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REPORTS

OF

CASES IN EQUITY,

ARGUED AND DETERMINED IN

THE SUPREME COURT

OF

NORTH CAROLINA,

FROM JUNE TERM, 1858, TO AUGUST TERM, 1859, INCLUSIVE.

VOL. IV.

BY HAMILTON C. JONES

REPORTER.

SALISBURY, N. C:

1859.

JUDGES OF THE SUPREME COURT,

DURING THE PERIOD COMPRISED IN THIS VOLUME.

Hon. FREDERICK NASH, Chief Justice.
Hon. RICHMