has passed to the corporation. Nor is it necessary that the sovereign, who becomes entitled under the law of *forfeiture*, as distinguished from *escheat*, should be a party; for that title does not attach until after the corporation takes the property.

On the other hand, if the corporation has neither capacity *to take* nor *to hold*, a conveyance made to it is simply void, and the title continues in the donor.

These propositions seem to be conceded; but it may be a question whether there is not a distinction between a conveyance executed *inter vivos*, and a devise or will, where the corporation, which is the object of the testator's bounty, although capable of *taking*, is not capable of *holding beneficially*; and whether the Court will not treat the devise or bequest as void, at the instance of the heir or next of kin, rather than permit the corporation to be used as a mere "*conduit pipe*," to pass the title into a third party, upon whom it was not the intention of the testator to confer a benefit; in other words, whether

the *principle* of *Atkins* v. *Kron*, 2 Ire. Eq. 58, be not applicable.

It may also be a question, how far the Acts of Assembly, which confer upon the University *escheats* and derelict personal estate, extend to estates which devolve upon the State under the law of *forfeiture*, because the donee has capacity *to take*, but not *to hold*.

In our case, the capacity of the college is restricted by a clause of its charter, in these words: "The property *belonging* to the college shall not at any one time exceed the amount of $200,000, &c." This presents a question of construction, in which the heirs-at-law and next of kin of the testator may have an interest, as well as the State or the trustees of the University, and we cannot proceed without having them all before us.

The cause will be remanded for the purpose of making parties, unless they can be made here by consent.

PER CURIAM, Decree accordingly.

THE cause was remanded to the Court of Equity of Rowan, and in that Court the bill was amended, according to the suggestion of this Court, by making the next of kin and the heirs-at-law of Maxwell Chambers, parties defendant. Process was also issued to the Attorney General as the representative of the State, and to the trustees of the University.

Process was also served on several persons as heirs-at-law, but it appearing that they were not such, their answers were withdrawn.

Most of the heirs-at-law live out of the State, and were not known to the counsel when the pleadings were sent up. It not being essential to a proper consideration of the case that they should be before the Court, the cause proceeded without them.

The answer of the next of kin was filed, not dissenting from any allegation of fact made by the plaintiffs, and submitting to such decree as the Court might think just and proper.

The cause was set for hearing and sent up by consent.

An Act of Assembly passed at the last session of the Legis-

lature, extending the corporate capacity of the plaintiffs, so as to enable them to hold property to the amount of $500,000, and relinquishing to the plaintiffs any interest which the State or University might have in the fund, was agreed to be considered as regularly pleaded.

The cause was again argued at December Term, 1856.

Graham, *Osborne* and *Wilson*, for the plaintiffs.

Winston, *sr.*, for the executors.

Jones, for the next of kin.

Bailey, *Attorney General*, filed a copy of the Act of Assembly above mentioned, and declined further appearing.

Advisari.—At this term the opinions were delivered.

PEARSON, J. The charter of the college (act of 1838) enacts among other things: sec. 1, "The trustees of Davidson College shall be able and capable to purchase, have, receive, take, hold, and enjoy in fee simple or lesser estates, any land, &c., by gift, grant, devise, &c.; and shall be able and capable, in law, to take, receive, and possess all moneys, goods and chattels, that have been, or shall hereafter be given, sold or bequeathed, for the use of said college, &c." Sec. 10. "Be it further enacted, that the *whole amount* of *real and personal estate belonging to said college*, *shall not any at one time exceed in value*, *the sum of two hundred thousand dollars.*"

These words express, very clearly, the intention of the Legislature, that this college shall not own, at any one time, more than two hundred thousand dollars' worth of property. The motives for making this restriction, and the policy upon which it is based, are not open to enquiry by us. The restriction is made by the act which creates the corporation, and our consideration is confined to its legal effect.

The testator, besides a devise of a large amount of real estate, bequeaths, for the use of the college, a *fund of personalty*, which, when added to the property owned by the college at the time of his death, will greatly exceed $200,000. We have this question: Is there any principle upon which this Court can declare, that the college is entitled to the excess of the fund, after the $200,000 is fully made up, and decree

that the executors shall pay over such excess for the use of the college? or are the next of kin of the testator entitled to the excess, on the ground, that it is not effectually disposed of by the will?

The general rule is well settled: When a legacy, from any cause, fails to take effect, the subject devolves upon the next of kin of the testator, as property undisposed of; for an ineffectual disposition, is no disposition at all. For instance, if a legacy fails by "lapse," i. e., the death of the legatee in the life-time of the testator; or by reason of its vagueness, as when the object of the bounty is not sufficiently described to enable the Court to say who is to take beneficially; *Bridges* v. *Pleasants*, 4 Ire. Eq. 26, where the object was "the poor saints;" or because the purpose of the testator is against the policy of the law, i. e., to establish an order of privileged slaves; *Lea v. Brown*, ante, 142; or, where those for whose benefit the bounty was intended, refuse to accept it; *McAuley* v. *Wilson*, 1 Dev. Eq. 276; or, where those for whose benefit the bounty is intended are *positively forbidden by law from owning it*, which is our case—made stronger, if possible, by the fact, that the prohibition is expressed in the very act by which the corporation is created.

The mere statement of the proposition seems sufficient for its solution; but as the amount involved is large, and the question a new one, we desired to hear all that could be said upon it, and to have the authorities examined; for that purpose, as there was not a full argument at the first term, we directed the next of kin and others to be made parties, and requested a second argument, suggesting in general terms, that there might be a distinction between conveyances executed inter vivos, and, possibly, devises; to which class of cases we had been referred, as establishing the distinction between a *capacity* "*to take*" and "*to hold*" real estate, and the devolution of property by act of law, and wills of personalty.

We are satisfied, after hearing a full argument in behalf of the college, that there is no principle upon which a decree can be made in its favor, in respect to the excess of the fund.

In England, under the doctrine of *cy pres*, the Chancellor would direct the excess to be applied to some other charity, as near as might be, like that indicated by the testator, and if no other male Presbyterian college existed, it would be applied to a female college of that denomination. *Attorney General* v. *Tonna*, 2 Ves. Jun. 1; 4 Bro. C. C. 103; but our Court has never acted upon that refinement. *McAuley* v. *Wilson*, sup.

The cases of *purchases* of land by aliens and corporations, under the statutes of mortmain, are not in point. It is settled, that an alien or a corporation may, by purchase, *take* land, but cannot *hold;* and the doctrine is put on the ground, that if one by an *executed conveyance*, which is *his own act*, passes land to an alien, or corporation, he shall not have it back; but it shall belong to the sovereign, upon office found. It is otherwise in regard to the *act of law*. If the heir, of one dying seized of land, be an alien, the law will not cast the descent on him, because he cannot hold beneficially, and the law will not give with one hand and take away with the other, but will cast the descent upon the next relation who is capable of holding. For the same reason, an alien husband does not take as tenant by the curtesy, nor an alien wife take dower.

In the case of a will of personalty, the property does not pass directly to the legatee; and the law will not require, or permit, the executor to assent to the legacy, unless it can take effect beneficially, according to the intention of the testator; but it devolves upon the next of kin, by the general rule, stated and illustrated above.

It was said, in the argument, that as the testator's object was a good one—the encouragement of learning, and his intention to give this fund to the college was clear, the Court should so decree, without looking at the consequences, and leave the question, as to whether the college violated its charter by taking it, to be settled upon proceedings instituted for that purpose, if the sovereign should see proper to do so. The reply to the first proposition is: The encouragement of learning is, in general, a good object, but it ceases to be so, when it

becomes necessary to violate a positive law. To the second: This Court is a co-ordinate branch of the government; it may be, that had this property been vested in the college by a direct gift inter vivos, the power of the Court could not have been called into action, except upon proceedings instituted by another branch of the government; but as a case is now instituted, it must exercise its power, and there is a solemn obligation resting upon it, not to aid, or sanction, a violation of the law, upon the suggestion that another department of the government can more properly see to its redress.

But it is asked: Are the plaintiffs in a worse condition, because the executors declined to pay over the fund without being protected by the sanction of this Court, than if they had been willing to take the responsibility of paying it over without suit? Certainly not. Upon the death of the testator, without having effectually disposed of this fund, the rights of the next of kin "*were vested.*" They could have filed a bill to prevent the executor from paying it over, or to follow the fund in the hands of the plaintiffs. This is also a full answer to the position, that the act of the Legislature, at its last session, by which the college is allowed to own property to the value of $500,000, and all right to the fund on the part of the State or of the University is relinquished, removes the objection to the plaintiffs' recovery. The rights of the next of kin being vested, the act of the Legislature does not in anywise affect them; so, the only effect of the act, besides enlarging the amount which the college is now capable of owning, is to waive any right of the State; but as we have seen, the State had none.

This being a bill against the executors only, the personalty was directly involved; but upon a suggestion, that the heirs-at-law might have an interest in the question, whether the full amount of the $200,000 should be made up out of the personalty alone, or out of the personalty and realty devised, by rateable contribution, it was directed that they should be made parties. We are satisfied that the personalty is the primary fund, and the requisite amount must be made up

out of that exclusively; for which the necessary enquiry will be directed. The bill will be dismissed as to the heirs, without costs, as they claim the legal title to the land. The question between them and the college may be presented in an action of ejectment, if the parties are so advised.

BATTLE, J. The pleadings in this case present a question of much importance, which has not been hitherto directly decided in this State, nor, so far as I have been able to ascertain, in any other State of the Union. The charter, by which the plaintiffs exist as a corporation, after conferring upon it the usual powers for the acquisition of estates both real and personal, declares in the tenth section, "that the whole amount of real and personal estate belonging to the said corporation shall not, at any one time, exceed the sum of two hundred thousand dollars." (See Act of 1838, ch. 13). It is admitted that the amount of the personal estate claimed by the plaintiffs, under the will of the testator, Maxwell Chambers, will, when added to the value of the property which they already possess, greatly exceed the sum mentioned in their charter; but their counsel contend, that notwithstanding the restrictive clause in their charter, the plaintiffs are entitled to receive the excess, subject to the right of the State to take it from them. A claim is set up on behalf of the defendant Caldwell, upon the ground, that the restriction in the charter of the plaintiffs made the excess of the legacy to them unlawful, and therefore void, in consequence of which, it results to him as the representative of the next of kin. The executors admit that they have the fund in their hands, and express their readiness to pay it over to whomsoever the Court may declare that it ought to be paid. The question is thus fairly raised between the plaintiffs and the next of kin of the testator, and it becomes the duty of the Court to decide it according to the established principles of equity.

In the very able arguments made for the plaintiffs, the counsel have urged their claim upon two grounds: First, its analogy to the acquisition of land by an alien; and, secondly, its

analogy to the principle upon which the statutes of mortmain in England were construed. I will proceed to consider them both, and will commence with that of the alien.

It is a well-settled rule of law in England, and in this State as well as in most, if not all, of the other States of the Union, that an alien may acquire lands by purchase, and may hold them against all persons except the King, or the State; but upon office found, the King in England, or the State in this country, may seize and have them. Co. Lit. 2; 1 Black. Com. 372. Different reasons have been given for the rule. Mr. Justice BLACKSTONE, on the page above cited, says that "if an alien could acquire a permanent property in lands, he must owe an allegiance, equally permanent with that property, to the King of England, which would probably be inconsistent with that which he owes to his own natural liege-lord; besides, that, thereby, the nation might in time be subject to foreign influence, and feel many other inconveniences. Wherefore, by the civil law, such contracts were also made void; but the prince had no such advantage of forfeiture thereby, as with us in England. Among other reasons which might be given for our constitution, it seems to be intended by way of punishment for the alien's presumption in attempting to acquire any landed property." One of the editors in his note (8) on this page remarks that "a political reason may be given for this, stronger than any here adduced. If aliens were admitted to purchase and hold lands in this country, it might at any time be in the power of a foreign State to raise a powerful party amongst us; for power is ever the concomitant of property." He illustrates his position by referring to the course pursued by the Czarina of Russia to raise up a party and acquire an influence in Poland whereby she was enabled to dismember that devoted and unhappy Kingdom.

In the case of *Governeur* v. *Robertson*, 11 Wheat. Rep. 332, Mr. Justice JOHNSTON, in delivering the opinion of the Court, speaks of the rule as having been so long and so firmly established in the common law, that an enquiry into the foundation of it was a mere matter of antiquarian curiosity, and he then

seems to approve what he had seen in an elementary writer, as the reason why the sovereign could not seize the lands until an office was found, to wit, "that every person is supposed a natural born subject, that is resident in the Kingdom, and that owes allegiance to the King, till the contrary be found by office." There can be no doubt, then, of the rule of law, whatever may be the reason for it, that an alien may acquire by purchase, land or any other species of real estate, and may hold it against all persons except the King or State; and may hold even against the sovereign, until he may choose to have an office found, and process thereupon to have it seized into his hands. Among the modes of acquisition in England and in this State, is that by devise, or disposition contained in a man's last will. Hence, in England, and perhaps in this State, an alien might take real property by devise, which would give him a good title to it, as against all persons but the sovereign. In analogy to this, the counsel for the plaintiffs have contended that their clients have the right to take the whole legacy bequeathed to them by Mr. Chambers, though it may be that by force of the restrictive clause in their charter, the State might, if it saw fit, take from them the excess over the value of the property which they were authorized to own. The argument would have much force—perhaps be irresistable—if the legacy vested at once and immediately, under the will, in the plaintiffs. Such is the case undoubtedly in a devise of land. The devisee takes it at once by force of the will, and his title becomes complete immediately upon the death of the devisor. But the case of a legacy is well known to be different. Upon the testator's death, all his personal property becomes vested in the executor, who holds it in trust, first, for the payment of the funeral expenses, charges of administration and debts, and then for the payment of legacies; and if there be a residue undisposed of by the will, he is bound, since the act of 1789, (see 1 Rev. Stat. ch. 46, sec. 18; Rev. Code, ch. 46, sec. 24), to pay it over to the next of kin. The legatee has no legal title to the legacy until the executor shall give his assent to it. So strong is this rule, that if a legatee take into possession a specific chattel,

given to him by the will, without the consent of the executor, the latter may by a suit at law recover it back; 2 Williams on Ex'rs., 845. It is true, that if, after the payment of all the debts and other legal charges upon the estate, the executor withholds his assent to a legacy, the legatee may, by a bill in equity, compel him to assent to it, and thereby give him a title to it; but it is by means of a suit in equity alone that he can get possession of a legacy, either general or specific, from an obstinate or dilatory executor. It needs the aid of a court, then, to enable the plaintiffs to recover the legacy which they claim; and the analogy to the case of an alien cannot be of much avail to them, unless we find that the law will *per se* and *proprio vigore* cast an estate upon him, or that a court either of law or equity, will lend him its assistance to obtain it. Let us see how that is. It is very certain that an alien cannot take lands by descent, or as a tenant by the curtesy, or tenant in dower, or other title derived merely from the law. Co. Litt. 8; 2 Black. Com. 249; 7 Rep. 25; *Paul* v. *Ward*, 4 Dev. 247; *Copeland* v. *Sauls*, 1 Jones' Rep. 70; Bell on the property of Husband and Wife, 151, (67 Law Lib. 114). It remains to be enquired whether the courts will aid him in his endeavor to obtain it. In making this investigation, we find it stated in the older authorities of the law, that an alien cannot maintain a real or mixed action. There was some difference as to the manner in which the defence was to be availed of by plea, when the alien was one of a country in league, and when he was an enemy. See Litt. sec. 198; Co. Litt. 129; Brooke, title Denizen, 3, 10; Roscoe on Real Actions, 197. Some learned Judges thought this doctrine to be at variance with the principle that an alien in possession of lands could hold them against all persons but the sovereign, and might maintain actions of trespass against wrongdoers. In the case of *Rouche* v. *Williamson*, 3 Ire. Rep. 141, this Court suggested the following explanation: "It has occurred to us, that perhaps the doctrine may be thus accounted for and explained. In real and in mixed actions strictly so called, the demandant seeks to obtain, by means of the law, the seizin of a parcel of

land or a tenement, whereof he has never had seizin, or of the seizin whereof he has been unlawfully deprived. Now, as the law will not aid aliens to get land, because by such means the realm may be impoverished, (*The King* v. *Holland*, Allen, 14), it will withhold its aid to restore, or to give him seizin, though, while he remains seized, it will protect him against wrongdoers. It may be, also, that while the alien is seized, the law regards him as holding for the use of the sovereign, (1 Inst. 186, a), but the law deems him an improper person to take such seizin for the King, without the King's license." It is true that the Court held that the alien might maintain ejectment; but they put the decision expressly upon the ground, that as against the tenant in possession, the lessor had the right to the *possession* of the land, of which such tenant had unjustly deprived him. "Upon the trial of an ejectment under the common rule, and on the plea of not guilty, (say they), nothing is in dispute but the right of the plaintiff's lessor to demise the land, whereof the defendant is in possession. The plaintiff is entitled to a verdict upon showing that at the date of the confessed demise, his lessor had a legal title to the possession of the premises. And this legal title to the possession must belong to him who is recognized by the law as having the estate in the premises." It is manifest from what has been shown above, that the plaintiffs' lessor's right of possession must have been previously acquired by his own act, and had not been cast upon him by descent, curtesy, dower, or any other title derived merely from the law. It is equally clear that the spirit of the old law was to forbid its courts from lending their aid to an alien when seeking to acquire, or regain, a seizin of lands or other real property.

The case of *Atkins* v. *Kron*, reported in 2 Ire. Eq. 58, and 5 Ire. Eq. 207, will afford a more apposite and instructive analogy. It was a case of a bill filed by an executor against the legatees and devisees of his testator, and also against the Trustees of the University, for the purpose of obtaining the advice and direction of the Court as to the proper construction of the will of his testator, and his duties arising therefrom. So

far as is necessary for my purpose, the provisions of the will are these: After giving a number of pecuniary legacies, the testator adds, "I give the balance or residue of my property to my executor, in trust, for the benefit of my sister Quenet's grand-children by the name of Forestier, to be paid to any one of them who shall apply for the same, subject, however, to the payment of the legacies made in this will," &c. "But should no one of my sister Quenet's grand-children, nor any one duly authorised to receive the above property in their behalf, apply within two years from the time of my decease, then the above property to revert unto Mary C. Kron's children, and be distributed equally amongst them, subject, however, to the legacies herein mentioned." One of the questions, and the only one necessary to be here noticed, was, whether the trust in the real estate included in the residue, for the testator's sister Quenet's grand-children, who were aliens, was valid and could be enforced in Equity. It was held, according to the report in 2 Ire. Eq. 58, that the devise in trust for the aliens was void, and that the limitation over to Mrs. Kron's children was good, and a decretal order was made in their favor. A petition to rehear that part of the decree was filed on behalf of the aliens, and the question was thereupon very fully and elaborately argued by counsel on both sides. The Court, in a very able opinion, delivered by RUFFIN, Chief Justice, in which all the arguments and authorities upon the subject are reviewed, affirmed the former decree, concluding thus: "The Court, then, looks upon the disability of an alien to hold as *cestui que trust* of land, as placed, beyond all question, upon both principle and authority. When, therefore, the testator's trustee and executor asked, whether he ought to execute the trust, in respect of the real estate in favor of the aliens, the Court was obliged to declare, that he ought not, and that against them the sovereign was entitled. Whether the State should in this particular instance take, as between it and the children of Mrs. Kron, the devisees substituted for the aliens, was another question, with which the aliens had, and yet have, nothing to do, and which

is not now open for discussion. But as to the exclusion of the aliens, no one of the Court doubted, when the decree was made; and upon a rehearing, no one of the Court now doubts." (See 5 Ire. Eq. at p. 216). Here, then, was a case in which the aliens might have taken under a direct devise of the legal estate to them, subject to the right of the sovereign to seize it upon office found, but in which, *as a trust*, the Court of Equity refused its aid to have it executed in favor of the aliens at all. If, therefore, it were unlawful for the plaintiffs, in the case before us, to hold the legacy as against the State, it seems to me that the analogy furnished by the case of an alien taking and holding land against every person but the sovereign, is against, instead of being in favor of, the claim of the plaintiffs to have it paid to them.

I will now consider the argument of the counsel for the plaintiffs, founded upon the analogy supposed to be afforded by the construction of the English statutes of Mortmain. In the outset I will remark, that a person, at first view, would hardly expect to find any thing in the English law of Mortmain, to throw much light upon the question of the right to a legacy in this State. The statutes of Mortmain never did embrace personal property even in England, (Shelf. on Mort. 9; Ang. and Ames on Corp. sec. 148,) and have never been adopted by any State of the Union, except Pennsylvania; Ang. and Ames on Corp. sec. 149; 2 Kent's Com. page 283. In England, the statutes were designed to prevent the accumulation of the landed property of the kingdom in the dead hands of the corporations, particularly the religious houses, whereby "it was observed that the feudal services, ordained for the defence of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to stagnate; and that the lords were curtailed of the fruits of their seigniories, their escheats, wardships, reliefs and the like." 2 Black. Com. 270. They were enacted from time to time, commencing with the great charter of Henry the 3rd, in the 9th year of his reign, and coming down to the stat. of 9th Geo. 2nd. It is not my in-

tention to give a history of them, either in detail or otherwise. An excellent summary of them, with their various provisions, and the construction put upon them, may be found in 2 Black. Com. from p. 270 to 275. In Shelford on Mortmain, (36 and 37 vols. of the Law Lib.) they will be found to be stated more at large, and treated of more fully. See also 2 Inst. 74, for a commentary upon such of them as were passed prior to the time of Lord COKE. Upon an examination of all of them, except that of 9th George 2nd, it will be seen that they did not make void the purchase of lands by the corporations, but declared that if it was made without licenses from the king, and the lords of whom the lands were holden, the lands should be forfeited, and the lord, or king, as the case might be, should have the right to enter for the forfeiture, and seize the lands for his own use. It will be seen further, that the king could not enter until office found; Shelf. on Mort. 10, citing *Hayne* v. *Redfern*, 12 East. Rep. 96; *Evans* v. *Evans*, 5 Barn. and Cres. 587, note (e); S. C. 8 Dowl. and Ryl. 399. The statute of 9 George 2, ch. 36, was intended to apply to conveyances and devises of lands, or any interest in them made to individual trustees, as well as to bodies politic, for charitable purposes, and it declared all such as were not executed as therein prescribed, to be void. Under this statute, then, all the forbidden conveyances and devises were construed to be void, and in the case of a devise, the heir-at-law was held to be entitled to the land. Shelf. on Mort. 204.

I have hereinbefore referred to the opinion of Chancellor KENT, that none of these statutes of Mortmain had been adopted in any State of the Union except Pennsylvania. I think I may safely assert that not one of them has ever been in force in North Carolina. I do not find in our reports any trace of their existence here. It is true, that the statute of 18th Edw. 1st, enacting that "no feoffment shall be made to assure land in main," is inserted by the revisors of 1820, in their list of British statutes then in force. (See 1 Rev. Code of 1820, p. 87). It may well be doubted whether it ever was so; but if it were, it was certainly repealed when the statutes were re-

vised in 1836. (See 1 Rev. Stat. ch. 1, sec. 2). There has been no necessity for any such restraints upon corporations by statutory enactments in this country. In England it was otherwise; and the difference in the condition of the two countries with regard to their bodies politic, and the resulting difference in their legislation concerning them, is clearly stated by the Court in a case to which I shall refer more particularly hereafter. "A capacity to purchase and alien land, unless specially restrained by its charter, or by statute, has been held to be an incident, at common law, to every corporation. This general power, it has been found necessary in England to restrain by statute; and there, their powers in this respect are understood to be general and unlimited, except so far as controlled by such statutes. A large proportion of the corporations there hold their corporate rights by prescription. This supposes the grant no where to be found in written form. The uncertainty of the limits of the powers granted, and the great extent of powers claimed, at an early period created a necessity of limiting them by act of parliament. The statutes of Mortmain have this effect, in reference to purchasing and holding lands. In this country, few instances can be found of the existence of corporations, whose charters did not originate in express legislative enactment, and are not to be found printed in the statute books. In these cases, the grant of power is before us. The charter defines the grant, with its restrictions and limitations. Unless some other statute, enacted by the same authority, either general or special, can be found, enlarging or restricting those powers, we look no further for the rights of the body corporate."

This notice, however brief and imperfect it may be, of the English statutes of mortmain, and of the difference, or contrast rather, between them, and our charters of incorporation, is sufficient to show that the principles applicable to the construction of the former, can have very little bearing upon that of the latter. The former were intended for an age, and a condition of society, entirely unlike the political and social institutions of the American States. They were mainly aimed against the

grasping power of the religious houses, in a semi-barbarous state of civilization, and were designed to rescue, from what has been quaintly called their *death-clutch*, the lands whose feudal services were the chief support and defence of the Kingdom. They fully accomplished their purpose by putting it into the power of the King and other feudal lords to enter upon, and seize, the lands when purchased without license from those whose rights were in danger of being invaded. The King, who, in the course of time, became almost the only person likely to be injured, it is true, could not take advantage of the forfeiture until an inquisition was made, as in the case of lands purchased by an alien. But that was found to be a sufficient protection to his rights; and the result of a commission issued on his behalf in December, 1833, in the case of the "University Life Assurance Society," shows that the power of entry upon office found, though it had its origin in a far different state of society, was still effective for good. See Shelf. on Mort., p. 10, note (e).

Corporations exist in this country, as has already been said, by virtue of express acts of legislation. They are created for a great variety of political and civil purposes, all having in view, or supposed to have in view, the weal of the State in which they have a "local habitation and a name." Their powers, rights and duties are defined, and limited in their several charters of incorporation, and when a question arises as to either rights, powers or duties, we must look to their charters mainly for the answer. The charter of any particular corporation is a law peculiar to itself, and by that law must it be judged. See Ang. and Ames on Corp., sec. 151. This brings us to the consideration of the restrictive clause in the charter of the plaintiffs, upon the proper construction of which our decision must turn.

There cannot be the slightest doubt that the Legislature intended to forbid the plaintiffs from owning, at any one time, real and personal estate, the value of which should exceed the sum of two hundred thousand dollars. Whether the policy of such a restriction was wise or not, I, as a Judge,

have no right to enquire. An examination of the course of legislation from 1833 to the present time will show that it has been a settled policy with the General Assembly to restrain the amount of property held, or to be held, by institutions similar to the one whose case is before us. Thus, in 1833, the act incorporating "A literary and manual school in the county of Wake," declared that the value of its real and personal estate should not exceed fifty thousand dollars. In 1838, the charter granted to "The Trustees of the Greensborough Female College," limited the whole amount of its real and personal estate to the sum of two hundred thousand dollars; the same amount, which, in the same year, was prescribed for the plaintiffs, and for "The Trustees of Wake Forest College." Passing by the "Carolina Female College," and the "Trustees of the Clinton Female Institute," whose capital stock was, in 1848 and 1850, fixed respectively at twenty thousand dollars, and the "Glenn Anna Female Seminary," whose capital stock was, in 1854, limited to twenty-five thousand dollars, we come to the year 1856, when as many as four literary institutions were created, or had their charters amended, with similar restrictions: First, "The Trustees of the Female College of the Methodist Protestant Conference," was chartered, with a clause which restrains the amount of its property to three hundred thousand dollars. Secondly, "The Warrenton Female College," amount restricted to forty thousand dollars. Third, the charter of the plaintiffs amended so as enable them to hold property to the amount of five hundred thousand dollars; and lastly, the capital stock of "Carolina Female College," was increased to one hundred and fifty thousand dollars. It is true that during this period many academies and other literary institutions, were chartered without any such restrictive clauses. Why this was done, we need not enquire. The restrictions imposed upon those to which we have referred, indicate that the Legislature had a policy upon the subject, though it may not have acted uniformly upon it. The effect of that policy was to make it unlawful for the institutions which we have named, to own

real and personal estate exceeding in value the amount specified for each respectively. What other construction can be put upon the words, "the whole amount of real and personal estate belonging to said corporation shall not, at any one time, exceed in value the sum of two hundred thousand dollars?" It seems to me, that, in admitting that the State, upon office found, or otherwise, may seize and take to its own use, the excess, the plaintiffs' counsel virtually admit that it is unlawfully held by the college. Why so forfeited to the State unless because the college has it in opposition to the express prohibition of its charter? If unlawful for the plaintiffs to have it, can a court of equity assist them to get it? I have, in vain, tried to discover a principle upon which the claim of the plaintiffs can be supported. The analogies of the common law are against it. It is well settled, and well known, that a contract, the consideration of which induces to the doing of an act, either *malum in se*, or *malum prohibitum*, is void, and no action at law can be sustained upon it. See *Ingram* v. *Ingram*, 4 Jones' Rep. 188, and the cases therein referred to. Will the court of equity be less sensitive to the duty of upholding the law, or less alive to the importance of preventing its violation? I have studied its principles to little purpose if it be so. I can find no case sustaining such a doctrine. On the contrary, I have found a very instructive one decided in the courts of one of our sister states, which fully sustains what I believe to be the true principle applicable to the present case. It is the case of *The President, Directors and Company of the Bank of Michigan* v. *Niles*, 1 Doug. (Mich.) Rep. 401. It was a bill filed by the plaintiffs, for the purpose of obtaining the specific performance of a contract entered into between them and the defendant, whereby the plaintiffs bound themselves, within a certain specified time, to convey to the defendant certain real estate described in the contract, and to obtain from one J. H. P. a good and sufficient deed for the property called the Rochester-mill property, and to convey to the defendant three undivided fourth parts of it; and, in case a mortgage or incumbrance should be created for the

purchase of the mill property, they covenanted to pay the same, and have it released within five years from the date of the contract; and they further agreed to deliver to the defendant certain certificates signed by him. The defendant, on his part, agreed to execute a mortgage to the complainants for the purchase-money to be paid by him, amounting to $28,000, and, in addition, to include in the securities, certain notes, and the amount of the above mentioned certificates. The mortgage was to be executed on the property conveyed to him, and upon the remaining interest, which he already possessed in it as tenant in common. Within the specified time, the plaintiffs purchased the mill property; and then prepared and executed to the defendant a deed for three fourths of it, together with the other property which they were bound by the contract to convey to him, and were ready and willing to perform their part of the contract. The defendant demurred, and the demurrer having been sustained by the Chancellor, the plaintiffs appealed to the Supreme Court. The question turned upon the construction of the 3rd and 9th sections of the plaintiffs' charter of incorporation. The 3rd section provided that they "shall be in law capable of purchasing, holding and conveying estate, real and personal, for the use the said corporation." The 9th section enacted "That the lands, tenements and hereditaments, which it shall be lawful for the said corporation to hold, shall be only such as shall be required for its accommodation, in relation to the convenient transaction of its business, or such as shall have been *bona fide* mortgaged to it by way of security, or conveyed to it in satisfaction of debts previously contracted in the course of its dealings, or purchased at sales, upon judgments which shall have been obtained for such debts."

Upon the argument, the defendant, in support of his demurrer, contended that the plaintiffs were not authorized by their charter to make such a contract as that stated in their bill; that the buying and selling of real estate, except in the cases specified in their charter, was not within the scope of their corporate powers, and was, therefore, unlawful; and that the

Court of Equity would not lend its aid to enforce a contract made in violation of law.

The counsel for the plaintiffs argued against the demurrer, that the general power to purchase and convey real estate, given by the 3rd section of their charter, was not affected or limited by the provisions of the 9th; that the latter used only the word "hold;" and they contended that the only design of the provision was to prevent real estate from being locked up in mortmain, in the hands of the corporation, and that the buying and selling of lands by it was not unlawful.

The Court, in an able opinion delivered by FELCH, Judge, decided that, by the terms of their charter, the plaintiffs were not authorized to make a business of buying and selling real estate; and that the contract made with the defendant was, therefore, unlawful. In concluding their opinion, the Court say, "there may be a difficulty, in cases where contracts are made in reference to matters but remotely tainted with immorality or illegality, and not the immediate subject of the undertaking of parties, to determine in what instances the principle should be applied; but when the very act contracted to be done is itself illegal, there can be no doubt of the application of the principle."

"The Bank of Michigan contracted to obtain and convey a title to real estate, under circumstances which made it a transaction prohibited by the spirit and terms of its charter. The defendant, with knowledge of the unlawfulness of the transaction, (for the charter is declared to be a public act), entered into the contract. Each party to the contract put himself in the power of the other; and as the Court of Equity would not interfere to compel the bank to perform its agreement, by buying and selling lands in violation of the law, so aid cannot be afforded to the bank to compel the defendant to perform on his part."

The principle deducible from the case to which I have just referred is the true principle by which the action of the Court of Equity should always be guided. Whether in matters of contract, or in any other matters in which human action is

concerned, it should ever be ready to enforce that which the law commands, and to prevent that which the law forbids. It would be untrue to its high duty, if it, in any case or under any circumstances, lent its aid to any person, individual or corporation, who was seeking, with however innocent an intent, to circumvent the law. Governed by this spirit, it cannot assist the present plaintiffs. The lawgiver says, in the plainest terms, that they shall not *own* (for what belongs to them, they must *own*), more in value of real and personal estate than $200,000. It is against the law, then, for them to have it, and yet they ask this Court to give it to them. The Court cannot do so without assisting them to violate the law, and, therefore, it cannot do so at all.

The case of *Humbert* v. *Trinity Church*, 24 Wend. (N. Y.) Rep. 587, and that class of cases, wherein it has been held, that an increase of income, above the limit prescribed in the charter, from property already held by the corporation, is not against law, do not militate against this principle. In such cases the corporation has no necessity to ask the aid of any court to enable it to get the property. The original owner had, long before, parted with his title to it, when to purchase it was not forbidden to the corporation, and when the value of the property rises above the chartered limit, the only question with respect to it, which can arise, must be between the corporation and the State.

It only remains for me to say, that if I have been successful in showing that when the testator died it was unlawful for the plaintiffs to have the excess of the legacy above what was necessary to make the value of their real and personal estate amount to $200,000, it follows as a necessary consequence that, as to such excess, the legacy was void, and in the absence of a residuary legatee to take it, it resulted to the next of kin.

The cases referred to by my brother PEARSON, clearly show this, and it is unnecessary for me to add any thing to what he has said upon that subject. He has shown also that, in the view which we have taken of the case, the act of the last General Assembly, (see Acts of 1856, ch. 94), has no operation

upon it. The 3rd section of that act provides as follows: "That all right, title and interest on the part of the State of North Carolina, and the University of North Carolina, or either of them, if any they have, in and to the estate and officers (?) given, or attempted to be given, in the last will and testament of Maxwell Chambers, late of Salisbury, to the Trustees of Davidson College be, and the same is hereby, released and conveyed to the Trustees of Davidson College, for the purpose specified in the said will." The section does not profess to give the legacy, or that part of it which may have previously become vested in interest, in the next of kin; and it is certain that the preceding section, which enlarges the amount of property the Trustees of the College should be authorized in future to hold, did not, and was not intended to, have that effect.

The novelty and importance of the question, and the large amount of property involved in the suit, must be my apology for stating the reasons for my opinion at such length.

NASH, C. J. *dissentiente.* The case presents two questions to be considered. The first is as to the nature and extent of the restriction contained in the 10th section of the college charter; the second, whether a violation of the charter by the corporation, such as this is alleged to be, can be enquired into under the proceedings. The act of incorporation gives to the trustees power "to purchase, have, receive, take, hold, and enjoy, etc.," "any land, etc.," "and to take, receive, and possess all moneys, goods and chattels," "given, sold, or bequeathed, etc." The 10th section is as follows: "Be it enacted that the whole amount of real and personal estate, *belonging* to said college, shall not, at any *one* time, exceed, in value, the sum of two hundred thousand dollars."

Maxwell Chambers, by his will, devised to the plaintiffs, the trustees of Davidson College, two hundred thousand dollars; and it is conceded that at the time of the death of the testator the college owned property to a considerable amount, and that the bequest would swell that amount to a sum considerably greater than the sum limited in the charter. Is the

devise, by virtue of the restrictive clause, void as to the surplus? I am of opinion it is not. The charter evidently contemplated that the college should go into operation, as soon as funds, sufficient to justify the act, should be given to the trustees, or be received by them. It will be observed that the charter does not make void any gift, purchase, or devise, whereby the limit should be exceeded. On the contrary, the phraseology of the 10th section, plainly points out that this excess might arise at several, and different, times—the amount in value shall not exceed $200,000 *at any one time*—looking to a possible recurrence of the event. Taking the 1st section and the 10th together, the restriction points, not to receiving and taking, but to a holding of a larger amount than the sum specified. That this is the proper construction of the charter is further evidenced by the words used. Three times the word *take* is used, and the charter recognizes the property, so taken, as the property of the corporation; the language is "the whole amount of the estate, both real and personal, *belonging* to said corporation, etc." It was the view of the Legislature, that all the property of both kinds, given or bequeathed to the corporation, in due form of law, without respect to the amount, belonged to the corporation, but that they should not hold more than the restricted sum. I shall have occasion to refer again to this point. The nature of the restrictive clause then, is directory to the trustees as to the amount which the college could own, and its effect, to put it perhaps in the power of the party with whom the contract was made, to dissolve it. I say *perhaps*, for in the opinion of the Vice Chancellor TURNER, as to the proper construction of a similar restriction in the charter of the London Hospital, *Robinson* v. *The Gov. of the London Hospital*, 21st Eng. Law and Equity Rep. 374, and in that of Senator FOSTER, delivered in the case of *Howland* v. *Trinity Church*, 24 Wendell, 630, it is said that the exceeding, by a corporation, the sum to which it is restricted, does not render void the charter, but only renders it voidable. "I do not even believe it to be voidable," is Mr. Foster's declaration. If the

restriction is a condition, it is a condition subsequent, for a breach of which no action can be taken against a corporation but by the sovereign, and with the latter, and its officials, it is a matter of discretion, whether a forfeiture will be enforced or not. To work a forfeiture of chartered privileges, there must be something more than accidental negligence, *excess of power*, or mistake; there must be something wrong arising from wilful abuse or neglect. Ang. and Ames, 886. There is here no forfeiture, for none has been judicially pronounced.

Secondly. Let it be granted, that by taking the whole of the property devised, the total amount in value would exceed what the corporation was entitled to possess, and thereby its charter might be forfeited, can the defendants, the executor, or the next of kin, take advantage of the breach of the condition in these proceedings? A charter is a contract between the corporation and the sovereign. It is well settled that none but the parties or their privies, can take advantage of a breach of a condition. Now, neither Mr. Chambers, nor his executor, nor his next of kin, are any parties or privies to the contract—upon what principle then, is it, that the executor can refuse his assent to the legacy to the college, or upon what principle can the next of kin claim it, or any portion of it? If Mr. Chambers, while in life, had donated to the college two hundred thousand dollars in cash—or its value in property, specified in the will, could he have been heard in a court of justice to say, that he had given the corporation too much, and they must pay back to him as much of the donation as was over and above what it could legally hold or retain? Suppose him to have brought an action for the surplus, could he have recovered? Surely not. He would be estopped, and of course, so would all persons claiming under him; *Gilliam* v. *Bird*, 8 Ire. Rep. 280. His death cannot alter the proposition. Whatever would estop him, must estop his personal representative, and must equally estop his next of kin, who claim through him. I cannot, therefore, see how either the next of kin or the executor of Maxwell Chambers,

can deny, in this proceeding, the right of the complainants to receive the whole of the sum devised them.

But again, I hold that no one but the State, as a sovereign, can call the plaintiffs to account for receiving, or holding, a larger amount of property in value than is limited in their charter. Jealousy of corporations in the accumulation of property has marked, for centuries past, the policy of England. Hence their mortmain acts. At common law, it was incident to any corporation to have capacity to purchase and sell lands and chattels, as any other person could, unless specially restrained by their charter or by statute. They had the absolute *jus disponendi*; 2 Kent, 280. This power or right is, in England, taken away or abridged by a succession of statutes, commencing in Magna Charta, the 9th of Henry III, and coming down to the present time. The object of these acts, called "Mortmain," was to prevent land from being placed *extra commercium*, upon the feudal principle of protecting the lords from having tenants that never die; *Giblet* v. *Hobson*, 3 Mylne and Keen, 517; 2 Kent, 282. In this State we have no statutes of mortmain, strictly speaking, but the same principle is observed, as to the acquisition of property by corporations, in the restrictions imposed upon them, in their respective charters. The devise in Mr. Chambers' will is of a mixed character, consisting of both real and personal property, and though his heirs are not before the court, yet it is difficult, if not impossible, to express my views upon the question, directly in contest, without referring to the English decisions upon their mortmain acts. If not of imperative force, they form a safe guide to direct the Court in its present enquiry. See Shelford on Mortmains, (where most of the cases on the subject are collected and observed upon), p. 10, note c; 36 Law Lib. 29, and other pages to be cited. The restriction upon the corporation, in the case mentioned in the note was similar to that in the case before us; it was that the corporation might purchase and hold lands, etc., "*not exceeding in value, in the whole*, the annual sum of £100. Certain lands were *seized* by commissioners *for the King*. See also

the opinion of the Court *in Re Rovington School*, cited in Shelford 36, Law Lib. 40, 41. In the *Attorney General* v. *Bowyer*, 3 Vesey, Jr., 727, Lord LOUGHBOROUGH declares that a court of equity will execute a trust in favor of a corporation, arising under a will or conveyance, giving more than the charter authorises it to hold, if the corporation obtain a license from the king enlarging their capacity, though the license be subsequent to the gift. Shelford, 251; 36 L. Lib. 185, to the same effect; and in *Attorney G.* v. *Munly*, 1st Merivale, 327, the same doctrine is held, the license being obtained after the death of the testator. These cases abundantly prove that, under such devises of realty to corporations, the legal title passes to the devisees, although thereby a larger amount is given than they are authorised to hold, and it is the same where the redundance is occasioned by the donation, by will, of personalties; the legal estate in the whole passes to the executor, who holds it to the use of the corporation. If, however, the holding more property by the corporation be a cause of forfeiture, the sovereign alone is entitled to call the body to account for it, because it is a criminal offence. Angel and Ames, 777. In each of the cases above referred to, the sovereign was the actor; no private person can allege the offence in bar of the suit of the donee. See the following cases decided in this State: *Tar River N. Co.* v. *Neal*, 3rd Hawks, 520, and *Buncombe Turnpike Co.* v. *McCarson*, 1st Dev. and Bat. Rep. 308. In the able opinion of the late Chief Justice of this Court, it is pronounced, "That the non-existence of the corporation, or the forfeiture of its charter, can be adjudged only at the suit of the sovereign against the usurpers of the franchise. They cannot be enquired into *collaterally* at the instance of an individual, *unless he shows that it has already been so adjudged* in favor of the State: in other words, that the charter has been annulled by judicial sentence, and no longer exists." I need no higher authority for the principle for which I contend, than the opinion above referred to. See upon this point, *The people* v. *Monroe*, 5th Denio, 400; *Silver Lake Bank* v. *North*, 4 John. C. R. 370,

and *McIndor* v. *St. Louis*, 10th Missouri R. 576. The sovereign may either expressly remit the forfeiture, or simply abstain from enforcing it. In the mean time, the right of the donee to possess and enjoy the property given, against all others, is complete. See Shelford, 9th Law Lib. 28. In *Robinson* v. *the Gov. of the London Hospital*, 21st vol. Eng. L. and Eq. Rep. 374, the same opinion is declared by the Vice Chancellor. The restriction, in the charter of the defendant, was substantially the same as in our case. The Government of the London Hospital were entitled by their charter to purchase, take, hold and receive lands, etc., not exceeding the yearly value of £4000. The devises in the will of D. T. Powell swelled the property to a larger annual value than that specified. The bill was filed by the trustees of Mr. Powell for the administration of the estate, and the heirs-at-law and the next of kin were defendants. The same question arose there as here—whether the testator's heir-at-law or his next of kin were entitled to such, if any, of his residuary estate, given to the London Hospital, as was not effectually given. The decision of the case turned upon a different point, and no opinion was judicially given upon the question stated above. The Vice Chancellor notices it, however, as follows: "The next question arises upon the charter under which the London Hospital was incorporated, and I do not think it necessary to give any opinion upon that charter. It is a subsisting charter, and is valid until it is impeached and disturbed, and the parties have a *right* to receive money, under it, so long as it stands. What might be the result of proceedings by the Attorney General or the Crown, for the purpose of setting aside the charter, if the Crown thought fit to take such proceedings, is one question; and what this Court is to do in the mean time, while the charter stands, is another and totally different question. Here is a legally constituted body, having the right to receive money by its constitution, and as long as that constitution exists, I think it the duty of this Court to deal with it as an existing body." That is, that, as long as the charter of a corporation exists, it may continue to receive do-

nations to any amount, the sovereign being the only power to which it is amenable, for violating its charter by increasing its property beyond the limit specified in the charter. In Angel and Ames on Corporations, pp. 136 and 888, it is stated, that where a corporation purchases land, affording a greater income than is allowed by their charter, it is a question between the sovereign and the corporation only, with which individuals have no concern, and of which they cannot avail themselves, in any mode, against the corporation. For this, they cite *Humbert* v. *Trinity Church*, 24th Wendell, 604, 629, 630; *Harpending* v. *Dutch Church*, 16 Peters', 492–3; *Bogardus* v. *Trinity Church*, 4 Sandford's Ch. R. 738–9. These cases show that neither the executor of Maxwell Chambers, nor his next of kin, can avail themselves, in this proceeding, of the allegation, that the surplus of the $200,000, bequeath-the plaintiffs, over and above the sum limited in their charter, is a violation of the charter, and is, therefore, not effectually disposed of by the will. This principle has been several times recognized in this State, by the decisions of this Court. See the cases, in this State, already referred to, (in which it is decided that the sovereign alone has a right to complain of a usurpation upon its rights, and an acquiescence is evidence that all things have been rightfully done), and *Whitley* v. *Daniels*, 6 Ire. 479, approving the decision in Hawks. It is similar to the case of an alien's purchasing land. He can purchase, and the title he acquires is good against all the world but the sovereign; so much so, that if ousted by a trespasser, he may enter and maintain an action of ejectment against him. *Rouche* v. *Williamson*, 3 Ire. Rep. 141. It is as much against the law for an alien to hold lands in this State, as for a corporation to hold more real estate, or property, than its charter allows; both are unlawful in the same sense, and to the same extent. A forfeiture is incurred for the recompense of the sovereign; if the sovereign pardon the offence, it is as if none had been committed, for he alone can punish, and he alone can pardon.

The counsel for the next of kin, urged upon the Court the

decisions made by it in cases of emancipation, as analogous to this. The analogy does not strike me. The policy of the emancipation acts is contrariant to that of the act in the present case. In the former, the law does not tolerate what is termed with us a *quasi* emancipation; that is, a state where the man of color is in form a slave, but in reality is in the enjoyment of freedom. No man has himself the power to emancipate his slave with the view to remain in this State, nor can his executors so do; if either attempt it, the act is absolutely void, and the slave remains a slave; and if the owner does it by will, the legacy is imperfect and void, and the next of kin necessarily succeeds to the property; there is no necessity for a commission of enquiry. In this case, and in similar ones, the policy of the law is directly the reverse. Montesquieu, in his Spirit of Laws, lays it down that, in free governments, the virtue and intelligence of the people are the corner stones of the governmental structure. If this be so, what higher duty can devolve upon the Legislature of the State than to provide means for the dissemination of knowledge among the citizens at large. Acting upon this principle, the framers of our constitution in the 41st section direct, "That a school or schools shall be established, by the Legislature, for the convenient instruction of youth, etc.; and all useful learning shall be encouraged and promoted in one or more universities." It is therefore not simply an act of policy on the part of the Legislature to encourage the establishment of schools and colleges, but a high constitutional duty. It seems to me, there can be no analogy between the cases of emancipation and the one we have before us, any further than it is in both cases a police regulation. In obedience to the constitutional requisition, the Legislature, at an early period, established the University of the State. Every one acquainted with its history knows the difficulties under which it struggled for many years; gradually did it work its way into public confidence, and now the citizens of the State may proudly point to it, as embracing not alone their confidence, but that of the whole of the southern portion of our confederacy. Its halls are now filled, not

only with young men of this State, but with youth from different States. Under these circumstances, it was thought advisable to charter Davidson College. It was a fondly cherished object of the testator, Mr. Chambers. Why then should not his patriotic and benevolent designs be carried out? The gift is complete; here is a donor with unquestioned capacity to give, a subject capable of being given, and a donee in existence and fully identified. Why, I repeat, shall the donee not take what was clearly intended it should take?

It is objected, that a Court of Equity will not lend its aid to the corporation to enable it to violate its charter. Certainly it will not. But, with great respect, it strikes me that principle cannot apply here. To sustain this position the counsel for the next of kin drew our attention to the case of the *Bank of Michigan* v. *Niles*, 1 Doug. 401. The case was, the defendant had made a compact with the plaintiffs that if they would purchase a certain piece of land, he would take it off their hands at an increased price. The land was purchased by the bank, and the defendant refused to execute his contract, and the bill was filed for a specific performance. The defendant demurred, and assigned for cause, that the bank, by its charter, was forbidden to hold more real property than was necessary for the convenient transaction of their business, etc. The demurrer was sustained. This case is in point, to a certain extent, and entitled to all respect as proceeding from a high court of a sovereign state. It stands, however, opposed by the opinion of a court entitled to equal respect. In *Baird* v. *the Bank of Washington*, 11 Serg. and Rawle, a direct contrary opinion is held. The Court there declare that there is a broad distinction between a prohibition to take, or purchase, and a prohibition to hold. As, where a bank is authorized to have, hold, purchase lands, etc., with a proviso, that the lands, etc., which they should purchase and hold, should extend only to such lot or lots and buildings as they should actually occupy, for carrying on their business, it was decided that the bank might purchase, absolutely, land lying in a distant county, which they did not occupy, though they, or any person to

whom they might convey, would hold by a title defeasible by the commonwealth. The authority of the case in Douglass is neutralized by that in Serg. and Rawle, and it differs from the one before us. In that, the bill was brought to compel the performance of a contract; in this, to compel the executor to execute a trust by paying over a legacy. But whatever doubt might rest upon the case, is, in my opinion, entirely removed by the act of '56, ch. 94. See laws of the State for '56, p. 96. The act in its caption professed to be made to amend the act of '38 chartering Davidson College. By the first section, the 10th section of the act of '38 is repealed; by the 2nd, the power of the corporation to purchase real and personal property is enlarged to $500,000; and by the 3rd section, the State releases and conveys to the corporation, all right, title and interest which the State had or might have, in and to the estate and property derived to it by the will of Mr. Chambers. This act is tantamount to a license by the Crown, and we have seen by the case from 3rd Vesey, jr., and that from Merivale, that a license from the Crown will enable a corporation to hold more property than the amount to which it was originally limited, (though the license was obtained after the death of the donor), upon the principle that, by the devise or purchase of more property than they were allowed to hold, the legal estate vested in the donee, subject to the will of the Sovereign.

It is further objected, that the act of '56 could not divest the next of kin of the interest which vested in them at the death of the testator. The above cases show that no interest vested in the next of kin, for it is decided in them, that the legal estate vested in the donees. But there is another answer to this claim of the next of kin. It is in *general* true that a devise ought to take effect on the death of the testator; but a devise to a collegiate corporation, not then in existence, *may* be good. Grant on Corporations, 123; *Attorney General* v. *Downing*, Wilmot's notes, 11 and 13. In that case, the devise was to a corporation, to be established in the University of Cambridge, and to be named after the testator, Downing College, in case the Crown should grant a charter incorporat-

ing the same, and a license to hold land in mortmain. The devise was held to be good. Here, the corporation was in full existence at the time the will was executed and when the testator died. The result of the cases to which reference has been had, is that a corporation may take more than the limit in their charter, but they cannot hold it unless they obtain an extension by the Crown. Grant, 104. No right to any interest then, according to the authorities, did or could vest in the next of kin. It is only on the ground, that the sum devised to the corporation, taken in connection with the property they already possessed, would exceed the amount they were entitled by their original charter to hold, that the next of kin found their claim to the surplus. And the very objection by the next of kin, that Equity will not assist the corporation to do a wrong, shows the fallacy of the objection we are now considering. It cannot be that the mere devise could constitute a breach of the charter. To effect that, there must be some *act* of the corporation; and at the time of the death of the testator, they had committed no such act. And if, upon the enquiry directed by the Court, it should appear that in fact the property held by the corporation does not exceed the limit specified in the original charter, then, surely, the next of kin had no vested right to be disturbed by the act of '56, for there would have been nothing to vest. But, apart from this, we have seen, from the cases from 3rd Vesey, Jr., and 2nd Merivale, and those cited from Shelford and others, that although a corporation holds more land than, by its charter, it is entitled to hold, the legal title is in the corporation, and the heir has none. If then, in this case, there was no breach by the plaintiffs of the charter under which they claim, (and there can be none, for they have not yet received any portion of the donation), then there can be no valid claim on the part of the next of kin; for the devise is perfect and not imperfect. If the charter has been violated, no one but the sovereign can claim the forfeiture; and as the sovereign, by the act of '56, has waived its right to vacate the charter, if there was any violation of it by the corporation, the right of the plaintiffs to

receive the donation from the executor, is complete, and put beyond all doubt in my estimation.

PER CURIAM, Decree according to the opinion of the Court.

THOMAS ROBBINS *and wife against* SAMUEL WINDLY, *Ex'r., and others.*

Where a testator, by his will, gave a slave to A, which, after the date of the will, he gave by deed to B, having by the same will given legacies of greater value than the slave to B, there is no construction authorised by the Act of 1844, (providing that a will shall speak and take effect as if made immediately before the death of the testator; Rev. Code, ch. 88, sec. 3), that can require B to elect for the benefit of A, between his legacies under the will, and the slave conveyed by the deed.

The act of 1844, ch. 88, sec. 3, relates to the *subject matter* of the disposition only, and does not, in any manner, interfere with the construction in regard to the *objects* of the gift.

THIS was a bill to recover legacies under the will of John Windly, transmitted from the Court of Equity of Beaufort County.

The only question made in the pleadings was in relation to a slave, Jesse. By his will, which was made in 1854, the testator gave this slave to the wife of the plaintiff Thomas Robbins. Subsequently, to wit, on 14th of June, 1855, he gave the same slave to George L. Windly by deed reciting a consideration of one dollar. By the said will, the testator gave to George L. Windly two plantations and four slaves, and other goods of much greater value than the slave Jesse. The testator died in 1856. Besides a prayer that the executor account, there was a further prayer that George L. Windly should be compelled to elect between the legacies given him by the will, and the gift of the boy Jesse, and that whichever interest he abandoned, should go to the plaintiffs, and that the executor, in paying over the legacies, might be so directed by this Court.

The answer of G. L. Windly admits the facts set forth in the bill, with this explanation: In the deed conveying the slave to the defendant George L., there is a condition reciting the bequest of Jesse to his daughter Susannah, in the will in question, and further reciting that there existed unsettled accounts between George L. Windly and Thomas Robbins, which were barred by the statute of limitations; and then these terms are used in the deed: "Now if the said Thomas Robbins shall well and truly and voluntarily come into a fair and full settlement before my death, with the said George L. Windly, according to the accounts kept by them, then these presents to be null and void, otherwise to remain in full force and effect." The defendant avers that the said Robbins was justly due him, the said George L. a balance on these unsettled accounts; that he had refused to settle them on fair terms, until the defendant's claims were barred by the statute of limitations, and that he did not come to a fair and full settlement, according to the accounts kept by them, before the death of the testator. So that according to the proper construction of the said will, taken in connection with the deed and the condition thereof, and the failure of the plaintiff to perform the said condition, the defendant George L. Windly says he is not bound to elect between the legacies given him in the will and the gift of the said Jesse by the said deed.

The other defendants answered. Replication. Exhibits filed. Set down for hearing, and transmitted to this Court.

Rodman, for the plaintiffs.
Donnell, for the defendants.

BATTLE, J. The only question which the pleadings present for our decision, is whether the defendant George L. Windly shall be permitted to take the slave Jesse under the deed from his father, and yet claim the legacies given to him in his father's will. The plaintiff insists that, according to the principles of equity, he cannot take both, and that the Court will compel him to elect between the two benefits. The doctrine of elec-

tion is well established in the Courts of Equity both of England and this State. To originate it, two things are essential: 1st, That the testator shall give property of his own; and secondly, that he shall profess to give, also, the property of his legatee or devisee. Adams' Eq. 93; *Wilson* v. *Avery*, 1 Dev. and Bat. Eq. Rep. 376; *McQueen* v. *McQueen*, 2 Jones' Eq. Rep. 16; *Flippin* v. *Banner*, *Ibid*, 450. The principle upon which the doctrine is founded, is "that one who takes a bounty under an instrument, is under an obligation to give effect to the whole instrument, or rather that the donor intended that he should not enjoy that bounty if he disappointed that bestowed on another in the same instrument." The plaintiffs contend that the act of 1844, ch. 88, sec. 3, (Rev. Code, ch. 119, sec. 6), brings the present case within the operation of the principle. The act declares that "every will shall be construed with reference to the real and personal estate comprised therein, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will;" and the argument is, that at the death of the present testator, the slave Jesse belonged to the defendant George L. Windly, under the deed from his father, and that, therefore, the will, speaking at that time, gave to the feme plaintiff what belonged to the said defendant. The conclusion deduced from this is, that as the defendant George has a legacy under the will, he cannot claim under both instruments, but must elect between them so as not to disappoint the legacy to his sister. The legitimacy of this course of ressoning depends upon the enquiry whether the act can admit of the construction contended for. What then is the meaning of the act? And in order to ascertain this, we must first enquire what were the mischiefs which it was intended to remedy. These will be found to have been of two kinds; one relating to real, and the other to personal, estate.

After the passage of the statute of wills, it was settled that a devise could pass only such lands as the devisor had at the time when his will was published, and that no words, however general, would embrace lands acquired afterwards, either by

purchase or descent. 2 Black. Com. 378; *Battle* v. *Speight*, 9 Ire. Rep. 288. The effect of this was, that, as to all after-acquired lands and other real property, the devisor died intestate, contrary to his actual intention, and sometimes to the disappointment of the most cherished objects of his affections. With regard to personal estate, this rule did not prevail; for general words in his will would embrace all the personal effects of every kind of which he died possessed, or to which he was entitled. But in some cases of specific legacies, his intention might be frustrated by the operation of another rule. Thus, if a testator, having a lease-hold messuage, or a sum of £1000, three per cent consols, bequeathed "all that my messuage in A, 'or all that sum of £1000, three per cent consols standing in my name,' he is considered as referring to the house or stock belonging to him when he made his will, and, therefore, if he subsequently disposes of such house or stock, the bequest fails, though at his decease he may happen to be possessed of messuages, or a sum answering to the description in the will." 1 Jar. on Wills, 280. Cases like this often occurred, and were supposed to disappoint, as no doubt, they often did disappoint, the testator's intention. To remedy these mischiefs, applying, though for different reasons, to both real and personal estate, the statute of 1 Vic. ch. 26, (of which our act of 1844, above set forth, is a literal copy), was passed in the year 1837. It needs no argument to show that the mischief did not extend to a case like the one before us. Indeed, to apply it to such a case would defeat the very purpose declared by the testator in the deed which he executed to his son. Mr. Jarman, in the conclusion of his chapter (the 10th) on the subject of "FROM WHAT PERIOD A WILL SPEAKS," remarks "that it will be remembered that the enactment which makes the will speak from the death, relates to the subject matter of disposition only, and that it does not, in any manner, interfere with the construction in regard to the objects of gift." 1 Jar. on Wills, 291. The reason must be, that the objects of the testator's bounty were not within the mischiefs which the statute was intended to prevent, and it cannot, therefore, upon any

just principles, be construed to apply to them. For a similar reason, it can not be extended, by construction, to defeat the manifest intention of a testator to adeem a legacy, by giving effect to it under the doctrine of election.

It is not denied that the plaintiffs are entitled to an account, but they have no right to put the defendant George L. Windly to an election, or to call upon him for an account respecting the slave Jesse.

PER CURIAM, Decree accordingly.

SAMUEL JOHNSTON *and Wife against* DANIEL COLEMAN, *Executor.*

A Court of Equity will not sanction an expenditure by a guardian or trustee, beyond the income of the estate in his hands, except in a case of *physical necessity;* as where the ward or *cestui que trust,* from weakness of body, or mind, was unfit to be an apprentice.

CAUSE removed from the county of Cabarrus.

James Coleman of the county of Iredell, made his will in the following form, that is:

"My will and desire is, that my wife, Mary A. Coleman, have and hold all my property, consisting of lands, negroes, horses, wagon, and all kinds of farming tools, that I may be in possession of at my death, entirely under her care during her widowhood, and as soon as she marries again, every thing is to be put to sale and equally divided."

Besides his widow, the testator left four small children, the eldest being only nine years old, and the youngest between three and four.

The property left her consisted of a tract of land of about two hundred and sixteen acres, one negro man, a negro woman with five small children, with the usual amount of stock, tools, &c., required to carry on a farm of that description.

Conceiving it to be her duty, under the will, she attempted to carry on the farm for the support of herself and her children, and she continued the effort for nine years. From this source alone, she fed, clothed, and educated her children during that time, giving them the very best education that she could. With the utmost care and economy, it was impossible for her to maintain so large and helpless a family without going into debt. So, from year to year, she borrowed money, contracted store accounts, and made other debts, altogether for the decent subsistence of her family.

The widow, Mary A., on the 27th day of December, 1855, intermarried with the plaintiff Johnston, and then, for the first time, it was discovered that the defendant, who is the executor of James Coleman, was unwilling to sanction these accumulated expenditures, or permit any of them to fall on the estate of his testator. On the other hand, he has, as plaintiffs allege, lately seized certain of the property, which the feme plaintiff had disposed of in payment of the debts thus contracted by her, and denies that she had any power or authority to manage such property as trustee, in this way, or to contract such debts on the faith and credit of the estate; and the plaintiff Johnston has been compelled to take the debts contracted by his wife upon himself, and the defendant refuses to allow him any thing for her thus rearing and providing for the children. The plaintiffs contend that the true interests of the children have been greatly promoted by these expenditures, and that under the will of her late husband, the authority to *have and hold all the property entirely under her care*, gave her a discretion as to the mode of managing it, and gave an authority to charge it with debts for the support of the family. The plaintiffs pray that the executor may be compelled to account, and settle with them upon these principles, and for general relief.

The executor answered, denying that the construction put upon his testator's will was the true one, or that he had any power to admit the claims of the plaintiffs against the testator's estate.

Replication, answer and proofs. The cause being set down for hearing, was sent to this Court.

Jones, for the plaintiffs.
Fleming, for the defendant.

BATTLE, J. The fair construction of the will of the feme plaintiff's first husband, taking into consideration the condition of his family and estate is, that the testator gave her the whole produce of the estate, during widowhood, for the maintenance and support of herself and children. The latter, indeed, are not expressly named in the will, nor is there any express gift to her. Taken literally, she is merely constituted overseer, or manager of the property, whilst she remains a widow, but upon her second marriage it is directed to be equally divided, without saying between whom. It is necessary, therefore, to supply, by construction, what was obviously the intention of the testator, that the property was given to the widow, and as long as she should remain a widow, for the use of herself and her children. When she should become the wife of another man, then it was to be divided between her and her children. Such seems to have been her understanding of the meaning of the will, and we agree, that in those particulars, she put the proper construction upon it. It is most unfortunate for her that she was not right in another matter—that she fell into the error of supposing that she could exceed the income of the estate, and charge the excess upon the children's interest therein. In this respect, we think, that she cannot be regarded in a more favorable light than if she had been expressly constituted guardian or trustee for the children. As such, this Court would not have sanctioned expenditures beyond the income of her wards, or *cestui que trusts*, except in a case of more pressing necessity than is shown by the pleadings and proofs in this case. In *Long* v. *Norcom*, 2 Ire. Eq. Rep. 352, it was held that in an ordinary case, the Court would not relieve a guardian, who, without its previous sanction, had made expenditures for maintenance

and education of his ward beyond the income of his estate, though he might have acted from the best of motives. But the Court will reimburse the guardian out of the estate of his ward, when the expenditures were demanded by such circumstances, amounting indeed to physical necessity, as would have compelled any court to authorise them without a moment's hesitation. The cases of *physical necessity*, alluded to, were those of minors, who could not be entitled to maintenance as paupers, who could not be maintained from the profits of their property, and who, from mental imbecility, or want of bodily health, could not be put out as apprentices, to be maintained by their masters. There is no pretence that the children, in the present case, come within the principles of this exception to the general rule. See also, *Patton* v. *Thompson*, 2 Jones' Eq. 411. In *Downey* v. *Bulloch*, 7 Ire. Eq. 102, it was decided that under some circumstances, a trustee, although restricted to the expenditures of the profits of the trust property, may be at liberty to anticipate, by spending, under emergency, more than the profits of the current year; as if there be a dearth and a consequent failure of the crops, or some extraordinary sickness, making it necessary to incur heavy medical bills; but in such case, the existence of this emergency must be averred and proved, and a full account rendered. We do not find any such averment and proof in the present case. On the contrary, the plaintiffs state that there was a regular excess of expenditure over income, arising from the inadequacy of the latter to support herself and her children. In such a condition of things, she ought either to have applied to the court of equity for an order allowing her to sell a part of the property for the support and education of her children, or, if that could not be obtained, then to have applied to the county court to have them bound out as apprentices, under the provisions of the Revised Statutes, ch. 5, sec. 1, Rev. Code, ch. 5, sec. 1.)

The principles which we thus find to be established as a part of the law of the State, we feel bound to apply to the present case. The plaintiffs are entitled to an account so far

as may be necessary to a division of the property according to the terms of the will; but not to any account for the expenditures of the feme plaintiff, before her second marriage, for, and on account of, her children, so far as such expenditures may exceed the income of the property.

PER CURIAM, Decree accordingly.

ELIZABETH R. McLEAN, *by her next friend, against* DANIEL C. HARDIN AND THOMAS G. McLEAN.

Personal property arising in another State to a married woman domiciled with her husband in this State, belongs to the husband according to our laws, and is not governed or controlled by the laws of the State from which it was derived.

THIS cause was removed from the Court of Equity of Alamance.

The plaintiff, Mrs. McLean, is the wife of Thos. G. McLean, one of the defendants. They were married in North Carolina, and have ever since their marriage resided in this State.

Mrs. Glass, the mother of Mrs. McLean, a citizen of the State of Mississippi, died in that State, intestate, in the year ——. Upon the distribution of the personal estate of Mrs. Glass, a negro slave, named Alick, was assigned to Mrs. McLean, and was delivered by the administrator to her husband, the defendant Thomas, who brought him to the County of Alamance, and he remained in the family for about a year, when he was conveyed by the defendant Thomas to the other defendant, Daniel, in trust, for the payment of his debts. The trustee advertised the slave in question, and was about to sell him, when he was restrained by an injunction from the Court of Equity of Alamance, issued in this case.

The plaintiff alleges that by the statute law of the State of Mississippi, she is entitled to the sole and separate property of the slave Alick, free and clear of any control or disposition

by her husband, and of all liability to his debts, and he insists that on bringing the slave to this State, the same rights and incidents attach to the property in this State as belonged to it in the State of Mississippi.

She prays that the plaintiff be enjoined from pursuing the said property for the debts of the husband; that her rignts be declared by the Court as above stated, and that this Court appoint a trustee to hold the property for her use.

The answer of the trustee contends for a different conclusion from the facts of the case, and insists that as the property is movable, it vested in the husband, and must abide the control of the laws of this State.

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

Miller and *Graham*, for the plaintiff.
Ruffin and *McLean*, for the defendants.

PEARSON, J. "Movable property" attends the person, and therefore, is called "personal," as distinguished from fixed, or real property; and the general principle is that, no matter where it may happen to be, it is subject to the law of the domicil; and although it be in a foreign country, it is governed by the same rules and laws of transfer and succession as if the owner had it in possession at home. *Moye* v. *May*, 8 Ire. Eq. Rep. 134.

The plaintiff and her husband are citizens of this State. They were married here, and have always lived here. As soon, therefore, as the title to the slave in controversy vested in her by the assent of the administrator and delivery by him, although the slave was in Mississippi, the property passed to the husband *jure mariti*, according to the laws of this State, and became his in all respects, in the same way as if the wife had possession of the slave *at home*. Being movable property, it attended her person, and in contemplation of law was in her possession at home as much as any property she had about the house, without reference to the manner in which her title

was acquired, or the place where it happened to be. The statute of Mississippi was not intended, and does not have the effect, to change in any manner, the nature and quality of slave property. It remains movable, and the State of Mississippi had no concern, in any conceivable manner, with this slave after it ceased to belong to one of its citizens and became the property of one of the citizens of North Carolina.

From a perusal of the statute upon which the plaintiff rests her claim to a separate estate, it is apparent that there was no intention to extend its operation beyond the State of Mississippi. It is entitled "An Act for the protection and preservation of the rights and property of married women." What married women? Certainly only those who are citizens of that State. We cannot impute to the law-makers an intention to regulate the rights and property of *married women* in North Carolina, and every other country on the face of the globe. The several provisions of this statute, and those of 1846, which is supplemental thereto, show that it was not the intention to give to it an universal operation, but to confine it to their own citizens, leaving us, and the rest of the world, to regulate the rights of our citizens *in our own way.*

If, however, we could entertain the supposition that such was the intention, then, very clearly, there is nothing in the law, or comity of nations, that requires the courts of this State to give effect to the law of another State in derogation of its own laws, and in violation of rights that have vested by force thereof. It is settled that, in regard to movable property, the rights of the parties are governed by the law of the *matrimonial domicil*, no matter where such property happens to be; or how, or where, it is acquired. Story, in his Conflict of Laws, sec. 158–9, after a full investigation, arrives at this conclusion, both upon the reason of the thing and the weight of authority. Kent, in his Commentaries, 2 vol. 237, concurs in this conclusion, and we take it to be settled.

Mr. Graham, upon the argument, took this position: Had Mrs. Glass, by will, or deed of gift, given the slave for the sole and separate use of the plaintiff, this Court would have been

bound to give effect to the trust so declared, and he asks, is not a statute of a sister state, by which a similar trust is declared, entitled to the same respect in this Court? And can we refuse to give effect to a statute where it is conceded that we would give effect to a will, or deed of gift, having a like purpose in view?

The analogy wholly fails. Mrs. Glass was the owner of this slave, and as such had a right to annex a condition to her gift, so that the donee must take subject thereto. But the State of Mississippi did not own this slave. It was movable property "not fixed and real" as a part of the soil of that State, and the State had no further concern with it after it ceased to be the property of one of its citizens. The State of Mississippi does not profess an intention to annex a condition to the gift, or transfer of this slave. The operation of the statute was intended to be confined to married women of that State, and has no application to *married women* of our State, and certainly, if such was the intention, the statute has no effect here, and the rights of the parties are subject to be regulated by the law of the matrimonial domicil.

It will be declared to be the opinion of this Court that the plaintiff is not entitled to a separate estate in the slave mentioned in the pleadings, and the bill will be dismissed.

PER CURIAM, Decree accordingly.

ALFRED M. WHITSETT *and others against* NATHAN BROWN *and others.*

Where a testator directed that a tract of land, given to one of his children, should receive contribution until it should be made equal in value to the shares of the other children, *Held*, that a crop growing on the land when the testator died, was subject to be valued with the land.

Where a testator directs that his estate shall be divided equally amongst certain classes, no notice being taken of advancements that had been made to certain individuals of these classes, *Held*, that there is no reason for taking these advancements into the estimate.

CAUSE removed from the Court of Equity of Caswell county.

The bill was filed by the plaintiffs as executors of Thomas Brown, praying a construction, and advice as to the proper manner of paying the legacies under the will, the material portions of which are as follows, viz :

"Item 1st. I give to my son Nathan Brown, all my lands that my deeds call for, of every description ; which said lands are to be put to him at a fair valuation, so as to make him equal in share with the rest of my children.

"Item 2nd. My will is, that all the balance of my property be equally divided among the rest of my children, to wit: Martha Rice, deceased, Mary Massey, James Brown, Sarah Whitsett, and her husband, Alfred Whitsett.

"First. That in the division of my personal property, that my son, Nathan Brown, after receiving my lands, at fair valuation, shall have made up to him out of the other property, so as to make him equal in share with the rest of my children.

"Secondly. That my daughter Martha Rice's children, receive the equal share of their mother, as their mother would do if living, which said share shall be equally divided between her children as follows, to wit: Nathaniel Rice, Thos. Rice, James Rice, Nathan Rice, and Martha Arnold, granddaughter of my said daughter Martha Rice, which said Martha Arnold shall receive the full share of her mother, as her mother would have done if alive.

"Thirdly. That my son James Brown's children, shall receive the full share of their father, as their father would do if alive.

"Fourthly. That my daughter Mary Massey, and her husband, Nathan Massey, shall receive their equal share, so as to make them equal with the rest of my children.

"Fifthly. That my daughter Sarah Whitsett, and her husband, shall receive an equal share of my estate, so as to make them equal in share with the rest of the children."

The first question raised by the executors was, whether Nathan Brown, who took the land, by the 1st clause of the will, was bound to state the value of the growing crop that

was on the land when the testator died, so that it might be included in the valuation of his share.

2ndly. Whether in taking an account, and in the general equalization of shares, as ordered by the will, advancements made to the legatees in the testator's life-time should be estimated.

The legatees made parties severally answered, but the facts, as above stated, were not disputed, and the opinion of the Court was also asked by them upon the several points stated as they peculiarly affected their interests.

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

Morehead and *Hill*, for plaintiffs.
Bailey, for defendants.

NASH, C. J. Thomas Brown died in 1855, leaving a last will and testament, which has been duly admitted to probate. By the first clause he devises to his son Nathan Brown all his lands, of every kind and description, but directs they shall be valued, and he shall take them at that valuation. By the second clause he directs that all his personal property shall be sold, or divided among all the rest of his children, but directs that if the valuation put on the land, should not make it equal to the shares of the other children, then the deficiency shall be made up to Nathan out of the other property. At the time of the death of the testator, a crop was growing on the land, and in the valuation, which has been made, no notice was taken of the growing crop. Nathan insists that it ought not to be taken into the valuation, the other legatees contending that it ought. The error on the part of Nathan Brown, no doubt, springs from the well-known rule, that a devisee of land is entitled to the crop which is growing on it at the time of the testator's death. As a general proposition, this is true; but not always so. There is no doubt, that in this case, the growing crop does belong to the devisee Nathan. The executor of Thomas Brown has no right to intermeddle with it; nor

have the other children any claim to it; but that is not the question here. Our enquiry is, whether the crop, growing on the land, is to be taken into consideration in estimating its value, and we are decidedly of opinion that it is. While growing and unsevered from the land, it was a part of it, as much so as a house, or any permanent improvement which might have been upon it at the time of the testator's death. If this were not so, that perfect equality in the disposition of the property disposed of by the will, would be effectually destroyed, for the son, Nathan, would have more than any one of the other legatees by precisely the value of the crop. The testator, with a view to this equality, converts the whole of the property, he then had, into one joint fund. The crop was as much his property as the land on which it grew, and he divides the whole. In estimating the value of the land, the crop upon it, at the time of the testator's death, must be taken into the estimate.

The case presents another question, upon which the opinion of the Court is required. By some of the legatees, it is insisted, that in the division of the estate, as directed by the will, the several legatees must account for their several advancements. It appears by the report of the clerk and master that all the legatees had been advanced by the testator during his life-time, and there is great inequality in the sums advanced. It is insisted that a perfect equality among those who would be entitled to his estate after his death, was the desire and intention of the testator, manifested throughout his will, and apparent upon its face. Our only legitimate power is confined to a proper construction of the will, and in arriving at this construction, we are here confined to the will itself. Whatever may have been in the view of the testator as to the equality among his children, there is nothing in the will itself to show us that it was intended to extend to the advancements previously made, and without such intention so appearing, we cannot extend it to them; if we did, we should, in that particular, be making the will of the testator, instead of expounding it. It must be declared that, in the discharge of the sev-

eral legacies, the advancements are not to be taken into consideration.

By the 6th clause of the will, the testator directs that all my property be sold except the land, which is to be valued to my son Nathan, or divided in such way as to make all my children equal; to wit, Nathan, Martha Rice's children, James, Mary, and Sarah—share and share alike. The testator here speaks of his children as if all were alive, though the will shows that James Brown was dead, and that the testator knew it. He has not left us in any doubt as to the manner in which the fund was to be distributed. The legatees were to take as classes; the children of Martha Rice to take the share their mother would have taken if she were alive; and so of the children of James Brown who is dead.

In the 2nd item of the will, the testator gives to the *children* of Martha Rice the share which their mother would have received, that is one equal fifth part of the fund. Among the children of Martha Rice, the testator numbers Martha Arnold, a grand-daughter of Martha Rice. Under the name of children of Martha Rice, Martha Arnold would have taken nothing, but the testator has thought proper to make her, *pro hac vice*, one of the children of Martha Rice, giving her an equal share with the children of Martha Rice, of the portion he had given to the children of her grand-mother.

Nathan Brown is to receive so much of the fund directed to be sold or divided as will make his share equal to that of each of the other classes; the children of Martha Rice, including her grand-daughter Martha Arnold, one equal fourth part of that fund after taking from it a sum sufficient to equalize Nathan's share, with that of the other legatees; James Brown's children one fourth part; Mary Massey and her husband Nathan Massey, and Sarah Whitsett and her husband, will receive one equal fourth part of that fund. There must be a reference to the clerk to take an account of the fund, and to ascertain the portions, or sums to which each legatee is entitled, and to take an account of the administration of the estate.

Per Curiam, Decree accordingly.

JOHN A. GRAVES, *Administrator, against* CATHARINE HOWARD *and others.*

'The residue of a testator's estate and effects,' means what is left after all liabilities are discharged and all the purposes of the testator are carried into effect.

Where there is a fund common to *both* of two charges, and a fund subject only to *one* of them, this separate fund must be applied in aid of the common fund.

CAUSE removed from the Court of Equity of Caswell county.

The bill was filed by the administrator with the will annexed of Elijah Graves, praying the advice of the Court as to his duty in the payment of the debts and legacies. The parts of the will material to the questions propounded, are as follows:

"To the children of my deceased sister Elizabeth Kimbrough, who may be living at my death, I give the sum of twelve hundred dollars.

"In like manner, I give to the children of my deceased brother Thomas Graves, who may be living at my death, twelve hundred dollars, to be equally divided between them.

"To my sister Catharine Howard, I give the like sum of twelve hundred dollars, if she be living at my death. If she dies before I do, or is now dead, then I give the sum to her children, who may be living when I die, to be equally divided between them.

"To the children of my deceased brother William Graves, who may be living at my death, I give the like sum of twelve hundred dollars, to be equally divided between them. The share of Elijah Graves, the younger, however, to be held by my personal representative in trust, for the sole and separate use of his wife and children, so long as he lives, and then to be paid over to his wife and children in equal shares.

"I give to the children of my deceased sister, Delilah Miles, who may be living at my death, twelve hundred dollars, to be equally divided between them.

"I give to my nephew Napoleon Elijah Graves, my undivided

half of the tract of land, near Milton, in Caswell county, known as the Milton race tract.

"I give to my friend Major L. Graves, of Georgia, the sum of three hundred dollars.

"My will is that my land shall be divided as follows:

(Setting out the metes and bounds).

"The lower tract of land aforesaid, I direct to be sold by my personal representative, upon such credit as he may deem expedient.

"To the living children of my sister Nancy Yancy, I give twelve hundred dollars, to be equally divided between them; the share of Virginia, the wife of George W. Swepson, is to be paid over to and held by Giles Mebane, in trust for the sole and separate use of Virginia Swepson aforesaid, so long as she lives, and after her death, if she dies without a living child, to be equally divided among her surviving sisters.

"My will is that all my slaves shall be equally divided among those of my brothers' and sisters' children who may be living in Caswell county at the time of my death, and if there shall not be property enough away from the sale of land, and property of a perishable nature, belonging to my estate, (and such land only as I have directed to be sold), to make the children aforesaid, living out of the county of Caswell, equal, in reference to the division of slaves, with those living in the county, then I direct that the children to whom I give the slaves aforesaid, shall pay to those living out of the county such sum of money as will be sufficient, together with what may arise from the sale of property aforesaid, to equalise them all in the distribution of the slaves; but I direct that the share of Elijah Graves, jr., shall be delivered to and be held by Abisha Slade in trust, as aforesaid, for the sole and separate use of the wife of the said Elijah, and her children, so long as he lives, and then to be equally divided between his said wife and children. * * * All the residue of my estate and effects, I give to the four youngest daughters of my deceased brother William Graves, namely, Isabella Dodson, Fanny Tuberville, Cornelia Tuberville and Virginia Graves."

The first question submitted in the bill, is whether Mrs. Swepson's share shall be assigned to her in slaves, or shall be made up in money. It is insisted by some of the legatees that, because Giles Mebane, to whom the legal interest in the legacy is conveyed, is not a citizen of Caswell county, but lives in Alamance county, she is not entitled to a share of the slaves in kind.

Secondly. The bill alleges that the administrator has sold the land and perishable property set apart for sale, and that the fund thus arising, added to the money on hand, and that arising from debts due the estate, and other sources, is insufficient to pay the pecuniary legacies and debts, and to equalise the division of the slaves between the two classes of legatees. He says that there is nothing falling into the residuum except the houses and lots in Yancyville. He asks the Court to instruct him how to proceed in this case: whether the pecuniary legacies shall abate, or shall he sell property to pay the whole, and if the latter, what propertyis he to sell? Shall he, in the latter alternative, sell slaves, or apply the money raised by selling the houses and lots falling into the residuum?

The plaintiff also asks the Court to "advise him upon the construction of the will generally."

The several legatees interested in these questions, were made defendants, and filed answers, admitting the facts, but insisting on different views of the rules governing the case, according to their several interests.

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

No counsel appeared for the plaintiff.
Hill and *Ruffin*, for the defendants.

PEARSON, J. 1. Virginia Swepson is entitled to a *share of the slaves*. She was living in the "county of Caswell." The circumstance that Mebane, in whom the *legal* title vested, lived out of the county, does not affect the legacy. She is the

beneficial owner. Indeed, the will speaks of her share in the slaves. This removes all doubt.

2. The residue of "the testator's estate and effects," means what is left after all liabilities are discharged and all the purposes of the testator are carried into effect. Consequently, the lots and houses in Yancyville must be sold, if, upon taking an account, it is found necessary to sell any property other than that directed to be sold.

The fund for equalising the distribution of the slaves, is the money arising from the sale of the land and property of a perishable nature, with this restriction, *such land only as I have directed to be sold*. There is, then, a further provision by which the children who get slaves are to contribute for equality of partition. This is a charge on the slaves as a *dernier resort*.

The fund for the payment of debts and pecuniary legacies, is the same with this addition, *it also extends* to the houses and lots in Yancyville, which are not specifically disposed of. This presents a question of "marshalling." There is a fund common *to both*, and a fund subject only to *one charge*. Upon a well-settled principle of equity, this separate fund must be applied in aid of the common fund; that is, the lots and houses must be applied to the payment of debts and pecuniary legacies, so that the common fund may, if possible, be made to cover both charges before the ultimate resort is made to the slaves for contribution.

3. The advice asked upon the construction of the will generally, is too vague and indefinite.

There will be a decree in pursuance of this opinion. The costs will be paid out of the estate.

PER CURIAM, Decree accordingly.

RILEY S. GARDNER *and others against* ALFRED PIKE *and others.*

A debt described properly in a deed of trust as to the amount—as to the time of its falling due—as the object for which it was created—as to the names of the makers, and as to the corporation for whom the debt was contracted—shall not be rejected because of a variance in the description of the name of the payee from the true name.

CAUSE removed from the Court of Equity of Randolph county.

In a deed of trust made to the defendant Alfred Pike, on the 14th day of July, 1856, by the Island-Ford Manufacturing Company, several debts are secured in the first class, and are given a preference over other debts specified in the said deed, which latter debts are due to the plaintiffs. Among the debts, mentioned in the first class, is one which is described as follows: "To the North-Carolina Insurance and Trust Company, in the sum of seven thousand two hundred and eighty-five dollars, due about the 19th of August, 1856, secured by the note of John M. Coffin, John R. Brown, Jesse Thornberg, John Branson and A. S. Horney," and at the close of the list of these preferred debts, is this further description, "all which debts were made to raise money for the said company, and the makers of said notes and securities thereon, made said notes for the sole and exclusive benefit of the said company." In another part of this deed of trust, the debt is recited as being due to "the North-Carolina Mutual Insurance and Trust Company."

There is no such company as that mentioned in the deed of trust in either of the clauses mentioned, and there was no note, bond, or obligation in existence, payable to such obligee, but there was existing, at the time of the execution of the deed of trust, a note payable to David P. Weir, treasurer of the Greensborough Mutual Life Insurance and Trust Company, for the sum of seven thousand two hundred and eighty-five dollars, which fell due on the 19th of August, 1856, which was signed by John M. Coffin, John R. Brown, Jesse Thornberg, John Branson and A. S. Horney.

This note had been executed, by the makers thereof and

the sureties, for the purpose of raising money for the said company, and not for any individual benefit to them.

It was intended that this note should be described in the deed of trust, as it really was, but, by mistake of the draftsman, the description varied from it in the particular above set forth.

The only question in the case was, whether the debt thus described, was entitled to a preference as one of the first class of debts, or whether it should be excluded; the plaintiffs, who were the postponed creditors, insisting that it was not thus entitled, and praying that it might be set aside, and the preference yielded in their favor.

Miller, for the plaintiffs.
B. F. Moore, for the defendants.

PEARSON, J. A similar question to that now under consideration, was presented in the case of *Miller* v. *Cherry*, ante 23. It is there said, "this is a latent, as distinguished from a patent, ambiguity, and presents a question of identity as distinguished from a question of construction." The authorities are examined, and this is established to be the true principle: "An error in some, out of several particulars of description, in a deed, bond, &c., is not fatal, provided the erroneous portions of description may be rejected as surplusage, and the debt in question (or other thing supposed to be described) can be sufficiently identified by the other particulars of description, in regard to which there is no error or discrepancy."

This principle is applicable to our question, and is decisive of it. The deed of trust describes, among others, a debt in this manner: It is a debt of the Island-Ford Manufacturing Company, due to *the North-Carolina* Mutual Insurance and Trust Company; its amount $7,285; its date about 19th of August, 1856; secured by the note of John M. Coffin, John R. Brown, Jesse Thornberg, John Branson, and A. S. Horney; and it is a debt made to raise money for the said company; and the makers of the said note made it for the sole and exclusive use of the said company. Now, as is said in *Miller*

v. *Cherry*, the difficulty occurs in fitting the description to the thing. If a debt answering the description in every particular existed, that would be "the thing." But there is no such debt. There is, however, a debt which answers this description in many particulars, and the question is, can the particulars of description, in regard to which there is an error or discrepancy, be rejected as surplusage, and leave enough to identify this debt as "the debt" set out in the deed? The debt in question answers the description in these particulars: It is a debt of the Island-Ford Manufacturing Company; its amount, $7,285; its date 19th of August, 1856; it is secured by the note of John M. Coffin, John R. Brown, Jesse Thornberg, John Branson, and A. S. Horney; it is a debt made to raise money for the said company; and the makers made it for the sole and exclusive use of the said company. Here are five particulars of description pointing to this as "the debt." If it be not the debt, there is no debt of the sort in existence, for there is no other debt answering the description in a single particular. We are satisfied that these particulars of description do identify the debt in question, as *the debt* set out in the deed of trust, and the payment of which is there provided for.

In the particular of description as to the creditor, there is manifestly an error. The debt is not due to the North-Carolina Mutual Insurance and Trust Company, but it is due to the Greensborough Mutual Life Insurance and Trust Company, and is secured by the note of Coffin and others, payable to David P. Weir, the treasurer of the said company. There is no such corporation as the North-Carolina Mutual Insurance and Trust Company. Reject that part of the description as surplusage, and we have seen the debt is sufficiently identified by the other particulars of description.

We lay no stress upon the fact, that Coffin and the other makers of the note by which this debt is secured, were the corporators of the Island-Ford Manufacturing Company, and the general scope of the deed of trust, as appears in its face, was to provide, in the first instance, for the debts of the company, for

which the corporators had become individually liable; because we prefer to put the decision on the broad principle settled by *Miller* v. *Cherry*, and not to weaken it by calling in collateral aid, when there is no use for it.

PER CURIAM, Decree accordingly.

CASES IN EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT MORGANTON.

AUGUST TERM, 1857.

CHARLES McDOWELL *and another, Adm'rs. of* JOHN E. BUTLER, *against* RACHEL BUTLER.

Where a bond was made payable to two, by several obligors, and one of the obligees became the administrator of one of the sureties, *it was Held* that, although the remedy as to such deceased surety was suspended at law, yet the right of the obligees to sue the principal obligor in a court of law was unimpaired.

THE bill alleges that the plaintiffs, as administrators of John E. Butler, sold the property of their intestate at public auction, and that the defendant became the purchaser of some of it at the price of $1,777,50, and gave them her sealed obligation for the same, with W. C. Butler, Thomas Butler and another, as sureties; that she made a deed of trust to secure the payment thereof, and by the sale of the property therein contained, $1,207,16 was made, and applied as a credit upon the said bond, and that the residue of the said bond is still due, and owing to them as administrators as aforesaid; that Thomas Butler and W. C. Butler are dead, and their estates insolvent, and that the other surety, one Harbison, is also dead, and left no property; that their intestate's estate was much involved in debt, and that the assets which came to their hands

were insufficient to liquidate the debts owing by their intestate; that claims to the amount of some three or four thousand dollars, against the estate of Samuel P. Carson, had been placed in the hands of certain attorneys in the State of Arkansas, for collection, and that, presuming on the availability of the said claims, they had suffered judgments to be entered against them, beyond the amount of the assets that came to their hands, and that part of the said judgments is still unsatisfied; that in consequence of the indulgence extended to them by the creditors of the estate, they were enabled to indulge the defendant on her note, and that hoping that the estate of S. P. Carson would be good, they forbore to enforce the collection against her, but they have been disappointed in the hope of collecting the said debt, and only the sum of $2,500 has been realised, and that the same has been applied to discharge the debts against the estate of their intestate; that the plaintiff Charles McDowell, with another, became the administrators of William C. Butler, and in consequence of the said administration, the remedy in behalf of the plaintiffs on the said bond, in law, was suspended, and there being a necessity for the residue of the amount of said bond, for the payment of debts as aforesaid, they pray that the defendant may be compelled, in Equity, to discharge the remainder of her bond.

Defendant demurred, and the cause being set for argument on bill and demurrer, the same was sent to this Court by consent.

Avery, for plaintiffs.
Dickson, for defendant.

BATTLE, J. The ground upon which the defendant's counsel places her demurrer, is, that the plaintiffs have a full and complete remedy at law against her; and we cannot see how the position can be successfully assailed by the plaintiffs. The bond given by the defendant and her sureties, is either in itself, or by force of the act of 1789, (Rev. Code, ch. 31,

sec. 84,) joint and several, and the plaintiffs had a *perfect right* to sue the defendant alone at law, notwithstanding the suspension of their remedy against the estate of William C. Butler, one of the obligors. The case does not come within the principle upon which *Sanders* v. *Bean*, Busb. Rep. 318, was decided, upon the supposed analogy to which, we have no doubt, the present bill was filed. In that case the relator, who was, in law, regarded as the plaintiff in the action, never had any right to sue in any court of law, upon the bond. By executing the bond as one of the sureties of the constable, he disabled himself from doing any thing, by which he could have a remedy at law upon it. The Court say expressly, that "his right to sue depends upon the fact, that the bond was, in effect, delivered to him, or that a contract was made with him; which could not be; as he could not, either by himself or with others, deliver the bond to himself, or contract with himself."

In the case now before the Court, no such objection could have been made against the bond when it was first delivered. The plaintiffs, then, had a perfect right to sue at law, all the obligors, or any one or more of them. When one of them, William C. Butler, died, and another obligor, together with one of the plaintiffs, took out letters of administration on his estate, the right of the plaintiffs to sue them was indeed suspended, but it in no wise affected their remedy against the present defendant, who was the principal obligor. She could have no equities for contribution against her own sureties, and there was, therefore, nothing, either in the technical forms of proceeding at law, or in the nice and refined principles of equity, to prevent a court of law from affording to the plaintiffs a full and complete remedy against the defendant. She was undoubtedly bound by her bond when it was originally executed, and the act of plaintiffs, or either of them, in suspending, or even in extinguishing their remedy at law against one of her sureties, could not suspend or extinguish the right to sue her.

The demurrer is sustained, and the bill dismissed with costs.

PER CURIAM, Bill dismissed.

PHILIP H. BENICK *and wife against* JOHN BOWMAN, *Ex'r., and others.*

Where a woman, upon the eve of marriage, made a conveyance of property to a trustee, to which she then had no right, but to which she afterwards acquired a right, *Held* that the property passed to the trustee by estoppel.

Although it is usual, in suits against executors and administrators, for the settlement of estates and the payment of legacies, to direct the costs to be paid out of the fund, yet, where the estate is very small, an executor who makes costs, by relying upon an unreasonable objection, will be decreed to pay them personally.

CAUSE removed from the Court of Equity of Rutherford county.

The bill was filed by P. H. Benick and his wife, against the executor of the will of David Bowman, for the recovery of legacies therein bequeathed to her. In the said will, certain specific items of property, such as cattle, beds and household furniture, were bequeathed to the female plaintiff, and a residuary clause in the same, entitled her to an equal share of the property not otherwise specifically bequeathed.

The executor set forth that, on the marriage of the plaintiff P. H. Benick with his wife, the female plaintiff, a contract was entered into between them and one Cicero Hinkle, to the effect that certain specific property, (naming it), which is the same that is contained in the will of David Bowman, as the legacy of the plaintiff Lydia, should vest in the said Cicero as trustee for the sole and separate use and benefit of the said Lydia. In which said marriage contract it was further stipulated that the said Lydia, should have full power and authority to acquire property or any estate whatever, in her own name, and in her individual right; and the executor objected that he had no right or authority to pay over these legacies, or any part of them, to Benick and his wife, but that the same vested

in the trustee, Cicero Hinkle, who is not made a party to the bill, but who should have been.

By an interlocutory order, it was referred to a commissioner to take an account of the residuary fund, who reported a small sum ($20,79), in favor of Mrs. Benick. The report was not excepted to, and was confirmed.

The cause was set for hearing upon the bill, answers and former orders; and on the hearing, the defendants' counsel submitted a motion to dismiss the bill for the want of proper parties.

Baxter, for the plaintiffs.
Shipp, jr., for the defendants.

PEARSON, J. The effect of the deed was to vest the title of the property, specifically mentioned, in Cicero Hinkle; for, although Mrs. Benick did not then have the title, yet, when she afterwards acquired it, under the will of her father, the deed took effect so as to pass the title of the property by way of estoppel. In respect to this property there is no controversy, the executor having assented. In respect to the amount to which Mrs. Benick is entitled, under the residuary clause of her father's will, the effect of the deed was to constitute a covenant by which Benick agrees to surrender his marital rights, and to permit his wife to acquire property, and to hold it for her own separate use in the same manner as if she was a feme sole. In regard to these future acquisitions, Hinkle is not interposed as trustee, but the matter is put on the footing of an executory agreement, to be enforced at the instance of the wife.

It follows that Hinkle was not a necessary party. The motion to dismiss is disallowed, and there will be a decree in favor of the plaintiffs, for the amount reported. The defendant will pay plaintiffs' costs. It is usual to direct the costs to be paid out of the fund, in suits against executors and administrators, for the settlement of the estate and the payment of legacies; but in this case, the fund is small, and it would be

unreasonable to allow the defendant to consume it by relying on an objection which turns out not to be tenable. He ought to have settled and paid over Mrs. Benick's portion of the residue, without suit, leaving it to her to move in the matter respecting the appointment of a trustee to carry out the provisions of the marriage agreement.

PER CURIAM, Decree accordingly.

JOHN A. FLEMING *and others against* JAMES McKESSON, *Adm'r.*, *and* WM. F. McKESSON.

Generally, the next of kin cannot sue the debtor of the intestate, but where an administrator is manifestly under the influence of the debtor, and that influence has been collusively exercised to the injury of the next of kin, they may, in equity, have an account against the debtor.

APPEAL from the Court of Equity of McDowell county.

The bill of the plaintiffs alleges that they are the only children and next of kin of Samuel Fleming, who died in the year 1851, intestate, leaving the plaintiffs infants of tender years, his only children; that the deceased, at the time of his death, owned a large personal estate, consisting of slaves, stock, grain, furniture, wagons, carriages, and debts due him by judgments, bonds, notes, accounts, &c.; that a few days after his death, the defendant James McKesson obtained special letters of administration on the estate of said Samuel, and in company with his son, the defendant William F. McKesson, and in the absence of all other persons, went to the late residence of the intestate, and took into their possession all his private papers, among which were three or more notes on the defendant William F. McKesson, amounting in the aggregate to over $6000, and receipts for payments made by him to said defendant, and obligations cancelled in relation to other business transactions between them; that under these special letters, the defendant sold many articles of property of great

value, the amount of which the plaintiffs are ignorant, and upon the expiration of his said letters, to wit, at —— Term, 1852, of the county of McDowell, the defendant James obtained general letters of administration on the said estate; that under these general letters, he proceeded to sell all the personal property of the said intestate, and made what purports to be a true return thereof, embracing an inventory of the judgments, bonds, notes, accounts and other debts of the intestate; but they charge that, by collusion between him and the said William F. McKesson, he failed to return the notes and single bills which the said William owed the said Samuel Fleming at the time of his death, to wit, one for $2,250, due 10th of Nov., 1849, and another for $150, due 1st of Jan., 1851.

The bill alleges that the defendants further combined and confederated together to cheat and defraud the plaintiffs, and, by collusion, the said James suffered and procured judgments to be rendered in the Superior Court of Burke county against himself as administrator, in favor of the other defendant William, to wit, one for $862,03; one other for $591,46, and costs; and a third for $146,03; that no part of either of these judgments was due from the deceased to the said Wm. F. McKesson, and that recoveries might have been successfully resisted if the defendant James had desired to do so; but that, instead thereof, he, by collusion, and for the benefit of his son, allowed the said judgments to be obtained without sufficient proof, and without producing on the trial the rebutting testimony within his possession and knowledge; that besides these amounts, the defendant James has in his hands other large sums which are due and distributable among the plaintiffs.

The prayer is, that the said judgments may be declared void, and if paid, that the said Wm. F. McKesson be decreed to repay the amount, with interest and costs, to the plaintiffs, and that he be decreed to pay the said notes and bills and all other debts due and owing from him to the said Samuel Fleming at his death; and that the said James render a full account of his administration; with a prayer for general relief.

The defendants severally demurred for the want of equity

in the bill; and for further cause, that the bill alleges several and distinct grounds of complaint against several and distinct persons, and is thus multifarious.

The cause was set down for argument on the demurrers, and, upon argument in the court below his Honor over-ruled the same, and ordered that the defendants answer; from which decree, defendants appealed to this Court.

Baxter, for the plaintiffs.
N. W. Woodfin, for the defendants.

BATTLE, J. We have no hesitation in deciding that the demurrer of the defendant James McKesson must be over-ruled. The plaintiffs, as the next of kin of his intestate, have a right to a full account of his administration, and there is nothing charged in the bill to which he ought not to be compelled to answer. If he, by collusion with the other defendant, who is his son, permitted him to abstract notes from the papers of his intestate, he ought to be accountable for them, and he is equally liable if he fraudulently permitted his son to recover judgment against him upon feigned debts.

The right of the plaintiffs to discovery and relief against the other defendant, the son, is, both upon principle and authority, equally clear. The demurrer admits the charge of collusion, and that being established, it is manifest that the father cannot be relied on to take the proper steps against his son for holding him to a just responsibility to the estate of his intestate. Besides, the plaintiffs seek to have the judgments obtained by the son against the father enjoined, and for that purpose the son is certainly a necessary party. In *Spack* v. *Long*, 2 Dev. and Bat. Eq. 60, this Court decided, that though, generally, legatees cannot sue a debtor of the testator, because it is the right and duty of the executor to collect all debts, yet, where the executor was insolvent, and manifestly under the influence of the debtor, who was his brother, and that influence was collusively exercised to the injury of the legatees, they might, in Equity, have an account

against the debtor. It is true that, in that case, the executor was insolvent, but it will appear, from the opinion, that the Court based their decision quite as much upon the improper influence exercised by the debtor brother over the executor, to the prejudice of the legatees.

In the present case, assuming, then, collusion between the father and son, as charged in the bill, to be true, the power of the son over the father, will undoubtedly be used in a manner detrimental to the interest of the next of kin.

The counsel for the defendants have referred us to the case of *Pearse* v. *Hewitt*, 7 Simons, 471, (10 Eng. Ch. Rep. 152,) as an authority against the right of the plaintiffs to make the defendant William F. McKesson, a party. That was a case where the devisees and legatees, under a will, filed a bill against the trustees and executors, and also against the mortgagee in possession of a part of the estates, alleging that the trustees and executors, colluding with the mortgagee, refused to make him account for the rents which he had received, or to redeem the mortgage, and prayed for an account of the testator's assets, and that the mortgage might be redeemed. The mortgagee filed a demurrer for multifariousness, which was sustained by the Vice Chancellor, Sir LANCELOT SHADWELL, upon the following ground: "If he (the mortgagee) is never to be freed from his suit until the accounts of the personal estate have been taken, he will not be placed in the situation in which he ought to be, because he has a right to have the account of his principal and interest taken at once, and a day fixed either for the payment of it or for a foreclosure, and not to await the result of taking the accounts of the personal estate, and other matters in which he is not at all interested." In the course of his remarks, the Vice Chancellor referred to the case of *Doran* v. *Simpson*, 4 Ves. Jr., 651, which had been cited to show that a party interested in the personal estate of the testator, had a right to sue a debtor to the estate, where there was collusion between him and the personal representative. But he remarked, that the right to sue extended only so far as was necessary to obtain payment of the debt

He also referred to the case of *Burroughs* v. *Elton*, 11 Ves. Jun'r., 29, decided by Lord ELDON, which he said was much discussed, and decided the same principle. He closed his remarks upon those two cases by saying, that the creditor might "sue to the extent to which it was necessary that he should sue for realising the debt, in order that it might be made available for the payment of what was due to himself and the other creditors of the testator, because the hand which ought to receive the debt would not be stretched out to receive it." "Those cases, however, (he adds) differ from the present, for there, the sole object was to recover the debt, but this not only seeks to redeem the mortgaged estate, (to which purpose it ought to have been confined, so far as he was concerned,) but relates to a variety of other matters in which he has no interest, and therefore, the cases cited have no analogy to the present."

We think the situation of the defendant Wm. F. McKesson is very different from that of the mortgagee in the case to which his counsel refers, and is more like that of the debtor mentioned in the cases therein cited. He is charged to be a debtor colluding with the administrator, his own father, not only for the purpose of avoiding the payment of the debts which he justly owes the estate, but actually seeking, by means of such collusion, to recover from the estate, debts alleged to be due him, which, in fact, never existed. If the charge of collusion be true, as admitted by the demurrer, it would be contrary to all human experience to expect that the father "will stretch out his hand to receive the debt" due from his son, or to prevent the collection of the judgments which the son has obtained against him.

Under the circumstances, it seems to us, that he is a necessary party, and his demurrer must be over-ruled.

The plaintiffs are entitled to a decree, over-ruling both demurrers, with costs, and requiring both defendants to put in answers to the bill.

PER CURIAM, Decree accordingly.

MICHAEL FRANCIS *against* JAMES R. LOVE.

In 1844, a parol agreement was made by the defendant to convey a body of land. In 1848, the defendant, in writing, recognised the agreement, and professed a willingness to perform it. After this, the plaintiff removed from the State, and for six years took no steps towards the completion of the contract, during which time the defendant put valuable improvements on the land. In 1854, the plaintiff filed his bill for a specific performance. *Held* that the plaintiff had laid by too long, and that he was not entitled to a specific performance.

CAUSE removed from the Court of Equity of Haywood county.

In the year 1844, the defendant entered into a parol agreement to sell and convey to the plaintiff a small body of land, the subject of this suit, including a mill seat, and, as a consideration, the plaintiff was to give the defendant credit for the price out of a claim for attorneys' fees, which the latter owed the former. In 1848, the plaintiff wrote to the defendant, inclosing him a blank deed, and stating that he wished the matter brought to a close. This letter was accompanied with a survey which the plaintiff had had made by the county surveyor. Upon the reception of this letter, the defendant sent a letter in reply, in which he recognised the parol contract as stated in plaintiff's letter, and professed his willingness to abide by and perform the same, but asked a little time to ride round the premises, to satisfy himself that the survey sent him was accurate. Nothing further was done by either party towards executing the agreement until the year 1854, when the plaintiff demanded a specific performance, and shortly afterwards filed this bill to enforce it.

The defendant answered that, very shortly after the above recited letter was written, the plaintiff removed from the State, and took no steps towards complying with the terms of their agreement, and that he believed from his conduct, he had abandoned all purpose of claiming a fulfillment of their bargain; that acting on this impression, he had, himself, gone on to improve the land, and had expended considerable sums

of money in doing so, and insisted that it would be unreasonable at this late day to compel him to make such conveyance.

There was replication, and proofs were taken, which fully sustain the defendant's averments. The cause was set down for hearing and sent to this Court.

Jos. P. Jordan, for the plaintiff.
Baxter, for the defendant.

NASH, C. J. The bill is filed to procure a specific performance of a contract for the sale of land. The contract was made in 1844, and was by parol. The bill was filed at Fall Term, 1854, of Haywood Court of Equity. In his bill, the plaintiff states that, in 1848, he made a written demand on the defendant to execute his contract by conveying to him the land previously sold, which the defendant declined doing at that time. The plaintiff soon thereafter, as shown by the testimony, left the State, and did not return until 1854, when the bill was filed. In the mean time, the defendant, as he states in his answer, believing that the plaintiff had abandoned his contract and did not wish to proceed in it, expended a considerable amount of money in improving the land. The plaintiff can not sustain his bill.

When, in a contract, a particular time is specified for the performance of an act, time becomes, or may become, of its essence; if, however, no time is specified, within which a performance is to be made, the party to the contract who wishes to enforce a specific performance, must come forward within a reasonable time to demand it. The contract was made in 1844, and the bill not filed until 1854, ten years thereafter. A portion of this time is not to be counted, to wit, from 1844 to 1848—four years. From 1848 to the filing of the bill is six years, during which the plaintiff makes no effort to enforce his rights; on the contrary, he leaves the State, and does not return until 1854, just before the bill is filed. The defendant was well justified in believing that the plaintiff had abandoned his contract, and that he was at liberty to proceed in im-

proving the land. It would be doing injustice to the defendant, after such delay on the part of the plaintiff, and after he had dealt with the land as if discharged from his contract, to permit the plaintiff to come forward and insist upon a specific performance. What is reasonable time within which such a claim as this is to be preferred, the Court must decide under the circumstances; and we are of the opinion that the plaintiff has laid by too long, and that he has not preferred his claim within reasonable time. See *McDowell and others* v. *Sims*, 6 Ire. Eq. 276. Admitting that the letter of defendant in 1848 bound him, there was nothing to bind the plaintiff, and it would be unreasonable to keep the defendant bound for six years. *Mizell* v. *Burnett*, 4 Jones' Rep. 249.

PER CURIAM, Bill dismissed with costs.

TILMAN BLALOCK *and another against* WILLIAM A. PEAKE *and others.*

Where the sureties of a sheriff have had to pay money for the default of a deputy, in not taking a bail-bond from a defendant in a writ, they have a right in equity to be substituted to the rights of the sheriff against such deputy, and to resort to a fund which he had secured from the defendant in the original writ, to indemnify himself against the consequences of the same default.

CAUSE removed from the Court of Equity of Yancy county.

The bill alleges that one John J. Evans sued out a writ in the county court of Yancy, against the defendant Abner Halcomb, and one Henry S. Halcomb, which was duly executed on the defendants therein named, by the defendant William A. Peake, as the deputy of Thomas Wilson, the then sheriff of that county, on the 10th of May, 1840; that Peake failed to take a bail-bond from the Halcombs, and by reason of such default, the plaintiff Evans ran a sci. fa. against Wilson, the sheriff, to subject him as special bail of the Halcombs, on which he recovered judgment for ——, being the amount of the

judgment, with interest and costs, which Evans had recovered in his action against Abner and Henry Halcomb. This judgment was rendered at Fall Term, 1848, of the Superior Court.

At October Term, 1839, of Yancy county court, Wilson, the sheriff, renewed his bond, and gave the plaintiffs, Tilman Blalock and Thomas Baker, as his sureties, which bond continued in force until October Term, 1840. Immediately after the renewal of his bond as sheriff, Wilson appointed the defendant William A. Peake his deputy for that year, and took a bond for the faithful performance of his duty, with Abner Halcomb and one Willie C. Bailey as his sureties; that previously to the term at which Evans' judgment against Wilson was recovered, to wit, the Fall Term, 1848, of Yancy Superior Court, Wilson had become insolvent, and left the State without paying this recovery; that Evans then sued on the official bond of the sheriff, and recovered in the Superior Court from his sureties, the plaintiffs Blalock and Baker, the unsatisfied amount which he had recovered from Wilson, the sheriff, in 1848, (vide *Evans* v. *Blalock*, 2 Jones' Rep. 377); that Wilson is dead, insolvent, and Blalock has administered on his estate, and made himself a party to this suit in that character; that the defendants Halcomb and Bailey are citizens of Tennessee, and are both insolvent; that Peake is an inhabitant of Madison county, and is amenable to the jurisdiction of the court; that the said Peake, by a bill in equity, which he filed in said county against Abner Halcomb, has secured certain property which is in his hands, to indemnify himself from loss, by reason of not taking a bail-bond from the said Halcomb.

The prayer is that the plaintiffs may be subrogated to all the rights of Wilson, the sheriff, against the defendants, and that the fund provided by Peake for his indemnity, may be subjected for the indemnification of the plaintiffs who have paid the debt.

There was a demurrer, and a joinder in demurrer.

The cause being set down for argument was sent to this Court.

Gaither and *J. W. Woodfin*, for the plaintiffs.
Avery, for the defendants.

PEARSON, J. When the sureties of a sheriff are compelled to pay money by reason of the default of a deputy who has given a bond with sureties to the sheriff for the faithful discharge of his duties, the application of the doctrine of substitution is established. *Brinson* v. *Thomas*, 2 Jones' Eq. 474. This disposes of the demurrer; for a demurrer which is bad as to part, is disallowed altogether. As the defendant is obliged to put in an answer, the Court will not take the trouble to look into the bill and point out the parts that need not be answered. In this case, the demurrer is also bad as to the other part.

The sheriff had a right to resort to the fund which his deputy had secured for his indemnity, and the same principle of substitution, (which is a very beneficent one, and well calculated to promote the ends of justice), gives his sureties an equity whereby to reach the fund for their indemnity.

PER CURIAM, Demurrer over-ruled.

EPHRAIM E. GREENLEE *and wife against* CHARLES McDOWELL.

Where the same person was administrator of a husband and guardian to the heirs of his wife, and he took a receipt, upon a disbursement, in his character of administrator, the *onus* of converting it into a voucher against his wards, on the ground of mistake, is upon him.

One fund cannot be subjected to the relief of another, upon the principle of substitution, unless it be made to appear, clearly, that the former fund was liable to the debt which the latter has discharged.

CAUSE removed from the Court of Equity of Burke county.

The bill was filed by the plaintiffs against the defendant as their guardian, for an account and settlement of his guardianship.

The case was referred to the clerk and master of Burke

county, to state an account, which he accordingly did. The defendant filed various exceptions to the report, all of which were withdrawn in this Court but the one relative to the item in the list of vouchers filed, marked No. 4, which is as follows:

"Received of Thomas Butler, administrator of W. C. Butler, deceased, two hundred and twenty-nine dollars and forty-seven cents, in full of one sixth of the amount of a judgment I obtained in Burke county court, against the estate of Mary Tate, administrator, &c., as will fully appear by reference to said judgment; and further, I release any further claim I have on said W. C. Butler's estate in said judgment; this 3rd of August, 1844. SAMUEL NEWLAND."

A record was produced showing that Samuel Newland sued the administrator, *de bonis non*, of Mary Tate, to the county court of Burke, and at the July Term, 1839, recovered a judgment for $1035,34, with interest, $266,52, and that the administrator had fully administered, and that there were no assets wherewith to satisfy the said debt and costs, and it was ordered that a *scire facias* issue against the heirs-at-law of Mary Tate.

No *scire facias* appears among the records of Burke county court, but extracts from the calendar of causes are made, stating a case in favor of "Samuel Newland against the heirs of Mary Tate," with the word "sci. fa." written opposite to the case, which was continued from term to term, from October, 1839, to April, 1842, when one of these extracts shows that the death of William C. Butler was suggested, and at July following, is this entry: "Death of W. C. Butler suggested—abated as to W. C. Butler. Judgment according to sci. fa.," and on the calendar of January Term, 1843, appears as follows: "Abated as to W. C. Butler and W. J. Tate. Judgment according to sci. fa., for $1121,82, of which sum $855,30 is principal; to bear int. from July 25, 1839, $12,65 cost, against the real estate of the heirs-at-law of Mary Tate; stayed twelve months."

Thomas Butler was the administrator of W. C. Butler, and the guardian of his children, who are the heirs of his wife, and it

is contended that the above payment was intended to be made by him in the latter capacity, and not in the former. If it is allowable to him in the capacity of guardian, the defendant, who is the surety on his bond, and his successor as guardian, is entitled to the benefit of it.

The receipt was rejected by the master, and the defendant excepted.

Avery, for the plaintiffs.

N. W. Woodfin and *Gaither*, for the defendant.

PEARSON, J. All the exceptions are withdrawn but that relative to voucher No. 4. That purports to be a receipt given by Samuel Newland to Thomas Butler, *administrator* of William C. Butler, in full of one sixth part of a judgment against "*the estate of Mary Tate, administrator.*" *Prima facie*, therefore, it is not a proper voucher in favor of the defendant, who stands in the place of Thomas Butler, *as guardian* of the heirs of William C. Butler. The *onus* of offering an explanation and proving that the sum referred to was properly chargeable against the heirs, so as to convert it into a voucher for Thomas Butler as guardian, is upon the defendant. We concur with the master in the conclusion that these facts have not been satisfactorily established, and the exception is overruled.

By the way of explanation, it is suggested that the receipt was intended to be drawn to Thomas Butler as guardian, and was, by mistake of the draftsman, written to him as administrator, (he being the administrator of Wm. C. Butler, and also guardian of his children.) In support of this position, the defendant relies on the fact that the debt to Newland was originally due by Mrs. Tate, who was the mother of the wife of William C. Butler, all three of whom were dead. So that, as was contended, William C. Butler was not, in fact, liable for the debt, but the liability was upon his wife as one of the heirs of Mrs. Tate, and after the death of Mrs. Butler, fell upon her heirs, who were the wards of Thomas Butler, and in behalf of whom he paid the money.

There are two facts which oppose this suggestion, and tend to show that there was no mistake, and that the intention was to pay the money as administrator and take a voucher accordingly. It appears by the record that Newland took a judgment against the administrator of Mrs. Tate, admitting the plea of "no assets," and issued a *sci. fa.* against her heirs. To this, William C. Butler and wife were parties defendant. It is not shown whether Mrs. Butler died before or after the death of her husband. If she survived him, then *her heirs* could not be made liable, unless a judgment was taken against her administrator, and the fact established that she left no personal estate subject to the payment thereof.

But if we assume that the husband survived, then it seems that the *sci. fa.* was still proceeded on against him until his death. At April Term, 1842, his death is suggested. At July Term following, the sci. fa. was abated as to him. From this it would seem that the parties acted under the impression that *he* was liable for the debt, and that after his death, his administrator paid it as a debt due by his estate. This inference is put beyond all question by the fact that, in the receipt under consideration, Newland adds a *release* of all further claim on his part against the *estate of William C. Butler in said judgment.*

So, there was no mistake as to the form of the receipt. But it was insisted that although the money was paid, as upon a debt of William C. Butler, out of funds belonging to his estate, yet, under the doctrine of "substitution," it can be set up against the heirs of Mrs. Butler. If a third person had been the administrator of William C. Butler and made the payment, it would have taken *a long shoot* to reach the heirs of Mrs. Butler, upon the principle of substitution or any other principle, for a debt of Mrs. Tate. It must be borne in mind that the plaintiffs are entitled to the land as the heirs of their mother, and do not succeed to it as the heirs of their grandmother. We are at a loss to see any ground upon which Thomas Butler can be allowed to take any benefit from the *accident* that he was the administrator of William C. Butler,

and also the guardian of the children. But waiving the objection that the payment was officious, and admitting that an administrator, or guardian, is at liberty to pay off debts without incurring the costs of a suit, yet it is clear, that if he does so, under circumstances like the present, he is bound to prove fully the liability of the fund in regard to which he seeks to use the payment as a voucher in his discharge.

The form of this receipt furnishes an inference, that Wm. C. Butler had become liable to pay this debt as a debt of his wife; but waiving that difficulty, under the law, as it was at the time this transaction took place, land descending to an heir was not charged with the debts of the ancestor, except for two years after the death. The debt of the ancestor became a debt of the heir in respect to the land, and not as a charge on the land so as to be a clog upon alienation, (Rev. Stat. ch. 63, sec. 15 and 16,) for which the heir might be made liable *if the personal estate* was insufficient. In order, therefore, to reach the heirs of Mrs. Butler, it is necessary to prove that it was a debt for which she was liable. Here the defendant fails. There was a judgment against the administrator of Mrs. Tate, ascertaining the debt so as to bind the heirs, but they were not bound on the question of personal assets. Upon the sci. fa. they could make up a collateral issue and go into the question; but the sci. fa. was permitted to abate, and that question was not passed on in a way to bind Mrs. Butler, and we have nothing to supply it. There is no proof before us binding upon the heirs, which shows that the personal estate of Mrs. Tate was insufficient to pay this debt in the due course of administration.

Again, suppose it be admitted that this was a debt for which Mrs. Butler was liable, then the question is, has the liability of the plaintiffs, as her heirs, been established? In order to this, it was necessary to take a judgment against her administrator, and issue a sci. fa. against her heirs, so as to fix them. No such proceedings were had, and there is no proof to supply the want of it. For aught that appears, Mrs. Butler, supposing her to have died in the life-time of her hus-

band, had choses in action, or effects not reduced into possession by the husband, which would constitute a fund in the hands of her administrator, for the payment of her debts. This may suggest a reason why the administrator of the husband paid the debt. But it is sufficient to say, that the defendant has not made the proof necessary to establish the liability of the heirs, so as to entitle him, under the doctrine of substitution, to convert this receipt into a voucher for him in discharge of the fund with which he is chargeable as the guardian of the plaintiffs.

PER CURIAM, The exception is over-ruled, and the report in all things confirmed.

JOHN E. PATTON *and others against* THOMAS S. PATTON *and others.*

Where a legacy is charged with a certain sum, bearing interest from a given day, which is long before the death of the testator, but it appearing that the said legacy had been advanced to such legatee before the day specified for interest to accrue, *Held* that he was properly chargeable with interest from that day.

PETITION to rehear a decree, made at August Term, 1856.

The cause in which this decree was made is reported in 2nd Jones' Eq. Rep. 494, which gives a view of all the facts necessary to the decision of the questions then arising. It becomes necessary, however, to the elucidation of the points raised by this petition, to state further, that in the 14th item of the will of James Patton, sen'r., he bequeaths as follows: "To my daughter Ann E. Perkins, $5,628, to be paid her and her children in equal proportions, at such periods before her youngest child shall attain the age of twenty-one years, as my son James may, in his discretion, consider best, *with interest from the first of May*, 1837." * * "Of the legacy to my daughter Ann, I direct that two thousand shall be paid by my four sons (John, James, Thomas and Benjamin,) in

equal proportions—$500 each, out of the legacies to them given." The will was dated on 1st of October, 1835, and the testator died in 1845.

In the report of the commissioner, it appears that John E. Patton was charged, by him, with interest on the $500 which he was directed by the will to contribute to the legacy of his sister, Mrs. Perkins, (now Mrs. Smith,) from 1st of May, 1837, he having had possession of the property bequeathed, during the whole time since 1835, which more than doubled the amount, being in the aggegate $1070. In their argument to the Court, the petitioners' counsel contrasted the magnitude of this sum with that against Thomas S. Patton, upon which interest was only counted from 1845, the time when he came to the enjoyment of his legacy. See *Patton* v. *Patton*, ubi supra. The prayer is to modify the decree so as to allow interest on his part of the legacy to Mrs. Smith from the year 1845, the date of the testator's death.

Gaither and *N. W. Woodfin*, for plaintiffs.
Baxter and *Avery*, for defendants.

BATTLE, J. There is no error in the decree so far as it affects John E. Patton. The testator, whose will was made in 1835, gave him, by the 2nd item, a considerable amount of property, consisting of both real and personal estate, which he says he had already put him in possession of, and which, of course, he was then enjoying. In the 14th item, the testator gives to his daughter Ann and her children a large legacy, to be paid with interest from the first day of May, 1837, and says that, of that legacy, his four sons shall each pay $500 out of the legacies given to them. The clerk and master was therefore right in charging John E. Patton with interest from the 1st day of May, 1837, as shown by his report.

The testator gave to his son Thomas, directly, but a very small legacy, to wit: the stock, &c., on the Swannanoah Farm, and in consequence of the dealings between him and his brother James, the executor, he did not get the benefit of it as a

legacy until the death of the testator in 1845, it being shown by the report, that interest is calculated in his favor from that time only. It would seem, then, to be just that he should not be charged with interest on the legacy to his sister until that time. But if that is not so, still John has no right to take exception, as he is clearly chargeable with interest from the time mentioned in the will, to wit, the 1st of May, 1837. His petition to rehear, must therefore be dismissed.

We have referred to the decree so far as it affects Thomas, for the purpose, only, of explaining the reasons why we overrule the petition of John E. Patton. We cannot give any direct opinion upon the case of Thomas, until it is properly brought before us.

PER CURIAM, Petition to rehear dismissed.

JOHN R. DYCHE *against* A. J. PATTON *and others.*

This Court will not set aside a verdict obtained in a court of law by perjury, and order a new trial, unless the witness, on whose testimony the verdict was given, has been convicted of perjury, or has died since the trial, so that his conviction is rendered impossible.

CAUSE transmitted from the Court of Equity of Cherokee county.

The bill alleges that the plaintiffs were sued in an action of trover, by the defendant, to the Superior Court of Macon county, for the conversion of certain store-goods, to which the defendant set up title as a purchaser from Morris and Colvert; that the plaintiffs were constables in the county of Cherokee, and having judgments and executions in their hands against the said firm of Morris and Colvert, they levied upon these goods, and having sold them, applied the proceeds to the satisfaction of the executions in their hands; that upon the trial of this suit, one Gideon F. Morris, the father of J. C. Morris, one of the said firm of Morris and Colvert, appeared as a witness in behalf of the plaintiff in that suit, and falsely and corruptly

swore that he, acting as the agent of the said J. C. Morris, made a *bona fide* sale of all the said store-goods to the plaintiff, before the executions in their hands were levied on the same, and before any lien attached on the said goods in favor of these executions; that by means of the said false oath, the said A. J. Patton was enabled to recover, and did recover, from the plaintiffs, a large sum of money, to wit, the sum of $550, with costs of suit, amounting in all to $741; that the said A. J. Patton well knew that the said oath of the said G. F. Morris was false, and that he wilfully and corruptly suborned and procured the witness Morris, thus falsely to testify in his behalf; that plaintiffs had just found out, during the week in which the bill was filed, that they could prove the falsity of the testimony given by the said G. F. Morris on the trial aforesaid; that they are now able to make such proof.

They pray for an injunction, and for such other and further relief as the nature of their case may require, and to the Court may seem meet.

The answers of the defendants denied fully the facts alleged; and at the August Term, 1852, of the Supreme Court, the judgment dissolving the injunction previously obtained, was affirmed. (See 8th Ire. Eq. Rep. 595.)

The bill was continued over as an original bill, and testimony taken in the cause; but as the opinion of the Court proceeds on the want of equity in the plaintiff's bill, it is not deemed necessary to note further the facts stated in the answers or the proofs.

The cause being set down for hearing, was sent to this Court for trial.

J. W. Woodfin, for the plaintiff.
Baxter, for the defendants.

NASH, C. J. The bill, in substance, is to procure a new trial of a cause which had been previously tried between the parties, in the Superior Court of Macon county, upon the ground, that the verdict was obtained on the evidence of

one Gideon Morris, who had committed perjury in swearing to the facts he did. The bill charges that the defendants, Patton and Colvert, were guilty of subornation of perjury, in procuring Morris to give such evidence. The power of a court of equity to interfere, by granting a new trial, when the judgment had been obtained, at law, by perjury, is not denied. This doctrine was recognised in this Court, in the case of *Peagram* v. *King*, 2 Hawks' Rep. 605. There, the bill charged that the verdict had been obtained by the perjury of one Jenks, who had confessed it on his dying bed, and a short time before his death. The Court granted the relief prayed for; but his Honor, Chief Justice TAYLOR, in pronouncing the opinion of the Court, observes, that "the death of Jenks, the witness, before the complainant knew by what witness his declaration could be shown, rendered a prosecution impossible." This was said in answer to a case cited in the argument by the counsel of the defendant. The case was *Torry* v. *Young*, Prec. in Ch. 193, in which the Lord Keeper declared "that the relief must be grounded upon new matter, and not what was tried before. When it consists in swearing only, I will never grant a new trial, unless it appear by deed or writing, or *that the witness upon whose testimony the verdict was given, has been convicted of perjury.*" It is evident from what fell from the Court in Peagram's case, that such would have been their decision, but for the death of Jenks, the perjured witness. The power, so to interfere by a court of equity, in granting a new trial in a case at law, is one capable of great abuse, and has always been exercised with great caution, and ought never to be applied to any case where the party applying has been guilty of any laches. In 2 Vernon's Rep. 240, a judgment was obtained at law upon a forged bond, and the defendant was surprised; in consequence of all the pretended witnesses to the bond being dead, a new trial was granted.

In this case, Morris, the witness, and Patton and Colvert, the alleged suborners, are all alive, so far as the case discloses the fact, and are now all within the jurisdiction of the Su-

perior Court of law of Macon county. The plaintiffs have not prosecuted them for perjury, or for subornation of perjury, nor given any reason for not doing so. Public convenience, as well as private interests, require that there should be an end of litigation. "It results (says the able counsel for the defendant in Peagram's case) from the palpable truth of the position, that a second, or a third, or any number of trials, will not, and cannot, in the nature of things, ensure a final decision absolutely just."

Let the plaintiffs come before the Court, armed with the recorded proof of the perjury alleged to have been committed by Morris, the witness, and his case will then be entitled to the consideration of the Court.

PER CURIAM, Bill dismissed.

PEYTON COLVARD *against* JOHN WAUGH, *Executor.*

To convert an absolute conveyance into a security for money, there must be facts and circumstances dehors the deed, showing that it was so intended, and proof of the declaration of the parties alone will not be sufficient.

Where there was an indefinite time, within which the mortgagor was to redeem a slave, which was left in his possession, under a special agreement, the statute of 1830 begins to run from the time the mortgagee gets possession of the slave.

CAUSE removed from the Court of Equity of Wilkes county.

The plaintiff alleges that, in 1845, being greatly in want of money, there being several executions in the hands of the sheriff of Wilkes county, which had been levied on a valuable slave, Wesley, he applied to the defendant's intestate, Wm. P. Waugh, to befriend him with a loan of money, to wit, $500, and that he agreed to do so; that they were in the act of counting the money, when the sheriff informed them that he would not release the boy Wesley, unless $600 was paid to him, for that was the amount of the executions in his hands; that thereupon a different arrangement was made, when it was agreed that Waugh should bid off the boy Wesley, and

should hold him as security for the money he should have to pay for him at the sheriff's sale; that Waugh, the intestate, did bid off the said slave, and took the sheriff's bill of sale for same at $530; that a part of the agreement was, that the services of the boy Wesley should go for the interest of the money. The said slave went back into the possession of the said Colvard after the sale, and remained with him for about two years, when he was claimed by Waugh to work for the interest as stipulated in the agreement, and that he was then accordingly surrendered, and remained in defendant's possession until the year 1855, when this bill was filed; that plaintiff was not able to redeem the said boy before that time. The prayer is to have the transaction declared a mortgage, and that plaintiff may have an account of the services, and that he may be relieved from the usurious contract to give the services of Wesley for the interest of the money.

The defendant answered, denying the trust; and by way of explaining the fact that the slave went back into the plaintiff's possession, he set forth a written contract of hire, whereby it was agreed that the boy Wesley should remain with the plaintiff at a given hire.

There was replication to the answer, and proofs taken, and the cause being set down for hearing, was sent to this Court.

Boyden, *Jones* and *Neal*, for the plaintiff.
Mitchell, for the defendant.

NASH, C. J. The bill is filed to convert a deed, absolute on its face, into a mortgage, upon the ground that it was intended by the parties to be a security for money loaned. The plaintiff alleges that several executions were in the hands of the sheriff against him, and levied by him on a negro boy named Wesley; that on the day of sale he applied to Wm. P. Waugh, the testator of the defendant, to lend him the amount needed, to wit, $500, which he agreed to do, and while he was in the act of counting out the money, the sheriff informed the parties that the money to be raised amounted to six hundred dollars, when the counting was stopped, and a new arrange-

ment entered into, whereby it was agreed that the sale should proceed, the testator should purchase the negro, take the bill of sale to himself, and hold the slave as security for the money advanced; all of which was done. The answer filed by the defendant, Waugh, the executor, does not admit the alleged fact of the agreement of the parties to treat the deed as a security for the money advanced, but insists that his testator always held and claimed the boy as his absolute property. The deed from the sheriff to W. P. Waugh is absolute upon its face. To convert such a deed into a security for money lent, it must be shown by *facts and circumstances dehors* the deed, that such was the fact, and those facts and circumstances must be such as, to the apprehension of men versed in business, and judicial minds, are incompatible with the idea of an absolute purchase, and leave no fair doubt that a security only was intended. But parol evidence by itself that, at the time of its execution, it was agreed it should be a mortgage, will not answer. *Blackwell* v. *Overby*, 6 Ire. Eq. 38. The only fact, or the material fact relied on here by the plaintiff, is that he remained two years in possession of the slave Wesley. This, however, is explained by the answer. It alleges that it was agreed subsequently to the sale, that Wesley should remain in his possession for two years at a stipulated price per annum, for which he gave his notes.

The allegation in the bill, then, that the bill of sale was taken as security for the money alleged to be lent, is not sustained by such testimony as authorises this Court to declare such to have been the fact; more particularly as the bill states a change in the first agreement, and the sale of the negro under the second.

If, however, the proofs were such as to authorise the Court to make such a declaration, there is another objection fatal to the plaintiff's claim. He has come too late to ask the aid of the Court. The contract was made in 1845, and the bill was filed in 1855—ten years after. The delay of two years is explained by the agreed possession of the plaintiff for two years. In 1847, Wm. P. Waugh took possession, making the delayed

time eight years. This delay was unreasonable. If the plaintiff could lie by that length of time, he might lie by any length of time at his pleasure, according to the maxim in equity, once a mortgage always a mortgage, a maxim which in its operation as applied to female slaves, has often been attended with disastrous consequences to mortgagees. To correct the grievance, an act was passed by the Legislature at its session in 1830, limiting the time to two years, within which equities of redemptions may be enforced. See Rev. Stat. ch. 65. By the 19th section, it is provided that, "when a mortgagee remains in possession of personal property for the space of two years after the time of performance specified in the agreement, or when the mortgagee shall omit, for that space of time, after the forfeiture of the mortgage, to file his bill to redeem such mortgage, he shall be forever barred of all claim in equity to such property." The first case arising under this act was *Bailey* v. *Carter*, 7 Ire. Eq. 282, where it was enforced. This was followed by *Kea* v. *Council*, 2 Jones' Eq. Rep. 345. In this case, the plaintiff's right to redeem, arose as soon as the mortgagee took possession of the negro in 1847, there being no particular time set when the money was to be repaid. The plaintiff comes too late to ask the aid of this Court.

PER CURIAM, Bill dismissed.

OSCAR WILLIS *against* DANIEL PETERSON *and another.*

Proofs taken in a cause, irrelevant to the *issues made by the pleadings*, will not be considered by the Court.

CAUSE removed from the Court of Equity of Rutherford county.

The plaintiff alleged in his bill, that, in 1849, he made a contract with one Elijah Craige, for the purchase of a tract of land, on which the said Craige lived, together with all his

stock of cattle, hogs and sheep; his corn, fodder, rye and wheat, and all his farming tools, &c.; that a difficulty having arisen between himself and Craige as to the price, he procured the defendant Peterson to go and close the contract, under an agreement, that they (the plaintiff and Peterson) should be joint owners of the property, and that they should carry on the farming business jointly, each paying one half of the purchase money; that this contract was reduced to writing, under seal, which is set out with the pleadings; that the defendant Peterson did conclude the bargain with Craige, and gave one hundred dollars in cash, and their joint notes for $400 more, payable in instalments, on a credit of one, two, three and four years; that the defendant Craige, not having obtained a deed from the legal owners of the land, Bronson and Hoyt, but only a bond to make title, which was assigned by the said Craige to Peterson, only, paid one half of the hundred dollars, and Peterson the other half, and that they, in the same proportions, paid off the first of the bonds given; that they carried on the farming operation for about a year, when the plaintiff left the place in the care of the defendant Peterson; that the said Peterson having possessed himself of a large portion of their joint effects, without the knowledge or consent of the plaintiff, re-assigned the said title-bond to Craige, and surrendered to him the possession of the land. The prayer of the bill is for an account of the joint property and effects, which has come into the hands of the defendant Peterson, and a payment of the sum to which the defendant is entitled; and that it be declared that one half of the said land, now held by Craige, is the property of the plaintiff, and that the same be sold for a partition and settlement between them; also for general relief.

The defendants both answered. The defendant Craige stated, in his answer, that he was in treaty for the land in question, with the plaintiff, but that a serious misunderstanding having taken place between them, he resolved not to let him have the land, and not to have any thing to do with him; that afterwards he did sell to Peterson, and did assign the

title-bond of Bronson and Hoyt to him, and having received one hundred dollars down, he took Peterson's notes, with the plaintiff and another as sureties on the credits above-stated; that one of these bonds was afterwards paid off, but that before the others became due, he became doubtful of the solvency of the security he had for his land, and employed an agent to get the debt on a safer footing; that the best the agent could do was to take back the land for the remainder of the debt, which he did by a re-assignment of the title-bond above-mentioned; but that he was himself, as was his agent, ignorant that the plaintiff had any interest or concern in the land.

The answer of Peterson substantially admits the allegation in the plaintiff's bill; only he says, that the plaintiff had declared publicly that he had abandoned the purchase, and would have nothing more to do with the matter.

There was replication to the answers, and proofs taken. The depositions taken by Craige tend to show that the re-assignment of the land, by Peterson, was with the consent of the plaintiff.

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

N. W. Woodfin, for plaintiff.
Gaither and *Guion*, for defendants.

PEARSON, J. The equity of the plaintiff to an account, in respect to the defendant Peterson, is not contested. It is clear that the deed executed by them, vests in the plaintiff a right to one half of the land mentioned in the pleadings. But the defendant Craige avers that he took the assignment of Peterson, and surrendered the bonds in consideration thereof, *bona fide*, and without notice either on his part, or on the part of his agent, that Willis had any interest in the land; and to make his averment more *emphatic*, he says, that the assignment by him to Peterson was, with the express understanding, that the plaintiff was to have nothing to do with the pro-

perty, or any control or concern therein. It turns out, however, upon the evidence, that, in despite of this understanding, Peterson executed the deed whereby the plaintiff did acquire an interest in one half of the land as well as the other property, and thereupon the defendant Craige, finding that the effect of this deed was to vest an interest in the plaintiff, (his refusal to have any thing to do with him, and his stipulation to that effect with his co-defendant, to the contrary notwithstanding,) attempts to shift his ground and take the position, that the re-assignment by Peterson to him was done with the consent of the plaintiff.

In regard to this new matter of defense, much evidence is taken on both sides; but we are not at liberty to consider it, because it is irrelevant to *the issues made by the pleadings.* "Proof without an allegation is of no more effect than allegation without proof." This case furnishes a striking illustration of the propriety of the rule. It is not adopted simply for the purpose of preventing the opposite party from being taken by surprise, but reaches further, and is relied on as a means of deterring parties, whether plaintiffs or defendants, from an attempt at imposition. For if the evidence runs ahead of the allegation, there is reason to consider it false, as every one is presumed to allege his cause of complaint, or his defense, as strongly in his own favor as he can, consistently with the truth; and if the evidence proves a matter which the party has not ventured to allege, but more especially if the evidence proves a matter which, as in our case, is inconsistent with the allegation of the party, and shows it to be false, then the effect of the rule is, that he stands convicted by his own showing. It is unnecessary to consider the other points made on the argument.

PER CURIAM, Decree accordingly.

CASES IN EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

DECEMBER TERM, 1857.

ROBERT R. BRIDGES, *Ex'r., against* NANCY R. WILKINS *and others.**

A bequest to the testator's six sisters and their *issues*, in one clause, to their *children*, in another, and to their *progeny*, in a third clause, while only one of the sisters was married and had issue at the date of the bequest, was *Held* to give an estate to each of the sisters for her life, with a remainder to her children, applying as well to such of the sisters as might thereafter marry and have children, as the one already married.

A bequest to six sisters, one of whom was married, "not to go to any but my sisters directly and their progeny, and not to their husbands," was *Held* to confer a sole and separate estate for life, as well upon the unmarried sisters, who might thereafter marry and have children, as upon the married one.

(The case distinguished from *Apple* v. *Allen*, ante 120, and *Miller* v. *Bingham*, 1 Ire. Eq. Rep. 423.)

CAUSE removed from the Court of Equity of Edgecombe county.

The bill was filed by the executor of the will of Thomas M. Wilkins, asking the Court for a construction of certain clauses thereof. The material parts of the will are as follows:

"Item 1st. After paying all my just debts out of cash on

*This cause was decided at the last term, but accidentally omitted in the reports of that term.

hand, or debts due me, I give and bequeath the balance of my property to my sisters, that may be living at the time of my death, and their lawful *issues*, except the slaves.

"Item 2nd. The slaves of which I am now seized and possessed, I give to my mother during her natural life, and after her death to go to my sisters and their children as above-mentioned, with the express condition that no property, of which I am now possessed, or may hereafter fall heir to, shall go to any but my sisters directly and their progeny, and not their husbands. * * *

"Item 4th. I give and bequeath to my sisters, as before stated, my life-policy of five thousand dollars."

The testator left six sisters surviving him, of whom William Annie alone was married before the death of the testator. Her husband is the defendant Hardy Norvall. Since the testator's death, another sister, Heron J., has intermarried with the defendant Joseph John Pender. The other four sisters, Mary, Nancy R., Esther Anne, and Cœlia Antoinette, are still unmarried.

Mrs. Norvall had issue of her marriage, during the lifetime of the testator, one child, who is made a party, and one after the testator's death.

The executor prays the opinion of the Court as to the point, whether the estates given to the sisters, are sole and separate estates; and if so, as to the defendant Mrs. Norvall, who was married when the will took effect, whether such is the case in respect to Mrs. Pender, who married subsequently to that event; and especially whether the provision for a sole and separate estate, is to apply to such as may marry hereafter.

He asks instruction also upon the question, whether the issue of the sisters is entitled to any interest in these legacies, or whether the whole does not go to the sisters in absolute right; and if the children shall be considered entitled, whether they take jointly with their mothers, or estates in remainder after the death of their mothers.

The defendants answered, admitting the facts as above

stated, and uniting in the executor's request for a construction by this Court.

Cause set down for hearing on the bill and answer, and transmitted by consent.

B. F. Moore, for the plaintiff.
for the defendants.

BATTLE, J. We are satisfied that it was the intention of the testator to give to his sisters the proceeds of his life-policy, in the same manner as he had given the balance of his property in the first item of his will. The expression, "to my sisters as before stated," admits of no other sensible construction. The fourth item of the will, in which it is found, was indeed unnecessary, as the policy would have passed under the first; but the testator seemed to have had an idea that it required express words to pass it, and his only purpose was to make it certain that the policy should be included in the gift of the "balance," excepting the slaves.

We have no doubt that the word "issues" in the first, and the word "progeny" in the second, item of the will, as applied to his sisters, were used in the same sense, to wit, children, and that the testator meant that all the children which his sisters might have, should be benefitted by the bequest. One, only, of the testator's six sisters was married and had children at the time when his will was made and at his death, and he certainly did not intend to exclude the children which his unmarried sisters might have, if they should think proper at any future time to marry and bear children. To give full effect to the will, therefore, it is necessary to adopt the construction, that the sisters shall take estates for life in the slaves and other property, with remainders to their children. This will embrace all the "issues," "progeny" or children, which the sisters, or any of them, may ever have, and is supported by the case of *Ponton* v. *McLemore*, 2 Dev. and Bat. Eq. Rep. 285.

It is very certain that the testator intended his married

sister should take what he gave her for her sole and separate use. The expression that none of his property should "go to any but my sisters directly, and their progeny, and not their husbands," can admit of no other fair interpretation. It is applied equally to all the sisters, and the Court cannot make any distinction between them. It differs from the case of *Apple* v. *Allen*, ante 120, because here, one of the sisters is married, and the husbands of all are expressly excluded. As to the unmarried sisters, their future husbands, should they ever marry, were necessarily referred to. No other construction can be put upon the words, and in that respect it differs from the case of *Miller* v. *Bingham*, 1 Ire. Eq. Rep. 423. It must therefore be declared to be the opinion of the Court, that the testator's sisters take each a life-estate in the property bequeathed to them, with remainders to their children respectively, and that they take their life-estates to their sole and separate use exclusive of their husbands, which either of them now has, or may hereafter have. A reference must be made to ascertain a suitable person to act as trustee for them.

PER CURIAM, Decree accordingly.

JOHN R. CARTER *against* PETER PRIVATT *and others.*

Where a debtor purchased a note on his creditor from a third person with the purpose of using it as a set-off against his own note, but without any agreement to that effect, he is not forbid in equity to transfer it for the indemnity of other *bona fide* creditors, although the debtor was insolvent, and the effect of such transfer would be to cause such creditor to lose the amount of his note.

Where the object of a suit was to enjoin the collection of a note, upon the ground of a counter claim in favor of the maker against the holder, a reference to a commissioner to state an account between the parties, a report and a confirmation thereof, before replication is entered and the cause set down for hearing, could not be considered as being intended as an adjudication upon the merits.

CAUSE transferred from the Court of Equity of Robeson county.

The defendant William W. Gunn was indebted to the plaintiff in the sum of three hundred dollars, which debt was evidenced by promissory notes, payable to plaintiff, and by open accounts. While thus indebted, the said Gunn purchased from the defendant Privatt, a note on the plaintiff for fifty-seven dollars, bearing interest, which was delivered to Gunn without being assigned. At the time of making this purchase, Gunn said the note would serve his purpose as cash, for that he intended to use it in part discharge of the claims that the plaintiff, Carter, had against him; but there was no allegation in the bill that any agreement to that effect ever took place between Gunn and the plaintiff.

Gunn became very much involved in debt, and afterwards left the country, entirely insolvent. Previously to his going off, he made a deed of trust for the benefit of his creditors, wherein he conveyed the interest of the note in question to the defendant Leitch, for that purpose. Leitch, the trustee, put the plaintiff's note to Privatt in suit, in the name of the latter, and obtained judgment thereon. The bill was filed for an injunction against the defendants to prevent the collection of the judgment, and for general relief.

The defendants Privatt and Leitch answered; but their answers, in the view taken of the case by the Court, are not material.

On the coming in of the answers, the cause was heard in the Court below, at the Spring Term of 1857, on a motion to dissolve the injunction which had previously issued. The motion was refused, and the injunction ordered to be continued to the hearing of the cause. At the same term, this order was made, "That this cause be referred to the clerk and master of this Court, to state an account between the plaintiffs and defendants, and that he report to the next term of this Court." At the Fall Term, 1857, the commissioner reported, and his report was confirmed. Afterwards, the cause was set down for hearing, and sent to this Court by consent.

Troy, for the plaintiff.
Kelly, for the defendants.

PEARSON, J. While the defendant Gunn was the equitable owner of the note, the plaintiff had an equity, as against him, upon which this Court would have interfered to prevent advantage from being taken of the fact that the legal title was in the defendant Privatt, and would not have allowed the judgment in the name of Privatt to have been enforced for the benefit of Gunn, but would have caused it to be discharged by making it a set-off, *pro tanto*, to the larger amount due to the plaintiff.

But after Gunn transferred the equitable ownership of the note to the defendant Leitch, for the benefit of the cestuis qui trust named in the deed, who were *bona fide* creditors of Gunn, the plaintiff had no equity as against Leitch; for he represents creditors; and the rule is, when equities are equal, the law prevails, and, as between creditors, a court of equity will stand neutral and allow the law to take its course, unless there be some circumstance that makes the equity of one superior to that of the other.

The plaintiff relies on the circumstance, that at the time Gunn traded for the note, he said "he wanted it for the purpose of paying off claims which the plaintiff had against him."

The plaintiff was not privy to this purpose of Gunn. It was collateral, and he was at liberty to change his mind in regard to it whenever he saw proper. In order to attach an equity to the note in favor of plaintiff, it is necessary that there should be an agreement between him and Gunn, that it should be applied as a set-off, or the plaintiff should have sued him and forced him into an arrangement while the beneficial ownership was in him. Of this, there is no allegation, and we cannot see that it was against conscience for Gunn, in the exercise of the right of every man to prefer one creditor over another, to transfer it for the use of other *bona fide* creditors.

The plaintiff, as a last resort, falls back upon the position,

that as the money is in his pocket, equity will not allow it to be taken out and applied to the use of others, causing him to lose his debt.

This general position has nothing to sustain it. The legal title is in Privatt. He has a right to collect the money for the benefit of the creditors represented by Leitch, to whom the equitable title was transferred. It is the plaintiff's misfortune not to have taken the steps necessary to attach an equity to the note while it was in the hands of Gunn.

Upon looking into the transcript, we find that, upon the coming in of the answers of Privatt and Leitch, "it is ordered that the cause be referred to the clerk and master to state the account," and the report is filed and confirmed.

The plaintiff relies upon this as an adjudication of his right to an account. We cannot give it that effect. There was no replication, and the cause was not set down for hearing until after the report was filed and confirmed. So, the order must have been intended, simply, as an enquiry to ascertain the fact of the plaintiff's debt against Gunn. It cannot be taken as an adjudication of the rights of the parties; because, at that stage there was nothing to adjudicate—nothing for the court to act upon.

PER CURIAM, The bill must be dismissed.

ANNE C. HALL, *Trustee, and others, against* THOMAS ROBINSON, *receiver, and another.*

Where a general right of disposition is given to the taker of an estate, a contingent limitation in remainder is inoperative and void but a limitation to one, and if he should die before arriving at full age, or if he should arrive at full age and afterwards die intestate and without issue, then to A, B, and C in remainder, was *Held* not, to give a general right of disposition, but that the limitation over was valid.

In a conditional limitation of an estate, if the person to take is *certain*, his representative is entitled to the interest limited to him, although he

died before the happening of the event on which the estate in remainder was to vest in possession.

As a general rule, dividends on bank stock, and interest arising from money, become the absolute property of the taker of the life-estate, and a contrary intention will not be inferred from the use of words not necessary to the sense of the bequest in which they were used, but in that connection were considered as surplusage.

CAUSE removed from the Court of Equity of Anson county.

Mrs. *Rosa A. Troy*, by her will bequeathed in the first clause thereof as follows:

"I give and bequeath to my grand-son Thomas Lance, twenty shares of stock in the Bank of the State of North Carolina; also twenty shares of stock in the Bank of Cape-Fear; also four notes at interest in South Carolina, amounting in the whole to three thousand three hundred dollars; also four hundred and thirty-five dollars at interest in North Carolina; also my negro boy named James (son of Molly); to him the said Thomas Lance and his heirs forever; with all increase and profits arising therefrom. Should my grand-son die before he arrives at the age of twenty-one, or should he die intestate after that age, leaving no issue, then, and in that case, it is my will that the above property bequeathed to him, shall be equally divided among the children of my daughter Anne Caroline Hall, in manner following: to Robert Troy Hall and Thomas C. Hall, their parts absolutely; but the three parts or portions of Mary W. Hall, Rosanna Hall and Harriet Elenor Hall, I give and bequeath to my sister Harriet H. Strong, her executors and administrators, in trust, for the use and benefit of said Mary W. Hall, Rosanna Hall and Harriet Elenor Hall, respectively."

In the sixth clause of the will, the testatrix directs that certain tracts of land, town lots and slaves shall be sold by her executrix, and then provides as follows: "The money arising from these several sales, I wish divided into six equal parts, or portions, for my six grand-children, viz: one portion for Thomas Lance, one for Robert T. Hall, one for Thomas C. Hall, one portion or sixth part for Mary W. Hall, one for Rosan-

na Hall, and one for Harriet Elenor Hall respectively—the three girls' parts to be held in trust, for their use and benefit, by my sister Harriet H. Strong, to whom I give and bequeath it for that purpose; should Thomas Lance die while a minor, or after coming to the age of twenty-one, leaving no will nor issues, then his sixth part shall be divided among my other five grand-children."

After having qualified as executrix, and having proceeded to some extent in discharging the duties of that office, and as special trustee for Mary W. Hall and her sisters, Mrs. Strong, upon an application to the Court of Equity of Anson county, was released from the trust aforesaid, and Anne C. Hall, the mother of the said Mary, Rosanna and Harriet Elenor, was appointed trustee in her place. Thomas Lance, the legatee, being a person of weak mind and incapable of managing his affairs, upon a like application to the Court of Equity aforesaid, the defendant Thomas Robinson was appointed a receiver for and in behalf of the said Thomas, to whom Mrs. Strong, the executrix, paid over the whole of the legacies coming to the said Thomas under the above bequests.

Thomas Lance died in 1857, after having arrived at full age, but without leaving any issue, and without having made a will, and the bill is filed by the contingent legatees in remainder against the receiver and against the personal representative of the said Thomas, praying that the said fund, with its increase and accumulations from dividends, interest on money and profits, shall be paid to them.

During the life of Thomas Lance, one of these contingent legatees, Harriet Elenor Hall, intermarried with Wright Huske, and died in the life-time of the taker of the life-estate. Her husband, the said Wright Huske, administered on the estate of his wife, and is a party plaintiff in this suit. He insists that he is entitled to one sixth part of the fund limited to his wife.

The receiver, Thomas Robinson, and the administrator of Thomas Lance, answered; the former stating the exact amount and condition of the fund in his hands, and the other con-

tending, *first*, that the first taker, Thomas, was entitled to the entire property in the legacies above mentioned, and that therefore the limitations in remainder to the plaintiffs, never vested. And 2ndly. That if these limitations in remainder should be sustained, he contended that the accumulations to the estate of the said Thomas, from dividends of bank stock, and from interest on money, &c., are no part of the fund sought by the plaintiffs, but belonged to the estate of the said Thomas. 3rdly. It was contended that Harriet Elenor Huske having died before the contingency happened, upon which these legacies in the remainder vested, that her representative is not entitled to recover.

The cause was set down for hearing upon the bill, answers and exhibits, and sent to this Court by consent.

Shepherd, for the plaintiffs.
J. H. Bryan, for the defendants.

PEARSON, J. Where a fee is limited upon a fee by way of executory devise, or bequest, if a general right to dispose of the property is given to the taker of the first fee, such right is inconsistent with the existence of the second fee, and the consequence is that the limitation over of the second fee is inoperative and void. See *Newland* v. *Newland*, 1 Jones' Rep. 463, where the subject is fully discussed.

The specific property mentioned in the first clause of the will of Rosa Troy, and the one sixth part of the sale of the land and negroes to be sold by the sixth clause, is given to Thomas Lance, with a limitation over to Robert, Thomas, Mary, Rosanna and Harriet Hall, in the event that Thomas Lance should die before arriving at the age of twenty-one, or if he arrives at that age, in the event of his dying intestate and without leaving issue. He arrived at the full age, but died intestate and without leaving issue. The first question is, did the limitation over take effect, or is it void?

The counsel insist that it is void, on the ground, that it is inconsistent with the right of Thomas Lance to dispose of the

property by the will, which right is implied from the fact, that the limitation over is in the event of his dying intestate.

We do not assent to the proposition. The rule stated above requires that the right of disposition given to the first taker shall be *general*, so as to be, to all intents and purposes, inconsistent with any estate or interest in the second taker. Here, the right of disposition is *limited*. It can only be made in one mode, to wit, by will. So that the entire estate of the testatrix was not consumed by the gift to the first taker. There was left an interest, or possibility of interest, depending on the uncertain event of the first taker dying before he arrived at age, or after he arrived at age, without issue and without making a will; which possibility of interest the testatrix could limit over to third persons, under the doctrine of executory bequests. The only difference between the present case and the ordinary cases of conditional limitations and executory devises and bequests is, that, here, the future contingent estate is made to depend not only upon the event of the death of the taker of the determinable fee under age, and if of age without leaving issue, but upon the additional event of his dying intestate, so as to make three instead of one, or two, contingencies; but there is no inconsistency between the existence of this contingent estate and the estate of the first taker; for, in order to make an absolute inconsistency, which the rule requires, the first taker must have the absolute estate, or a general power of disposition, so as to leave nothing in the testatrix capable of being given over to a third person. We are of opinion that the limitation over was valid.

2nd. Harriet Hall intermarried with Wright Huske, and died in the life-time of Thomas Lance, leaving, her surviving, her husband and one child. Her interest, under the executory bequest, was transmissible to her personal representative; because the person was certain. Where that is the case, it is well settled that the contingent remainder, or executory devise, or bequest, is transmissible by descent, or by succession.

3rd. Does the *property* given to Thomas Lance as distin-

guished from the dividends of bank-stock, interest upon the money, &c., alone pass under the limitation over, or does such part of the dividends, profits, &c., as was not used by him, also pass as incident to the principal? The words are: "then, and in that case, it is my will that the above property bequeathed to him shall be equally divided," &c. We can see no ground for the position that the dividends and profits accruing while he owned the property, did not become his absolutely. It is true, after giving him the property, it is added "with all increase and profits arising therefrom." These words are superfluous. The increase and profits would have belonged to him any how, and they cannot be allowed the effect of attaching the dividends and profits to the property, so as to subject them to the limitation without manifest violence to the intention. For if so, then the primary object of the bounty of the testratrix, in respect to this property, would be left to starve, for the purpose of providing an accumulating fund for the secondary objects of her bounty.

To meet this difficulty, it was suggested that only so much of the dividends and profits as were not used by Thomas Lance, should pass with the property.

There is no intimation of any such middle ground contained in the will. Either all the profits pass, or none; unless we undertake to make a will for the testatrix. Our opinion is that the accrued dividends and profits belong to the personal representative of Thomas Lance.

PER CURIAM, Decree accordingly.

DAVID SWINDALL, *per Guardian, against* WILLIAM BRADLEY.

In a bill for an injunction to prevent slaves from being taken out of the State, an allegation that the defendant was about to sell his perishable property, and that it was rumored he was about to remove, and that plaintiff believed if he did so, he would carry off the slaves which he held for life only, was

deemed sufficient ground for the issuing of an injunction, and, not being met by the answer of the defendant, though it denied the intention of removing, the injunction was ordered to be continued.

On a motion to dissolve an injunction, where the mischief, arising from the act complained of, would be irreparable, the settled practice is for the plaintiff to read affidavits in opposition to the answer.

APPEAL from the Court of Equity of Bladen county, MANLY, J., presiding.

By the will of Mary Kelly, which was proven in the year 1852, a negro woman slave Tenah, and her child Lucy, were bequeathed to Mary Swindall for life, and, at her death, to her son, the plaintiff. The executor to the will of Mary Kelly assented to the legacy, and the slaves went into the possession of Mrs. Swindall. Afterwards, the said Mary Swindall intermarried with the defendant, William Bradley, who took possession of the slaves in question. The woman Tenah had three other children, who were all in the possession of the defendant at the commencement of this suit, and were worth at that time $2,300.

The bill alleges that the defendant, Bradley, is about to sell his perishable property, and, as plaintiff believes, is about to leave the State. The plaintiff asserts his belief that, if the defendant does so leave the State, he will carry off the said slaves, and that his remainder in the same will be rendered difficult to be obtained at the falling in of his mother's life interest, or totally defeated. He prays for an injunction and a sequestration.

The writs prayed for were ordered, and the slaves in question were seized by the sheriff of Bladen, and held by him, pursuant to the writ of sequestration.

At the Special Term of the Court held for Bladen county, (May, 1857,) the answer of the defendant came in. He denies therein that he is about to leave the State, or that he is about to carry off the slaves in question, but says he had provided homes for them in Bladen county, and made all needful arrangements for their maintenance and comfort.

A motion was made to dissolve the injunction and seques-

tration. The plaintiff offered affidavits in opposition to the answer, which his Honor refused to hear, and, on consideration of the matter upon the bill and answer, dissolved the writ of injunction and ordered a restoration of the slaves to the defendant. From this order, the plaintiff appealed to this Court.

Troy, for the plaintiff.
Shepherd and *White*, for the defendant.

BATTLE, J. This is the case of a special injunction, and it is admitted that, upon a motion to dissolve, the plaintiff would be at liberty to read affidavits in support of the allegations of his bill, if such allegations were sufficient to entitle him to relief; but the defendant contends that such is not the case, and that the injunction ought to be dissolved, and the sequestration discharged, because of their having been improvidently granted.

It is unquestionably true that a court of equity will not enjoin a tenant for life of slaves, from removing them, or compel him to give security for their forth-coming, unless good cause be shown that they are in danger of being carried beyond the jurisdiction of the Court; *Clayon* v. *Veasey*, 7 Ire. Eq. Rep. 173. The mere fears and apprehensions of the remainder-man will not entitle him to an injunction, unless he can allege such facts and circumstances as will show that his fears and apprehensions are well founded; *Lehmaa* v. *Logan*, Ibid, 296. The only enquiry, then, is whether the present bill contains a statement of facts sufficient to lay a foundation for the relief sought. It alleges that the defendant "was about to sell his perishable property," and that the plaintiff was informed, and believed, that the defendant was about to leave the State, and then avers his belief that, if the defendant did leave the State, he would carry off the slaves with him. The fact that the defendant was about to sell his perishable property, and the rumor that he was about to leave the State, were, we think, calculated to excite the plaintiff's fears that

he would carry off the slaves, and required explanation. The answer denies distinctly and positively that the defendant intended to leave the State, or that he had any design to remove the slaves beyond the jurisdiction of the Court, but it is altogether silent in respect to the charge that he was about to sell his perishable property. This silence is, to say the least of it, suspicious, and makes the answer obnoxious to the imputation of being evasive.

In this state of the pleadings, we think the plaintiff had the right to read affidavits in support of the allegations of his bill, and to insist upon them in opposition to the motion to dissolve his injunction and sequestration, and that, consequently, his Honor erred in refusing to hear them; *Lloyd* v. *Heath*, Busb. Eq. 39; *McDaniel* v. *Stoker*, 5 Ire. Eq. Rep. 274; *Griffin* v. *Carter*, Ibid, 413. It is true that, in these cases, the bill only was read as an affidavit in opposition to the answer, but, in *Lloyd* v. *Heath*, the following passage from Drewry on Injunctions, 429, is quoted with approbation, and fully sustains our decision in this case: "And it may be stated to be at the present day the well-settled practice to permit affidavits to be read in opposition to the answer at certain stages of the proceedings in cases of *waste, and injuries in the nature of waste;* for the mischief is irreparable; the timber, if cut, cannot be set up again; in other words, the mischief, if permitted, cannot be retrieved." The order, from which the appeal was taken, must be reversed, and this opinion certified to the Court below.

PER CURIAM, Decree accordingly.

M. N. LEARY, *Executor, against* S. W. NASH, *and others*

Children of a female slave directed by will to be liberated, born after the making of the will and before the death of the testator, are not entitled to their freedom.

CAUSE removed from the Court of Equity of Cumberland county.

The bill was filed to obtain a construction upon the will of Solomon W. Nash.

One of the questions presented to the Court is, whether the defendant John, who was born after the making of his father's will, could take any thing by law, he not having been in any manner provided for in the said will.

The clause of the will, upon which the next question arises, is as follows:

Item 6. "I further leave my negro slave woman Venice, to serve my daughters ten years from the time of my death, and after the expiration of that time, I desire her to be freed; and if she wishes to remove to any free State, I wish her to be permitted to do so; and if she may be permitted to remain in North Carolina, that she may enjoy all the privileges that can be, or may be, allowed by law to slaves left by their masters or mistresses to be freed.

"The way I desire Venice to serve my daughters is, for her to be hired out for the term of ten years, and the proceeds of the same to be equally divided amongst them."

At the time of the making of the will, the woman Venice had no child, but after that event she had two children, Jack and Festus.

The executor enquires whether the woman Venice is entitled to her freedom, and if so, upon what terms, and also, whether Jack and Festus, children of Venice, born after the making of the will, but previously to the death of the testator, are entitled to be emancipated.

The children of the testator, who are legatees in the will, and John, born as above stated, after the will was made, are made parties defendant, who answered, but their answers contained nothing affecting the questions treated of in the opinions of the Court.

Banks and *Troy*, for the plaintiff.
Strange and *Baker*, for the defendants.

PEARSON, J. 1. The defendant John, who was born after the making of the will, and before the death of the testator, is entitled to a filial portion, according to the provisions of the statute.

2. The slave Venice has her election either to leave the State and be thereby emancipated, or to remain here as a slave. As to this there will be an enquiry.

3. The two children of Venice born after the making of the will, and before the death of the testator, are slaves. There is no ground upon which they are entitled to their freedom. Before the death of the testator the will did not take effect; it was revocable and had no operation until that event. In *Caffee* v. *Davis*, 1 Jones' Eq. Rep. 1, commented on in *Cromartie* v. *Robinson*, 2 Jones' Eq. Rep. 218, the child was born *after* the death of the testator. In *Wooten* v. *Becton*, 8 Ire. Eq. Rep. 66, the child born after the making of the will, and before the death of the testator, was held to be entitled to his freedom by force of the words "together with all *future issue* and increase," which had the effect of taking that case out of the well-settled general rule. Here, there are no such words.

PER CURIAM, Decree accordingly.

J. P. REDDING, *administrator, cum tes. ann. against* S. A. L. ALLEN, *and others.*

Where a testator bequeathed as follows: "I give to S. A. (his wife) all the negroes, of every description, that I have received through or by her, viz: B, C, D," naming them and several others, and concluding the last with an "&c," "and all the undivided negroes of the estate of W. K., also $312 *in cash*, the amount for which H (one of the negroes that came by his wife) was sold," and died intestate as to all the rest of a large estate, *it was Held* to have been the intention of the testator to pass the increase of the slaves of both classes, irrespective of the times of their birth.

Where two modes of description are used, and there is a descrepancy between them, that mode will be followed which is least liable to mistake.

Where slaves given as above to a legatee, were hired out by the executor after the death of the testator, it was *Held* that the hires went to the legatee.

Where a sum of money was given in lieu of one of the negroes that, before the will was made, had belonged to the former of the above classes, but sold by the testator, it was *Held* that such sum of money should bear interest from the death of the testator.

CAUSE removed from the Court of Equity of Beaufort county.

This bill was filed to obtain the opinion of the Court of Equity upon several questions arising upon the will of Shadrack P. Allen, which is as follows: "I give and bequeath to Sophonisba A. L. Allen, all the negroes, of every description, that I have received through or by her viz: Ben, Julius, Matilda, Eve, Maria, Jin and her children, Juliet, Lettice, and William, &c., and also the undivided negroes of the estate of William Kennedy, deceased, also three hundred and twelve dollars in cash, the amount for which Horace was sold, to her and her heirs forever. In testimony whereof, I have set my hand and seal."

The bill sets forth that one of the above named negro women Jin, had increase, viz., the boy Daniel, before the making of the will; that several of the women of the class received through or by Sophonisba A. L. Allen, who was testator's wife, had increase, seven in number, after the execution of the will and before the testator's death, and one after his death; that several of the women of the class described as the undivided negroes of the estate of Wm. Kennedy, had increase, four in number, after the execution of the will and after the division of the Kennedy property, but before the testator's death, and one after his death; that, besides these slaves, the testator owned other slaves, and real and personal estate, which he had acquired from other sources than the two above specified, of which no mention is made in his will.

The plaintiff, who is the administrator with the will annexed, prays to be instructed by the Court:

Whether the increase of the female slaves mentioned in the

first class as being derived from Mrs. Allen, born after the will was made, and before his death, pass to her by force of such bequest. And whether the one born after his death will thus pass. Also, whether Daniel, born before the making of the will, passes.

Also, whether the increase of the women derived from the estate of William Kennedy, born after the making of the will, passes. And whether the one born after his death passes.

Also, whether the pecuniary legacy bears interest, and from what time.

Whether Mrs. Allen is entitled to the hires of the slaves of the original stocks, and whether to the hires of the increase of these stocks.

Mrs. Allen had no issue; she and one sister of the testator, and the only daughter of a deceased sister, as next of kin of the testator, are made parties defendant, who answered, not contesting the facts set forth in the bill, and concurring in the prayer that the Court will instruct the administrator with the will annexed, as to their rights and his duties in the premises.

The cause was set down for hearing on the bill and answers.

No counsel appeared for the administrator in this Court.

Donnell, for the next of kin.

B. F. Moore and *Shaw*, appeared for the legatee, Mrs. Allen.

Mr. Shaw's argument was as follows: The principal question arises upon reading the will of Dr. Allen, as to its proper construction and purport, and this is the enquiry in Nos. 3, 4, 5. The will is as follows, and its date is the 21st March, 1835:

"I give and bequeath to Sophonisba A. L. Allen all the negroes of every description, that I have received through or by her, viz., Ben, Julius, Matilda, Maria, Eve, Jin and her children Juliet, Lettice, and William, &c., and also the undivided negroes of the estate of William Kennedy, deceased, also $312 in cash, the amount for which Horace was sold, to her and her heirs forever."

The facts are that Horace was one of his wife's negroes;

that the marriage of the testator was on the 22nd December, 1829; that the negroes of Wm. Kennedy's estate were divided the 30th December, 1836, one year and nine months after the date of the will, and the negro William, a child of Jin, named in the will, was born after Dr. Allen had received Jin into his possession.

The female slave Jin had a boy child, named Daniel, born prior to the date of the will, and his name is not mentioned in it.

Other female slaves, both those named in the will and those that were of the undivided negroes of Wm. Kennedy's estate, had issue born between the date of the will and the death of the testator, and also issue born after his death. Mrs. Allen claims to be entitled to the issue of all the slaves named in the will, and of those referred to as "the undivided negroes," without regard to the time of their births, and claims Daniel, the issue of Jin, born before the date of the will, though he is not mentioned in it, by name.

The case shews that the testator having negroes, some of which he acquired by his marriage and some otherwise acquired, made this instrument for the purpose of giving to his wife the negroes mentioned in it, so that they might be her's after his death. In it he speaks of no other negroes except such as had been hers; in it he provides for no one else, and it is concerning her and such negroes as he had acquired by her, and no other kind of his property, that he speaks, throughout. Whatever feelings he might have had for them, he knew that as they were her family negroes, she had a feeling of stronger attachment for them than she had for the rest.

The case also shews that he had no issue by the marriage. This instrument was under these circumstances and with such views made; in it there are found no terms of art, but simply the general and popular language that is used in familiar life. It is by a consideration of this kind of language used by him on this occasion, to this sort of expressions, that the court are to look, and upon them they are mainly to ground their opinion as to what was his intention. The court does,

in order to this, endeavor to place themselves in that position, which it appears to them that the writer occupied, and from which he looked upon the objects, at the time when he began to describe them; because they know that before he began, he had some scheme or plan already conceived, and an intention to point out to others what that was. This is one mode of looking into his thoughts and views, in order to ascertain what was most likely to be, and what was, his intention. The state of his property, his kindred, the relation in which he stood to the property and to the person pointed out for whom he seems to design a benefit, are circumstances tending to show what was his state of mind, what his end and aim in penning down his words. When popular expressions are found, no great stress is to be placed upon the several words that appear, as accurately indicating the thought or intention of the writer; for, not accuracy of expression, but a general resemblance to it, is all that in general can be expected from such single expressions; but in case of such language, the whole of the words used, or all taken together, will generally conduct the mind to the true intention of the writer.

It is understood by her counsel that her claim to the issue of the female slaves is resisted, for some, or all, of the following reasons: 1st. That it cannot, even from the first words found in this instrument, be inferred that it was by the testator intended that she should have more than such negroes as he *had received*, and became enabled to receive by the law, which, jure mariti, gave him not the issue, but only their mothers.

2nd. That by what is called an enumeration of certain slaves, which occurs next after these words, the previous words are narrowed down, and their function so limited and restricted that she is only entitled to such as are *named*; that all which he received is shown by what he has named; and named also in order to pass each negro by his or her name, to his legatee; and, therefore, that the issue do not go with their mothers to her. I likewise understand that this enumeration is to

be read without giving any effect to the characters, "&c.," found added after certain names; and if so, I have to say, as to this, that I cannot be expected to consent to *its* being narrowed down, by dropping from it these characters, any more than I can, to the first words being narrowed down by dropping from *them* the word "through," so as to get rid of its sense.

In opposition to all these objections made against her claim, I will endeavor to show that the scheme or plan of the testator was this: That he separated from the rest of his negroes those which were his wife's family negroes, and of these latter, he appears to have considered them to consist of two classes, viz., one class composed of such as he had reduced into his possession, even Horace that he sold; and the other class, such as he was entitled to receive from the estate of her father; and that as such classes, or, if not as such, then as one whole and entire class or stock, consisting of all his wife's family negroes, he intended to dispose of them to her; and nothing less than the whole, as well the stock as the increase, will satisfy the words "all the negroes, of every description, that I have received through or by her;" also that the words following these general ones, were not used by the testator for the purpose of narrowing these previous ones, nor at all to impair or restrict their function, but for another and different purpose, namely, to show in what sense he intended to apply these general words, and to guard against a misconception of his intention in using them.

It is true, that immediately after the first general words, by which he had already pointed out that it is his wife's family negroes that are the *subject* of the bequest, there occurs a videlecet, a. viz., and certain negroes are next described by their names, and at the end of the numbering, there is an et cetera (&c.) But to call this mere list of names, without the &c., an enumeration, is a misnomer, but provided that the &c. were stricken out, then the naming each and every negro would constitute it such; but so long as these characters are apparent on the face of the instrument, they form a part of

it, as well as the names. The word enumeration, according to Dr. Johnson, is the act of reckoning singly, or counting over singly, certain things. According to Mr. Webster, it is the act of counting or telling a *number*, by *naming* each particular article, or, an account of a *number* of things, in which mention is made of *every particular article*, and if the testator did attempt to do such an act, it appears by his using certain names and also the et cetera (&c.,) that he considered that to make a complete enumeration of the negroes, to which he had previously referred, it was necessary to add the et cetera (&c.) to the names. If, however, to the naming, the et cetera be considered as added, and its signification be given to it along with the names, it may then be properly called an enumeration. The characters, &c., have as certain a signification as the characters v, i, z; the v, i, z, is a contraction of the word videlicet, (in latin videre licet) and means, according to Dr. Johnson, "to wit," "that is," or "namely," and according to Mr. Webster, it means "to wit," "namely." The characters &, c, are a contraction of et cetera, which mean "and others," "and the rest," "and so on;" and the latter, as here used, denote not *other things*, but *other negroes*, but if other things, then "of the same sort," "of the like kind." See 3 Ire. Eq. 86, *Malcom and Gaul* v. *Purnell*, the words "other persons, whom he cannot now specify," added after naming certain creditors, and the sums due them; and also as to the words "other things," see *Young* v. *Young*, 3 Jones' Eq. 220. The words et cetera, mean things ejusdem speciei, or ejusdem modi, as found with the named negroes, "with which they stand connected in that clause," these words "are intended of like nature and species with *those before specified*," and these characters *also serve to show*, that the testator *intended for her* other negroes; as if he had said expressly, these named are but *a part*, there are others. But even if there be, as above admitted, an enumeration, yet it is denied that such enumeration contains any evidence that it was the testator's intention to narrow down the meaning of his previous general words, and without that did appear, the enumer-

ation simply, however complete, has no *such* effect as that.

The next words that occur are, "and also the undivided negroes of the estate of Wm. Kennedy, deceased," which show the testator's intention to give them to her, not as individuals, but as a stock, and as forming a part of what are included, or meant to be, in the previous general words.

The next, and last words, refer to a sale, by him made, of Horace, one of his wife's family negroes, and he says that having received by such sale $312, he gives that sum to her.

I have to ask attention to these last and closing expressions in this instrument, and whether it does not appear therefrom, that it was the intention of the testator to give her as well the stock as every part and parcel of *interest and profit* derivable therefrom. It seems that this, in connection with the fact that he was making a provision for her exclusively and against the claim of every relative, and not out of a part, but by giving to her all of her family negroes, explains what he meant by not only using the word "*by*," but the word "*through*" her, can it be supposed that when he referred to the sale of Horace and mentioned his price, and gives that to her, that he intended to make to her a pecuniary legacy, irrespective of the source from whence that money was by him received? And does it not also appear that he intended that no one of the negroes, or the proceeds, income or profit, of any of them, should go to any one but her?

By his mentioning "the undivided negroes," as it might be said that *they* did not come within the previous words, viz., "that he *had* received," he says that they, too, form a part of the bequest, and surely, *they* are not given as individuals, but as a class or stock. And last, he tells us that Horace's price comes also within the meaning and scope of the first general words, as if he had said, though I did not get the negro's price, jure mariti, yet, I received the price *through* my marriage with her. With respect to the boy Daniel, the child of Jin, who was born before the date of the will, and is not named therein, it is probable that he knew she had a child lately born, but did not know or remember his name, and on that account added

the et cetera to the names; but, be that as it may, if as is contended, the negroes given were intended to be given as a class or stock, then he is included in the class name. The same remark is applicable to the issue of "the undivided negroes;" Champion and others *ex parte*, Busbee's Eq. 247, 250.

I understand that it is contended against her, that the words subsequent to the first general ones, show an intention of the testator to restrain the meaning of the first. To this, I answer, by asking where is the evidence of it? Does the clause wherein he recognizes the undivided negroes which he was *thereafter* to acquire the possession of, denote such an intention? and does the last clause that refers to the sale of Horace, and gives to her the price, show an intention to narrow them? If it be because the last words do more clearly and certainly describe the subject of the bequest, and thereby operate to restrain the generality of the first, then I ask whether the first words will not bear a comparison with the last in point of clearness and certainty, and that comparison be, on the whole, favorable to the first? It appears to me that so far from the last words showing more clearly his intent, they themselves do stand in need of explanation from the first; that each mutually reflect light upon the other, and that the last words do in fact receive as much *from* the first, as they do convey *to* the first; but the last do not, in any way, that I can perceive or conceive, restrain the effect and function of the first. If there be any evidence of the last words, or any part or portion of them, showing, or tending to show, such *restraint*, he that alleges it, should show wherein, as well as its nature, and the extent of it.

But next I say, that from a consideration of one part, even of that of the words called the enumerating ones, it does appear that the testator's intention was to pass the issue, because the issue of one of the females, which issue was born *after* he had received them, and before the date of the will, to wit, Daniel, the child of Jin, is referred to by the &c., and another one of Jin's issue, William, who was also born after the testator received Jin into his possession, is named in the will;

and also by considering another part of the enumerating part, certain negroes are described, not singly, but as a class or stock; and it does, in fact, appear by consideration of the whole of the enumeration, that it was the intention of the testator to give her the issue, and that such intention as fully appears from the subsequent words, all taken together, as from the first general words. I will next present to the consideration of the Court several adjudged cases, that relate to the construction put upon such words as are found in this instrument, and unless I am mistaken in my inference, all of them resemble in certain respects, and some of them exactly, the case before the Court. I think that the reasons and principles upon which their decision is professedly grounded, are applicable to this case; that they do show, that by certain forms of expression used by the testator, respecting the disposition of a female, or female slaves, and upon a fair construction of them, the issue may, and does, pass along with the mother; and that from such words and expressions used by the testator as are found in this case, the Court has inferred an intention to pass the issue along with their mothers, and declared that such is their purport and effect.

1st. *Long* v. *Long*, 2 Mur. 19, general words.

2nd. *Cromartie* v. *Robinson*, 2 Jones' Eq. 219, general words.

3rd. *Drake* v. *Merrill*, 2 Jones' Law, 368, general words.

4th. *Fagan* v. *Jones*, 2 Dev. and Bat. Eq. 70, enumeration after general words.

5th. *Champion and others, ex parte*, Busb. Eq. 247, enumeration after general words.

6th. *Caffee* v. *Davis*, 1 Jones' Eq. 8, and remarks of PEARSON, J., 2 Jones' Eq. 221, intention by general words to pass issue.

7th *Joiner* v. *Joiner*, 2 Jones' Eq. 71, 74, intention by general words to pass issue. 3 Ire. Eq. 86, "other persons;" 3 Jones' Eq. 220, "other things."

I cite these adjudged cases, as authorities, because I think that in them, is to be found the fact, that from similar words, and such also as are exactly the same as here used, and used on like occasions, it has been established that the courts are

to infer, and do infer, that he that used them, did intend to pass the issue of slaves along with their mothers; that when their mothers are given as a class or stock, that thereby the issue are inferred to be also given. I cite them as containing evidence of a *rule* or *law* governing such cases. If this be not the rule found to be applied in these cases, then there is, as yet, no fixed rule established to direct any that do employ such general words and phrases as these, in the use of them; or, to show what they may expect will be the recognized effect of their using them, when they come to be drawn into question before our judicial tribunals.

7th enquiry, with respect to the time from which interest is to be computed upon a legacy. A legacy in money, when no time is fixed for its payment, is payable at the testator's death, and when there are no debts, the executor must pay interest on it from the death; 7 Ire. Eq. 127. It is payable from the time of demanding the legacy, after that legacy has become due; 4 Ire. Eq. 195. When there are debts, interest is not to be charged *against* the executor, until two years from the probate; 3 Ire. Eq. 9, 15, *Hester* v. *Hester*.

6th enquiry, with respect to the hires and profits and the expenses of the slaves. The hires or profits of such slaves as are given to a legatee, go with the principal, i. e., the slaves which are the subject of the gift to her; so also the losses and expenses paid for such as are given to her, must be allowed to the administrator against her; 6 Ire. Eq. 416. The issue of slaves born after testator's death, go to the legatee of their mother; 8 Ire. Eq., *Wooten* v. *Becton*.

1st and 2nd enquiry. With respect to the 1st and 2nd enquiries made by the bill of complaint, they are answered as to the negroes and other property, including bank, plank road and gold-mine stock, by Revised Code, ch. 118, sec. 13, and ch. 64, sec. 1 (3), and ch. 26, sec. 31, 5 Ire Rep. 136; and in this case the widow is entitled to one half of the undisposed of surplus, and the residue goes equally to the next of kin.

Pearson, J. Every one who reads the testament submit-

ted to us for construction will, at the first blush, be struck with its singularity in this: it has but one clause; no executor is appointed; it disposes of but one class of the testator's property, to wit, that which he acquired *jure mariti*, and there is an intention to die intestate as to the other class, to wit, that which he acquired by his own exertions. These circumstances force upon the mind the conviction that it was the testator's intention to give back to his wife all that he got by her. Whether this was in pursuance of an ante-nuptial agreement, or because of the wife's importunity, or because of a sudden freak of temper, excited by a "falling out" or quarrel of the parties, it is unnecessary to enquire. No matter what may have caused it, the fact is apparent on the face of the paper.

So the case falls within the principle established by *Jessup* v. *Jessup*, Busb. Eq. 180; *Cromartie* v. *Robinson*, 2 Jones' Eq. 219, and many others.

It is clear that the issue or increase of the slaves acquired from the estate of William Kennedy, pass under the general words, without reference to the time of their birth.

It is equally clear that the issue or increase of the slaves which the testator, at the writing of his will, had reduced into possession *jure mariti*, also pass under the general words, without reference to the time of their birth, unless the enumeration has the effect of restricting the meaning of these words.

When two modes of description are used, and there is a discrepancy, that is to be followed, in respect to which there is the least liability to mistake. This rule is well settled. *Carter* v. *Lowe*, 2 Jones' Eq. 379, among others, furnishes a striking instance; the testator had loaned to his son *Thornton* several slaves, to wit, "Lucy" and others; he had also loaned to his son *Archer* several slaves, to wit, "Sylvia" and others; by his will he gives to Thornton the following slaves, to wit, Sylvia and others, naming them, *being the negroes I louned him some years since;* and he gave to Archer the following slaves, to wit, "Lucy, &c.," (naming them) *being the*

negroes I loaned him some years since. This enumeration exactly reversed the thing, so there was a discrepancy between the mode of description by the enumeration, and the other mode by reference to the prior loans, and it was held that the latter description was to be followed, because in respect to it there could be no mistake; whereas, he might have forgotten which family of negroes he had given to the one, and which to the other, and so made a mistake in attempting to name them; "but he could not have forgotten the fact of the previous gifts."

Apply the principle to our case; there can be no mistake in the description, "all the negroes of every description that I received through or by her, i. e., that I acquired *jure mariti*;" but the attempt at enumeration is liable to mistake. Suppose it had omitted one of the old negroes, surely that negro would, nevertheless, pass under the general description. So, if it had omitted a child *born before the writing of the will*, (which is admitted to be the fact in regard to one of them,) certainly that child will pass. The same principle applies to a child born after the writing of the will, for it falls under the general words, and is included in *the class* intended to be given; in fact, it was impossible to include that in the particular description, which accounts for the "&c." at the end of the enumeration, whereby it is left open to take in others of the same class that were not named.

This conclusion is confirmed by the further fact, that in regard to the negroes of the estate of William Kennedy, the children born between the writing of the will and the death of the testator, pass under the bequest; and no reason can be suggested why he intended to make it otherwise as to the negroes that he had before reduced into possession, especially in face of the fact, that he adheres so strictly to his intention to give to his wife all that he had acquired *jure mariti*, as to direct the price of one of the class that he had sold, to be paid to her in cash.

We think it is clear that Mrs. Allen is entitled to the hires of the slaves from the date of the death of her husband, and

on the same principle she is entitled to *interest* upon $312, directed to be paid in *cash;* the principal standing for the negro he had sold and the interest for his hire.

PER CURIAM, There will be a decree declaring the rights of the defendant, Mrs. Allen, according to this opinion.

A. W. CLAYTON *against* A. J. GLOVER.

A court of equity has power to set aside a sale made under its order, as well at the instance of the purchaser, as of the owner of the property.

Where the Judge in the Court below refused to set aside a sale because of a mistaken idea that his discretion was controlled by a principle of law which had no application, it was *Held* an appeal would lie to this Court, and that the question should be sent back to the Court below, that it may be again considered by the Court, and his discretion fairly exercised.

APPEAL from a decree made by his Honor, Judge CALDWELL, at the Court of Equity of Chowan Fall Term, 1857.

The plaintiff, by his guardian, had filed his petition at the Spring Term of the Court, for the sale of a slave named Alfred. At the Fall Term, 1857, the clerk and master made the following report: "In this case the undersigned reports, that he exposed the slave Alfred to sale, at the court-house door, in the town of Edenton, on the 3rd Monday in June, 1857, on a credit of six and twelve months, with interest from date, after deducting $75 in cash to pay costs; having first duly advertised according to an order of this Court, at Spring Term, 1857, at which time and place, appeared Andrew J. Glover, and bid for the said slave $1000, which is the full value of said slave."

"At the time of the sale, and in the hearing of all persons present, the undersigned made known, that there was a defect in each of the said slave's eyes, and called up the said

slave so near the stand, that all persons present could see the said defect, which was patent."

"After that declaration and the sale, the said Glover took possession of the said slave, but refused to comply with the terms of the sale on account of said defects."

"The undersigned has not since exercised any control over the said slave, nor has the guardian, on whose petition he was sold. Said Glover still refuses to comply with the terms of the sale."

At this Court, (Fall Term, 1857,) the purchaser, Glover, appeared and filed the following affidavits of himself and Edward Warren and Thomas Gregory, upon which he based a motion to have the sale of the slave Alfred set aside, viz:

"A. J. Glover maketh oath, that he was not present when the condition of the said slaves' eyes was made known by the clerk and master, that he saw the white spots in the eyes, but thought the said slave had glass-eyes, which is a sure sign of permanent vision; that he afterwards consulted a physician, who, on an examination, informed him that the eyes were defective, and that the said slave might go blind immediately."

"Edward Warren being duly sworn, maketh oath that he is a physician, and that at the request of A. J. Glover, he examined the eyes of the slave Alfred, and found them defective; that there was a white spot upon each eye, produced by disease, which may increase and finally destroy the sight of the said slave."

"Thomas Gregory maketh oath, that he considers the said slave worth about $500, with his eyes defective."

His Honor, after hearing the report of the clerk and master, and the affidavit of A. J. Glover, and the depositions of the witnesses, decreed as follows: "That inasmuch as there is no warranty of soundness in the sale, by a clerk and master in equity, that the sale and report be, in all respects, confirmed, and that the said A. J. Glover do comply with the terms of sale." From which decree Glover appealed.

No counsel for plaintiff.
Heath, for defendant.

BATTLE, J. Had his Honor, after hearing the report of the clerk and master, and the affidavits produced by the purchaser, refused to set aside the sale, upon the ground that the purchaser had shown no sufficient cause for relief, there might have been a question, whether upon an appeal, we could review his decision; but he declined to grant relief upon another ground, to wit, a want of authority; assigning as a reason, that there was no warranty of soundness in the sale of a slave by a clerk and master in equity. This was putting the case upon a question of law, and not of fact, and we, therefore, think an appeal lies from his order or decree. See *Freeman* v. *Morris*, Busb. Rep. 287, and the cases therein referred to.

The Court of Equity has, undoubtedly, the power to set aside a judicial sale, made in pursuance of its order, whenever the owner of the property, or those who act for him, can show that the price bid is inadequate, and it would seem that in fairness, the court ought to have the corresponding power to relieve the purchaser, whenever, from fraud and mistake, he has bid too much for the property; and such, from the authorities, we find to be the case. In *Morehead* v. *Frederick*, (stated in Sug. on Ven. and Pur. page 80, and in the App. No. 10, of the Am. from 9th London Ed.) the purchaser was relieved from his purchase, on the ground of mistake; and in Note 3, to 2 Dan. Ch. Prac. 1515, (Am. Ed.) we find that similar relief has been granted by courts of Chancery of several of our sister States. The sale being made under its authority, the court will see that justice shall be done to both vendor and purchaser, upon the fairest principles of equity and good conscience.

Believing that his Honor erred, in supposing that he had no power to interpose in favor of the purchaser, his interlocutory order must be reversed, and this opinion certified to the Court below.

PER CURIAM, Decree accordingly.

WILLIAM F. NEWELL, *administrator, and others, against* DEMPSEY TAYLOR *and others.*

A deed made in 1835, conveying a slave to a man and one's wife "during their joint life-time and no longer," passes the entire interest in the slave, notwithstanding the attempted restriction.

Note. The Revised Code, ch. 37, sec. 21, varies from the Rev. Stat. ch. 37, sec. 22, and would require, on a deed made since the latter went into effect, a different construction from that given in this case.

APPEAL from an interlocutory order made by the Court of Equity of New-Hanover county, at the Spring Term, 1857, his Honor Judge PERSON presiding.

The bill, in this case, was filed by the plaintiffs, as legatees in remainder under the last will and testament of Theophilus Swinson, who died in the year 1835. By this will, a certain female slave named Satira, and her future increase, were bequeathed to Dempsey Taylor and his wife Sarah, for their joint lives, and after their deaths, to the plaintiffs. The bill alleged that the defendant Taylor had sold several of the slaves thus bequeathed, and that they had been removed by the purchaser beyond the limits of the State, and that he threatened to sell the remainder of them, and that there was a strong probability that these, also, would be removed out of the State. The prayer was for a sequestration as to these remaining slaves, and for general relief. Merriman, the purchaser of Satira and her children, was made a party defendant.

Under this bill, a writ of sequestration was ordered in vacation, and two of the children of Satira, Jerry and Jim, remaining in the hands of the defendant Taylor, were seized by virtue of this writ, and were so held at the coming in of the answers.

The defendants, in their answer, admitted the bequest as set forth in the plaintiffs' bill, but alleged, in bar of the plaintiff's equity, that, previously to the making of the will in question, to wit, on the 14th day of January, 1835, the said Theophilus, by a deed in writing, properly executed, passed the absolute

right in the said slave Satira and her increase, to the defendant Taylor, so that the plaintiffs had no right, title or estate, present, or in remainder, in the said woman Satira, or any of her increase, which said deed is as follows: "Know all men by these presents, that I, Theophilus Swinson, of the county and State aforesaid, have given, granted, sold and delivered to Dempsey Taylor and Sarah Taylor, his wife, one certain negro girl named Satira, now about the age of ten years, for, and in consideration of, the sum of two hundred and fifty dollars, for and during the natural life-time of them, the said Dempsey and Sarah Taylor, and no longer. In testimony whereof, &c."

Upon the coming in of this answer, the defendant moved for the removal of the sequestration, and the restoration of the slaves held under it; which motion was refused by his Honor, and the sequestration ordered to be continued. From which order the defendants prayed and obtained an appeal to this Court.

Troy, for the plaintiffs.
W. A. Wright, for the defendants.

BATTLE, J. The case turns upon the effect which the act of 1823, 1 Rev. Stat. ch. 37, sec. 22, has upon the deed by which Theophilus Swinson, under whom the plaintiff claims, conveyed the slave Satira, to the defendant Dempsey Taylor and his wife, for life. This deed bears date 14th of January, 1835, and it is admitted that unless the act above referred to gives it a different effect, it conveys an absolute interest in the said slaves, to Taylor and wife, notwithstanding the attempted restriction of the estate in her to them for life, and no longer. The words of the act are that "every limitation, by deed or writing, of a slave or slaves, which limitation, if contained in a last will and testament, would be good and effectual as an executory devise or bequest, shall be, and is, hereby declared to be a good and effectual limitation in remainder of such slave or slaves, and any limitation made or reserved to the

grantor, vendor, or donor, in any such deed, or writing, of a slave or slaves, shall be good and effectual in law. *Provided* such limitation, had it been made to another person, would be good and effectual according to the preceding clause." It is manifest that the present case does not come within the letter of the act, and it would be too strained a construction to hold it to be within the spirit and intent of it. The particular mischief which the legislators had in view, and which they intended to remedy was, that a limitation, by deed, of a remainder in slaves, or any other chattel property, after a life estate granted, was void; the rule of the common law being that the grantee for life took the whole interest in such slaves, or other personal property. A similar limitation of a remainder contained in a will, was held to be good as an executory devise, and the like doctrine was applied to limitations by the way of trust. But, in a deed at common law, so strong was the rule that there could not be a limitation of a remainder in personal chattels after a life estate granted therein, that it was held, that if slaves, or other chattels, were given or granted absolutely, but with a reservation of a life estate to the donor or grantor, the limitation was void, because the reserved life estate absorbed the whole interest. This doctrine was clearly settled in this State by the cases of *Black* v. *Beatty*, 2 Murph. Rep. 240, *Graham* v. *Graham*, 2 Hawk's Rep. 322, *Foscue* v. *Foscue*, 3 Hawk's Rep. 538, and *Sutton* v. *Hallowell*, 2 Dev. Rep. 185, and it was found so often to disappoint the intention of parents in making gifts of slaves to their children, reserving an estate for life to themselves, or gifts to their daughters for life, with limitations over to the children of such daughters, that the Legislature passed the act of 1823, above referred to, to prevent such mischief for the future.

The terms of the act clearly embrace all such cases, but in no fair sense can they be applied to a case like the present, where there is no limitation over after a remainder for life, or reservation of a life estate in the grantor after a conveyance of the absolute interest in the slave. The case before us, then,

must be governed by the rules of the common law, which make this grant of the life estate in the slave the grant of the absolute interest in her.

It may not be improper to remark that the Revised Code, chapter 37, section 21, varies from the Revised Statutes, and that, according to the terms therein used, the grant of a life estate only in slaves, in a deed executed since the Code went into operation, would not convey the absolute estate in such slaves, but would carry only a life estate to the grantee, leaving a reversionary interest in the grantor.

The result of our opinion being that the plaintiffs have no interest in the slaves in controversy, the interlocutory order to continue the sequestration of the slaves must be reversed, and this must be certified to the Court below.

PER CURIAM, Decree accordingly.

WILLIAM S. DEVANE, *Adm'r. of* PORTER R. MOORE, *against* WILLIAM S. LARKINS, *Ex'r., and others.*

It is a well known rule of construction, that if the expressions in a will be ambiguous, and the intention doubtful, the court leans in favor of holding a legacy to be vested rather than contingent.

A bequest "that all the balance of my property shall go to the benefit and support of my beloved wife and children during my wife's widowhood and the minority of my children, but should my wife marry again, she shall receive her distributive or child's part of my estate, and should any of my children attain the age of twenty-one, then such child or children, shall receive his distributive share, it being equally divided among my wife and children," was *Held* to be a vested interest in each of the legatees from the death of the testator.

CAUSE removed from the Court of Equity of the county of New Hanover.

The bill was filed for the recovery of a legacy arising to the plaintiff's intestate, under the will of Benjamin C. Moore, and it was admitted on both sides that the plaintiff's right to

recover depended on the construction that might be given to the will. After giving several slaves to a daughter, Mary D. Moore, the will is as follows: Item 3rd. "It is my will and desire, that all the balance of my property, both real and personal, shall go to the benefit and support of my beloved wife, Mary J. Moore, and my other children, Margaret A. Moore, Harriet D. Moore and Porter R. Moore, during my wife's widowhood and the minority of said children; but should my wife marry again, it is my will that she shall receive her distributive share or child's part out of my estate; and should any of my children, named in the clause, live to attain to the age of twenty-one years, then such child or children shall, upon reaching said age, receive his, her or their distributive share or shares, it being equally divided among my wife and three last children named; and at the death of my wife, it is my will and desire, that my first named child, Mary D. Devane, shall have her distributive share or draw of my real estate, her and her lawful heirs."

Porter R. Moore, the legatee named in this clause, died before he reached the age of twenty-one and during the widowhood of his mother, Mary J., and the plaintiff administered on his estate. After the death of Porter R. Moore, the widow, Mary J., intermarried with Joel Hines, and it is contended that on the happening of that event, the estate became divisible, and his intestate was entitled to draw his legacy; that his legacy was vested in the legatee, and only the time of enjoyment was postponed.

The defendants demurred to the bill, generally, for the want of equity.

The cause was set down for argument on the bill and demurrer, and sent to this Court by consent.

E. G. Haywood and *Fowle*, for plaintiff.
Strange and *Howze*, for defendants.

BATTLE, J. The only question in the case is, whether the plaintiff's intestate, Porter R. Moore, took a vested or a con-

tingent interest in the residue of the personal property bequeathed to him and others in that clause of his father's will. In support of the demurrer, the counsel for the defendants, contend that the share given to the testator's widow was clearly contingent, and argue from that the contingency of the shares limited to the children. The counsel for the plaintiff insist, on the contrary, that the part bequeathed to the widow was not contingent; but if it were, it did not follow, as a necessary consequence, that the parts given to the children, respectively, were also contingent. We agree with the plaintiff's counsel, that the respective shares of the widow and children, mentioned in the above-mentioned clause, were all vested immediately upon the death of the testator, and that upon a fair construction of the will, the contingency therein mentioned, applied only to the time when each should take his or her share out of the common stock.

It is a well known rule of construction, that if the expressions in a will be ambiguous, and the intention doubtful, the Court leans in favor of holding a legacy to be vested rather than contingent; *Stuart* v. *Bruor*, 6 Ves. Jr. 522; *Litwell* v. *Bernard*, Ibid. 522. We hardly deem it necessary to call in aid this rule, in endeavoring to carry out the wishes of the testator in the present will. He clearly gives the fund immediately for the benefit and support of his widow and three of his children. They are to have it in common until certain events shall happen, which would make partition necessary. The widow might marry, or the children might, one after another, come of age, and then she or he "shall receive" her or his distributive share. The very terms used, "shall receive," plainly imply that they respectively had vested interests in the property before that time. This construction is, we think, the only fair one which can be put upon the words of the will, without reference to the authority of adjudicated cases; but if any such aid were needed, it may be found in several cases heretofore decided in this Court.

In the case of *Johnson* v. *Baker*, 3 Murp. Rep. 318, the testator bequeathed as follows: "I give and bequeath to my

said wife, all the property I received with her, to her and her executors and administrators; and the rest of my estate, I also give her, till my son comes of lawful age, when I will that the same shall belong to him, and in the mean time, it is my will and desire, that he be maintained and educated at a reasonable expense out of my estate, in proportion to the value of all my property and its general profits and income."

The widow died, leaving her son surviving, and then he died under the age of twenty-one years. The question was whether the legacy was vested or contingent upon the son's arriving at full age. The Court held that the legacy became vested immediately upon the death of the testator, and that the words "till his son should come to lawful age, when the property should belong to him," did not import a contingency, but only denoted the time when the remainder, limited by the will, was to vest in possession, the bequest being considered as made subject to the intermediate estate created out of it, and made an exception to it.

In *Clancy* v. *Dickey*, 2 Hawks' Rep. 498, the will, upon which the question arose, contained the following clause: "It is my will and desire, that my negroes should be kept together until my children arrive to full age, or marry, and then to be divided between my beloved wife and children, share and share alike, equally," and "it is my will and desire, that whenever any of my children arrives at full age, or marries, that his, or her, share of my estate be delivered to him, or her, immediately." The Court held the legacy to the children to be vested during their minority, and not to depend upon their arriving at full age.

The case of *Guyther* v. *Taylor*, 3 Ire. Eq. Rep. 323, is an instructive one. A testator, among other bequests, made the following: "It is my will, that my negroes and stock be kept on the plantation whereon I live, until my son Kinchen attains the age of twenty-one years. Item. I give to my son Joshua, $1000, to be raised from the farm. Item. I give and bequeath to my three daughters, Maria A. Guyther, Harriet Jane Taylor and Charity D. Taylor, and my son Kinchen,

to be equally divided between them, my negroes, when my son Kinchen arrives to the age of twenty-one years. Item. It is my will that the residue of my estate, of every description, belong to my son Kinchen Taylor." RUFFIN, C. J., in delivering the opinion of the Court said, that in respect to gifts of personal estate by will, the law is, that the word "when," is a word of condition, and imports that the time *when* the legatee is to receive the bounty is of the essence of the donation, unless there be some expression to explain it or some provision of the context to control it." He then went on to state that a direction in the will, making a disposition of the property until the time specified, is such a provision as will control the general rule. So also the expression in the will "to be equally divided between them," is equivalent to the expression "payable," or "to be paid," in explaining the word "when," or any other word of condition. The opinion concluded, by declaring that the son and three daughters took vested and equal interests, under the clause in which was contained the bequest of the negroes.

The rules established by these cases, appear to be decisive of the present, and the only case which seems to be in opposition to these rules, is that of *Anderson* v. *Felton*, 1 Ire. Eq. Rep. 55, cited and relied upon by the defendants' counsel. There, the testator, after giving his manor plantation to his son, and two other plantations to his four daughters, and providing that all his lands should be rented, and his negroes hired out until his youngest daughter became fifteen years old, and that his children should be educated and boarded out of the estate, proceeded as follows: "I likewise will, that at the time my youngest daughter, Sarah Thatch, arrives to the age of fifteen years, all my negroes, money and perishable estate, shall be divided between all my children. In case any of my children should be married before Sarah Thatch arrives at fifteen years of age, then my will is, that his or her board shall be stopped, and no further charge be paid for him or her until Sarah Thatch arrives to fifteen, when he or she shall receive his or her proportional part." The Court

decided that the legacies to the children were not vested, but contingent upon their living to the period when the testator's youngest daughter should arrive to the age of fifteen years, or in case of her death, to the time when she would have arrived at that age, had she lived, and that only those of the children who were alive at that period, could take. Upon examining the case, it will be seen that the main ground upon which it was put, was, "that there were no words of gift of the personalty, except by inference from the direction to divide, and as to the period of division, and consequently of gift, the will uses terms of strict condition, 'at the time my daughter Sarah arrives at fifteen,' and 'when he or she shall receive,'" &c. The Court also remarked, that the intermediate profits were not given to the children as distinct from the capital, nor for the purpose of maintenance; that the maintenance was merely a *charge*, which might consume the profits, or it might greatly exceed it, and in that case, the capital must supply the deficiency; that besides, the maintenance was to cease upon the marriage of a child before the division. The Court, therefore, said, "The provision for maintenance, will not bring the case within that exception to the general principle, which is founded on a gift of the intermediate interest or profit, to the same legatee, to whom the future legacy of the capital is given. That does not apply, if the maintenance is not to absorb the whole amount of profits, or if it be not restricted to that as the only fund; *Pulsford* v. *Hunter*, 3 Bro. Ch. Ca. 416; *Hanson* v. *Graham*, 6 Ves. Jr., 249; 1 Rop. on Leg. 497."

Thus explained, the case is not at all inconsistent with the others to which we have referred, and presents no obstacle in the way of our conclusion, that, in the present case, the legacy to the widow and children became vested in them, as tenants in common, immediately upon the death of the testator.

The demurrer must be overruled with costs, and the cause must be remitted to the Court below, in order that the defendants may put in answers.

PER CURIAM, Decree accordingly.

WILLIAM FAIRLY *against* ARCHIBALD PRIEST *and others.*

Where a testator by his will gave property to a son and three daughters, with a provision that, on the death of either of them intestate, or without *heirs of his or her body*, his or her share should go over, it was *Held* that the intention was not that it should go over on the death of the mother of an illegitimate child, but that the latter was entitled to his mother's share.

CAUSE transferred from the Court of Equity of Richmond county.

This cause was before the Court, December Term, 1856, ante, 21.

The bill alleges that the plaintiff is the illegitimate son of Flora Priest, who afterwards intermarried with Daniel Lytch; that Angus Priest, her father, devised and bequeathed as follows:

"*First*, I give and bequeath to my son, Archibald Priest, all my lands with their improvements, reserving the right and privilege to my daughters, Flora Priest, Elizabeth Priest and Sarah Priest, to remain in the occupancy of the said land in common with my son Archibald, as long as they or any of them remain unmarried."

"I give and bequeath to my daughter Sarah Priest, my negro boy Tom; and to my daughter Flora Priest, my negro boy Wilson; and to my daughter Elizabeth Priest, my negro boy Allen; and my will and desire is, that my negro woman Sylvia remain on the plantation as the common property of my son Archibald Priest and his three first mentioned sisters, as long as any of them remain unmarried here; and should they all, at any time, marry or leave the place, then to be equally divided between them; and in regard to the future increase of my negro woman Sylvia, my desire is that her first child be given equally to my three grand-children, Daniel Snead, Anna Snead and Mary Snead; that her second child be given to my daughter Sarah, and all her future children belong equally to my son Archibald and his three sisters, Flora, Elizabeth and Sarah. My will and desire is that the whole of my

stock, not already mentioned, of horses, cattle, hogs and sheep, household furniture and the goods and chattels which I possess, shall be owned and possessed by my three first named daughters and my son Archibald Priest, in common, except one cow and calf, which I direct to be given to my grand-son, William Fairley; and should my son Archibald Priest, or either of my three first-named daughters, die intestate, or without heirs of their own body, the estate of the deceased person or persons to be inherited by the surviving ones of them alone, or their legitimate heirs."

Previously to the intermarriage of the said Daniel Lytch and Flora Priest, they entered into a marriage contract, by which all the property which she had received or might receive from her father's estate, was conveyed to Archibald Priest, as trustee, for the sole and separate use of the said Flora for her life, and after her death to "descend to, and be enjoyed by, the heirs of the said Flora, in the same manner as if she had remained single and unmarried."

The said Archibald accepted the trust and had this deed duly authenticated.

Elizabeth Priest died intestate in the year 1853, whereby her interest vested in her brother Archibald, and her two sisters, Flora and Sarah. Shortly after the death of Elizabeth, Flora died intestate, leaving her brother Archibald and her sister Sarah and the plaintiff, William Fairley, illegitimate child of Flora, her surviving.

Besides the two children bequeathed to the Sneads and to Sarah, the woman Sylvia had six others, which went into the possession of Archibald Priest, and he claims the same as belonging to himself and his sister Sarah in absolute right, and refused, on demand, to account with the plaintiff for Flora's share.

Archibald Priest, Sarah Priest, Daniel Lytch, the husband of Flora, and the administrator of Elizabeth, were made parties defendant, and judgment, pro confesso, was taken as to Daniel Lytch, the administrator of Elizabeth.

The plaintiff, having administered on the estate of his mother,

claimed the property in question in that capacity; likewise, in his own right, under the provisions of the deed between Daniel Lytch and his mother, the said Flora. The prayer was for an account and for general relief.

The cause came to this Court formerly upon demurrer, which was over-ruled, ante 21, and was remanded to the Court below.

The answers of the defendants, disclosed no fact varying the above statement of the case. It was set down on bill and answer. The only question was as to William Fairley's right to succeed to the property of his mother, the said Flora.

Kelly and *Banks*, for the plaintiff.
Troy, for the defendants.

BATTLE, J. When this case was before us on a demurrer at December Term, 1856, (see ante 21,) it was held that the plaintiff was entitled to the share which accrued to the mother as one of the survivors upon the death of Elizabeth Priest, intestate and without issue. The question whether the plaintiff is entitled to the original share given to his mother by her father's will, and which was there said would be an interesting question of construction, is now presented to us by the pleadings which followed the over-ruling of the demurrer.

Upon a fair construction of the will of Angus Priest, and the operation of the 4th section of the 64th chapter of the Rev. Statutes, (see also Rev. Code, ch. 64, sec. 5,) we are satisfied that the plaintiff's claim to the original share of his mother, is as well founded as it is to her accrued share.

The property given by the will to the testator's son and three daughters, is given to them absolutely, but with an executory bequest over to the survivors upon the death of either, intestate and without heirs of his or her own body. The expression without heirs of their own body, manifestly means without issue or children. Now, it is clear that, if the plaintiff had been legitimate, his mother's portion would not have been subject to the limitation over to the surviving

brother and sister, but would have remained her absolute property, and, of course, would have devolved upon her personal representative, and then have gone to the plaintiff as her next of kin. But, being illegitimate, he could not at common law have been regarded as the heir of her body, that is, her issue or child, and she would have been deemed to have died without any such heir, issue, or child.

This rule of the common law has been altered by the section and chapter of the Rev. Statutes, to which we have referred, and which was taken from the act of 1799, (ch. 522, of the Rev. Code of 1820.) The effect of that act has been to legitimate the plaintiff as to his mother, and to make him, in law, the heir of her own body, or her issue or child. See *Kimbrough* v. *Davis*, 1 Dev. Eq. 71; *Coor* v. *Starling*, 1 Jones' Eq. Rep. 243. This operation of the law seems to be in accordance with the intention of the testator, who, in his will, recognizes the plaintiff as his grand-son, and after using the words "without heirs of their own body," in connection with the death of one or more of the legatees, limits the property to the "surviving ones of them alone, or *their legitimate heirs*." He thus seems to have understood the meaning of the term "legitimate," and if the plaintiff's mother had died before, instead of after her sister Elizabeth, it might have excluded him from the succession to the share of the said Elizabeth, limited to his mother, or her "legitimate heir."

The ante-nuptial marriage settlement made between the plaintiff's mother and her husband, Daniel Lytch, had the effect to secure the property in question to her sole and separate use, and he sets up no claim to it; the consequence is that the plaintiff, as the administrator of his mother, is entitled to the said property, and to all the necessary accounts from the parties who have the possession of it; and a decree to that effect may be drawn, and the cause will be retained for further directions upon the coming in of the report.

PER CURIAM, Decree accordingly.

THOMAS S. EVANS AND HENRY S. EVANS *against* DUNCAN KING AND SARAH J. HOLMES.

The fact that it is unusual for a man to make a trust in favor of a child, which his wife may have by another husband, will not, of *itself*, justify a court to depart from the ordinary meaning of terms used in a deed.

The declaration of an executed trust of land, will have exactly the same construction as if it had been a conveyance of the legal estate; such a declaration, therefore, that does not contain words of inheritance, passes only an estate for life.

THIS was a cause removed from the Court Equity of Bladen county.

James Holmes, on the 22d of February, 1847, executed to defendant Duncan King a deed of trust, conveying to him and his heirs, several tracts of land and two female slaves, with their three children and future increase, and some other personal property, upon the following trust, viz: "In trust, nevertheless, that the said Duncan King will retain the aforesaid described land, and other property, for the sole support and maintenance of my wife, Elizabeth L. Holmes, and my daughter Sarah J. Holmes, and any child or children that the aforesaid Elizabeth L. Holmes may hereafter have, so that the same shall not be liable for the debts of the said James Holmes, or in any manner responsible to his creditors, either at law or in equity."

James Holmes died during that year, his widow, Elizabeth L. Holmes, and his daughter, him surviving.

In May, 1850, the widow intermarried with the plaintiff Thomas S. Evans, and having had issue of that marriage, the other plaintiff, Henry S. Evans, she died in 1855, leaving her husband, said Thomas S., and her two children, Sarah J. and Henry S., her surviving. Thomas S., the husband, administered on the estate of his deceased wife, and brought this suit in behalf of himself and his son Henry S., against the trustee, King, and daughter, Sarah J. Holmes, claiming, *jure mariti*, his wife's interest in the property conveyed in the deed of

trust, and a share for his son Henry, by force of the words of that instrument.

The defendants, King, the trustee, and Sarah J. Holmes, answered, admitting the facts as above stated, but contesting the plaintiffs' right to recover any thing under the deed of trust.

Cause set down for hearing on the bill and answer, and sent to this Court.

E. G. Haywood and *Baker*, for the plaintiffs.
Troy, for defendants.

PEARSON, J. This is an *executed* trust, i. e., a trust of which the scheme has, in the outset, been completely declared, as distinguished from an *executory* trust, of which the scheme has been imperfectly declared in the outset, and the creator of the trust has merely denoted his ultimate object, imposing on the trustee, or on the court, the duty of effectuating it in the most convenient way. The terms in which an executed trust is declared, are interpreted by the ordinary rules of law. The terms in which it is declared in this deed, are, "for the sole support and maintenance of my wife, Elizabeth L. Holmes, and my daughter, Sarah J. Holmes, and any *child or children that the aforesaid Elizabeth L. Holmes may hereafter have.*"

The question is, does the defendant Henry, a child of Elizabeth L. Holmes by a second husband, take under this deed. He fully answers the description, and we can see no sufficient ground upon which to exclude him.

It is certainly unusual for a man to convey property, with an intent to provide for a child that his wife may have by another husband; but he may do so if he chooses, and the fact, that it is unusual, will not, of itself, justify a court in departing from the ordinary meaning of the terms used in the deed. There is nothing whatever in the deed to qualify or explain the words "and any child or children that the aforesaid Elizabeth L. Holmes may hereafter have." He does not even say "my wife." In *Good* v. *Harris*, 2 Ire. Eq. Rep. 630,

where a trust was declared for the wife and her children, the Court thought that the recital, that he was embarrassed and made the conveyance for the purpose of paying his debts and to secure a maintenance for his family, taken in connection with the consideration, that it was unusual and against the common sense of self-preservation, for an embarrassed man to stint his own children in order to provide for the children of his wife by two former husbands, justified a departure from the ordinary meaning of the words in which the trust was declared. So, that case supports the position, that where there is nothing in the deed to qualify or explain, the words must be taken in their ordinary acceptation. We are of opinion, that the defendant Henry takes under the deed.

2nd. The deed conveys slaves and other personal property, and also land, and there are no words of limitation. In respect to the personalty, an absolute estate vested in Elizabeth and Sarah Holmes, subject to open and let in any after-born child, which can be done by means of a trust as well as a will; and as the deed gives the wife a separate estate, so as to exclude her husband, it follows that Sarah Holmes takes one third, the plaintiff Henry one third, and the plaintiff Thomas S. Evans the other third, *jure mariti*.

In respect to the land, as the conveyance is by deed, and no words of inheritance are used, if it was of the legal estate, it is clear that only a life-estate would pass; and we think, that in regard to an executed trust, the same rules of construction must apply. Adams, in his learned treatise on Equity, treats the subject as settled: "It was at one time suggested, that the language of a trust might be construed with greater license than that of a gift at law; but this notion is now at an end, and it is clear that the declaration of an executed trust, will have exactly the same construction, as if it had been a conveyance of the legal estate:" page 41. *Equitas sequitur legem*, is the maxim in regard to trusts. Under the doctrine of uses, before the statute of 27 Hen. 8, the word *heirs* was not considered by the Chancellors, who were ecclesiastics, as necessary to create an estate of inheritance;

but after that date, the Chancellors were lawyers, and adopted the above maxim in order to make the rules of their court conform to the rules of the common law, unless there was something to warrant a departure. In the case of deeds, there is nothing to dispense with the use of technical terms. The parties are not *inopes consilii*, which is the ground upon which technical terms are not required in devises, provided the intention to give an estate in fee is otherwise expressed. Elizabeth and Sarah, at the creation of the trust, took an estate for life as tenants in common; upon the birth of Henry, the trust opened and let him in as to one-third part for life, leaving a resulting trust in the grantor, in fee; upon his death it descended to the defendant Sarah as his heir-at-law; and upon the death of Elizabeth, Sarah became entitled to two thirds of the land in fee in possession, and to the reversion in fee of the other third, expectant upon the life estate of the plaintiff Henry.

It is said the intention clearly was to give the same estate in both species of property, and as Henry takes an absolute estate in the personalty, it seems to be a strange result that he only takes a life estate in the land! That may be so, and the reason of the difference is, that, in respect to the personalty, there is nothing to defeat the intention, whereas, in respect to to the land, a fee simple cannot be created by deed without the word *heir*, no matter how clearly the intention may be expressed.

PER CURIAM, There will be a decree declaring the rights of the parties according to this opinion.

WILLIAM K. LANE *against* JANE BENNETT *and others.*

Slaves were bequeathed by name to the testator's widow, but after the testator's death they were recovered from the executor by a decree of the court of

equity as having been mortgaged to him. It was *Held* that the legatee was entitled to the money paid for the redemption of the slaves, but that the legatee had no claim to have her legacy made good in any other way.

Slaves directed by will to be emancipated, and which were hired out by the executor for the convenience of the estate, are entitled to these hires, and also to the surplus of a sum of money set apart for their removal from the State.

A sum of money arising from the redemption of a slave held in mortgage, (which slave was directed to be freed, but was not,) does not pass into a fund directed to be raised by the sale of certain negroes and *all the balance* of the testator's property; nor does money directed to be expended in the removal of a slave who could not be liberated pass into such fund.

CAUSE removed from the Court of Equity of Wayne county.

Farnifold Jernigan, by will properly executed and proved, bequeathed as follows: "Item 1st. I give and bequeath to my beloved wife, Jane Jernigan, the following named negro slaves, together with all their increase at the time of my death, viz: Lynn, &c., (enumerating thirteen slaves, and amongst them Bill Winn, John Winn, Simpson and Anne.")

* * * * * * *

"Item 3rd. It is my will and desire that my executors, hereinafter named, hold in trust for my daughter, Mary Anne Kelly, the following negro slaves, together with their increase at the time of my death, viz.: Edmund, &c.," (enumerating eight others, and amongst them the slave "Olive;") "and after the death of my said daughter, Mary Anne Kelly, it is my desire that the said negro slaves, and their increase, be divided equally between the children of the said Mary Anne Kelly, to them and their heirs forever."

* * * * * * *

"Item 5th. It is my will and desire that my negroes, Dave, Tom, Morris, Lila and Mary, be liberated, and that my executors, hereinafter named, send them to a free State, and I hereby set apart out of the sale of my property, hereinafter named to be sold, the sum of five hundred dollars, to defray the expenses of so removing them."

"Item 6th. It is my will and desire that the following negro slaves be sold by my executors, viz.: Martin, &c.," (enumerating

ten,) "with all the balance of my property not herein given away, and out of the proceeds of such sale, they first set apart the five hundred dollars named in the 5th item of this will, and that out of the balance remaining, they pay all my just debts, and after that, if there be a balance remaining, my will and desire is that it be equally divided among my children, to be held on the same conditions as the specific legacies are, named in this will."

John A. Green and William K. Lane, were named executors in the said will, of whom the latter only qualified, and took upon himself the burden of executing the several provisions thereof.

The bill is filed by the executor praying the Court to instruct him as to the following points upon which he thinks there are difficulties and doubts as to the proper construction to be put on the provisions above set forth.

Previously to the filing of this bill, and before the payment of the legacies, a suit was brought against the executor by one Adam Winn, for the recovery of the slaves John Winn, Bill Winn, Simpson and Anne, bequeathed as above set out, to the widow Jane, and of Olive bequeathed to the executor in trust for Mrs. Kelly and her children, and of Dave directed to be liberated, upon the allegation that the said slaves had been mortgaged to plaintiff's testator to secure the payment of certain sums of money loaned to the said Adam by the testator, and a decree was passed in the said Court of Equity ordering and adjudging that, upon the payment of certain sums therein named, which were ascertained to be the amount loaned, with interest thereon, the defendant should reconvey the slaves above mentioned to the said Adam; which sums were accordingly paid, and the slaves conveyed to him accordingly.

The executor hired out the slaves, Tom, Lila, &c., directed to be liberated, and has the sum thus produced in hand.

The widow of Farnifold Jernigan, intermarried with Thomas Bennett, who died during the pendency of this suit, and before any part of her legacy had been paid by the executor. The

first instruction prayed by the executor is as to the legacy bequeathed to the widow; whether she is entitled to it, or whether it goes to the representative of her second husband, Bennett; and is she entitled to compensation as to the slaves bequeathed to her, which were redeemed and thus taken from her? And the same question is propounded as to the slave bequeathed to the trustee of Mrs. Kelly, which was also redeemed and taken from her. He enquires as to the proper disposition of the sums raised by the hires of the slaves directed by the testator to be liberated.

It appeared that of a part of the sum of five hundred dollars set apart for the removal of the liberated slaves, was unexpended and remained in the hands of the executor after that trust was performed, and after deducting $100 on account of Dave; the executor asks the Court to instruct him as to the disposition of this balance. The executor states that the proportion of the five hundred dollars which would have been required for the removal of Dave, would have been one hundred dollars; and he enquires as to the proper disposition of that sum. He likewise enquires what disposition he shall make of the money paid for the redemption of Dave. Whether these two last mentioned sums fall into the residue and go to the persons named in the residuary clause, (the children,) or whether they are undisposed of, and are to be paid out according to the statute of distributions (under which the widow would be entitled to come in.)

In behalf of Mrs. Bennett, the widow, it was contended in her answer that she is entitled to the full value of the slaves bequeathed to her, but which were lost to her by being redeemed; but, if this was not allowed her, that she is entitled to the money paid for the redemption of these slaves. And the like claims were set up in behalf of Mrs. Kelly and her children, on account of the redemption of the slave Olive.

The other legatees answered, but their answers do not vary the statement above made.

The cause being set down for hearing on the bill and answers, was sent to this Court by consent.

Rodman, for the plaintiff.
Dortch and *Wm. A. Wright*, for the defendants.

BATTLE, J. The first question presented is, whether the testator's widow, who is now the wife of the defendant Thos. Bennett, is entitled to any, and, if any, what interest in the legacy of the slaves bequeathed to her by the will, and which have been since redeemed as a mortgage by the mortgagor. The defendants, Bennett and wife, claim the full value of the slaves from the executor, but if that be not allowed, they claim the amount paid for their redemption. The question is new, and the counsel for the defendants says he has been unable to find any decision upon it. We think, however, that, upon principle, there can be no difficulty in it. Whatever interest the husband had in the slaves, we think passed to his widow under the will, and we can see no reason why she should get more, to the disappointment of the other legatees. For the same reason, the trustee of Mary A. Kelly, is entitled to claim for her use, the money paid for the redemption of the slave given to her. The slave Dave loses, of course, his freedom intended for him, and no question is made about the amount paid to redeem him.

2. The slaves who have been emancipated under the directions of the will, are clearly entitled, each, to his or her hire from the death of the testator. They had a right to their freedom from that time, and are not to be prejudiced by the delay of the executor in effecting their emancipation. They are also entitled to the residue of the five hundred dollars appropriated by the testator for removing them out of the State, after deducting one hundred dollars as the share intended for Dave, who loses his freedom because of his having been redeemed by the mortgagor.

The residue of the proceeds of the slaves directed to be sold, is clearly a partial residue, (see *McCorkle* v. *Sherrill*, 6 Ire. Eq. 173, *Pippin* v. *Ellison*, 12 Ire. Rep. 61, *Lowe* v. *Carter*, 2 Jones' Eq. Rep. 377,) and does not embrace the money paid for the redemption of Dave, nor the one hundred dollars in-

tended by the testator to defray the expense of his removal from the State, had he been set free. The amount of these two sums are, therefore, undisposed of by the will, and must be distributed equally among his widow and children, who are his next of kin. Let a decree be drawn declaring the rights of the parties according to this opinion, and let an account be taken, if the parties desire it. The costs must be paid out of the estate.

PER CURIAM, Decree accordingly.

JOHN J. WILLIAMS *and others against* FRED'K. K. COTTEN, *Executor.*

Where specific and pecuniary legacies were given absolutely, by will, with executory bequests over upon specified contingencies, all that the executor is required to do is to deliver the property to the first taker (he giving a receipt). He has no right to exact a bond for the security of the ulterior claimants, but they must look to the protective aid of the court to secure them from loss by removal, waste or destruction, as the case may arise.

CAUSE removed from the Court of Equity of Wake county.

Margaret G. Cotten, died in the county of Wake, on 5th of December, 1855, having executed her last will and testament. By the will aforesaid, she bequeathed to Frederick K. Cotten a negro slave by the name of Prince, and to Eliza H. Thompson, a negro woman named Sabina and all her children, except Prince. She then bequeaths as follows:

"5th. All the residue of my estate, I give in the following manner, viz: To my son Frederick K. Cotten, one share; to my grand-daughter, Eliza H. Thompson, one share; to my four grand-children, viz., Margaret E. Cotten, Arabella C. Cotten, Florida C. Cotten and John W. Cotten, one share. Frederick and Eliza accounting for the negroes given them above.

"6th. Should Eliza H. Thompson die without issue, that

is, a child or children, then, and in that case, I give all the property bequeathed to her above, of every description, to my son Frederick K. Cotten, one share or one half, and to Margaret E. Cotten, Arabella C. Cotten, Florida C. Cotten and John W. Cotten, one share or the other half.

"7th. Should one or more of the children of my son, John W. Cotten, viz., Margaret E. Cotten, Arabella C. Cotten, Florida C. Cotten and John W. Cotten, die without issue, then, and in that case, all the property bequeathed to them above, to be divided between the survivors. Should all die without issue, then, and in that case, I give all the property bequeathed to them above, to my son Frederick K. Cotten and my grand-daughter E. H. Thompson."

The defendant, Frederick K. Cotten, was appointed executor in the said will, and was qualified and undertook the discharge of that office. The bill alleges that a large amount of personalty came to the hands of the executor, and prays for an account and settlement among the legatees. The above named Eliza H. Thompson, had intermarried with the plaintiff, J. J. Williams, and Margaret E. Cotten with the plaintiff Joseph A. Engelhard, before the filing of the bill; Arabella C. Cotten, Florida C. Cotten and J. W. Cotten, are infants, and sue by their mother and next friend, Mrs. Laura Cotten.

The defendant answered, admitting the facts stated in the bill, and professing a readiness to pay over the above legacies, under a decree of the court of equity; but he doubts whether it would be safe for him to pay the principal of the fund, which is chiefly money, to the primary legatees, or whether he should only pay the interest, and he asks to be advised by the Court, in regard to his duty in this particular. He states, that for the purpose of satisfying all the legatees, and for the purpose of settling the estate in a safe and speedy manner, he invited the filing of this bill, and is willing to abide by such decree as the Court may make in the premises.

The cause was set down for hearing on the bill and answer, and transmitted by consent.

Fowle, for the plaintiffs.
Moore, for the defendant.

BATTLE, J. It is now a settled rule in this State, that if a mixed and indiscriminate fund of goods and other things is given as a *residue* to one for life, with a limitation over, it is the duty of the executor to sell the property, and pay the interest to the first taker during his life, keeping the principal for the remainderman; on the ground, that this is the only mode in which the latter can get a fair share of the testator's bounty; *Smith* v. *Barham*, 2 Dev. Eq. 420; *Jones* v. *Simmons*, 7 Ire. Eq. 178. But when it appears to be the intention of the testator, that the legatee for life shall have the use of certain articles of a specified nature, then the executor has no right to sell them, but must deliver them to the tenant for life, in which case, his assent to the legacy will enure to the benefit of the remainderman, who may, at any time, if it should become necessary, take measures to prevent the removal or destruction of such parts of it as are not of a nature to be consumed in the use; *Tayloe* v. *Bond*, Busb. Eq. Rep. 5. When the property is given to the legatee absolutely, with an executory bequest over upon a specified contingency, the reason for delivering it to the first taker is much the stronger, because his interest is greater, and that of the ulterior limitee, is more remote and uncertain. The executor, after giving his assent, will have nothing more to do with the property, and it will be left to the person, having such executory or contingent interest, to apply to the court for its protective aid, whenever the property is really in danger of being removed, wasted or destroyed. In the case before us, to some of the legatees, negroes and other articles are given specifically, while to others, general or pecuniary legacies only are given; but the executory limitations over are applied equally to each of the legatees, and to both species of legacies. It is clearly the duty of the executor to assent to the legacies of the slaves, and the other specified chattels, and as to them, he has no right to require the legatees to give bond, with secu-

rity, for the forthcoming of the slaves and other articles, in the event of the ulterior limitation taking effect. The same rule, we think, must apply to the money legacies; and all that the executor can be required to do, is to take a receipt from the legatees (or from their guardians, if they be minors,) for the articles or money delivered or paid to them, for the benefit of those who may, upon the happening of the contingency mentioned in the will, become entitled to it; *Bullock* v. *Bullock*, 2 Dev. Eq. Rep. 321. A decree may be drawn in accordance with the principle herein declared.

PER CURIAM, Decree accordingly.

EZEKIEL COLLETT *against* ALLEN M. FRAZIER, *administrator.*

A plaintiff cannot be brought into this Court as a pauper, in a suit transferred to the Court by consent, or on affidavit. An order in the Superior Court authorising a party to sue in that character, extends only to the officers of that Court, so that such a party is liable for costs in this Court if he loses his suit, and may recover them if he gains it, notwithstanding such order below.

BAILEY, *amicus curiæ*, moved in this cause to tax the defendant with the costs of the suit, and that the decree made in this cause at the last term, be amended in this particular, *nunc pro tunc*. It appeared that the plaintiff had obtained an order from a Judge to sue in the Court of Equity of Randolph *in forma pauperis*; and that the case was removed to this Court by consent, and the plaintiff obtained a decree for eighty dollars with interest from 1841; he moved in the alternative, if the former motion did not prevail, to tax the plaintiff with the costs of the suit.

This motion was opposed by *J. H. Bryan* for Frazier.

Bailey, for the motion, cited *Clark* v. *Dupree*, 2 Dev. 411; Tidd's Practice, 1 vol. 38; Beame's Costs in Equity.

Gorrell appeared for Collett.

BATTLE, J. This is a motion against the defendant for a decree for costs, under the following circumstances: The plaintiff was, by an order of the Court of Equity of Randolph county, permitted to file his bill and prosecute in that court *in forma pauperis*. When the cause was ready for hearing, it was set down for that purpose, and, by consent of the parties, removed to this Court to be heard here. No order has been made in this Court allowing the plaintiff to prosecute his suit in it as a pauper, but the cause was heard at the last December Term; 3 Jones' Equity Report, ante 80, and the plaintiff obtained a decree for the sum of eighty dollars, with interest thereon from the year 1841. The question is, whether he is entitled also to a decree for his costs in this Court. This question of practice has not hitherto been brought distinctly to our attention, but we have now given to it a due consideration, and our conclusion is that the plaintiff is entitled to have his motion granted.

If the plaintiff had brought his case before this Court by an appeal in the usual manner, then the case of *Clark* v. *Dupree*, 2 Dev. Rep. 411, would have been a direct authority in his favor. That was a case commenced by a warrant before a single justice, and taken to the County Court, where an order was made to allow the plaintiff to proceed as a pauper. It was afterwards carried by the appeal of one of the parties (but which of them the report does not state,) to the Superior Court, where the plaintiff was nonsuited, and the judgment rendered against him for the costs of both the County and Superior Court, and from that judgment he appealed to this Court. Here the judgment of nonsuit was affirmed, but the judgment for costs was reversed, because the costs of the County Court were included in it. This Court then proceeded to give a judgment in favor of the defendant for the costs of the Superior Court, and in favor of the plaintiff for the costs of this Court, leaving the costs of the County Court to be recovered by neither of the parties.

In delivering the opinion of the court, RUFFIN, J. said "The judgment, however, was properly rendered for the costs of the

Superior Court, because the plaintiff had never been a pauper in that Court. The order of the County Court can only extend to its own officers. They can have no control over the counsel and officers of another court superior to themselves, so as to make an order that they shall work for nothing, nor a suitor after he ceases to be a suitor before them; *Gibson* v. *McCarty*, Cas. Temp. Hardw. 311. Suppose the plaintiff had been unable to give security for his appeal to this Court, his only remedy would have been by *certiorari* granted by this Court upon our own terms. The Superior Court could not have sent him here as a pauper appellant, nor, I think, as a pauper appellee."

Now, if the plaintiff in a suit, either at law or in equity, (for in that respect there cannot be a difference in the practice of the courts,) cannot be brought into this Court as a pauper appellee, there can be no reason assigned why he should come here as a pauper in an equity suit removed here for hearing, either upon affidavit or by consent of parties. The argument is unanswerable, that the court of equity of any county, which is inferior to this Court, cannot make an order that the counsel and clerk of this Court shall work for nothing. To effect that object there must be an order of this Court to allow the plaintiff to prosecute his suit here as a pauper. The motion, in behalf of the plaintiff, is granted.

PER CURIAM, Decree accordingly.

JOHN W. B. WATSON *against* GEORGE W. WATSON *and others.*

A court of equity has no power to order the sale of land, for the purpose of converting it into more beneficial property, where it is limited in remainder to persons not in *esse.*

THE bill states that Josiah O. Watson died seized of a large real estate, which he devised to the plaintiff, to have and to hold, during his life, and at his death, to such children of the

plaintiff as might be living at his (plaintiff's) death, and the issue of such as might have died leaving issue; and that it is further provided in the will of the said testator, that if the plaintiff should die without leaving issue living at his death, the estates so given to him should be equally divided amongst the defendants, William H. Watson, Henry B. Watson, Geo. W. Watson and Orren L. Dodd.

The bill further states, that all these defendants, except Orren L. Dodd, had assigned their interest in this bequest to him, and have released the same to him, free from all claim. The bill further states, that the plaintiff has never been married, and is a young man.

He alleges, in his bill, that there are two tracts of land, lying near the city of Raleigh, which are minutely described by the boundaries, containing in all about 673 acres; that this land is sterile in quality, and could not be made remunerative without a large outlay for manure, and that as he has much better land lying at a distance from it, it is not to his interest thus to improve it, or to cultivate it; and that in all probability, if he is obliged to keep it, it will become a waste. He states, as his belief, that if laid off into smaller lots, it can be sold to great advantage, and that the interest of himself as well as his children, if he should ever be blessed with any, as well as that of the defendant Dodd, if the contingency should ever happen for him to succeed to the property, will be greatly promoted by a sale of the premises. He prays that the lands be sold, and reinvested, either in money, or in other lands, more beneficial to himself and to those who may succeed him; that if the investment shall be ordered in money or stocks, that the interest may be paid to him, and the principal kept to meet the contingencies set out in the will.

The answer of O. L. Dodd, admits the allegations in the plaintiff's bill, and concurs in the opinion, that it will be to the interest of the plaintiff, and all concerned, that the sale and investment shall be made, provided the court shall deem that it has power to order such sale.

The other three defendants admit that they have assigned and released to the plaintiff, as stated in the bill.

Cause set down for hearing on the bill and answer, and sent to this Court by consent.

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

BATTLE, J. In the case of *Troy* v. *Troy*, Busb. Eq. Rep. 85, we said, "That a court of equity has, in this State, the power to decree a sale of lands held in trust for a feme covert and infants, upon the petition of the feme and the guardian of the infant, we think, cannot be questioned; and in a proper case, such a sale will be ordered, and the proceeds directed to be laid out in the purchase of other lands, or perhaps vested in stocks, and settled upon the same trust. Whether the power of the court extends to a case like the present, where the trust is for a class of persons, some of whom may, but have not yet come into existence, it is unnecessary for us to decide; for, admitting such a power, we do not think this a proper case for its application." The question which we, in that case, were at liberty to evade, now comes before us in a manner which compels us to decide it; and after full consideration, aided by the arguments of able counsel, we are compelled to say, that we cannot find from the authority of an adjudicated case, or deduce from any analogy to the admitted powers of the court of equity, that it has, or has ever claimed, the power which we are now called upon to exercise. The plaintiff is tenant for life, with a contingent remainder in fee to his children who may be living at his death, and to the issue of such children as may have died in his life-time leaving children, with an executory devise over to the defendants in the event of his dying without issue. The counsel for the plaintiff are compelled to admit that, after a diligent search, they cannot find a case in which a court of equity has undertaken to order the sale of land limited to persons not in esse. That alone affords a pretty strong argument against

the existence of a power in the court to do so; for there must have been many—very many—instances in which the tenant for life, or tenants in fee, with an executory devise to unborn children, would be much benefitted by, and would therefore very much desire, the exercise of such power. The difficulty consists in there being no persons in existence for whom the court can be called upon to act. It was the will of the testator to give only a limited estate to the first taker, leaving the most valuable interest in the property to be enjoyed by those who are in *posse*, but not in *esse*. It would defeat that will, to some extent at least, if the real estate were converted into personal, and *that* any court would be reluctant to attempt to do, unless it were entirely satisfied of its power to act. Even in the case of infant persons, in esse, it was gravely doubted, until 1827, whether the courts of equity in this State had the power to order the sale of their lands, even if their best interests required it; for the act of the Legislature, which expressly confers the power, has the following preamble: "Whereas, doubts are entertained whether it is competent for any judicial authority to direct sales to be made by guardians of the real, or personal, estates of their infant wards, except in the cases specified in the acts of Assembly passed in the year 1762, and in the year 1789; and whereas, the best interests of infants sometimes demand that such sales should be made in cases to which the enactments of those acts do not extend; *Be it therefore enacted*," &c., see acts of 1827, cha. 33. It is unnecessary for us now to determine whether those doubts were well or ill founded. Their existence alone as applied to persons in *esse*, represented by guardians, whose bounden duty it is to take care of their interests, affords a strong, if not conclusive, argument, that the courts did not possess any power to order the sale of real estate limited to persons unborn, and not even in *ventre sa mere*, who cannot have a guardian, and who cannot, therefore, be represented before the court. We think the argument is rendered quite conclusive, when it appears that no case can be shown, either in England, or in this State, where such a power has ever been exercised.

The cases in the English courts, cited by the plaintiff's counsel, where decrees have been made in causes concerning lands, in which the tenants in tail only, without the remainderman, were made parties, do not apply, because the rule was adopted for convenience, the remaindermen being considered " mere cyphers" on account of the power of the tenants in tail over the estate.

In the present case, the tenant for life had never been married, and, of course, had no children, which makes a difference between it and a case where there are some children born, who may represent the class, and for whom, when their interest requires it, the Court may decree a sale of their real estate, by virtue of the act to which we have above referred.

PER CURIAM, Decree accordingly.

WILLIAM W. SPENCER, *and another, Executor, against* PETERS P. SPENCER *and another.*

Where, on the day before an intended marriage, the wife secretly made a conveyance of her property to a distant relation, which was carefully concealed from the husband during his whole life, while he was permitted to use and treat the property as his own during that whole time, the fact that he had heard from rumor that his intended wife thus intended to convey, though he did not believe it, was *Held* not to be a sufficient assent to the conveyance to prevent it from being declared void.

For a deed made in contemplation of marriage to have the effect of barring the rights of the husband, it must appear that he had knowledge of the particular deed, and gave his assent to it.

The principle of constructive notice is always resorted to in order to prevent the person having it from doing an act to the injury of another, and does not apply where the question is whether one was barred by his assent to a fraud practiced on him.

CAUSE removed from the Court of Equity of Hyde county.

The bill was filed to set aside a conveyance of slaves made by the defendant, Mary Gibbs, then Mary Harris, upon the

eve of her marriage with the plaintiffs' testator, Wilson Gibbs, as being in fraud of his marital rights. The bill alleges that the said Mary Harris, being entitled to certain slaves, to wit. Mary and seven others, (naming them,) a few days before the marriage took place, but after the marriage was agreed on between them, conveyed to the defendant, Peters C. Spencer, the whole of the said slaves by a bill of sale bearing date a few days previous to the marriage; that by the said bill of sale, a life estate in these slaves is reserved to her, the said Mary, and, after her death, the whole property is conveyed to the said Peters C. Spencer; that the consideration expressed therein is two hundred dollars, which would have been a totally inadequate price for them, but that, in truth, nothing at all was paid by the said Spencer for the slaves; that the existence of this deed was carefully concealed from the testator both before and after the marriage; that it was not registered until after his death, which took place in 1855; that a probate was had of this deed before a Judge at a great distance from the place where the testator lived, and an order of registration endorsed on the instrument in November, 1852, but it was not put on the register's book until the year 1856; that the testator took these slaves into his possession, claiming them as his property, and finally disposed of them by his will; that by this will he gave some of these slaves to his wife, the said Mary, who took possession of them, and has held them ever since; and, although several years have elapsed since his death, his widow has not filed any dissent from the will, but has taken other legacies under it. The bill states that these slaves are necessary for the payment of the debts of the said Wilson Gibbs, but that, if sold with this cloud upon the title, they will be sacrified.

They pray that the defendant Spencer may be decreed to deliver up the said bill of sale or deed, in order that it may be cancelled, and that the said P. C. Spencer and Mary Gibbs be enjoined from suing at law for the said slaves and introducing said bill of sale as evidence.

Mary Gibbs answered, admitting the execution of the deed for the slaves in question, at the time alleged, but the avers

that she did so with the full knowledge and consent of her intended husband.

The other defendant, Peters C. Spencer, states in his answer, that a few days before the marriage, the plaintiffs' testator applied to him, to know if it was true, that Mary Harris had made him a bill of sale for these slaves, to which he answered in the affirmative, when the other said, it made no difference. He says, that it was agreed between Mary Harris and himself, that he was to pay off her debts, and she would convey the slaves; that he did pay off debts to the amount of $200; but he says, this was merely incidental, for that the conveyance was, in fact, a gift, made in consideration of friendship or kin. The reason given for proving the deed before Judge Battle, at Chapel Hill, was, that the subscribing witness was residing at that place, pursuing his studies there; that after it was proved, it was returned to him, and he laid it away with his other papers, not supposing it important that it should be registered immediately, and that it remained until his attention was called to it by the death of Mr. Gibbs.

There was replication to the answers, and proofs taken, which are sufficiently set out in the opinion of his Honor in delivering the opinion of the Court.

The cause was set down for hearing on the bill, answers, proofs and former orders, and sent to this Court by consent.

Donnell and *Carter*, for the plaintiffs.
Rodman, for the defendants

BATTLE. J. It is now clearly settled in this State, that a voluntary conveyance of her property made by a woman in contemplation of a marriage which afterwards takes place, is a fraud upon the husband, if he be not apprised of the existence of the deed; *Logan* v. *Simmons*, 3 Ire. Eq. Rep. 487; *Bailey* v. *Tisdale*, 6 Ire. Eq. 358; and *Strong* v. *Menzies*, Ibid, 544. In adopting this principle, we are only following the rule which has been laid down in England, and sanctioned in several of

our sister States; see, among other cases, *Taylor* v. *Pugh*, 1 Har. 608, *Ramsey* v. *Joyce*, 2 McMul. Eq. 237, *Mones* v. *Darrant*, 2 Rich. Eq. 404, *Tucker* v. *Andrews*, 3 Shep. (Me.) Rep. 124. The counsel for the defendant admits the existence of the general doctrine, but denies its application to the present case, because, as he alleges, the husband was informed of the execution of the deed, and assented to it before the marriage. The question, then, is one mainly of fact, whether the allegation of the husband's knowledge of, and assent to, the bill of sale executed by his intended wife, before the marriage, is sufficiently proved by the testimony. In the examination of the proofs taken in the cause, we are at once struck by the discrepancy in the statements of the witnesses as to the time when the marriage between the plaintiff's testator and the defendant Mary Gibbs (then Mary Harris,) took place, and as to the interval between the execution of the deed and that event; and it turns out that we get from Mary Gibbs only, the true time of her marriage, and from the date of the deed itself, the only reliable time of its execution. From these sources we learn that the deed was executed on the 26th day of March, 1851, and the marriage was consummated the next day, to wit, on the 27th day of the same month. The testimony relied upon to show that the intended husband knew of the existence of the deed, and gave his assent to it before his marriage, is not at all satisfactory upon that point. The defendant Mary Gibbs is the only person who pretends to speak with any precision upon the subject, and she gives us two accounts of it, one in her answer, and another in her deposition taken by the other defendant under an order of the Court. These accounts cannot well be reconciled with each other, and, of course, leave us in doubt which is the true one, if indeed either can be relied on as entirely accurate.

In her answer she says that, "after the conveyance had been made, and about —— days before the marriage, the said Wilson Gibbs, having been informed of it, asked her if it was true that she had made such a conveyance. She replied to him that it was true, and told him fully how it was. To this

he replied that it made no difference at all; that he had not desired to marry her with any view to her property; that he had enough of his own, and, at his death, would provide for her a good home." In her deposition, (which only, and not her answer, can be used by the other defendant as testimony,) she does not say that she told her intended husband that she had already executed the deed, but uses the following language: "I had a conversation with Mr. Gibbs about a week before our marriage, relative to my conveying my negroes to Peters C. Spencer, (the other defendant.) He told me that he had heard, from Col. Benjamin Watson, that I had conveyed my negroes to Peters Spencer. I told him I was agoing to do so. He then said it made no difference with him; to give them to him if I wished; that it was not my negroes he wished to marry me for; that he had enough of his own, and, when he died, he would leave me a house and home." The deposition of Col. Benjamin Watson is on file, and he says, on this subject, that "a short time before the marriage, say a week, a conversation took place between myself and others in the presence of Wilson Gibbs, when it was remarked by R. J. Bonner, that Mary Harris had conveyed her negroes to some one, and Wilson Gibbs shook his head and said, no."

The discrepancy between the answer and the deposition of Mary Gibbs (upon which the plaintiffs have a right to rely, for the purpose of impeaching the accuracy of her statements) and the improbability that Col. Watson gave the information to Wilson Gibbs, as to what she said the latter told her he did, would, of itself, incline us to doubt whether Wilson Gibbs ever did know of the existence of the deed. He had, no doubt, heard of the rumor which prevailed, that his intended wife was about to convey her slaves to some person before her marriage; but we are satisfied, from subsequent occurrences, that he did not believe the report, and that he lived and died in ignorance that the deed in question ever had been executed. We are almost certain that the existence of the deed was carefully concealed from him during his life. It was executed, as we have already stated, on the 26th day of

March, 1851; was proved for registration before a Judge, who lived at a distance from the county, on the 26th day of November, 1852; and was not registered until the 15th of February, 1856, after the death of the husband. In the meantime the husband had the possession of the slaves, and bequeathed a part of them to the widow, and the others to some of his children. It is true, that he had a right to the possession, under the deed, on account of the life-estate reserved therein to his wife; but his bequest of them, in his will, can be accounted for upon no other supposition than that he claimed them as his own, and thought that they belonged to him by virtue of his intermarriage with their former owner.

Supposing it, then, to be established that the husband had heard, before his marriage, that the woman whom he was about to marry, intended to transfer her slaves, by a deed of gift, to another person, and had even said that it would make no difference to him if she did, would those circumstances prevent a deed from being void, as a fraud upon his marital rights, if it were executed in secret, and its existence kept concealed from him during his life? We are clearly of opinion that an instrument, executed under such circumstances, cannot be supported. There must be a knowledge of, and assent to, the particular deed, to give it the effect of barring the rights of the husband. Or, in the language of Mr. Roper, which seems to be quoted with approbation by this Court in the above cited case of *Logan* v. *Simmons*, "Any disposition by the wife, made after the courtship began, without the intended husband's knowledge and concurrence, is within the mischief and principle laid down by the courts." 1 Rop. on Hus. and Wife, 163. And, in reason it ought to be so. By the marriage, the parties acquire valuable reciprocal interests in each other's property. If the wife survive the husband, she will become entitled to dower in his lands, and a certain portion of his personal estate, of which he cannot deprive her by his will; and during the coverture she has a claim for a comfortable support, suitable to the amount of his property and her station in life. So, the husband acquires rights in her

property, varying in its kind and circumstances, as whether real or personal, in possession or in action. Now, until the marriage, the legal title remains in the wife, and she may dispose of it as she pleases. But if, after a courtship begins, the court of equity recognises an inchoate right in the intended husband at all, it follows that it cannot be disposed of by the intended wife without his direct knowledge and acquiescence. In a case like the present, there is no place for a constructive notice. That is always resorted to for the purpose of preventing the person who has it, from doing an act to the injury of another. Here, the husband can injure no other person. He has rights which the rule protects, by preventing another person from injuring him.

Upon the whole, we are decidedly of opinion, that nothing has been shown, on the part of the defendants, to prevent the plaintiffs from having the relief which they seek, and they may have a decree accordingly.

PER CURIAM, Decree accordingly.

JAMES E. BURNS *against* DOUGALD CAMPBELL AND JOHN TAYLOR.

Where a bill was filed by the purchaser of land at a sheriff's sale, praying an injunction to restrain one, who entered under the former owner, from cultivating turpentine trees, upon the allegation of irreparable mischief from the defendant's insolvency, and it turns out that the defendant entered by virtue of a lease of the trees for making turpentine, made before the sheriff's sale, it was *Held* that it would be inconsistent with the relief sought by the bill, to decree the appointment of a receiver of the rent to secure its payment to the reversioner.

APPEAL from an interlocutory order of the Court of Equity of Robeson county, Judge BAILEY presiding.

A writ of injunction had been issued in vacation to restrain the defendant Taylor from working and using certain pine-

trees for the purpose of making turpentine on a tract of land which the plaintiff had purchased in August, 1856, as the property of the other defendant, Campbell. The land had been sold by the sheriff of Robeson under judgments and executions against the said Campbell, and a deed had been made to him of the premises, of that date, (Aug. 1856.) The bill alleged that the plaintiff had instituted an action of ejectment against Campbell, in the Superior Court of Robeson, which was still pending; that the defendant Taylor had entered into the possession of the premises under the defendant Campbell, had cut and boxed a very large number of the trees for the purpose of obtaining turpentine from them; that he was preparing to dip and take off the same from the trees, and that as both Campbell and Taylor were insolvent, he would probably lose the whole value of the commodity thus obtained by Taylor, and all rent for the use of the trees which might be received by Campbell; that the land was not fit for any other profitable use except that of making turpentine; that the process of making this article was quite exhaustive in its tendency, and that, from the insolvency of the said parties, the injury thus done to the property by destruction, would be also irreparable.

The prayer of the bill is to restrain the defendants from committing waste and destruction upon the premises by cutting and boxing trees, and from dipping and taking away the turpentine.

The defendants answered severally, Campbell averring that only one third of the interest in the premises had ever belonged to him, and that he had sold and conveyed that interest to his son, John E. Campbell, for a full and fair price, in the year 1853, before any judgment, execution or sale to the plaintiff by the sheriff of Robeson; that the other shares in the land belonged to his two sisters, Catharine and Nancy; that as agent and tenant of his son John E., he was residing on the land in question, and that as such agent, in January, 1856, he had leased the same for three years to the defendant Taylor for the purpose of operating for turpentine, and that

his two sisters above named had also made leases for the same length of time for the same purpose, reserving a certain rent for the premises.

Taylor, in his answer, sets up these leases, which he likewise asserts were made at the time they bear date, to wit, in January, 1856, and says he is working at the business above described, in virtue thereof. He denies that he is insolvent, but says he is fully able to pay the rent agreed upon, or any damages that may be arising on account of the injuries complained of; and he likewise denies that any material injury can be done to the trees during the unexpired period of his lease, or that the land is unfit for cultivation.

On the coming in of the answers, a motion was made by the defendants to dissolve the injunction, which was ordered by the Court, and the plaintiff appealed.

Troy, for the plaintiff.
Banks, for the defendant Taylor.
Shepherd, for Campbell.

PEARSON, J. There is no error in the interlocutory order disposing of the injunction. The defendant Taylor had leased the turpentine trees upon the land, in *January*, 1856, for the term of three years. The plaintiff did not acquire title till afterwards, to wit, *August*, 1856. Consequently, he took the land subject to the title of Taylor, and has no ground upon which he can ask this Court to restrain Taylor from cultivating the trees in pursuance of the paramount title created by the lease. The plaintiff's remedy, if he has any, is to have a receiver appointed to hold the rent until his title to the reversion can be estabilised by his action at law; upon the ground that the rent is incident to the reversion, and belongs to him. This relief is inconsistent with the relief prayed for.

We concur with his Honor that the injunction ought to have been dissolved upon the coming in of the answers.

PER CURIAM, Interlocutory decree affirmed.

THOMAS L. HALL, *Executor of* ALEXANDER CARTER, *against* SETH DAVIS, *Administrator of* JAMES P. DAVIS.

Where an agent to collect money, took specific chattels in payment of the debt, and the principal brought an action at law on the contract of agency, during the pendency of which more than three years elapsed; it was *Held* that he might take a nonsuit and follow the property in equity and the latter suit having been brought within a year after the nonsuit, it was *Held* further, that it was the same cause of action in both courts, and that the latter suit was within the saving of the statute of limitations.

CAUSE removed from the Court of Equity of Craven county.

James P. Davis, the defendant's intestate, of Duplin county, was employed by Alexander Carter as agent, and attorney in fact, to collect certain debts due him by bonds, notes, and accounts, on divers persons, and amongst them, was a bond on Zachariah Davis, jun'r., for seven hundred dollars, due the 1st day of June, 1845, and dated 11th April, 1844, with interest from the date. The most of these debts were collected, but on the one last mentioned he caused a suit to be commenced in the County Court of Duplin, in the name of the plaintiff's testator, to the use of the said James P. Davis, and at July Term, 1846, of that court, he obtained a judgment for the principal money, with $47,95 interest. In the January following, (1847) the said James P. Davis made an adjustment, by which he received, in satisfaction of this judgment, five several bonds, each for a fifth of the whole, payable one, two, three, four and five years, after date, with Thomas Davis as surety thereupon, which made the debt perfectly good. The plaintiff states that he is not informed whether these latter bonds were made payable to his testator or to the defendant's intestate.

Afterwards, and before the last of these bonds became due, the said James P. Davis took from the obligors three negro slaves, to wit, Mary and her two children, Rachel and Rosa, in full discharge and satisfaction of these bonds, whereupon the same were delivered up to them, and a conveyance of the slaves was made to him. The slaves remained in

the possession of the said Davis from that time until his death in ——. In the meantime, the slave Mary had four other children, to wit, Julia, Ben, Charlotte and John. On the death of the said Davis, Mary and her children went into the hands of his administrators—the defendant and one Jarman, who has since died. On the 27th of Sept., 1849, the plaintiff's testator brought suit against the administrators of Davis in the Superior Court of Craven, for the money due and owing from their intestate, as agent, which pended until September, 1853, when the plaintiff took a nonsuit; in the meantime, the death of the testator, Alexander Carter, had been suggested of record (at September, 1852,) and his executor, the present plaintiff, was made a party, and within one year thereafter, to wit, at March Term, 1854, the bill, in this case, was filed against the surviving administrator, praying that the defendant may be declared a trustee, for the benefit of the plaintiff as executor of Alexander Carter as to these slaves, and that he may be decreed to deliver them to the plaintiff, and account.

The defendant answers, and relies upon the statute of limitations.

The cause being set down for hearing, was sent to this Court.

Donnell, for the plaintiff.
J. W. Bryan, for the defendant.

Pearson, J. The five notes taken in satisfaction for the note of $700, were the property of the plaintiff's testator. These notes were converted by the defendant's intestate for the slaves now in controversy. So the plaintiff has a plain equity to follow the fund, and have the defendant declared a trustee for him in respect to the slaves.

The defendant's counsel could not deny this equity, and was forced to rest the case upon the statute of limitations. This is a constructive trust, and Equity follows the analogy of the Law in respect to the bar of the statute. It is insisted that the writ issued in the action of assumpsit, for the amount of

the notes, was a demand, (which was in September, 1849,) and that the defendant is protected by the statute and more than three years' adverse possession. A nonsuit was entered in the action, September, 1853, and the bill was filed, March, 1854. The question is, did the filing of the bill within a year after the nonsuit, prevent the operation of the statute? If a new action had been commenced within a year, it would not have been barred. "Equity follows the Law," and must give to the filing of a bill within the year, for the same cause of action, the like effect that a new action within the year would have had at law. It is said this might be so, provided the relief prayed for had been an account of the money that ought to have been collected on the notes, but as the bill seeks to recover the slaves, it is not for the same cause of action.

The defendant is put in this dilemma: The demand made by the writ in 1849, either extended to the slaves as an incident or emanation of the cause of action given by the demand, or it was restricted to the money. If the former, then this bill is for the same cause of action, and the principle applies. If the latter, then there has been no demand in respect to the slaves, and consequently there has been no adverse possession; for it is well settled, that as between principal and agent, bailor and bailee, and the like, the statute does not commence running, and the possession is not adverse, until the relation ends, or there is a demand.

We are satisfied, however, that the cause of action is the same. At Law, the remedy is confined to the value of the notes; in Equity, it is broader, and the party is allowed to follow the fund in its converted state, as a more adequate remedy for the injury; but still it is the same injury, or ground of complaint, or cause of action. Equity may give the same relief as is given at Law, or it may give a more adequate relief, and if the legal analogy is no bar to the former, as a matter of course, it is not a bar to the latter; for although the remedy is different, the injury is the same. The plaintiff is entitled to a decree.

Per Curiam, Decree accordingly.

ROBERT CHESNUT *and wife against* POLLY MEARES *and others.*

A limitation of slaves or other chattels in a bequest, or a conveyance in trust, to a mother and her children, while she has children, will, as a general rule, make her and her children take as tenants in common; but if the primary object of the testator or grantor appear to have been to provide for the mother, and that object would be defeated by such construction, then she shall take the whole property for life, with the remainder to her children.

CAUSE removed from the Court of Equity of Columbus county.

This was a petition for the partition of slaves amongst the plaintiffs and defendants, upon the allegation, that they were tenants in common. The question arises on the construction of the following deed, made by Joab Meares, to wit: "Know all men by these presents, that I, Joab Meares, of the State of North Carolina, and county of Columbus, for and in consideration of the sum of five dollars to me in hand paid, the receipt whereof I do hereby acknowledge, before the ensealing and delivery of these presents, the payment being made by Philip Coleman, trustee of my wife Polly Meares, and for the further consideration of love and affection for my said wife Polly, as well as for her better maintenance and support, have bargained and sold and delivered unto the said Philip Coleman, in trust for my said wife Polly, the following negroes, viz: Mourning, a negro woman, and her children, namely, Arthur, Reddick, Stephen, Amy, a negro woman, and her child Willis; and I, the said Joab Meares, by virtue of these premises and for the purposes before expressed, do bargain, sell, and deliver the said negroes, unto the said Philip Coleman, intrusted as aforesaid, and do hereby agree for myself, my heirs and assigns, subject to the annexed proviso, to warrant and forever defend the said slaves unto the said Philip Coleman and his heirs forever, for the said Polly Meares and and her children which she has, or may have, by me, the said Joab Meares; the conveyance and warranty as aforesaid, subject to the following restrictions: that the said trustee, nor none who succeeds him, ever dispossess my said wife Polly

and my children which I have, or may have, by her, of the said property, and shall suffer her to enjoy, together with the children, the benefit, use and profits of the said negroes forever. In witness whereof I have hereunto set my hand and seal, this 10th day of February, 1819."

The slaves conveyed in this deed and their increase, amounting in all to the number of fifteen, are still held by the defendant Polly Meares. The bill is filed by Robert Chesnut and his wife Elizabeth, who is one of the children of the said Joab, by his wife Polly, against Mrs. Meares and the rest of the children, alleging the death of Joab Meares, and that they are all tenants in common of these slaves, and praying for a division, and for an account of hires and profits.

The defendants, in their answer, say that they are advised, according to a proper construction of the deed above recited, that Polly Meares is entitled to an estate for life in the slaves in question, and that the plaintiff Elizabeth, and the other children of Joab Meares, are entitled as tenants in common to the reversion of these slaves after the death of the said Polly, and that they now have no right to a division.

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

Troy, for the plaintiffs.
Strange and *Shepherd*, for the defendants.

Battle, J. The right of the petitioners to a partition of the slaves in question, depends upon the construction of the instrument executed on 10th of February, 1819, by Joab Meares to Philip Coleman, as trustee for his wife and children. The instrument is not very formal in its structure, nor altogether technical in its language, yet, we think, there is not much difficulty in ascertaining its true intent and meaning. The primary object of the grantor was to provide for his wife. The love and affection which he bore to her, and the desire to provide the better for her support and maintenance, are recited as the consideration for the conveyance, and accord-

ingly the trust is first declared and then repeated for her alone. The children are not mentioned at all until the clause of warranty is reached, and then for the first time a *proviso* is inserted, by which the trust is said to be for the wife and children which she then had or might thereafter have by the grantor; and then another clause is added, by which the trustee is prohibited from ever taking the slaves from the possession of the wife and children.

If this limitation had been contained in a will, we think there could be no doubt it would be construed to give the wife an estate for life in the slaves, with a remainder to all her children as a class. See *Crawford* v. *Trotter*, 4 Madd. 362; *Morse* v. *Morse*, 2 Simons, 485. It would embrace all which were born to her during the life of the husband, or within a competent time after her death. The strongly expressed object of the testator to provide a support and maintenance for her, would make it an exception to the general rule, and would thus prevent a construction, which, by making the children tenants in common with her, would enable them, when they came of age, to demand a partition, and thus leave their mother destitute in her old age. For the general rule, see *Moore* v. *Leach*, 5 Jones' Rep. 88. A like construction, for the same reason, is inadmissible in the case now before us, which is the limitation of a trust. The analogy between an executory bequest, and the limitation of a trust, has been long and well established, and we must apply the same rule of construction to the latter, which it would be our duty to do to the former.

The consequence is, that the petitioners having only an estate in remainder as tenants in common with their children, have no right to demand a partition with the tenant for life, and their petition, for that purpose, must be dismissed with costs.

Per Curiam, Petition dismissed.

FREDERICK BECTON *and others against* JOHN E. BECTON *and others.*

As a general rule, infant plaintiffs are as much bound by a decree as persons of full age; but they are not so bound in a proceeding by an official plaintiff, though they are styled relators, without the intervention of a *prochein amy.*

In a bill filed by the Attorney General, or a solicitor, against a defaulting guardian, under the act of 1844, ch. 41, the wards are not required to be made parties, and such a proceeding is not made by the law conclusive upon their rights.

CAUSE removed from the Court of Equity of Jones county.

Frederick Isler Becton, by his last will and testament, (made in 1843,) devised and bequeathed, after several other bequests, as follows:

"Item. I give to my beloved wife, Eliza A. G. Becton, during her life, all the rest of my estate of every description, including all my lands and negroes not given to my son William; all my stock of every kind; household and kitchen furniture; money, notes, bonds and other choses in action; in short, all my property of every kind, subject to the limitations and conditions hereinafter mentioned, to wit: that my said wife shall advance, upon the marriage or arrival at age of my two grand-children, daughters of my daughter Julia Becton, one eighth part of all my negro slaves, which I give to them and their heirs, and shall advance in like manner to all my other children, the issue of my marriage with her, as they shall arrive at lawful age, each, one eighth of said slaves, which I give to them, their heirs and assigns forever, and shall also advance to my children, the issue of my marriage with her, one seventh of all the other property, given to her for life, which I give to them, their heirs, &c., they leaving to my said wife one eighth of my slaves after the other shares are all advanced, and one seventh of all the other property except the land, which, after her death, I give to my six children, the issue of my marriage with her, and to the survivor or survivors of them; and in case of her surviving the time of the arrival at twenty-one years, or marriage, of all my children, the eighth of the slaves remaining, and the seventh of the

other property left, I give to my said wife absolutely, her heirs, &c.," and appointed the defendant William B. Becton the executor, who qualified and undertook the discharge of the office. Frederick Becton, jr., Richard D. Becton, James J. Becton, Susan G. Becton, Nancy R. Becton and Jacob G. Becton, are the children of the testator by his wife, Eliza A. G. Becton, and are, except Jacob, the plaintiffs in this suit. Besides the above, the said testator left two children, Wm. B. Becton and Elizabeth Heath, and two grand-children, Sarah Loftin and Julia Becton, the issue of a deceased daughter, Julia, him surviving, who were by a former marriage. These latter, with the husband of Elizabeth Heath, Amos Heath, and Elijah Loftin, husband of Sarah Loftin, and Jacob G. Becton, of the latter marriage, are made defendants. John E. Becton became the guardian of Frederick Becton, jr., Richard D. Becton, James Becton, Susan G. Becton, Nancy R. Becton, and the defendant, Jacob G. Becton, and gave bond, with Wm. B. Becton and Simon S. Becton his sureties, and as such guardian and sureties, they are also made parties defendant.

Eliza A. G. Becton, the widow, intermarried with one John E. Becton, and died sometime in the year 1850. The said second husband is also made a party defendant. The property bequeathed above, willed to Mrs. E. A. G. Becton, went into her possession, and the amount given for her own use for life, was in her possession at the date of her death. The suit is brought against the executor and the guardian and his sureties, for an account and settlement of the several amounts that have come into their hands, or which ought to have come into their hands, for the use and benefit of the plaintiffs, and as a part of the estate of Frederick I. Becton, sr., they claim a distributive share of the legacies given to Eliza A. G. Becton; that the contingency upon which she was to take this property, absolutely, never having occurred, she had only a life estate in it, and that there was an intestacy as to it after the falling in of her life estate.

By way of anticipation, the plaintiffs set forth the proceedings of the Court of Equity of Jones county, under a bill filed

against John E. Becton, the guardian of plaintiffs, and his sureties, by George S. Stephenson, solicitor, under the act of 1844, wherein there was a reference to a commissioner, and a decree professing to ascertain the amount for which they were liable to the plaintiffs, and protesting that they are not concluded by the decree in that case; for that, although mentioned as relators in the case, being infants, they could not be such, and that thus being unrepresented, their interests were not duly asserted and considered, and that the said decree is for far too small an amount; that, in truth, the act never intended that the wards whose rights were involved, should be made parties, or that they should be estopped by the decree in such a case.

They further state, by way of anticipation, that a petition was filed in the Court of Equity of Jones county, by Jacob G. Becton, and in the name of the plaintiffs, alleging that they were tenants in common of thirty-two slaves under the will aforesaid, and praying that a partition of these slaves might be made between them, which was ordered and made accordingly; but they say there was error in the decree, and that the rights of the parties were not properly set forth and declared; for that, the said Jacob G.Becton was only entitled to a share of the unwilled property with the children of F. J. Becton of both marriages, whereas the decree gives him much more than that proportion, to wit, one seventh part. They insist that they ought not to be estopped by that decree, for that they were infants, and their interest not sufficiently attended to. The children and grand-children of the first marriage, also say they ought not to be bound by this decree for partition, as they were not made parties thereto.

The answer of the executor, Wm. B. Becton, and the guardian and his sureties, insist upon the decree made in behalf of the plaintiffs, notwithstanding the protestations and matters in law alleged by the plaintiffs; and the said Jacob G. Becton insists upon the decree for the division of the slaves as final and conclusive on the plaintiffs, in respect to their rights to the slaves assigned to him, notwithstanding the mat-

ters alleged in bar thereto. The cause was set down for hearing on the bill, answers and exhibits, and sent to this Court by consent.

J. W. Bryan, for plaintiffs.
Hubbard, for defendants.

BATTLE, J. We have no doubt that, upon a fair construction of the will of Frederick I. Becton, the elder, he died intestate as to the share of his negroes and other property which he limited, upon a certain contingency, to his widow absolutely. She died before the happening of the contingency, and there is no ulterior disposition of such share in that event. The consequence is, that one eighth part of his slaves and one seventh part of all the other property given to the widow for life, belong to his next of kin, who are his children, now living, and the two daughters of his deceased daughter, Julia, all of whom are parties, either plaintiffs or defendants, to this suit.

The defendant John E. Becton, who was formerly the guardian of the plaintiffs, and such of the other defendants as were his sureties, insist in their answer, as a bar to the account which the plaintiffs now seek, on a decree which was rendered against them by the court of equity for Jones county in a suit instituted under the authority of the act of 1844, ch. 41, by George S. Stephenson, the Solicitor for the circuit in one of the counties of which the guardian was appointed. We cannot concede to the decree the conclusive force contended for by the defendants. It is true, as a general rule, that infant plaintiffs are as much bound by a decree as persons of full age; and neither they, nor their representatives, are allowed to open the proceedings unless upon new matter, or on the ground of gross laches, or of fraud and collusion. See McPherson on Infants, 386, (41 Law Lib. 248,) which cites *Gregory* v. *Molesworth*, 3 Atk. 626; *Lord Brook* v. *Lord Hertford*, 2 Peere. Will. 519; *Sheffield* v. *Duchess of Buckinghamshire*, 1 Atk. 631. In these cases the infants are parties to the suit, and must have next friends to take care of their interest. The act of 1844,

does not require the infants to be made parties to the suit, which may be filed on their behalf by the Attorney General, or Solicitors in their respective circuits. In the present case, indeed, the Solicitor, in the bill which he filed for them, styles them relators, which, however, we think, was entirely unnecessary, if not improper. The relators, in a suit upon an official bond made payable to the State, are the real plaintiffs; and *that* infants cannot be without a *prochein ami*. See *McLaughlin* v. *Neill*, 3 Ire. Rep. 394; *Sanders* v. *Bean*, Busb. Rep. 318. The infants cannot be bound, then, as parties plaintiff, in a suit by the Attorney General, or a Solictor, and the act does not expressly, or by any necessary implication, give it a conclusive effect. If it have such effect, it must be by the force of the general rule, and that does not apply to the case for the reason above given, that the infants are not properly parties to the proceedings. The act intended, by ordering such a suit against a defaulting guardian, to have the interests of the infants attended to, whenever there was reason to fear, from the misconduct of the guardian, that there was danger of loss to them. The object of the act will be fully accomplished by having the guardian removed, his accounts settled, and a suitable person appointed to receive and manage the estate of the wards, under the direction of the court. It could not have been expected that the officer, having many other important public duties to perform, could attend properly to the taking of the accounts between the guardian and his wards, and hence the act was silent as to the conclusiveness of the decree. The infants may still, by their next friend, or after they come of age, call upon the guardian for a full account, and the former decree will be allowed no other effect than a *prima facie* presumption that the account and report, upon which it was made, were correct. If it were allowed a greater effect, the proceeding by the Attorney General or Solicitor would, in many cases, be prejudicial to infants, and it would have been better to have left them to the remedies which they had before the act was passed.

The defendant Jacob G. Becton objects to another partition

of the slaves, upon the ground that the plaintiffs are estopped from demanding it, by a decree of the court of equity for Jones county, upon a petition filed by them and him, for a partition of the same slaves. The reply to that is, that the defendants William B. Becton and Elijah Loften, and his wife Sarah, have an interest in one eighth part of the slaves which the testator gave to his wife for life, and left the remainder undisposed of, and that, in the settlement of the whole estate, there must be a new division so as to give to these defendants their respective shares. In making the said divisions, the former partition must stand so far as it may do so consistently therewith.

A decree may be drawn declaring the rights of the parties according to this opinion. There must be a reference for taking the necessary accounts, and a commissioner must be appointed to make another partition of the slaves upon the principle above stated, and the cause will be retained for further directions upon the coming in of the report.

PER CURIAM, Decree accordingly.

JEHU B. LAMBERT *against* JOHN HOBSON *and others.*

Where an executor made a deed in pursuance of a bond for title executed by his testator, with a covenant of warranty, on which he was sued and subjected to the payment of damages, he has a right to be substituted to the rights of the obligee, and be reimbursed out of the estate.

Where there was a bill filed and a decree for the settlement of an estate, and the executor failed to have himself protected in the decree against a suit for damages, in which he was primarily liable, but for which the estate would be liable to him, he cannot, without some explanation of, or excuse for, his apparent laches, maintain a bill for reimbursement against the legatees to whom he has paid their legacies.

CAUSE removed from the Court of Equity of Randolph county.

The plaintiff is one of the administrators with the will an-

nexed of John Lambert, sen'r. The testator, claiming to be the owner of a tract of 230 acres of land, in Chatham county, sold the same to one John J. Burke, for about $200, and made a bond conditioned to make title for the same whenever the purchase-money was paid. Burke paid part of the purchase-money, and then assigned his rights, under this bond, to John Headen. Upon the death of the testator, Headen paid to the plaintiff and his co-administrator, John Lambert, the remainder of the purchase-money, and they made a deed for the land, with a general warranty, which bound them individually. It turned out that John Lambert, sen'r., the testator, had no title to the land thus contracted by him to be sold, but the land belonged to one Joab Lambert, who brought an action of ejectment for the same and recovered possession from Headen. The latter then sued the plaintiff and John Lambert on their warranty, and recovered about six hundred dollars. The plaintiff alleges that he paid the whole of this sum out of his own means, his co-warrantor having become insolvent and left the State. The plaintiff insists, in his bill, that having exonerated his father's estate by making good these damages, he is entitled to be subrogated to Headen's rights under the bond, and to be paid back the same out of that estate. He says, however, that having paid over all assets in his hands to the several defendants, who were legatees under the will, he has no means wherewith to indemnify himself by retaining, and prays the Court to decree a reimbursement of, the amount thus paid by him, from the defendants who have received the estate.

It appears from the answers of the defendants, and from the exhibits filed by them, that a bill was filed against the plaintiff and his co-administrator in the court of equity of Randolph county, by most of the present defendants, seeking a settlement of the estate of the testator in their hands; that the same was transferred to the Supreme Court and an account ordered, which was taken by the clerk of this Court and confirmed; that a decree passed in pursuance of the same, and under this decree the payments of their legacies

were made to such of the defendants as were made parties plaintiff. They aver and show that the suit, for a breach of warranty, was pending at the time the decree was rendered in the Supreme Court. They plead and claim the protection of that decree against further molestation on this account.

After the decree in the Supreme Court, several other of these defendants, who were parties defendant in the case above-mentioned, and who, on that account as they say, could not get a decree for their portions, filed a petition in the county court of Randolph, for their shares of the said estate under the will, and in that suit the plaintiff having brought in this claim for reimbursement, the same was allowed in the decree therein made, and the proportionate amount was deducted from the shares of each of the petitioners, and ordered to be paid into the clerk's office of Randolph county, for the benefit of the plaintiff, which was done. This decree is also pleaded as a bar for such of the defendants as were parties to this latter proceeding.

J. H. Bryan, for plaintiff.
Gorrell and *W. J. Long*, for defendants.

PEARSON, J. The testator by himself and administrators with the will annexed, received the price of the land. He was under obligation by force of his bond to make title; this was discharged by the act of the administrators with the will annexed, by reason whereof they became individually liable, and the plaintiff has been compelled, in consequence of the assertion of superior title, to pay a large sum. As his act exonerated the estate of the testator, he had an equity under the doctrine of substitution, to stand in the place of Burke and Headen the assignee, in respect to the amount they were entitled to under the bond, and to be reimbursed that sum out of the estate of the testator.

The only question is, whether the plaintiff is not too late in seeking relief. In respect to such of the legatees as have paid into the office of the county court of Chatham their rela-

tive parts, the plaintiff is not entitled to relief under the bill now filed, for there is nothing to prevent him from applying for and receiving the fund which has been retained for his use. In respect to the other legatees, the plaintiff had an opportunity, and ought to have availed himself of it, when the bill was pending for the settlement of the estate, and before a final decree was entered in this Court, under which these legatees recovered from him their respective shares, to have brought forward this claim and had it passed on and provided for in the decree. It is too late, after a final settlement of the estate under the decree of the court, and after he has, in pursuance of that decree, paid over their shares, for him to file another original bill for the purpose of recovering back by the decree in this case, a part of what he has paid by a decree in that case. There must be an end of litigation.

The bill is singularly defective in respect to dates; enough, however, appears from the pleadings and exhibits to show, that while the bill for a settlement of the estate was pending, Joab Lambert instituted an action of ejectment for the land, and the plaintiff was thereby notified of his danger, and was called upon to provide against it. He failed to do so, and there is no allegation to account for, or excuse, his neglect and laches.

PER CURIAM, Bill dismissed.

MARTIN STEEL *against* JUDITH E. BLACK.

The fact that the bargainor, in an absolute deed, remained in possession of the land conveyed, for more than a year after the sale, using it as his own, is *dehors* the declarations of the defendant, and is inconsistent with the idea of a purchase; and if in addition, it be proved that the seller was hard pressed for money, that the money advanced was not more than half the value of the premises, and that the defendant agreed to execute a bond to reconvey, and refused to do it, a sufficient case is made out to entitle the plaintiff to a reconveyance on the payment of the sum advanced, with interest.

CAUSE removed from the Court of Equity of Cabarrus county.

The plaintiff, being hard pressed for money, and his land being levied upon and advertised for sale, conveyed to the defendant, then a married woman, a tract of land, worth two hundred dollars, and got her to pay off the executions that were then against him. These amounted to about $100. The plaintiff remained in possession of the land for a while after the execution of the deed, and then rented it out for a year at thirty dollars, which was paid to him with the knowledge of the defendant and with her assent. The plaintiff alleges, in his bill, that the land in question was advertised to be sold at Concord, on the week of Cabarrus county court, October term, 1854, and that the defendant meeting him at that place, proffered to advance him money to pay off the executions, and to take a deed for the land as security for the repayment of the money advanced; and as she was then a married woman, she proposed that her husband, in a few weeks thereafter, should execute a bond to reconvey the land on the repayment of the money with interest; that he agreed to the terms proposed, and accordingly made an absolute deed for the premises; that at the same time it was agreed between them, if he was unable to redeem the land, she was to advance a further sum, so as to make the whole sum three hundred dollars, which was the estimated value of the land; that in about three weeks afterwards he called on her to have the bond to reconvey executed, when she expressed a willingness to do so, but said it was not convenient to do the writing at that time, and it was further agreed that it should be done in a short time thereafter; that in about three weeks more he tendered her the sum advanced for him, which she refused, insisting that the purchase was an absolute one.

Samuel N. Black, the husband of the defendant, died in the year ——, having made and published a will, in which he devised the land in question to the defendant, and appointed her his sole executrix, and she therefore brought an action of ejectment against the terre-tenant, who had been put into possession by the plaintiff, which was still pending when

the bill was filed. The bill is filed against the defendant in her individual capacity and as executrix of her husband, and prays for a reconveyance of the land upon the repayment of the money advanced, with interest, and that, for that purpose, an account may be taken to ascertain the amount.

The defendant denies, in her answer, that she made any such agreement to reconvey the premises on the repayment of the money as is alleged. She says that the plaintiff, meeting with her at Concord, on the day on which his land was to be sold, proposed the terms which he now insists on having been agreed on between them, but that she refused them, and would only agree to make the necessary advance of cash, on condition that the land was sold to her absolutely for the amount he required to pay off the executions; that the plaintiff finding that she would not loan the money upon the security offered, to avoid the exposure of a public sale, agreed to sell the land to her for the amount required to satisfy the executions, which she admits was only about half its value. She utterly denies the agreement to have a bond executed by her husband, but says she gratuitously told the plaintiff, after the deed was made, that she would let him have the land back if he would pay her the money advanced, with interest. She admits that she assented to the rent's being paid to the plaintiff for the year after the deed was made, but she says this was done entirely out of favor to the plaintiff, because he was in needy circumstances and she had got the land cheap.

There were replication and proofs, and the cause being set for hearing, was sent to this Court by consent.

Boyden and *Long*, for plaintiff.
Wilson, for defendant.

Pearson, J. The pleadings and proofs satisfy us of these facts: the plaintiff was pressed for money; his land had been levied on and was advertised by the sheriff for sale; the consideration paid for the land did not exceed one half of its value, as admitted by the defendant, or one third according

to the proof; the plaintiff retained possession for more than a year—receipt of the rent being a possession on his part; the defendant admitted that she had agreed to execute a bond to reconvey if the money was repaid. So, undue advantage was taken of the necessitous condition of the plaintiff to get his property at much less than it would have sold for under execution. There was fraud in agreeing to execute a bond to reconvey and afterwards refusing to do so. The possession of the plaintiff was inconsistent with an absolute sale, and is a fact dehors the declarations of the defendant.

The circumstance that the defendant was a feme covert, and therefore her agreement to execute the bond was void, will not avail her as a defense. Notwithstanding her coverture, she was capable of accepting the deed so as to acquire title, and the agreement as to the bond is relied on, not for the purpose of enforcing it, but for the purpose of showing fraud and undue advantage on her part; in regard to which it is pregnant proof.

The pretext set up by the answer, that the plaintiff was willing to sell his land absolutely, at half price, to avoid the exposure of a public sale, after it had been levied on and advertised, is too flimsy to be entitled to notice.

The plaintiff has established every particular necessary to bring his case within the principle upon which this Court will declare a deed, absolute on its face, to be a security for money.

The plaintiff is entitled to a decree for redemption, upon payment of the money advanced and interest; as to which, there will be a reference.

Per Curiam, Decree accordingly.

THOMAS R. MILLER *against* CHARLES MOORE *and* JAMES W. PATTON *and* THE DAVIDSON RIVER MANUFACTURING CO.

A corporation held a tract of land under a bond for title when the purchase-money should be paid. This equity, it was agreed by the corporation, should be mortgaged in behalf of certain individual members who were about to incur personal liabilities for the company, and such agreement was entered in the minutes of the company, and afterwards a deed of trust made in conformity therewith. It was *Held* that these members, having acted on the faith of the resolution, were entitled to the security, and that it was of a nature to be upheld in equity; also that the deed of trust was but a a confirmation of the agreement, and had relation to the resolution.

Held also that this equity over-reached a lein acquired by a judgment creditor, who filed a bill to subject it; he having notice of the prior equity.

CAUSE removed from the Court of Equity of Henderson county.

Thomas R. Miller, Thomas T. Patton, Wm. Patton, Ephraim Clayton and Javan Trammell; Samuel Hefner, Reuben Clayton, James Judge, James W. Patton and Charles Moore, on the 23rd of July, 1842, formed a copartnership for the manufacturing of iron. The capital of the said company was to be $5000, to be made up by shares of $100. The plaintiff, Miller, subscribed three shares, James W. Patton seven shares, Moore five shares, and the other persons named above subscribed the remainder in proportions agreed on by them. Subsequently, the capital was increased, and Miller subscribed two additional shares, James Patton and Moore subscribed five shares in addition. The defendants Patton and Moore were the owners *in fee* of 117 acres of land lying on Davidson's river, which is particularly described in the bill, and the plaintiff, Miller, claimed, by purchase at execution sale, 1,500 acres, adjoining thereto, which is also described in the bill, and on the 30th of that month, July, 1842, they contracted to sell these tracts to the company at the price of $3000, on a credit of one and two years, in equal instalments, with interest from the time of the sale till the same was paid, and executed their covenant, in which they obliged themselves to convey the 117 acres first above mentioned, *in fee, with warranty of title*, and release all plaintiff Miller's title and interest in the residue. The

plaintiff alleges that it was agreed between the three that, out of the purchase-money, Patton and Moore were to receive enough to pay a debt due from plaintiff's father to one Murphy, for which they were sureties, but not to go beyond $2300, and the remainder was to go to the plaintiff for his claim in the land.

It appears from the pleadings, that whenever instalments were called for by the company, the assessments on the said Patton, Moore and plaintiff, were not to be required in cash, but were to be regarded as paid at the time they were made payable, and the amount deducted from the purchase-money due for the said land. Instalments were called for, but the company needing money very much, the plaintiff and defendants Moore and Patton waived their rights under the original agreement, and paid 30 per cent. in cash. The remainder of their stock was paid for by deducting the same from the money due them for the land. In January, 1847, the company was incorporated by an act of the General Assembly, under the name and style of the Davidson River Manufacturing Company, which charter was accepted by the company then existing, on the 30th of March, 1847, and the corporation duly organized by the appointment of officers and enactment of by-laws. The incorporated company succeeded to the rights of the former company, and became responsible for its debts, and, amongst these debts, the sums due to the plaintiff and defendants Moore and Patton. It is further alleged that, besides the 70 per cent. deducted for their stock subscription, neither the plaintiff nor the defendants Moore and Patton, has received any part of this debt, and that the balance due after such deduction, is $1850, which the said incorporated company justly owes them.

At Spring Term, 1850, of Henderson Superior Court, the plaintiff, Miller, recovered judgment against the company for the sum of $432,55-100, with interest. He took out execution upon the same, and had it levied on all the property of the said corporation liable to execution, which was sold and bid off by the plaintiff, and the sum thus realised was at first

applied to the satisfaction of the execution, and he alleged that there was yet remaining unpaid of this judgment about $200; that the lands held by the said company were improved in value, and that they are now sufficiently valuable to pay the whole of the plaintiff's judgment for the purchase-money due him. The prayer of the bill is for an account of the affairs and dealings of the Davidson River Manufacturing Company, the amount due to the plaintiff and the defendants Moore and Patton, and the proportion due to each, and for a settlement of the remainder due him out of the land held by the said company under the title bond made by the plaintiff and defendants.

The answer of the defendants Moore and Patton states that they had become liable, as sureties of John Miller, the father of the plaintiff, and that, to save themselves from loss, they bought his land (the said 117 acres,) at public sale, and that the plaintiff had purchased the adjoining land (the 1500 acres) at execution sale, and it was agreed between the three that the land thus held by them should be conveyed to the company at the price of $3000; but they deny that the division was to be made as claimed by him, but that the defendants Moore and Patton were first to receive the amount of their liability for John Miller, which, it was thought, would not amount to more than $2500, and the plaintiff was to receive what he had paid on his bid for the other land, which, with interest, it was thought, would amount to less than $100, and the remainder was to be divided into three equal parts, each one to take a third.

They state that the plaintiff had been employed as agent and manager of the concern, and that, having managed it very badly and got it in debt, he brought suit for his salary and recovered the judgment mentioned in his bill; that he had the effects of the company levied on, and sold all he could have levied on at an undervalue, and bid it in himself. This was between the obtaining the judgment in his favor, (Spring Term, 1850,) and filing his bill, (Fall Term, 1850.) It is further alleged by them, that, in order to extricate the company from its

difficulties, it was agreed, in 1849, to borrow money from the bank at Asheville, and, as the bank refused to take the note of the corporation, a note was made in the name of Ephraim Clayton as principal, and the defendants Moore and Patton as sureties, and, at a general meeting of the stockholders, at Asheville, in September, 1849, it was resolved that all the property and effects of the company should stand pledged to secure the payment of the said debt, and save harmless, the said Clayton, Patton and Moore. There being some informality in the wording of this resolution, it was again brought before the body of stockholders in April, 1851, and modified so as to express its true purpose, which was to the effect as stated; at both which meetings the plaintiff was present and concurred in the measure. In pursuance of this resolution, a mortgage, or deed of trust, was drawn up embracing these purposes, and was duly registered. As one of the means for extricating the corporation from its difficulties, it was determined to purchase the ore-bank on which they had to rely for their supply of material, and $600 of the money thus raised, was appropriated to this purpose. Of the property which the plaintiff had levied on and sold, this ore-bank tract of land was the principal; this he bid off for $200

The cause was set down for hearing on the bill, answers and exhibits, and sent to this Court. At August term of the court at Morganton, a decree was passed by consent, authorising the sale of the lands held by the company, by a commissioner of this Court; also it was referred to *Mr. Dodge*, the clerk at Morganton, "to ascertain and report how much is due from the defendant, the Davidson River Manufacturing Company, to the plaintiff, and to the defendants Charles Moore and James W. Patton, for the residue of the purchase-money for the said lands, and what proportion is due to each of them; what amount of the plaintiff's judgment against the Davidson River Manufacturing Company, referred to in the pleadings, remains unsatisfied,—distinguishing between the judgment for costs, principal and interest; and whether there existed any mortgage lien or other valid incumbrance on the

equitable title of the said Davidson River Manufacturing Company to the lands in the pleadings mentioned, or any part of them, in favor of any other person or persons, before the lien of the plaintiff attached by the commencement of this suit, and if so, the nature and extent of such lien or incumbrance, and the person or persons in whose favor it existed; and it is further ordered, that all the matters be held over for further consideration of the Court."

"And it is further ordered, adjudged and decreed, by consent of parties, that in the account, complainant's judgment shall not be credited with the amount of his bid for the lands of the defendant, but the sale shall be regarded as set aside, and the said lands shall be sold together with the other property hereinbefore referred to."

In obedience to this order, Mr. Commissioner *Dodge* reported, among other matters, that the deed in trust to Williams, to indemnify Clayton, Patton and Moore, gave them a lien, which overreached that created by the commencement of this suit. Plaintiff excepted to this part of the report.

The report, in making up the balances, treats the agreement to set aside the sale of the ore-tract as entire, whereas the plaintiff contends that the lien which was obtained by the levy of the execution, should have been reserved to him, and thus given him a preference as to that land. This is the ground of the second exception of the plaintiff. The cause was argued upon the exceptions at Morganton, at August term, 1857, by *Baxter*, for the plaintiff, and *N. W. Woodfin*, for the defendants, and removed to this Court for a second argument; but no counsel appearing for either party, the Court proceeded to consider the case.

PEARSON, J. The first exception is overruled. The corporation succeeded to the rights of the company in respect to the land mentioned in the pleadings—that is, an equity to have the legal title upon payment of the balance of the purchase-money. This equity, the corporation agreed should be mortgaged, or conveyed in trust as a security for the liabili-

ties incurred by Ephraim Clayton for its benefit; and Clayton acted upon the faith of this agreement. This was in 1849. Upon the maxim, equity considers that as done which ought to have been done, Clayton was entitled to this security at the date of the agreement, which over-reaches the lien of the plaintiff in respect to his judgment debt, which attached by the filing of the bill. The objection that the maxim cannot apply to an agreement to execute a mortgage or deed of trust, because such instruments are of no force or effect until registered, is met by the fact, that a mortgage or deed of trust conveying a chose in action, or an equity which is not subject to execution at law, does not come within the operation of the statutes in regard to registration. This is settled in *Wallston* v. *Braswell*, 1 Jones' Eq. 137. So, the deed of trust afterwards executed may be viewed, simply, in the light of a deed, in confirmation of the prior agreement, which, being in writing, signed by the party, or authorised agent, was sufficient to bind the corporation; of this, the plaintiff had full notice, and of course, he is bound thereby.

The second exception is also over-ruled. When the plaintiff agreed to release or waive his right in respect to the ore-bank, in order to make the property sell to advantage, he did not reserve any right which he had acquired by force of the levy of his execution; the levy or lien thereby was consequently waived. We are also of opinion, that the plaintiff had compensation for this waiver by being allowed the excess of the balance of the purchase-money, over and beyond the sum of $2500, in opposition to the answer, in which it is averred that such excess was by agreement to be divided between him and the defendants Moore and Patton.

Per Curiam, Decree accordingly.

MARY E. JOHNSON, *Executrix of* HEZEKIAH JOHNSON, *against* JAMES F. JOHNSON *and others.*

Where a testator ordered his estate to be divided between his wife and certain children, she to have a part for life, and, at her death, there was to be an equal division of the part held by her, amongst the same children, it was *Held* that one of the children, who had not received his share in the first division, had a right to have it made good to him in the second division.

CAUSE removed from the Court of Equity of Yadkin county.

James Johnson died in the year 1841, having made and published his last will and testament, in which he appointed his son, James F. Johnson, his executor, who qualified and undertook the administration of the trust confided to him. In this will, are contained the following clauses:

"Item. I lend unto my beloved wife, Cassandra Johnson, the one-third part of the whole of my estate, real and personal; the real estate to be laid off by metes and bounds, so as to include the dwelling-house in which I now live, and all the necessary out-houses, for and during her natural life. * * *

"Item. To my son Hezekiah Johnson, if he returns from Texas within the space of seven years from the date of my decease, I give and bequeath one equal share of my estate with the rest of my children; but if he does not return within the time specified, then, and in that case, I give and bequeath to his children the one half as much as is hereinafter bequeathed to any one of my other children." * * *

"Further. It is my will that all the balance of my estate be equally divided, share and share alike, between the following of my children, namely, Harriet Tomlinson, Mary Bryson, Matilda Churchill, Julia Harbin, Curtis Johnson, James F. Johnson and William Johnson. To those of the aforesaid children, or any of them, to whom I may have formerly loaned any negro or negroes, the said negro or negroes are to be valued at whatever they may have been worth at the time the said children received them, and the amount of the said valuation, when ascertained, is to be taken out of said child or

children's individual share. And further, it is my will and desire, that at the death of my beloved wife, Cassandra, the property I have loaned her, shall be equally divided, share and share alike, between my children aforesaid, namely, Harriet Tomlinson, Mary Bryson, Matilda Churchill, Julia Harbin, Curtis Johnson, James F. Johnson, and William Johnson."

In order to make a convenient division of the remainder of the estate according to the will, the executor advertised and sold the whole thereof. At this sale it was understood that each of the legatees should bid for his or her share of the estate, as nearly as it could be estimated, and that the amount of his or her legacy was to be deducted out of the purchases thus made. Cassandra Johnson purchased property at this sale to the amount of $3,540,35, for which she gave the executor a receipt in full for her share.

The testator, in his life-time, had advanced property to each of his children, except the plaintiff's testator, and she insisted that, according to the terms of the will, they were bound to account with his estate for these advancements.

The several legacies, mentioned in this will, with the exception of the plaintiff's testator, received the full legacy to which each was entitled, and the widow, Mrs. Cassandra Johnson, received property to the amount of $3,540, for which she gave the executor a receipt in full for her share.

The plaintiff alleges, that her testator received only $400 in a note on Ross McClelland, and a road-wagon, worth $100, although he returned from Texas to the county of Surry, in less than two years after his father's death. The widow had assigned to her for life, among other chattels, as evidenced by her receipt, a number of slaves, who have increased and amount, now, to the number of eleven. The widow died shortly before the filing of the bill, and the defendant Lawrence became her administrator. He had purchased the shares of Wm. Johnson and Thomas Harbin and wife, in the said slaves.

The plaintiff insists, that under the will of the father, she is entitled, as her husband's executor, to one-eighth of he whole

estate, reckoning as part of it the advancements made in the testator's life-time; and she further insists, that she is entitled to have such eighth part made good to the estate of her testator, out of that part of it, which was lately in the hands of Mrs. Johnson, and which is now held by her administrator. She prays for an account, and for general relief.

Winston and *Miller*, for plaintiff.
Boyden, for defendants.

BATTLE, J. We think that the obvious construction of the will of James Johnson, is that upon the return of his son Hezekiah from Texas within the time specified, he was to have an equal share, with the children named, in what the testator calls the balance of his estate. That balance included as well what was given to the children after the death of the testator's widow, as what was given to them immediately, and there is nothing in the will to show that it was intended to be restricted to the latter. As the plaintiff alleges that her testator, the said Hezekiah, has not received any part of the share to which he was entitled, the question arises whether she, as his representative, can claim to have it allotted out of the shares which were given to the widow for life, and which have come into the possession of the children by her death. We cannot perceive any just ground upon which such claim can be resisted. The testator's children, among whom the balance of his estate was to be divided, are all before the Court, and a part of the common fund is still undivided; and it is but an ordinary application of the principle, that equality is equity, that a party who has heretofore had nothing, shall now have a full share of the whole assigned to him in the present division. In this division, those who claim by assignment the interests of some of the legatees, can take only so much as their respective assignors would have been entitled to.

There must be an account taken of the testator's estate, and of what each of the children, including the plaintiff's testator has received, and also an account of the slaves and other ef-

fects, which were given to the widow for life, and which, upon her death, remain still to be divided according to the testator's will. The commissioner appointed to take the account, will also enquire and report what assignments of the interest of any of the legatees have been made, and to whom, and the cause will be retained for further directions upon the coming in of the report.

PER CURIAM, Decree accordingly.

JOHN N. HANFF *against* THOMAS S. HOWARD *and others.*

Where real property was bought for the purpose of being used by a company formed for the purpose of carrying on a mechanical trade, and was so used, and had been so used, by several companies before this, and was necessary to the carrying on of such business, and was mentioned in the several deeds to the several partners as a part of the effects of the partnership, it was *Held* that there was a trust of such real property, by operation of law, for the partnership as tenants in common, though it had not been declared in writing.

A trust by operation of law, is not within the scope of the statute of frauds. (*Hargrave* v. *King*, 5 Ire. Eq. 430; *Cloninger* v. *Summit*, 2 Jones' Eq. 513, cited and approved.)

CAUSE removed from the Court of Equity of Craven county.

This was a bill filed for the sale of a lot of land, to which the plaintiff claimed to be a tenant in common with the defendants, alleging that an actual partition could not be made without great injury and loss to the several claimants.

On the —— day of December, 1841, Malachi B. Robinson executed a deed to Wm. P. Robinson and Joseph J. Robinson, reciting that, by articles between Malachi Robinson and John Noe, dec'd., they had entered into copartnership in the ship-carpenter's business, under the name and style of Noe & Robinson, and held the following property as effects of the firm, "a certain lot of ground lying in the town of Newbern, with the railways and other improvements thereon, and various

implements and articles for the better success and promotion of the business of their said copartnership, all of which was held by them as copartners;" that the said copartnership had been dissolved by the death of Noe, and the said M. B. Robinson, as surviving partner, conveyed the whole of the said property to William P. Robinson and Joseph J. Robinson. On the same day, for a valuable consideration, they sold and conveyed back to the defendant Malachi B. Robinson, one undivided half of the lot and its appurtenances. The recital in the deed sets forth that the said Malachi, William and Joseph, had associated themselves together under the name and style of Robinson & Brothers, for the purpose of carrying on the ship-carpenter's business. For the consideration of three thousand dollars they conveyed to the said Malachi, each one half of his interest, to wit, one fourth of the land, "with the wharf buildings, railway, falls and fixtures, incidental and appertaining to said railway, together with one half of all their right, title, claim and interest in and to the timber, tools, saws, iron-canoe, horse, cart and harness, bellows and anvil, and other articles bought by them at the sale of the effects of the late firm of Noe & Robinson." This deed also sets forth the proportions in which each of the partners was to be interested in the profits and liabilities of the firm. On the 6th of April, 1843, Malachi B. Robinson, with the consent of the other partners, sold his interest (one half) in the land, fixtures, tools, &c., to Thomas S. Howard, who thenceforward became a partner in the same business with the said William P. and Joseph J. Robinson. This sale having been made on a credit, the said Malachi took a mortgage on the share so conveyed to Howard, which was still unsatisfied at the commencement of this suit. Joseph J. Robinson, with the consent of his associates, Howard and Wm. P. Robinson, on the 3rd of February, 1845, sold and conveyed his share of the lot, railway fixtures, tools, &c., to James Pittman, who thenceforward became a partner with Howard and Wm. P. Robinson, and the business was carried on, on the premises with the railway &c., in the name and style of Robinson, Pittman & Co.

During the time of this latter copartnership, a house was built on the said lot as a residence for Pittman and his family, which was paid for out of the common funds of the company, which he occupied until his death, which occurred in the year ——, and was still occupied by his widow at the beginning of this suit. Another house on the premises, which Howard occupied as a residence, was extensively repaired, also at the expense of the company. The firm, last formed, was carried on for several years with the same means, but it became embarrassed in its affairs, and at the time of filing this bill, there were outstanding debts against it to a considerable amount beyond its means. On the 10th of February, 1849, James Pittman made a mortgage deed to Alexander Miller, to secure the payment of certain debts therein specified, due by Pittman to one Mitchell and others, for which Miller was his surety. This deed purports to convey the lot, "marine railway, buildings, improvements, and every part of the gear, tools, and appurtenances thereunto belonging." Miller filed a bill in the court of equity against the heirs and personal representatives of Pittman, and obtained a decree of foreclosure, under which the interest of the said Pittman in the land in question, was sold at public auction and purchased by the plaintiff. The suit is brought to have the share thus purchased realised by a sale, and for partition of the money. It was insisted by the defendants that the said lot, with the buildings and fixtures, was brought into the business capital of the firm, and, as such, was not liable to the private debts of the partners, either by way of mortgage or by execution, but was, in the first instance, liable to the debts of the copartnership; that the only interest which the mortgagee obtained by the deed of 1849, was to have the surplus coming to Pittman, after the debts of the firm were paid. The plaintiff, on the other hand, contended that the land was conveyed to Pittman individually, and as the association was formed by parol agreement, the land never vested in the company; that the statute of frauds prevented the land from so vesting.

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

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

PEARSON, J. If a partner executes a mortgage of the whole or any portion of the partnership effects, as a security to an individual creditor, the mortgagee takes, subject to the equity of the other members of the firm, to have the effects first applied to the discharge of the partnership debts, and acquires only the interest of the mortgagor; i. e., his share of the surplus, if any, after the liabilities and debts of the firm are paid and the business is wound up. This is a well-settled principle and is applied not only to mortgages, but to sales under execution in favor of a private creditor of one member of the firm.

This doctrine was properly conceded in the argument, but it was insisted, for the plaintiff, that the land, together with the marine rail-road, buildings and other fixtures, did not constitute a part of the partnership effects; for that it was not embraced in the original copartnership; and in the second place, if it was, as the agreement was not in writing, it is void in respect to the land by the statute of frauds. We are satisfied, that although the legal title to the land remained in the respective members of the firm as tenants in common, yet the use of it did constitute a part of the partnership effects. We are led to this conclusion by many circumstances and considerations: The deed of William and Joseph Robinson to Malachi Robinson, December, 1841, recited: "Whereas, Malachi, William and Joseph Robinson, have agreed to associate themselves together as copartners, under the name of Robinson and Brothers, for the purpose of carrying on the ship-carpenter's business, and have further agreed to become interested in the property hereinafter mentioned, in the proportion of one half by Malachi, and one half by William and Joseph, for the purpose of carrying on the said business." The deed, then,

conveys to Malachi all right and interest in one half of the land, marine railway, buildings and other fixtures, and timber on hand, tools, saws, bellows and anvil, and other articles, bought at the sale of the effects of the late firm of Noe and Robinson. A deed of the same date, executed by Malachi Robinson to William and Joseph Robinson, recites, that by articles of agreement between Malachi Robinson and John Noe, deceased, they had entered into copartnership in the ship-carpenter's business, under the name of Noe and Robinson, and held the following property, as effects of the firm, setting out the land, railway, &c., the same as the other deed. In *April*, 1843, Malachi Robinson, by deed, conveys to Thomas Howard, all his undivided half or right, title and claim in the land and railway, &c., tools, &c., describing the same property, and the business was then carried on by Howard and William and Joseph Robinson, as copartners, using and treating the land, tools, &c., as effects of the firm. In *February*, 1845, Joseph Robinson, by deed, conveys to James Pittman, all his undivided one-fourth part or right, title and claim in the land, railway &c., tools &c., describing the same property, and the business was then carried on by Howard and William Robinson and James Pittman, as copartners, using and treating the land, tools &c., as effects of the firm.

So, this land has been used for many years as partnership property; first by the firm of Noe & Robinson; then by Robinson and Brothers; then by Howard and the two Robinsons, and then by Howard, Robinson & Pittman; and although these several firms were unconnected, and one was followed in succession by another, still the same land, tools &c., constituted the effects of the respective firms, and the land was identified and became just as much a part of the effects of the firm as the "bellows and anvil," or other implements. The land was necessary for the purposes of the firm; in fact, the business could not be carried on without it. The land was not only used and treated by Howard, Robinson and Pittman, as a part of the effects of the firm in the usual way, but a house was built on it for Pittman to live in; How-

ard's house, on it, was repaired at a large expense, and a shed and other buildings were erected, all of which was done and paid for by the firm. The deed of mortgage by Pittman to Miller, *February*, 1849, conveys all of Pittman's "undivided one fourth *share, interest, estate* and *claim* in the *land*, together with the marine railway, buildings, improvements, and every part of the *gear*, *tools* and appurtenances thereunto belonging." So that the deed, under which the plaintiff claims, connects the land and tools, and treats them alike as effects of the firm.

The question is, does the statute of frauds make void this copartnership agreement in respect to the land? We find it settled by authority, that it does not; and we fully concur in the reasoning on which that conclusion is based; *Dale* v. *Hamilton*, 5 Hare's Rep. 369, and the cases there cited, where the subject is fully discussed. Adams' Eq. 36; "If land is acquired as the substratum of a partnership, or is brought into and used by the partnership, for partnership purposes, there will be a *trust by operation of law*, for the partnership as tenants in common, although a trust may not have been declared in writing, and the ownership may not be apparently in all the members of the firm, or if in all, may apparently be in them as joint-tenants." *Hargrave* v. *King*, 5 Ire. Eq. 430; *Cloninger* v. *Summit*, 2 Jones' Eq. 513, are cases where the agreement, in respect to land, was held not to be within the operation of the statute, upon the same principle of enforcing the execution of a trust.

In our case, the legal ownership was in Howard, Robinson and Pittman, as tenants in common, but a trust was implied by operation of law, because it was a partnership transaction. The land was necessary for the purposes of the association, and was brought in and used for partnership purposes, and a trust, by operation of law, is not within the operation of the statute.

PER CURIAM, Bill dismissed.

DAVID WILLIAMSON AND AMELIA *his wife, against* HENRY B WILLIAMS, J. B. CASHION *and another.*

A court will not entertain the question of "nullity of marriage on account of imbecility," incidentally, but will stay proceedings in the suit in which such issue is made, that it may be determined by a direct sentence in either a superior court of law or a court of equity.

CAUSE removed from the Court of Equity of Mecklenburg county.

The bill was filed by the plaintiffs, as husband and wife, against the wife's guardian, for an account and settlement of his trust. By way of anticipation, it was alleged, that the form of a marriage had passed between the feme plaintiff and one Cashion, who is still living, and that the defendant made that as an excuse for not settling with the plaintiff; but that this was not a bar to their right of recovery, for that at the time of this pretended marriage, she was little over thirteen years old; was very weak of intellect, and was brought to submit to this pretended ceremony by fraud and artifice, accompanied, in some degree, with actual force, but that she did not understand the nature of the transaction in which she was involved; that she did not give her consent to a marriage, and never afterwards consummated such a marriage by cohabitation with said Cashion; that she remained in the house of the said Cashion, closely watched by his near relations, residing with him, for about six months, when accidentally meeting with her mother, she was rescued from this state of duress by her, assisted by her slaves; that she never saw or spoke to the said Cashion afterwards; that he shortly after this ran away from this country and went to parts unknown to her; that this took place in 1846, more than nine years before the filing of this bill, and that the said Cashion, except one visit to her mother's house, a few days after her rescue, when she refused to see him, has made no assertion of marital rights or authority. The plaintiffs state that, not deeming such an iniquitous transaction a marriage, after arriving at

mature years and a better state of mind, she entered into a marriage with the plaintiff Williamson, and as such husband and wife, this suit is brought for the recovery of her estate, which consists of land and slaves and money, and the profits arising from these for several years past.

The defendant Williams, the guardian, avers the validity of the former marriage, and alleges it in bar of the plaintiffs' right to recover in this action.

A judgment *pro confesso* was entered as to the defendant Cashion. Replication, commissions and proofs, and the cause being set for hearing, was sent to this Court, where the case was contested upon the question of the validity of the former marriage.

Osborne and *Jones*, for plaintiffs.
Wilson, for defendants.

PEARSON, J. This is an ordinary bill by a ward against a guardian for an account and settlement of her estate. By way of anticipating the defense, the plaintiffs charge that the defendant refuses to account, pretending that, prior to the intermarriage of the feme plaintiff with the other plaintiff, she was married to one Cashion, who is still living; but they aver that, although there was a marriage de facto between the said Cashion and the feme plaintiff, yet such marriage was null and of no force or effect, for that, at the time of its celebration, she was of a weak and imbecile mind, and did not consent to the marriage, but was by fraud and duress procured to enter into it against her will, and that as soon as she was freed therefrom, she separated from him and refused to recognise the relation of man and wife in respect to him.

The answer relies upon the marriage of the feme plaintiff with Cashion as a defense, and the validity of that marriage is thus incidentally put in issue.

The plaintiffs' counsel cited several authorities in support of the position that where "nullity" of marriage is incidentally put in issue, in any proceeding, before any tribunal, such

tribunal has power to decide the question as necessarily involved in the exercise of its appropriate jurisdiction. Without entering upon this subject, it is sufficient to say, in the language of the court, in *Johnson* v. *Kincade*, 2 Ire. Eq. 474, "It is convenient and fit in respect to the decent order of society, the condition of the parties and succession of estates, that the validity of such a marriage should be directly the subject of judicial sentence." And as the Legislature has conferred *sole, original* jurisdiction in *all applications for divorce*, upon the superior courts of law and courts of equity, (Rev. Code, ch. 39, sec. 1,) and pointed out the mode of proceeding, and the rules and regulations to be observed (sec. 5) and required that the material facts charged in the petition or libel shall be submitted *to a jury*, upon whose verdict, and *not otherwise*, the court shall decree, (sec. 6,) and authorised a decree from the bonds of matrimony, or *that the marriage is null and void*, and, after a sentence nullifying or dissolving the marriage, all and every, the duties, &c., in virtue of such marriage, shall cease and determine, with a proviso as to the legitimacy of the children, (sec. 11,) we do not feel at liberty to decide a question of such grave importance, as a thing collateral or incidental to an ordinary bill for an account, where the trial will be made, without the intervention of a jury, upon depositions which are usually taken in a defective and unsatisfactory manner; *Fisher* v. *Carroll*, 1 Jones' Rep. 27.

That the jurisdiction of the Superior Courts of Law and Courts of Equity, under the statute, extends to a case of "nullity of marriage, is settled; *Johnson* v. *Kincade*, *supra*; *Crump* v. *Morgan*, 3 Ire. Eq. 91; and the propriety of requiring that fact to be established by the judgment or sentence of a tribunal having sole original jurisdiction, is too manifest to require any further observation.

The cause will be retained "for further directions," to the end, that the plaintiff, if so advised, may institute proceedings in the proper court to obtain a decree of nullity of marriage, after which they will be at liberty to move in this cause, and

in the meantime to take any order that may be necessary to secure the fund.

PER CURIAM, Decree accordingly.

JOSEPH POTTS *and others against* JOHN BLACKWELL *and others.*

Where one of two partners, by a mortgage deed, conveys to the other, partnership effects, to secure debts alleged to be due from the one to the other, which deed and effects are assigned to *bona fide* creditors of the mortgagee, to secure debts due from him to such creditors, such conveyance was *Held* to be valid against creditors of the firm, who had acquired no lien.

A trustee or mortgagee is a purchaser for a valuable consideration, within the provisions of 13th and 27th Eliz., but *it seems* he takes subject to any equity that attached to the property in the hands of the debtor, from which he cannot be discharged by the want of notice.

Plaintiffs in a court of equity are only bound to show that they have reduced their debts to judgments, when they sue *as creditors*, to obtain an equitable *fi. fa.* where property cannot be reached by a *fi. fa.* at law, or where they sue to have the rights of their debtor declared and incumbrances removed, so as to make the property bring a fair price.

CAUSE removed from the Court of Equity of Beaufort county.

Benjamin F. Hanks, being largely indebted to several persons, on the 17th of September, 1856, executed a deed of trust to the plaintiffs, Potts, Myers and Donnell, to secure the payment of these liabilities, conveying to them several parcels and lots of land in, and near, the town of Washington, in this State, on which were erected valuable steam saw-mills, distilleries and planing machines; also the machinery and implements pertaining to these mills, &c.; also a steam-boat, called the Astoria or Post-Boy. Which deed of trust was registered on 18th of September, 1856.

B. F. Hanks had carried on the business of sawing and planing lumber at these several mills, and shipping and selling the same, and of distilling, in his own name, from the year 1844, up to the 23rd of August, 1856, but was, in fact, in

secret copartnership in that business with the defendant John Blackwell, who resided in the town of Newbern. The business had been unprofitable for several of the latter years of the copartnership, and when the partnership was dissolved on 23rd of August, 1856, it was largely insolvent, as was each of the partners, Hanks and John Blackwell.

On the said 23rd of August, 1856, a written contract of dissolution was entered into, and as a part thereof, Hanks executed to John Blackwell, five notes of four thousand dollars, each payable in one, two, three, four and five years, bearing interest from that date, and at the same time executed a mortgage deed, conveying the same property that was afterwards conveyed in trust to the plaintiffs (which is above described,) to the said John Blackwell, to secure the payment of the same. The consideration of these notes, as stated by both the partners, was, that Hanks had used, on his private account, funds of the firm, to the amount of twenty thousand dollars, and these notes were given as an equivalent to the other partner. The mortgage deed to Blackwell was registered on the same day with the deed of trust made to the plaintiffs, but a short time before it.

At the time of this transaction, John Blackwell was indebted to his brothers, Robert M. Blackwell, Josiah Blackwell and James M. Blackwell, who all lived in New York, in several sums to each, amounting in the aggregate, including interest, to twenty thousand dollars; and on the same day on which the mortgage was executed, to wit, on 23rd August, 1856, it was formally assigned to them.

The plaintiffs allege, in their bill, that, in fact, John Blackwell had no such debt against Hanks, as that stated by them as the consideration of the notes and mortgage; that a true state of the dealings showed him to be indebted to the firm; that both partners well knew of the insolvency of the firm, and that in contemplation of an early disruption of the business, these notes and the mortgage were fabricated fraudulently to transfer these effects beyond the reach of their creditors.

The prayer of the bill is, that the mortgage may be declared

fraudulent, and that the assignees, Robert M., Josiah and James M. Blackwell, may be compelled to release their estates to the plaintiffs, Potts, Myers and Donnell, for the benefit of the creditors provided for in the deed of trust made to them.

All the defendants answered. Robert M., Josiah and James M. Blackwell, state fully the origin and nature of the several debts to them, and aver that they were *bona fide* and justly due them; they deny that they had any reason to believe, or did believe, that the firm of Hanks and Blackwell was verging on insolvency, when the notes and mortgage deed were made and assigned to them; that so far from that, they were informed, and believed, that Hanks, after the dissolution, was abundantly good for all his debts. Hanks and John Blackwell deny the material allegations in the bill, and aver that the transaction of the notes and mortgage was fair and honest.

There were proofs taken on both sides, and the cause was set down for hearing on the bill, answers, exhibits and proofs, and sent to this Court by consent.

Rodman, for plaintiffs.
Fowle and *Rodman*, for defendants.

The argument of Mr. Fowle was as follows:

1st. There was no fraud in the conveyance from Hanks to John Blackwell. But, if there was, the plaintiffs are not entitled to recover; for

2. They must claim either as purchasers or creditors, under 27 or 13 of Eliz.; Rev. Code, ch. 50, secs. 1, 2.

1. Are they purchasers, under 27 Eliz.? We think they are; Roberts on Fraud. Conveyances, 373; *Chapman* v. *Emery*, Cowp. 279; 5 Ire. 91; 1 Ire. 149; 3 Dev. 105.

Being purchasers they might have taken the land as against John Blackwell, but not the steam-boat, which is personalty, since the 27 Eliz. applies only to realty; *Grimsley* v. *Hooker*, 3 Jones' Eq. 7; *Green* v. *Kornegay*, 4 Jones, 69.

The objection that the deed to John Blackwell was not

recorded in the custom-house, according to the act of Congress, will not avail the plaintiffs, because Congress only has power to regulate commerce with foreign nations and among the several States, and with the Indian tribes;" Constitution of United States, Art. 1, sec. 8, clause 3.

In our case, the steam-boat plies between Washington and Beaufort, and never leaves the territorial limits of North Carolina. But Robert, Josiah and James Blackwell are purchasers (i. e. if a mortgagee is a purchaser) from John Blackwell for a valuable consideration, and without notice, for the deed to the plaintiff had not been executed at the time of the conveyance to them. They, therefore, take discharged of the plaintiff's claim; Rev. Code, chapter 50, sec. 4. If a mortgagee is not a purchaser, the plaintiffs cannot claim as purchasers; for a trustee and the cestuique trust, together, are equal to a mortgagee. The interest remaining in the trustee has been declared to be an equity of redemption, under the act of 1812; *Simpson* v. *Fries*, 2 Jones' Eq. 156; *Harrison* v. *Battle*, 1 Dev. Eq. 537.]

2. As creditors of the partnership, they are not entitled; because

1. They have not reduced their claims to judgment and taken hold of the property; *Grimsley* v. *Hooker*, 3 Jones' Eq. 7; *Harrison* v. *Battle*, 1 Dev. Eq. 537.

2. The creditors of a partnership have no lien in equity against partnership effects, except through the partners themselves; Adams on Equity, [243,] note (1,) 457. The creditors' right may, therefore, be terminated at any time by the act of the partner, through whose lien they claim; *Clement* v. *Foster*, 3 Ire. Eq. 213; *Parrish* v. *Lewis*, 1 Clarke. C. R. 191; *Waterman* v. *Hunt*, 2 R. I. 298. Thus a sale of each partner's interest upon separate executions to the same purchaser, passes the whole interest in the partnership property discharged of the partnership debts, for the equities of the partners have then ceased; *Doner* v. *Stauffin*, 1 Pa. R. 198; Baker's Appeal, 21; Penn. St. R. 83. So a conveyance of partnership property to pay seperate debts of the partners, if *bona fide*, is

binding, whether the partnership be solvent or not; *Allen* v. *Centre Valley R. R.*, 21 Conn. 130.

Lastly. An *assignee* of a mortgage given to *one partner* by *another member* of the *firm*, holds *unaffected* by the claims of the *partnership creditors*: *Waterman* v. *Hunt*, 2 R. Island, 298.

PEARSON, J. This is a contest between two sets of creditors, one the creditors of Hanks and Blackwell, the other creditors of Blackwell. The debts of each are admitted to be true; so they are equally innocent, and the question is, upon which shall the loss fall? The plaintiffs claim under a deed of trust executed by Hanks to secure them; the defendants (except Hanks and John Blackwell) claim under a mortgage executed by Hanks to Blackwell, and by him assigned to them prior to the execution of the deed of trust. The property is the same, and belonged to the firm of Hanks and Blackwell.

The plaintiffs put their equity on the ground that they are firm-creditors, and the property was firm effects, and it was a fraud on their rights for Blackwell, with the concurrence of Hanks, to withdraw these effects from the firm and apply them to the payment of his individual debts, as they well knew that the firm was not in a condition to meet its liabilities. They seek to have the mortgage put out of their way.

Before entering upon the principle which we think governs this case, it is proper to dispose of two questions much discussed at the bar: Is a deed of trust, or a mortgage, made to secure an existing debt, a conveyance for valuable consideration?

It is a settled principle, acted upon every day, that the trustee, or mortgagee is a purchaser for a valuable consideration within the provisions of the 13th and 27th of Elizabeth; but it would seem they take subject to any equity that attached to the property in the hands of the debtor, and cannot discharge themselves from it on the ground of being purchasers *without notice;* in like manner as a purchaser at execution sale takes subject to any equity against the debtor, without

reference to the question of notice. This distinction is a plain one, and reconciles the cases, *Donaldson* v. *Bank of Cape Fear*, 1 Dev. Eq. 103, *Harriss* v. *Horner*, 1 Dev. and Bat. Eq. 455, *Holderby* v. *Blum*, 2 Dev. and Bat. Eq. 51, with the settled principle above stated. We are not at liberty, however, to decide the question, as both parties stand on the same footing with regard to it; so the case does not present it.

It was insisted that the bill could not be sustained, because the plaintiffs had not reduced their debts to judgments. That is only required when a creditor, *as such*, seeks to have an equitable *fi. fa.*, on the ground, that the property cannot be reached by a *fi. fa.* at law, or because it is necessary to have the rights of the debtor declared, and incumbrances removed, so as to make it bring a fair price. The plaintiffs do not sue in the character of creditors, but of *subsequent purchasers*, and their debts being admitted to be true, constitute a valuable consideration, and possibly they could have reached the land under the 27th Elizabeth, if it had remained in the hands of John Blackwell; but in respect to the steam-boat, which is personal property, the case of *Grimsley* v. *Hooker*, 3 Jones' Eq. 4, may have been in the way even as against him, for they claim under Hanks, the alleged fraudulent donor, and the property (as the 27th Eliz. has no application,) can only be reached by a title paramount to that of the fraudulent donee.

There is a broad ground upon which the plaintiff must fail: If a partner conveys the effects of the firm to secure his individual debts without the concurrence of the other partner, only his interest passes; that is, his share of the surplus after the debts of the firm are paid and the business closed; *Hanff* v. *Howard*, ante 440, decided at this term. But if the conveyance be made with the concurrence of the other partner, the property passes, and it is binding upon the firm creditors, for they had no lien on the firm effects, and can only work out an equity to subject the firm effects to the payment of the firm debts, under and through the other partner, which is precluded by his concurrence; *Clement* v. *Foster*, 3 Ire. Eq. 213;

Hassell v. *Griffin*, 2 Jones' Eq. 117; *Rankin* v. *Jones*, Ibid. 169.

In our case, Hanks agreed that Blackwell should appropriate the firm effects to the payment of his (Blackwell's) individual creditors, to the amount of $20,000, the sum set out in the mortgage. It is said that he did so because he had used effects of the firm to that amount for his own private purposes, and thought it fair that Blackwell should have the same amount. Whether this be so or not, is a question between themselves. It is certain Hanks did concur and join in the conveyance that was made to secure the defendants. It is also certain, that they are *bona fide* creditors of Blackwell, and no imputation can be made of a want of *bona fides*, in respect to the manner in which they obtained the security. This being the case, it is immaterial what form the parties adopted in order to effectuate their purposes; it might have been done by a mortgage executed both by Hanks and Blackwell; or by a mortgage executed by Blackwell and concurred in by Hanks; or a mortgage executed by Hanks to Blackwell and by him assigned to the other defendants, which was the form adopted. All that was essential, to give effect to the transfer, was the concurrence of Hanks, and *bona fides* on the part of the defendants, who are creditors of Blackwell. This made the conveyance valid against the creditors of the firm who had acquired no lien, and presents the ordinary case of a *bona fide* purchase for value from a fraudulent donee, and a subsequent *bona fide* purchase for value from the donor, in which case it is well settled, that the first purchaser holds against the subsequent purchaser, under the 27th Elizabeth. Bill dismissed with costs as to Hanks and John Blackwell.

PER CURIAM, Decree accordingly.

THOMAS B. POWELL *against* SAMUEL M. COBB *and others.*

Where slaves were bequeathed to a trustee for the sole and separate use of a feme covert for her life, with a remainder to her children, money arising from the hires and profits of such slaves in the life-time of the feme, if in the hands of a trustee, go to the wife's representative, where it would, in the first place, be liable to any debt she might have contracted in anticipation of the fund, and then become the property of the husband, *jure mariti.*

Where an ignorant old man was induced to execute a deed, surrendering to his children a large fund to which he was entitled, by being informed by them of the opinion of a lawyer whom they had employed, and in whom he had great confidence, which opinion was, that he had no right, and by the false representation of one of his children as to what they had agreed to give him, and as to the purpose for which the deed was to be used, a court of equity will disregard such conveyance as being against conscience, and decree the fund as if the conveyance did not exist.

CAUSE removed from the Court of Equity of Caswell county.

Joel Cannon, the father of Mrs. Annie Powell, the late wife of the plaintiff, by deed, dated in 1829, conveyed a woman named Peggy, and her two children, Milly and John, to trustees for the *sole and separate* use of the said Annie during her life, with a remainder to her children. The trustees, named in the deed, having left the State before the trust was completed, the defendant Allen Gunn was, by an order of the Court of Equity of Caswell county, made in 1848, substituted in their place, and for many years received the hires and profits of the slaves, only a small portion of which was ever paid to Mrs. Powell. In 1855, Mrs. Powell died intestate, and the defendant Cobb became her administrator. The said Cobb, with the other sons-in-law of the plaintiff, consulted counsel as to their rights to the accrued fund in the hands of the trustee, and as to the proper mode of recovering the same; he gave it as his opinion that the profits and hires of the slaves arising to the said Annie Powell during her life-time, and which were then in the hands of the trustee Gunn, went, not to the plaintiff, Powell, but to the administrator of Mrs. Powell for the benefit of her children; but out of an

abundant caution, and to facilitate their proceedings against the trustee, he advised that they should procure a release from the plaintiff of his right to the fund in question, and to that end drew up a deed, of which the following is a copy of the material part thereof: "Whereas, Joel Cannon, late of Caswell county, conveyed by a deed of settlement, on 29th day of December, 1829, to Elijah Cannon and James Cannon, trustees, a negro woman by the name of Peggy, and her children, Milly and John, to hold to the exclusive and sole use of Annie Powell during her life-time, and after her death said slaves, with their increase, to be divided between her children; and whereas, Elijah Cannon and James Cannon left the State of North Carolina, and settled in some distant State, whereby it became necessary to appoint other trustee or trustees, and Doctor Allen Gunn having been appointed, who has had control of said slaves for many years, and the said Annie having died in the month of July last, and being willing to carry out to the full extent the wishes of my late father-in-law, Joel Cannon, in his provision for his daughter and her children: Now, therefore, this indenture witnesseth, that for and in consideration of one dollar to me in hand paid, * * * I have bargained and sold, delivered, transferred, made over and assigned, and by these presents do bargain, sell, deliver, transfer, make over and assign, to Samuel Cobb and his wife Matilda, Jeremiah Rice and his wife Mary Anne, Andrew J. Cobb and his wife Jemima, and Josiah Powell, all the right, title and interest which I have, or may have, in the slaves Peggy, Milly and John." Then follows a conveyance of the "*profits, hires or issues of the said slaves, which accrued in the life-time of his wife.*" This instrument was carried some ten miles distance from the court-house where it was prepared, to the residence of the subscribing witness, Haralson, where it was presented to the plaintiff by the defendant S. M. Cobb, and by him (pl'ff) executed, and witnessed by Haralson, though from the situation of the parties, it being night, and there being no light at hand, they

were not able to read the paper, and it was never read to or by the plaintiff at all.

The bill charges that Cobb, having stated his errand and the opinion of the lawyer, whom the children had retained, told the plaintiff that they (the children) had agreed, if he would sign the deed, they would convey Peggy to him for his life; that this was untrue; that no such agreement was made amongst these parties, and when called on that they refused to fulfill this promise. The plaintiff alleges, being ignorant of his rights, in this particular, confiding in the integrity and intelligence of the attorney whose opinion was made known to him, not supposing he had any right to these profits and hires, and believing it would facilitate the recovery of his children and sons-in-law in their suit against the trustee, and also influenced by the consideration that they would convey Peggy to him for his life, he did execute the deed aforesaid, surrendering all his claim to these hires and profits to the defendant Cobb, and the other defendants, his associates; but he insists that it would be iniquitous in them to set up such deed against him, and he prays that, notwithstanding such deed, the defendant Gunn may account and pay the fund in question to him. Gunn was made a party defendant. Samuel M. Cobb and his wife Matilda, Jeremiah Rice and his wife Mary Anne, Andrew J. Cobb and his wife Jemima, and Josiah Powell, children and sons-in-law of the said Annie, are also made parties defendant.

The answer of S. M. Cobb, which is the subject of a particular examination by the Court, contains this language: "The defendant further answering, saith that the plaintiff has no right to any portion of the slaves, nor to the hires and profits, for reasons appearing on the face of the conveyance of Joel Cannon." * * "Joel Cannon attempted to provide for his daughter Annie Powell and her children, to the utter exclusion of the husband, which is apparent upon the deed, which contains the following language, (quoting from the deed): The defendants submit, from the conveyance, it is plain that the grantor intended entirely to exclude the plain-

tiff from any and all interest in the slaves; and they further submit, that if any portion of the hire and profits of the slaves was in the hands of the trustee, unexpended at the death of Annie Powell, such profits were incidents growing out of the slaves, and must necessarily pass with the slaves over to those in remainder; the plaintiff cannot surely have a greater interest in the profits of the slaves after the death of his wife than he had during the coverture." The part of the answer relating to the execution of the deed by the plaintiff, and to the negro Peggy as a consideration, and the concomitant circumstances and conversations, with the account of the same, as given by the subscribing witness, Haralson, in his deposition, are so fully noticed by his Honor in delivering the opinion of the Court, that it is not deemed necessary to state them here.

Replication and proofs. The cause being set for hearing on the pleadings, exhibits and the evidence, was sent to this Court.

Bailey, *Hill* and *Fowle*, for the plaintiff.
Morehead, for the defendants.

PEARSON, J. By the deed of Joel Cannon, a separate estate in the use of the slaves vested in the wife of the plaintiff for life, with a remainder to her children. The children had no more right or claim to the profits and hires of the slaves during her life-time than she had to the slaves after her death. Had the profits and hires been received by her, any part thereof remaining on hand at her death, would have belonged to the plaintiff as husband, *jure mariti*. As they were not paid over, but remained in the hands of the trustee, the administrator of the wife became entitled thereto, to pay such debts as she might have contracted in anticipation thereof, and the plaintiff was entitled to the surplus; *Molony* v. *Kenady*, 10 Simons, 254; *Johnston* v. *Lumb*, 15, Ibid. 308. Bell on Husband and Wife, 64, Law Lib. 493; McQueen, 285. The case put in the argument:—If a bond be given, any interest

accrued at the time of the gift will pass as an incident,—is not applicable. A more apposite case is, a bond or bank-stock is given to A for life, remainder to B: Has B any pretext for setting up a claim to the interest or dividends which accrue during the life-time of A?

The case turns upon the validity of the deed of transfer. We are satisfied that it was obtained under such circumstances as make it against conscience for the defendants to set it up or seek to claim any benefit under it. The pleadings and proofs present this general view: An ignorant old man is entitled to a fund of some $1500, the accrued profits of slaves while they were held by a trustee for the separate use of his wife. His children and sons-in-law are entitled to the slaves. One of the sons-in-law administers upon the estate of the wife. Counsel is consulted by the latter in regard to their rights and the proper mode of proceeding in order to get the fund out of the hands of the trustee. They are advised that they are not only entitled to the slaves, but to the accrued profits, the counsel falling into error by this fallacious reasoning which is set out in the answer: "The plaintiff cannot, surely, have a greater interest in the profits of the slaves after the death of his wife, than he had during the coverture, and by the terms of the deed the property is to be held to her *exclusive use*." So, it is concluded that the old man had no right to the profits; but the counsel advised, "out of abundant caution, the plaintiff had better release his interest, if any, in the hire and profits," so as to relieve the children of all difficulty in bringing the trustee to account. Accordingly, the counsel draws up a formal deed, reciting the deed of settlement, the substitution of the defendant Gunn in the place of the original trustees, and that the plaintiff, "being willing to carry out, to the full extent, the will of his late father-in-law, Joel Cannon, in its provision for his daughter and her children, in consideration thereof, and in further consideration of one dollar, "doth bargain and sell, transfer, make over, and assign" to his children and sons-in-law, all the slaves and their increase, and also doth "hereby make

over and assign all right, title and interest, which I have as husband, or may have as administrator of my wife, to the profits and hires of said slaves accrued in her life-time, &c." This deed is handed to the defendant Cobb, who procures the old man to execute it; neither the old man, nor Cobb, nor the subscribing witness, being able to read it; but Cobb tells him that it gives up all right or claim to the slaves and their profits, and informs him what lawyer drew it; the old man remarks, "I do not believe he would do any thing to injure me," and thereupon he executes it. So, it is manifest that it was executed by the plaintiff in ignorance of his rights; which ignorance was induced by an error of the counsel employed by the defendants, in whom the plaintiff had entire confidence, not only as a lawyer, but as a man; and it is also manifest that it was executed by the plaintiff for the purpose of enabling his children and sons-in-law to prosecute successfully what he supposed were their rights against the trustee, who held the property and the accrued profits. A simple statement of the circumstances, under which the execution of the deed was procured, is enough to show that it is against conscience for the children and sons-in-law to turn upon the old man and use this deed, not for the purpose for which he executed it, but for the purpose of depriving him of what justly belongs to him.

The same conclusion follows from a particular view of the part acted by the defendant Cobb. He says he carried the deed to the plaintiff and *got him to sign it.* He told him its contents—did not tell him he was to have *Peggy as the consideration of executing it;* "he might have said, and probably did say, that, when he went to house-keeping, old Peggy could work for him; but he never intended, nor did the plaintiff understand, that he was to have the use of Peggy as a matter of right." This is the account he gives of the manner *in which he got the old man to sign it.* Haralson, the subscribing witness, flatly contradicts him. "Mr. Cobb told Mr. Powell, if he signed that paper he would sign away all of his interest in the estate finally and forever, and *we have all agreed to give*

you the old negro woman Peggy." "Mr. Powell replied, that is just as much as I wanted, as they are all my children, and as he only wanted her to cook and wash for him." "Mr. Cobb told Mr. Powell, if he died, the negro must come back to the children." Mr. Powell replied, "he had no use for the negro after his death." "Mr. Powell then signed it and I witnessed it." The witness says none of them could read the paper, and adds, "I think he said something about his not believing that the counsel, who drew the paper, would do any thing to injure him."

The other defendants say, they never did agree to let the plaintiff have Peggy as a consideration for executing the deed; on the contrary, they say they did not believe the plaintiff had any right to the slaves or the profits, and they still deny his right. So, the plaintiff was induced to execute the deed, not only in ignorance of his rights and *aliena intentione*, but by means of a direct falsehood in regard to the consideration, which was told to him by the defendant Cobb, acting for himself and as their agent. They repudiate his act. The consideration, being a parol agreement to transfer an interest in a slave, cannot be enforced, and as a matter of course, they cannot avail themselves of the iniquity of their agent.

The plaintiff is entitled to the relief prayed for.

PER CURIAM, Decree accordingly.

BRYAN GARDNER *and another against* SAMUEL MASTERS.

Where matters in controversy are submitted to arbitration by agreement of the parties, being a tribunal of their own choosing, it is independent in its action, and no appeal will lie from its decision; neither can it be rescinded by a court of law or equity. The only ground upon which an award upon a submission *in pais* can be set aside in a court of equity is, that it is *against conscience* to take benefit under the award.

An award upon a submission, in a suit pending in court, requires *more certain-*

ty than is required in an arbitration by agreement out of court, because the court is to pronounce its judgment upon it.

Mistakes in charging interest and the like do not furnish a ground for a court of equity to interfere and set aside an award.

A want of *certainty* and *finality* are not such errors as make it against conscience to seek the enforcement of an award.

An award is deemed sufficiently certain and final when it is as much so as the nature of the case will admit.

In a suit brought upon a bond conditioned for the performance of an award, as the question whether the authority of the arbitrators was revoked before the award was made, can be legitimately put in issue therein, a court of equity will not take cognizance of it. Nor is there anything in that question affecting the conscience of him in favor of whom is the award.

A court of equity will not set aside an award because the arbitrators have awarded costs in such a case without authority, as the party can have the benefits of it, on the trial at law, in the mitigation of damages.

APPEAL from the Court of Equity of Craven county, Judge ELLIS presiding.

The bill was filed for an injunction to restrain the defendants from proceeding to enforce the collection of a bond given by the plaintiffs, for the performance of an award made by certain arbitrators, or otherwise, for the recovery of the award made by them.

The plaintiff Bryan Gardner, and the defendant, Samuel Masters, entered into a copartnership in the business of making, distilling and selling turpentine in the State of Georgia, and for this purpose they purchased a body of land in the county of Charlton in that State, from one C. Hall, and hired from him a number of slaves with which they commenced that business on 1st of July, 1853. The name of the firm was agreed to be "Gardner and Masters." Each partner was to advance an equal share of the funds to establish and carry on the business; each was to be equally liable for the charges, losses and expenses of the same; and each to draw an equal share of the profits. The business was carried on under this copartnership until the 11th of December, 1854, when it was dissolved by mutual consent. In the prosecution of the business, they purchased a number of slaves, wagons, mules, and

implements for carrying on the work, which were entered on the books of the firm as a charge against it, and the active operations, during the partnership, were conducted at a place called "Camp Pinckney," situated upon their possessions aforesaid. On the dissolution of the copartnership, a division of the slaves and effects took place between them, the share of the plaintiff being put into the possession of Joseph Simpkins as his agent.

Differences having arisen between the partners as to the settlement of their copartnership dealings, it was agreed that all the matters pertaining to their copartnership business should be referred to two arbitrators, Messrs. Jerkins and Guion, with power in them to choose an umpire, and each was to execute a bond with security, conditioned for the performance of such award as might be made, and as a basis upon which the arbitration was to be conducted, it was agreed in writing, in substance as follows:

1st. That Masters should make over to Gardner, a full and perfect title to the Camp Pinckney lands.

2d. That Masters was to be looked upon as one who had loaned his money to Gardner.

3d. That Gardner was to refund the same to Masters, with six per cent interest from date and one per cent for damages. That Gardner was to pay Masters for the use of his negroes and their expenses in travelling to and from Camp Pinckney, and his own travelling expenses.

4th. That Masters should retain the slaves which he had received, on the dissolution of the copartnership, as a part payment, also such sums as he had received, and such as might be due from him to the firm, in part payment; that it should be left to the arbitrators whether or not he should retain the other property received by him on that occasion.

5th. On all calculations of interest one per cent should be added to cover damages.

6th. That Gardner should give a note and security due twelve months after date, with six per cent interest from date, for such sums as the arbitrators might award against him.

The bond provided for was given on the part of Gardner with the plaintiff Hughes as his surety, in $10,000, conditioned to *stand to, abide by and perform*, the award; but the plaintiffs allege that the corresponding bond of the defendant never was given, and they insist that this failure to give such bond on his part, renders the award nugatory, and discharges the plaintiff Gardner from all liability to perform it.

The bill charges that, while in session on the matter of reference, the arbitrators permitted the defendant to come before them, and to make *ex parte* statements concerning their dealings, without being on oath, but refused to let plaintiff Gardner come before them at the same time, or let him know what was going on, though requested to permit him to come before them and to be heard in explanation of his accounts.

The arbitrators, after bestowing much labor upon the subject referred to them, came to a conclusion and made in writing a rough exhibit of the state of the dealings between the parties, on the 19th of July, 1856, and submitted it to their inspection, with a request that they should state any objections they might have, and offering to correct any errors that might be pointed out. By this statement, it appeared that Gardner was indebted to Masters in the sum of $7,873,58 with interest from 1st of January, 1856. It was also stated in this paper, as the opinion of the arbitrators, that the defendant should return to the plaintiff Gardner certain articles of property which he had received upon the dissolution of the copartnership at Camp Pinckney, a list of which was furnished to Gardner. According to the invitation, Gardner first appeared before the arbitrators and pointed out divers errors in charging certain amounts to him which had been included in notes given by Gardner to Masters and been paid; likewise divers errors in the calculations of interest. The defendant afterwards came before the arbitrators and pointed out several other errors in his favor, all of which were allowed by the arbitrators, and the account being corrected, the award was corrected also, and the balance against the plaintiff Masters was reduced to $6,741,91. A notice of this correction was given

to Gardner with a request that he would produce before them, the statement made in July, 1856, that it might also be made to correspond with the final award which they were about to make. This he refused to do, but gave notice to the arbitrators that he revoked the submission and desired them to proceed no further in the business. Notwithstanding this intimation, the arbitrators, on the 26th of September, 1856, did make a final award according to the statement as corrected, which was delivered to the several parties.

The plaintiff, in his bill, insists that the award made on the 19th of July, 1856, exhausted the power of the arbitrators, and that they had no right to take further action in the case, and that the award then made was erroneous in many particulars, going on to specify the errors already spoken of as being corrected in the further award, with some few others of minor importance. He contended that these errors were of so grave a character as to show misconduct in the arbitrators. He contended also that the arbitrators exhibited partiality in permitting the defendant to come before them and make *ex parte* statements, but denying the same privilege to plaintiff Gardner. That the award is uncertain, and not final, and embraced matters not embraced in the submission. They excepted to it also, on the ground, that it adjudged them to pay the costs, whereas there was no power given them to determine upon that subject; and because no conveyance of the Camp Pinckney land had been ordered by them.

The defendant answered, denying that he had failed to give bond and security as required by the terms of the submission. He averred that he made and delivered a bond to the arbitrators according to the terms of submission, and that the defendant had notice of it before the arbitration was entered upon.

He further says in his answer, that the books of the copartnership had been kept entirely by Gardner; that they were very unskillfully kept, and that most of the errors into which the arbitrators fell were occasioned by the loose and incorrect manner in which these books were kept; that one of the ar-

bitrators had been employed by him (Gardner) to post the books and arrange the accounts before the submission was made, and that both of the arbitrators were selected by him. He denies the charge of partiality in permitting him to come before them privately and to make *ex parte* statements. He says that the chief business of the arbitrators was to collect a result from the books as furnished by Gardner, and that for months, while this engaged their attention, neither party was permitted to come before them; but that on arriving at a conclusion based on these premises, they were both then called on, and first Gardner and then Masters did come before them and were fully heard; that the explanations of both were duly considered, and all fair corrections made, except some few unimportant ones in the matter of interest, which were overlooked. He denies that there was any fraud, corruption, partiality or misconduct in the arbitrators, but so far as he could discover, there was an earnest purpose to do justice between him and his adversary. He says that after the first draft of the award was made, the plaintiff still recognised the pendency of the business before the arbitrators, by coming before them and making corrections, and that he did not signify his dissent to their going on with the arbitration until he found out what the arbitrators had finally agreed upon, and were just about to deliver their final award.

The cause was heard on the bill and answer, and upon a motion to dissolve the injunction.

His honor ordered the injunction to be dissolved, and the plaintiff appealed.

J. W. Bryan, for the plaintiffs.
Hubbard and *Donnell*, for the defendant.

Pearson, J. Where matters of controversy are submitted to arbitration by agreement of the parties, they substitute a tribunal of their own choosing in place of the ordinary courts of the country. Whether the motive be to save expense or to avoid giving notoriety to the "actings and doings" of the par-

ties, or because they suppose the matters are so complicated, that a court and jury cannot investigate them so as to arrive at justice, or because they desire the controversy to be adjusted upon principles different from those adopted in a court of law or of equity, and more consonant (as they imagine) to substantial justice, or whatever else the motive may be, is immaterial. The tribunal so constituted by them is independent in its action. Its decision cannot be appealed from, nor can it be rescinded either by a court of law or equity.

Where a suit is pending, and the matter in controversy is referred to arbitration as a rule of court, the action of the arbitrators is not entirely independent, for it is resorted to as ancillary, or in aid of the court by whose judgment it is to be carried into effect, and on that account is, in some degree, subject to the supervision of the Court. This mode of arbitration differs essentially from the former, and some conflict has been allowed to creep into the cases by not keeping the distinction steadily in view. *Devereux* v. *Burgwin*, 11 Ire. 490, and *Eaton* v. *Eaton*, 8 Ire. Eq. 102, are instances of the former. The manner in which an award, made by tribunals of this kind, is treated by the courts, both of law and equity, is therein fully discussed.

The submission in this case was by agreement of the parties *in pais*. The defendant has instituted an action, at law, upon the bond executed by the plaintiffs to perform the award, and they seek the interference of this Court to enjoin him from proceeding at law.

The only ground upon which they can ask this relief is, that it is against conscience for the defendant to avail himself of the advantage that the award gives him in a court of law. So the question is reduced to this: Is there any thing to affect the conscience of the defendant, growing out of unfairness or fraud on his part, or of misconduct or corruption on the part of the arbitrators? "Corruption or partiality are admitted grounds for setting aside an award; so is a mistake into which the arbitrators have been led by undue means, or into which they have been permitted to fall by the fraudulent conceal-

ment of the party or his agent. A court of equity does not in such cases correct the award, or revise the decision of the arbitrators, but holds it to be against conscience to take advantage of the award in seeking to enforce it by an action at law, or by using it as a plea in bar of a bill for an account;" *Eaton* v. *Eaton*, *supra*.

The matters charged in the bill, at least in this stage of the cause, where the answer is to be taken as true, do not make a case for the interference of this Court. The plaintiffs allege that the defendant did not execute a bond for the performance of the award, and so was guilty of fraud. This is denied, and the defendant swears he did execute a bond, which was duly filed with the arbitrators, and of which the plaintiffs had notice.

They allege that the arbitrators refused to allow the plaintiff Gardner to appear before them and make the necessary explanations, but came to their conclusions from the *ex parte* statements of the defendant. This is denied, and a satisfactory explanation is set out in the answer; for the defendant says, that the matters connected with the copartnership, a settlement of which was the object of the reference, appeared, or ought to have appeared, upon the books, which had been kept by Gardner; that the task imposed upon the arbitrators was mainly that of finding out from the books how the balance stood, which was not easily done because of the very loose and unskilful manner in which they had been kept; that while thus engaged, they did not allow either of the parties to appear before them; that on the 19th July, 1856, having made out a rough estimate, they made the result known to the parties, and notified them to attend and suggest any mistakes or corrections, or alterations, that ought to be made. This was assented to. Gardner accordingly went before them, and at his instance, several alterations were made. Afterwards, the defendant went before them and pointed out several mistakes into which they had fallen, owing to the confused manner in which the entries had been made, but the correction of these mistakes was in favor of Gardner.

They allege several mistakes, and insist that the errors are so gross as to raise a presumption of corruption or misconduct. The answer admits these mistakes; for instance, charging interest in favor of the defendant some five months before he was entitled to it and the like.

Mistakes, such as these, do not furnish an inference of misconduct; they are all fairly attributable to the condition of the books, and we are satisfied that the arbitrators acted fairly, and devoted much labor to the investigation, with a single eye to the truth, and a conscientious desire to do justice.

They allege that the arbitrators exceeded their authority, and took into the account matters not submitted. This is denied. They allege that the award is uncertain and not final. Such objections apply more properly to awards made under a rule of court, where a degree of certainty is necessary to enable the court to enter up judgment. In awards under a submission by agreement *in pais*, so much certainty is not required. In respect to its not being final, the particular mainly relied on is that the award does not provide for a conveyance or release of the defendant's interest in the whole tract of land. This had been sufficiently provided for in the articles which the parties adopted as the basis of the agreement to refer the matters to arbitration. The same remarks are applicable to the other particulars relied on as showing that the award is not final. A further answer to this objection is this: the supposed want of certainty and finality is not a matter that affects the conscience of the party, and may be made the subject of consideration as well in a court of law as in equity. It would seem that in either court, an award would be deemed sufficiently certain and final, if it be as much so as the nature of the several matters involved in the controversy are susceptible of, and the condition of things makes practicable.

They allege that the submission was revoked before the award was made and published. We will not enter upon this subject, because if it be true in fact, the plaintiffs may avail themselves of it at law. It certainly does not affect the conscience; and indeed, if it be true that the attempt to revoke

was not until after the plaintiff Gardner was informed how the award would be, if he was not too late in the consideration of a court of law, he surely cannot expect such an objection to be received with favor by a court of conscience.

And lastly, they allege that the arbitrators were not empowered to tax him with the costs of the arbitration. The same remarks apply to this objection. It may be that the arbitrators had no right to make any disposition of the costs in the absence of an express clause to that effect; but it is a strict legal objection, and we must refer it to the court of law where the action is pending, and the defendants may have the benefit of it by way of reducing the damages.

PER CURIAM, There is no error, and the decretal order is affirmed.

OBED McMICHAL *and Eliza his wife and others against* HARVEY MOORE *and others.*

The surviving father or mother of one seized of land, who dies without leaving issue capable of inheriting, or brothers, or sisters, or the issue of such, will take the inheritance under the *proviso* in the 6 Rule of the chapter of descents, (Rev. Code, ch. 38) without regard to the question whether such parent is of the blood of the purchasing ancestor.

THIS was a petition for the sale of a tract of land for partition, heard before MANLY, J., at the last Fall Term of the Court of Equity of Rockingham county.

The petition set forth, that Mary McCollum was the person last seized of the tract of land described in the pleadings; that she died intestate, in the year 1857, leaving no issue, nor brother, nor sister, nor the issue of such, but leaving her father, Harvey Moore, her surviving.

Mary McCollum derived the inheritance in question from an uncle, Milton Whitsell, who died intestate in 1852, leaving the said Mary one of his heirs-at-law.

The petitioners are the uncles and aunts and the children of uncles and aunts of Mary McCollum, that is, the brothers and sisters of Milton Whitsell, and the children of his deceased brothers and sisters.

Mary McCollum left half brothers and half sisters, the children of the said Harvey Moore by a second marriage with one not of the blood of the purchaser; so they, although next in degree, were not of the blood of the purchaser.

The land was ordered to be sold, and the question was to whom the fund belonged; whether to the uncles and aunts of Mary McCollum, of the blood of the purchasing ancestor, or to the father, or her half brothers and sisters.

His Honor, upon the hearing below, being of opinion that the defendant Harvey Moore, the father, was entitled, so decreed, and the plaintiffs appealed.

Morehead, for the plaintiffs.
Miller and *Winston, Sr.*, for the defendants.

PEARSON, J. The fourth canon of descent, Rev. Code, ch. 38, sec. 4, provides that, on failure of lineal descendants, where land has been transmitted by descent, &c., the inheritance shall descend to the next collateral relations of the person last seized, *who are of the blood of the ancestor.*

The petitioners are of the blood of the ancestor from whom the land descended; the defendants, who are the children of the defendant Harvey Moore, and the half brothers and sisters of the person last seized, are nearer in degree than the petitioners; but they are not of the blood of the ancestor; consequently, as against them, the petitioners would be entitled to the land.

But Harvey Moore is the *father* of the person last seized, and there is a general provision applicable to all cases, that "where the person last seized shall have left no issue capable of inheriting, nor brother, nor sister, nor the issue of such, the *inheritance* shall vest in the father if living, and if not, then in the mother if living."

This general provision, in favor of the father and mother, expressly departs from the principle of keeping the inheritance in the blood of the first purchaser, which, for feudal reasons, was strictly adhered to by the common law, and which is retained in our statutes in regard to collateral relations, except for the purpose of preventing an escheat. The parents are, by the statute, looked upon as lineal relations in the ascending line, and in respect to them, the common law principle is put entirely out of the way. Under the statute, now in force, the inheritance vests absolutely in the father, if living, although he is not of the blood of the ancestor from whom the land descended. No words could make the intention of the law-makers plainer than those that are used. In the Rev. Statutes, ch. 38, the provision was, that in such cases the inheritance should vest in the *parents, for life only*, with the right of survivorship; as amended, the inheritance vests in the father, if living, absolutely; but in both statutes, there is the same disregard of the blood of the first purchaser or ancestor from whom the land descended.

In our case, the half brothers and sisters not being capable of taking, it follows that the defendant Harvey Moore, who is the father of Mary McCollum, the person last seized, is entitled to the land in fee simple.

PER CURIAM, Decree affirmed.

JAMES FREEMAN, *Executor, against* ALSON OKEY *and others.*

Where a testator, by his will, gave slaves to his wife for her life, and then to the heirs of his two daughters who were then living, the assent of the executor to the legacy of the taker for life, vested the title of the property in the children of the daughters, who were living at the death of the tenant for life.

Where a testator bequeathed slaves to one for life, with an absolute power of disposition, without any residuary clause, and the first taker failed to exercise

such power, it was *Held* that there was an intestacy as to such property. Where a testator charged his estate with the support of one for life, and provided no fund out of which the support is to be furnished, it was *Held*, that property undisposed of by the will, must, in the first place, be applied to that purpose.

CAUSE removed from the Court of Equity of Guilford county.

This was a question of construction, arising upon the will of John Cathey, which is as follows: "I give and bequeath to my beloved wife, Margaret, all my landed estate during her natural life-time or widowhood, by her giving unto my daughter Eliza Ragsdale, and her children, the privilege of living on the Sullivan tract, and furnishing her with a reasonable support for her and her children off of said Sullivan tract, while she may continue to live thereon. Also, to my wife, Margaret, the following negroes, during her life or widowhood, at the expiration of either, to dispose of as she pleases: Andy, Harriet, Thomas and Jacob. Edy and Neely, I give and bequeath unto my daughter Lavinia Freeman. I give and bequeath to my wife, also, Burton, Peter, Ailsey and Lucinda, during her life or widowhood; after her death or marriage, Burton, Ailsey and Lucinda I bequeath unto the heirs of Eliza Ragsdale, viz., Joseph and John, and if she should have any more children, the above named negroes is to be equally divided amongst the whole. As to my landed estate at my wife's death or marriage, I give and bequeath one half of it to the heirs of Lavinia Freeman, to be equally divided as to the value, and the other half to the heirs of Eliza Ragsdale, to be equally divided amongst them. I also give and bequeath unto my wife, all my stock of horses, cattle, hogs and sheep, wagons, carriages and farming tools, all the growing crop, all the stock of provisions that's on hand; also, all the household and kitchen furniture in like manner as the aforesaid property; and also I give and bequeath unto my daughter Eliza Ragsdale, five dollars in cash." To which was added this codicil: "I do not allow any of my property to go to pay Sanford Ragsdale's debts in any way; and after

my wife's death, I give Eliza Ragsdale as long as she lives, she and Lavinia, her support."

The bill is filed by James Freeman, the surviving executor, alleging that the executrix appointed with him, in the above will, is dead, and prays the advice and direction of the Court as to the proper construction to be put on it in the several particulars following: He states that the said Margaret, after paying off the debts and charges against the estate, possessed herself of the land and slaves and other property devised and bequeathed to her, and died in the possession of the most of it, without having disposed of any part of the property by will, or otherwise; that Sandford Ragsdale, the husband of the legatee Eliza, is also dead, and that she has intermarried with the defendant Alson Okey. He asks the Court to instruct him, 1st, what is the intention of the testator in respect of the bequest of the horses, cattle, &c., which, after the death of his wife, he directs to go "in like manner as the aforesaid property," and whether or not it means that it must be divided amongst the children of his daughters, in the same manner as he had directed a division of his lands. Whether the possession of the property by the tenant for life amounted to an assent to the children of the daughters, who were to take in remainder, and whether all these children who were living at the death of the tenant for life came in for a share, and if they all take, by what mode the same is to be divided between them.

As to the slaves Andy, Harriet, Thomas and Jacob, that he gave to his widow for her life or widowhood, with the power of disposing of them to whom she pleased, as the tenant for life made no disposition of them, the executor asks to be instructed whether they constitute a part of the widow's estate, or whether they revert to the estate of his testator; and if the latter, what disposition he shall make of them.

As to the direction contained in the codicil to this will for the testator's two daughters, Eliza and Lavinia, to have a support, he inquires how such support is to be supplied to them, and out of what estate, and whether he can let them have the

slaves left for, and to, the disposition of the widow, and whether such support is to their sole and separate use, independently of the control of their husbands.

The daughter Eliza and her husband Okey, her other daughter, Lavinia Freeman, the wife of the plaintiff, and their several children, are made defendants, whose answers do not vary the above statement.

The cause was set down for hearing upon the bill, answers and exhibits, and sent to this Court by consent.

Dick and *Fowle*, for the plaintiffs.
Miller, for the defendants.

BATTLE, J. The clause in the testator's will, in which he gives to his wife, all his stock of horses, cattle, hogs, &c., immediately follows that in which he devised all "his landed estate," after the death of his wife, one half to the heirs of his daughter Eliza Ragsdale, and the other half to the heirs of his other daughter, Lavinia Freeman; and it is connected with it by the expression, "I also give," &c. When, therefore, he says, in another part of the clause, that he gives "the stock of horses, cattle, hogs," &c., "in like manner as the aforesaid property," he must mean that, after the death of his wife, it was to be divided between the heirs (or children) of his daughters, in the same manner as he had directed a division of his lands.

As the executor had assented to the legacy to the widow for life, the legal title vested in the children of the two daughters, who were living at the death of the tenant for life, and a division among them may be made, either specifically or by means of a sale, as the parties or their guardians may desire.

According to the principle recognised as law in the case of *Newland* v. *Newland*, 1 Jones' Rep. 463, we think the wife of the testator took only an estate for life, with an absolute power of disposition, in the slaves Andy, Harriet, Thomas and Jacob, and as she died without exercising her power, and as the will has no residuary clause, the testator died intestate as

to the reversionary interest in them, and they now form a part of his estate. In the case to which we have referred, we quote an extract from 4 Kent's Commentaries, pp. 35 and 386, to the following effect: "If an estate be given to a person, generally or indefinitely, with a power of disposition, it carries a fee, unless the testator gives to the first taker an estate for life only, and annexes to it a power of disposition of the reversion. In that case, the express limitation for life will control the operation of the power and prevent it from enlarging the estate to a fee." We then add, "these rules are laid down after an elaborate review of the English and American authorities, in some of which it was said, that there was, in this respect, no distinction between real and personal estate, and we have no doubt of their correctness." The bequest in the present case is in express terms to the wife for life, with an absolute power of disposition, which confines the interest which the wife took in the slaves, to a life estate, and leaves them still a part of her husband's estate, as she died without exercising her power.

By his codicil, the testator gives expressly to each of his two daughters, after the death of his wife, a support for life. This is a charge upon his estate, and must be raised, in the first place, out of the slaves left undisposed of by the will. It is suggested in the answers of the daughters, that those slaves will be sufficient for the purpose, and they claim that those slaves shall be divided between them, and that, as they are married women, the share of each be secured to her sole and separate use. From the nature of the charge, it must be for the sole and separate use of the daughters; but before the Court can make a final decree in relation thereto, there must be a reference to the clerk, or to some other person, as a commissioner, to ascertain and report the amount necessary to be paid to each of the daughters annually, for her support during life, and the cause will be retained for further direction.

PER CURIAM, Decree accordingly.

CALLOWAY J. HARRISON *and wife and others against* WILLIAM B. BOWE, *Administrator, and others.*

(Construction of a will depending on the peculiar phraseology of the instrument.)

The word "or" will be construed to have been meant for "and" when the plain intent of the testator will be defeated without the substitution; but it is never admissible, unless it is necessary to carry out the manifest design of the will.

CAUSE removed from the Court of Equity of Caswell county.

Henry Hooper died in the year 1853, having made and published his last will and testament, which is as follows:

"As the laws of the State would make a different disposition of my property, after my death, than would be pleasing to me, or consistent with moral justice, I shall avail myself of this time, place, and the little strength that disease has left me, to dispose of it in a way that is most satisfactory to myself, viz:

"1st. I desire that an administrator may be appointed as soon as convenient, and that the court bind him in such way as it would have done, had I died without a will. He will then be authorised to receive all my property of every description, money, papers, and debts, &c., which is to be managed by him, under the supervision of the court, in the way that may be deemed the best to maintain my mother and Jane B. Richardson, during their natural lives, and also Prudence H. Richardson, Louisa Richardson and Henry McAden Richardson, until the said Henry arrives at the age of twenty-one years. The above children are to receive a plain English education. When the said Henry McAden Richardson arrives at the age of twenty-one years, he may, if his mother be living, become the administrator, by giving satisfactory and legal security to the court.

"After the death of my mother and Jane B. Richardson, and Henry McAden Richardson has arrived at the age of twenty-one years, all the negroes are to be liberated, on condition of their leaving the United States, or performing any

other condition that the policy of the State and the times seem to require; but such as or may wish to serve, will be at liberty to remain on the plantation as slaves, and they, and every species of property, together with the money, &c., are to be delivered over to the said Henry, after he has given good free-hold security, that may be deemed sufficient to the court, that he will maintain his two sisters until they marry or be sufficiently provided for."

Woodlief Hooper was appointed and qualified as administrator with the will annexed, who managed the affairs of the estate until Henry McAden Richardson, arriving at twenty-one, became administrator in his place. The said Henry McAden Richardson having died, the defendant Bowe was appointed administrator *de bonis non*, with the will annexed. Jane B. Richardson was the kept mistress of the testator, by whom he had issue, the said Prudence, Louisa and Henry McAden Richardson, and they had lived in the family with him up to the period of his death. The bill is brought by C. J. Harrison and wife Prudence, the legatee mentioned above, and George W. Riggs and Louisa his wife, a legatee also mentioned above, alleging that they have not been maintained and supported out of the estate of the testator as directed, and claiming compensation for such omission and failure, and insisting that, by a proper construction of the will, they are entitled to a support, even after Henry McAden Richardson arrived at full age. The mother of the testator, as well as Jane B. Richardson, were dead at the commencement of this suit.

The prayer of the bill was for an account and settlement.

The defendants answered, not denying any thing in the above statement material to the question considered by the Court.

The cause was heard on the bill, answer and exhibits.

Bailey and *Fowle*, for the plaintiffs.
Rogers and *Husted*, for the defendants.

BATTLE, J. The claim of the plaintiffs for maintenance since their brother came of age, cannot be sustained consistently with any fair construction of the will of the defendant Bowe's testator. The primary object which the testator had in view was to provide for his own mother and the mother of his illegitimate children. He accordingly charges, first, the whole of his property with their maintenance during their lives, and then adds, "and also Prudence H. Richardson, Louisa Richardson and Henry McAden Richardson, until the said Henry arrives to the age of twenty-one years." The evident meaning of this is, that the three persons named, who were the illegitimate children of the testator, should likewise be maintained out of his property until his son should come of age. The counsel for the plaintiffs contend, indeed, that the maintenance of the son alone should be restricted until he should arrive at the age of twenty-one years, and they insist that such is the only proper grammatical construction. In that, we differ in opinion from the counsel. The testator had just above spoken of his mother and his mistress together, and specified the duration of the support he intended for them; and we must suppose that, in classing his illegitimate children together, he intended that the period, mentioned for their maintenance, should be the same for all; and this supposition is strengthened, by finding that he immediately speaks of them together, in saying "the above children are to receive a plain English education."

But if there be any doubt about the construction of the will, as it is to be collected from the clauses to which we have referred, it is completely removed by what follows. After the deaths of the prime objects of his bounty, his mother and his mistress, and after his son Henry has arrived at the age of twenty-one years, he provides that all his slaves shall be emancipated and sent out of the country, except such as are too old or are unwilling to go; and then, with the proceeds of the labor of those slaves who remain, and with the aid of all the other property, Henry is to maintain his sisters until they marry, or be sufficiently provided for. The testator evidently

thought at first, that, by the time Henry came of age, his sisters would be married, or would be able to take care of themselves, and hence, the maintenance directed for them until Henry's attaining his full age; and that was all he intended to provide for them so long as the first objects of his bounty were living and thus needing a support. But, after they should be dead, then he was willing that the benevolent intentions towards his slaves should be carried out, and what of his property remained should go into the possession of Henry; and if his sisters should then still be single, Henry is required to maintain them until they should find husbands to take the burden off of his hands, or until, in some other way, they should be sufficiently provided for. That seems to be the plain meaning of the language used by the testator, and was no doubt his intention. He very clearly did not intend to provide for his daughters an equal share of his estate with his son; else he would have directed an equal division, or have given them certain portions of his property, equal in value to what he gave his son. His manifest intent, in favor of his daughters, was merely to provide a maintenance for them until a certain time short of the duration of their lives. What time? The testator answers himself,—until they married, or be sufficiently provided for. But, say the counsel, the word "or" must be construed "and." Such a change of words is admissible, certainly, when the intent of the testator will be defeated without it; but it is never admissible unless it is necessary to carry out the manifest design of the will. Such is not the case, here, and the feme plaintiffs ceased to have any right to maintenance, out of the testator's estate, after their respective marriages.

But the plaintiffs are certainly entitled to something for maintenance which they ought to have received before their brother came to the age of twenty-one years. This they allege that they have never received. The allegation is neither admitted nor denied in the answers, and it is agreed by the parties that an enquiry may be made to ascertain whether the fact is so. Let an order be made for that purpose, and if

they have not received all that they are entitled to, to ascertain what amount is due them on that account, and let the cause be retained for further direction upon the coming in of the report.

PER CURIAM, Decree accordingly.

IN THE MATTER OF JOSEPH BOST AND OTHERS.

Where lands are ordered to be sold for partition by a court of equity, the authority of the court to set aside an inchoate sale, and to order a re-opening of the biddings, applies as well to cases where all the parties are adults, as where some of them, or all, are infants.

THIS was appeal from an order made by his Honor, Judge PERSON, in the Court of Catawba county, setting aside an incomplete sale of land.

The petitioners in this case were all adults, but several of them were married women, who joined with their husbands. Joseph Bost, the bidder, was one of the petitioners. The prayer was for a sale of the land, of which there were two tracts set forth, and a distribution of the money in certain proportions, as set forth in the petition. The sale was ordered, and at the next term of the Court, the clerk and master reported that he had sold the old, or homestead tract, to Joseph Bost, for a certain sum, which, in his opinion, was less than its value. This opinion was, in part, founded on the affidavit of one Wilfong, who stated that, as his opinion, and offered at the same time to give ten per cent more upon the sum bid. The other tract he reported as having been bid off by Joseph Bost at a fair price. Upon a motion, by the petitioners' counsel, to set aside the attempted sale of the old tract and confirm the other, Joseph Bost was heard in opposition. He filed his own affidavit, stating that, in his opinion, he had bid enough for the old tract, and had bid more than the value of the

second tract, because he had bid off the first, and it was all-important to furnish timber for keeping up the other. He insisted that, as there were no infants, who had a right only to invoke the protection of the court of equity, a re-sale could not be rightfully, and according to the rules of courts of equity, ordered.

His Honor ordered that the attempted sales, as to both tracts, be set aside and a re-sale ordered as to both. Joseph Bost, the bidder, being dissatisfied with the decision as to the old tract, prayed an appeal to this Court, which was allowed.

Fowle, for the petitioners.
Boyden, for the bidder.

BATTLE, J. A sale made by the clerk and master, under an order of a court of equity, is in no case complete until it is reported to, and confirmed by, the court. Until then, the so-called purchaser is only a bidder, making an offer of a certain price for the land, and showing his ability to pay by giving bond with good and sufficient security. If the court be satisfied, from the master's report, that the price offered is a full and fair one, it will accept the bid by confirming the report and declaring the bidder to be purchaser. But, if, on the contrary, the court be informed by the master's report, or by affidavits, that the sum bid for the land is not its full value, it will be its duty to set aside the report and order a re-sale of the land. Of this, the so-called purchaser has no right to complain, because he knew, or ought to have known, that his bid was made subject to the condition of its acceptance or rejection by the court; see *Scott* v. *Nesbitt*, 3 Bro. Ch. Cas. 475; *Williams* v. *Dale*, 3 John. Ch. Cas. 271; *Lancy* v. *McPherson*, Ibid. 425. These cases show that where the report of the sale has not been confirmed, the biddings may be opened on a proposed advance of price merely. The counsel for the would-be purchaser, admits this to be the rule when the sale is made for the benefit of infants, but contends that it is different when the order of sale is obtained at the

instance, and for the benefit, of adults, who are able to take care of their own interests. The reply is, that from the very nature of the proceeding the sale is only a conditional one, and the condition is that the court must be satisfied that the sum offered is a full and fair price for the land sold. Besides, in the present case, the counsel for the petitioners has very properly said that they, being, most of them, married women, have as strong a need of the protective power of the Court as if they were infants. Upon the whole, we are satisfied that his Honor, in the Court below, committed no error in directing the report of the master, as to the sale of the principle tract of land, to be set aside, and ordering a re-sale of it. The report as to the other tract was set aside at the instance of the bidder himself, and of course, he has no right to object to that.

The interlocutory order is affirmed, and this will be certified to the Court below as the law directs.

PER CURIAM, Decree accordingly.

ALFRED BOST *and others against* SOPHIA BOST.

Where a testator, seized and possessed of a large real and personal estate, made a partial disposition of it to some of his children and to his widow, to the latter of whom he gave household and kitchen furniture, slaves, horses, farming implements, and many other things applicable and necessary for house-keeping and farming operations, leaving out the bulk of his land, and then adds, "I will that all the balance of my estate, real and personal, be disposed of as the law directs," it was *Held* to have been the intention of the testator that the widow should have her dower assigned in the mode directed by law in cases of intestacy.

CAUSE removed from the Court of Equity of Cabarrus county.

The question in this case arises on the construction of the will of John Bost, which is as follows:

"First, I will and bequeath to my beloved wife, Sophia

Bost, the following negroes, (naming nine) to her and her heirs and assigns. It is my will that she have my carriage and harness, one horse to be selected by her out of my horses on hand, and that she have my threshing machine and all the appurtenances belonging to it. It is my will that George W. Bost have his portion of my lands laid off to him at the place where he now lives, and, in the valuation of the said land, that he be allowed the valuation of all the improvements upon the said land.

"It is my will that John M. Bost have his portion of my lands laid off to him where he now lives, and that he be allowed the valuation of all the improvements on said land. It is my will that the balance of my negroes be divided between my children, and all the balance of my estate, real and personal, be disposed of as the law directs." To which is added a codicil as follows: "I do will and direct that my sons, George W. Bost and John M. Bost, have my mill and cotton-gin and screw, and all the appurtenances thereunto belonging, and so much of the land as is necessary for the use of the same, that is, beginning on the branch, &c., (describing a parcel by metes and bounds) and also my negro boy George, the miller, to them, their heirs and assigns, with the condition that they give my wife, Sophia Bost, the one third of all the profits arising therefrom, after the necessary expenses have been paid for keeping up the mill, during her life. * * *

"I do further will and devise to my wife, Sophia Bost, all of my house-hold and kitchen furniture, and all of my farming tools that she may want; also my blacksmith's tools and all the appurtenances belonging to the blacksmith shop, and that she have the choice of my wagons and all the appurtenances belonging to it, and all the hogs that is on the home plantation, and six of the best cows, such as she may select; and further, that she have my wind-mill belonging to the thresher, and that she have two choice mules, such as she may select. I do further will, that the balance of my estate be disposed of as directed in my said will and testament."

The suit was brought by the petitioners, who are the heirs-

at-law of John Bost, praying a partition of the land between them, to the exclusion of the widow from any further participation in the real estate than her share of the profits of the mill, which they aver was a valuable and ample provision.

The widow, Mrs. Sophia Bost, was made a party defendant to the bill, who answered, denying that the provision made for her by her husband's will, is at all ample, and insisting that, according to the evident intention of the testator, she is entitled to have an estate in the land equal to what would have been her dower, in case there had been an intestacy. She submits to such decree as the court may deem just and equitable.

The cause was set down for hearing on the bill, answers and exhibits, and transmitted to this Court by consent.

Osborne and *R. Barringer*, for the plaintiffs.
Boyden and *V. C. Barringer*, for the defendant.

PEARSON, J. We are satisfied, from a careful perusal of the will, that the widow takes, under it, the same estate in the land that she would be entitled to by her common law right of dower. The testator makes a partial allotment of his land, by directing that his son George shall have *his portion* laid off so as to include his improvements, and makes a similar allotment in respect to the portion of his son John, leaving the land to be disposed of as the law directs, subject only to to this partial allotment; so, as a matter of course, the widow is to have her dower assigned in the mode directed by law.

Whatever doubt may have existed, taking the will by itself, is removed by the codicil. From that, it is manifest that the testator intended his widow to have dower in all his land, for in respect to the mill, he assigns her the part which the law directs, giving her one-third of the profits, after deducting the necessary expenses, during her life; which is one of the peculiar modes of assigning dower at common law in that species of property; thus leaving it to be inferred, as of course, that she was to take the third of the rest of his

real estate during her life, which is to include the dwelling-house and improvements, as the law directs.

This conclusion, if it needed it, is fully confirmed by the bequest to her of the threshing machine, household and kitchen furniture, farming implements, blacksmith's tools, &c.;—just such things as she would require to carry on her business in his mansion-house and plantation. *Brown* v. *Brown*, 2 Ire. Eq. 309, cited in the argument, upon examination, is found to support this construction. It certainly would require the most overwhelming weight of authority to justify a departure from what was, so manifestly, the intention of the testator.

PER CURIAM, Decree accordingly.

ROBERT SIMPSON, *Administrator of* DAVID MOORE, *against* JOHN P. HOUSTON *and another, Administrators of* NEEDHAM ARMFIELD.

Where a party claimed title to a slave by virtue of an estoppel growing out of a proceeding in a county court, in a suit to have such proceeding declared inoperative on account of a mistake, the fact, that the purchaser had consulted a friend as to the validity of the title under the proceeding, previously to the purchase, and, upon their both concurring in the opinion that it was good, made the contract, was *Held* to amount to notice of the plaintiff's equity, and placed the purchaser in the shoes of the vendor.

THIS was an appeal from a decretal order of the Court of Equity of Union county, continuing, to the hearing, the injunction theretofore granted; His Honor, Judge PERSON, presiding.

The bill states that Milton Moore of the county of Union, died intestate in the year 1847, leaving his widow, Jane Moore, him surviving; that the said intestate was possessed at his death of two slaves, Pena and her child Manda, which are the subject of this controversy; that these slaves had been originally the property of Jane Moore and her two sisters, one of whom, Catharine, had intermarried with the plaintiff James Moore, and the other, Elizabeth, was at that time an infant under twenty-one years of age, and were held, with a number

of other slaves, by the three sisters, as tenants in common under the will of their grandfather, Joshua Gorden, who died domiciled in the State of South Carolina, in which State the will was admitted to probate. The plaintiff James Moore took administration on the estate of Milton Moore, but never having seen the will, or a copy of it, and having been informed, and believing, that by the will of the said Joshua Gorden, the interest of Jane Moore was limited to her sole and separate use, to the exclusion of her husband, the said Milton, he and his wife joined in a petition with the said Jane and Elizabeth, in the County Court of Union, representing themselves as joint owners of the said slaves, and praying a partition thereof amon g the three. Under this proceeding, commissioners were appointed to make the partition according to the prayer of the petition, who proceeded to do so, and reported among other things that the slaves Pena and Manda were by them allotted to the petitioner Jane. This report was confirmed by the said County Court. The plaintiffs in their bill further allege that after this proceeding was had, he discovered there was a total misapprehension as to the provision in the will of Joshua Gorden, and that there was no such separate estate given to the legatee Jane, but that her right to the slaves bequeathed was absolute, and, as such, vested in her husband, Milton Moore, *jure mariti*. They state that, upon the discovery of this error in the proceeding in the County Court, the said Jane, to thwart and hinder the plaintiff in the recovery of his rights by a suit in court to which he was about to resort, conveyed the said slaves to defendants' intestate, Needham Armfield, who had full notice of the plaintiff's equity arising from the mistake of the parties. They aver that there was no consideration paid by the said Armfield to the said Jane for these slaves, but that the sole object of the parties was to prevent the plaintiff, as the administrator of Milton Moore, from recovering his just rights in the premises. They further state in their bill, that the plaintiff James Moore, and his father David Moore, acting under his authority, supposing that they could thus come to the rights of the plaintiff as ad-

ministrator of Milton Moore, got the slaves in their possession and held them adversely to the claim of the said Needham Armfield; for this the purchaser Armfield instituted an action of replevin against them in the Superior Court of Union County, and as the plaintiff was considered to be estopped by the mistaken allegation of title in Jane, made in the petition in the County Court, a judgment was rendered against them in the Supreme Court and the defendants who are the administrators of Armfield threaten to take out execution upon the same. The prayer is for an injunction and for general relief.

The defendants in their answer state that their intestate bought the slaves in question from Jane Moore, and made her ample compensation for the same; that he took from the said Jane a bill of sale for these slaves, with a warranty of title in which there was an acknowledgment of the receipt of $500. The defendant John P. Houston says, after the confirmation of the report in the County Court, Armfield consulted with him as to the propriety of purchasing the said slaves, Pena and her child Manda, and as to the title of the said slaves, and observed that he thought if the County Court was good for any thing, the title was good, and that he, Houston, said he thought so too.

They further state in their answer that their intestate, Armfield, took immediate possession of these slaves and sent them to the Brewer gold-mine, in South Carolina, whence they were surreptitiously taken by the plaintiff James Moore, and the intestate, David Moore, and brought to the County of Union, upon which taking, the defendants' intestate took out a writ of replevin which was prosecuted to judgment in the Supreme Court, and it is submitted that the decision of that Court established in the defendants' testator a good and indefeasible title.

The cause came on for hearing upon the bill and answer, upon a motion to dissolve the injunction theretofore issued, and, upon consideration of the case, his Honor refused to dissolve the injunction, but ordered it to be continued to the hearing. From this order the defendants appealed.

Osborne and *Jones*, for the plaintiff.
Wilson, for the defendants.

PEARSON, J. There is no error in the decretal order appealed from. The defendants aver that their intestate made ample compensation to Jane Moore for the slaves in controversy, but they do not aver that he purchased *without notice* of the equity of the plaintiff's intestate growing out of the petition for partition. On the contrary, the defendant Houston says "that after the confirmation of the said report, his intestate consulted with him as to the propriety of purchasing the slaves, and *as to the title*, and observed that he thought if the County Court was good for any thing, the title was good, and this defendant, John P. Houston, said he thought so too." So, here is an express admission that doubts had been suggested as to the title of Jane Moore, and the intestate of the defendants, after a consultation with his friend in regard to the title, concluded to take the responsibility of making the purchase. This amounts to notice, and he took subject to any equity, or infirmity in the title, and must stand in the shoes of Jane Moore, under whom he claims.

PER CURIAM, Decretal order affirmed.

THOMAS J. SHINN, *Adm'r. cum. tes. an. against* THOMAS MOTLEY *and others*

(CONSTRUCTION OF A WILL.)

Where, in the distribution of a fund, two daughters are mentioned as taking equally with their brothers and sisters, and then is added, that these shares are not to go to them, but to their children, it was *Held* that it was intended that they, the children, should take *per stirpes*, that is, each class the share at first designated as their mothers'.

The general rule is, that where there is a bequest to children, and no life-estate is interposed, and the period of division is not postponed, only the children born at the testator's death can take. But this rule is varied where it is manifestly the intention of the testator that all the children that may be born of a person, as well as those already born, were intended

to take. And it is the duty of an executor, in paying over the shares in such case, to take bond, with security, for the payment of the shares of children that may subsequently come into being.

CAUSE removed from the Court of Equity of Cabarrus county.

This bill was filed by the administrator, with the will annexed, of Robert Motley, stating that difficulties had arisen amongst those entitled under this will, and conflicting claims set up by them, so that he thought it would not be safe for him to pay the legacies bequeathed therein, without the protection of this Court; he therefore asks to be advised upon the several points stated below, which arise upon the following clause of the will, viz: "*It is my will that all the remainder of my property*, which I possess at my death, shall, after giving lawful notice, be put to public sale and sold to the highest bidder, and the proceeds arising from such sale, and all my cash and notes, and effects of every kind, which I have not willed to my children, to be equally divided between my sons, Thomas Motley, John Motley, Rufus Motley, and my daughters, Martha Rhinehart, Kiziah Sossaman, Leah Love, Sally Plott, Elizabeth Biggers, Rowena Moses, Lavina Faggart and Nancy Furr, all married women. But the amount, in this division, which would come to the shares of my daughters, Martha Rhinehart, Kiziah Sossaman and Nancy Furr, is not to go to them, but to all their children, which now are, or hereafter may be; the grand-children of them three daughters shall equally inherit it, their mothers' shares."

Martha Rhinehart had six children living at the death of her father.

Kiziah Sossaman had four children by a former marriage, and two by her marriage with her present husband, all living at the testator's death.

Nancy Furr, at the time of her father's death; had no child, but had one in less than ten months afterwards, which is since dead, and letters of administration have been taken on its estate by its father, Wilson Furr. No other children have been born to either of these three daughters of the testator, and

neither of them has, or has had, a grand-child. Upon this premise, the executor asks:

1st. Whether, on account of the obscurity and apparent contradiction, any of the offspring of the daughters Martha, Kiziah and Nancy, can take any thing?

2nd. Should they take, will it be *per capita* or *per stirpes?*

3rd. If it be considered that the children of these females take, will it be limited to such as were in being at the time of the testator's death, or will children thereafter born come in for a share with the others?

4th. Did a share vest in the child of Nancy Furr, and if so, what becomes of such share?

5th. In case it be considered that the children of these females, born hereafter, take, how is the distribution to be made amongst the living children, and how is the contingency to be provided for?

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

R. Barringer, for plaintiff.
Ashe, for defendants.

BATTLE, J. The questions which have been raised upon the construction of the fourth clause of the will of the plaintiff's testator, and which are now presented for our determination, are, mostly, easy of solution. We will consider them in the order in which they are presented by the bill.

1. There can be no doubt that the children of the testator's three daughters, Martha Rhinehart, Kisiah Sossaman and Nancy Furr, take under the will. The word "grand-children" was used, either by an obvious mistake for the children of his daughters, for he immediately adds, that they "shall equally inherit their mother's share," or was an awkward expression to signify that they were his grand-children, as being the children of his daughters. The meaning of the testator is plain, and cannot be defeated by an obvious mistake or by an awkward expression.

2. The children certainly take *per stirpes*, or by families.

The daughters were first mentioned as if they were to take, each a share, and then the shares which were set apart for them, are given to their respective children. See *Lockhart* v. *Lockhart*, ante 205, and other cases there referred to.

3. The general rule is, that where there is a bequest to children, and there is no life-estate given in the mean time, and the time for a division is not postponed to a certain period after the death of the testator, only the children born at the testator's death can take. But if the intent of the testator is clear that he wishes his bounty to be enjoyed by children born after his death, they too shall be included in the bequest. Thus, in the case of *Shull* v. *Johnson*, 2 Jones' Eq. Rep. 202, where a testator gave a legacy to his nephews and nieces, that might "be living at or after" his decease, we held that the nephews and nieces born after the testator's death, were entitled to take equally with those who were born before. That decision was made at Morganton, and we cited no authority in support of it. We are now able to refer to the cases of *Defliss* v. *Goldsmidt*, 1 Mer. Rep. 417, *Scott* v. *Lord Scarborough*, 1 Beavan's Rep. 154, (17 Eng. Con. Ch. Rep. 154,) which fully sustain it.

4. The child of Nancy Furr, which was born within ten months after the death of the testator, is to be considered as having been then *in ventre sa mere*, and of course entitled as a child born at that time. But in the present case, the child would take under the limitation to afterborn children. The interest which she took was clearly vested, and, upon her death, went to her administrator.

5. The executor has a right, and it is his duty, in paying over to the children who are now entitled, or to their guardian, if they be minors, their respective shares, to take a bond with good and sufficient security, for refunding what may be necessary to pay the portion of such children as may be hereafter born. See *Shull* v. *Johnson*, above referred to.

A decree may be drawn, declaring the rights of the parties according to the principles herein-before set forth.

PER CURIAM, Decree accordingly.

NANCY PINCKSTON *against* MOSES BROWN, *Adm'r., and* JOHN CAUBLE.

Where persons are in *pari delicto* in the commission of an illegal act, and one gets an advantage of the other, equity will not interfere to relieve; but where they are not equally in fault, as where one is old, ignorant, dependant and unduly influenced by the other, equity will afford relief against hardship and imposition growing out of the illegal transaction.

CAUSE removed from the Court of Equity of Rowan.

The plaintiff was, at the time of the occurrences herein stated, an aged, infirm and ignorant woman; she had lived in the same family with her son Meshach, the defendant's intestate, for several years, and on account of her frail condition, mentally as well as physically, for she had just before had a stroke of paralysis, she entrusted the entire control and management of her business to him. Her hands worked the plantation with him, and all the profits and surplus realised from the crops, after paying the store-bills and other expenses, were retained by him, without rendering any account to her. The said Meshach was her oldest child, and the only one of age; she had the most implicit confidence in his business capacity and integrity. The plaintiff owed one James W. Clark, as assignee, two notes, amounting together to about one hundred and fifty dollars, ($150) and some few debts besides, but she had abundant means, ultimately, to pay them all, but no present funds to do so. When she was informed by her son Meshach, that Mr. Clark had purchased her notes, she was very much alarmed and agitated; she appealed to him to devise some plan, or furnish her with some means, to save her from the ruin that the urgent collection of these notes would bring on her. The plan he devised for that purpose was, to have a deed of trust made of all her property, securing the payment of all her other debts, leaving out Clark, and as the property was greatly more valuable than these debts amounted to, he proposed that she should make fictitious debts to be secured in the said deed. This was his plan, and she, knowing nothing about business, and yielding every thing implicitly to him, gave in

to it, and did make three several notes payable to him, one for $200, due 1st January, 1849, one of $150, due 1st January, 1850, and one for $50, due 2nd ———, 1849, which were entirely without consideration, and made for the sole purpose of carrying out the scheme which the said Meshach had devised to extricate her. In furtherance of this plan, she made a deed of trust to the defendant John Cauble, to secure these notes, which are set forth therein, and all the debts which she actually owed. This deed conveys her dower in the land on which she lived, a negro woman, all her corn, bacon, oats, hay, house-hold and kitchen furniture, horses, cattle, and stock of every kind, and every thing else that she owned. Shortly after this was done, she became aware of the nature of the transaction and sought to get rid of it. She paid all the other debts mentioned in the deed, and then demanded that he should surrender it as well as the notes. This he failed to do, putting her off with various pretexts until his death, which took place in ———. The defendant Brown administered on his estate, and proceeded to the collection of these notes, by requiring of the trustee, the defendant Cauble, to advertise the property for sale. The bill is filed to enjoin the sale, and to stop the collection of the notes.

The defendants answered. Replication was taken to the answers. Commissions and proofs taken, and the cause being set down for hearing, was sent to this Court.

Fleming and *J. E. Kerr*, for plaintiff.
Boyden, for defendants.

NASH, C. J. Fraud vitiates every contract into which it enters, and equity will grant relief by declaring it void and decreeing the instrument executed under it to be delivered up, and this whether the fraud be actual or constructive. The party, however, claiming this relief, must come into Court with clean hands. If he has been a *particeps criminis* in the concocting of the fraud, equity will leave him to his legal remedy; in other words, will not interfere be-

tween the parties, but stand neuter. Relief is not granted where both parties are *truly* in *pari delicto*. For enforcing, however, this rule, it is not sufficient that both parties are *in delicto*, concurring in the unlawful act; they must stand in *pari delicto*, for there may be other, and very different, degrees of their guilt. Judge STORY, in the 1st vol. of his Equity, section 300, says "one party may act under circumstances of oppression, imposition, hardship, undue influence or great inequality of condition, or age, so that his guilt may be far less in degree than that of his associate in the offense." In such cases the court will grant relief in favor of a plaintiff who was *particeps criminis* as not being in *pari delicto*. Such is the decision of the master of the rolls in *Osborne* v. *Williams*, 18 Ves. 382. The master observes, "Courts of law and equity have held that two parties may concur in an illegal transaction, without being deemed in all respects in *pari delicto*. I consider this agreement as substantially the mere act of the father." The agreement between the parties was an illegal one, as being in contravention of the post-office act. The parties being both dead, the bill was filed by the representatives of the son, against the representatives of the father, for an account, and decreed, *though* both decedents were *participes criminis*.

The same principle applies to cases of usury. If the borrower asks relief, equity will grant it upon such terms as it may prescribe; and if he has paid the money, he can recover back the excess of interest, and neither the maxim of *particeps criminis*, nor that of *volenti non fit injuria* applies. He is not in *pari delicto*. He stands in *vinculis*,—is called the slave of the lender, and is compelled to such terms as the usurer and his necessities impose upon him; *Smith* v. *Bromley*, Doug. Rep. 696, in note; 1 Story's Eq. sec. 302.

Let us bring this case to the test of those cited. The plaintiff is the mother of Meshach Pinckston, deceased, whose representative, Moses Brown, is before the Court. At the time the notes and deed of trust were executed, the plaintiff was old, infirm, weak of mind, and much diseased and distressed in

body, having, as the testimony shows, recently been struck with paralysis. Her property was not large, but more than sufficient to pay all her debts. With a view to delay and hinder Mr. Clark in the collection of his debt, the deed of trust was made, all her other debts being provided for in it. This deed is then clearly void as to Mr. Clark—the transaction was illegal, and the plaintiff was a *particeps criminis*; and as all the debts secured by it have been paid, except the notes made payable to Meshach Pinckston, the plaintiff is entitled to a decree to have it surrendered, together with the property mentioned in it, unless she stands in *pari delicto* with the obligee, Meshach. He was her oldest son; all the rest of her children being infants. He lived with his mother, and they worked the farm together. He managed the whole business, sold the crops, and after furnishing the family, paid the store-bills and other accounts, and appropriated the residue of what was realised, to his own use. His mother had great confidence in his integrity and ability. In the language of one of the witnesses, "such was his influence over the old lady, that he could make her do just what he wished her to do."

Such was the relation in which the mother and son stood to each other. The plaintiff becoming very uneasy about her affairs, Mr. Craige was sent for to advise with. When he got there, he found the old lady in bed, weeping and much distressed. She told him she had been informed that Mr. Clark was about to enforce the payment of his debt, and if he did so, it would ruin her. Meshach was there and no one else. She proposed to make a conveyance of her property to her children. The witness proposed she should make a trust, to which she assented. Upon summing up the amount she owed, it was ascertained that, excepting the debt to Clark, the property to be conveyed would considerably exceed in value the amount of the debts. With a view to cover the whole of the property, Craige proposed that the plaintiff should execute three notes to her son Meshach, to an amount sufficient for that purpose. The notes were written and executed and antedated, so as to come within the operation of the deed. No one, up-

on reading the proofs in the case, can doubt that Meshach was the person who gave the information that Clark was about to press the collection of the debt due him. Was this information true? What has become of the Clark debt? We hear nothing more of it. Is it still in existence? For aught that appears it is, and no demand of it by Clark, or any other person, is shown. We are justified, then, in considering the information given to her to have been false, and given for the purpose of working upon her fears, and driving her to the execution of the trust. This case is, in some of its leading features, like that of *Osborne* v. *Williams*, *ubi supra*. There, the concoction of the fraudulent transaction was a father practicing on his son; here, it is a son practicing on the weakness of an aged and confiding mother. In the case just referred to, the master of the rolls says, "I consider this agreement as substantially the mere act of the father;" and the deed of trust in this case, under the evidence, is to be considered as the mere act of Meshach, the son. Here were imposition, hardship, undue influence and great inequality in age, all brought to bear upon the plaintiff. The mother and son were in *delicto*, but not in *pari delicto*, and the plaintiff is entitled to the decree she asks.

PER CURIAM, Decree accordingly.

JOHN IRELAND *and another against* PETER FOUST *and others.*

It is not a ground for excluding property from a residuary clause in a will, that the testator did not know, or believe, that he had a title to it.

One purpose of a residuary clause is to dispose of such things as may have been forgotten, or overlooked, or may be unknown.

Where a party purchased, on speculation, a doubtful right of certain children, to slaves which had been bequeathed by their father to their mother, which right was afterwards decided against the purchaser, he has no right in equity to claim a re-imbursement for the loss of his money, out of pecuniary legacies left by the mother to such children.

CAUSE transmitted from the Court of Equity of Alamance county.

At the December term, 1853, of this Court, the suit of *Foust* v. *Ireland*, 1 Jones' Rep. 184, was decided, by which it was established that Mrs. Mary Foust took the full right and property to certain slaves bequeathed to her by the will of her late husband, Peter Foust, in case she abstained from again marrying. Up to the time of this decision, there was great doubt prevailing amongst those interested in the succession, whether, under her husband's will, Mrs. Foust took more than a life estate in these slaves In case she took but a life estate, it was conceded on all hands that the slaves devolved upon the living children of the testator, Peter Foust, and the children of a daughter, Mrs. Clapp, who was dead. In the year 1851, the plaintiffs, Ireland and Hurdle, purchased the right of Mrs. Amick, one of the children of Peter Foust, to the slaves in question, which was supposed to be one sixth part in the remainder after the death of Mary Foust, for which they paid $1600. They also purchased of Peter Clapp, one of the children of Mrs. Clapp, his supposed interest in his mother's share of the slaves, at $250; also of Henry Clapp, another of her children, his interest, at $200; and of Solomon May, who had married a daughter of Mrs. Clapp, his wife's interest therein, at $250.

Mary Foust, the widow of Peter Foust, long before the decision of the case in the Supreme Court, to wit, in the year 1849, made her will, in which she bequeathed, among other things, as follows:

"2nd. I will to my daughter, Elizabeth Clapp or her children, one hundred dollars.

"3rd. I will to my daughter Sally Amick, one hundred dollars."

She then proceeds to will to her sons, John, George, Peter and Daniel Foust, several plantations, describing them, and to Daniel Foust $200.

She bequeaths some small specific legacies to divers persons, and then proceeds:

"13th. I will to my son Peter Foust, one negro man named James, and five hundred dollars in cash, to him and his heirs and assigns forever.

"14th. The balance of my property, not willed away, to be sold by my executors, either at public or private sale, or to be divided at their discretion, and after paying off all the above legacies, if there should be any thing left, it is my will that it shall be divided among my sons, share and share alike."

Mrs. Foust died in the year 1851, without having married again, at which time the slaves had largely increased and become very valuable.

The plaintiffs allege in their bill that Mrs. Foust never supposed or believed that she had any greater estate than a property for her life in the slaves in question, and that she did not intend, by the residuary clause in the above recited will, to pass them to her four sons, and that according to a fair construction of the will, she died intestate as to them, so that the parties from whom they purchased were entitled, each to a share, and they pray that they may have the benefit of their purchases allowed them by a decree of this Court.

But if in this they are mistaken, and the Court shall be of opinion that the slaves passed by this residuary clause, they pray that they may be, *pro tanto*, reimbursed for the money they have paid, out of the two pecuniary legacies of one hundred dollars, willed to Mrs. Amick and Mrs. Clapp.

The next of kin of Peter and Mary Foust are made parties defendant, who answered the bill; but as the decision of the Court is based upon a consideration of the equity set forth in the pleadings as above stated, it is not deemed necessary to notice further the answers or the proofs taken in the cause.

Winston, *Sen'r*, and *Norwood*, for the plaintiffs.
Moore, for the defendants.

PEARSON, J. The rule is settled that, under a general residuary clause, every thing passes that is not disposed of by the will.

It may be true that the testatrix did not know she was entitled to the absolute property in the slaves; we are inclined to think such was the fact, because she seems to have been doubtful whether there would be any thing left after paying off the specific and general legacies; but however this may have been, it is not sufficient to make an exception to the rule. The grounds upon which exceptions are made, are stated and discussed in *Lea* v. *Brown*, ante 141. This case does not come within any principle that has been recognized as sufficient to make it an exception. The presumption is that every one who makes a will, intends to dispose of his whole estate, and one purpose of a general residuary clause is, to dispose of such things as may have been forgotten or overlooked, or may be unknown.

The plaintiffs have no pretext for setting up a claim to the pecuniary legacies of $100. These legacies have no reference to, or connection with, the slaves whatever.

PER CURIAM, Bill dismissed.

*** His Honor, the CHIEF JUSTICE, was prevented by sickness from attending the Court during the greater part of this term, which accounts for the fact that so few opinions of his appear in this number.

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TO THE PRINCIPAL MATTERS

OF

VOL. 3, JONES' EQUITY.

PRACTICE.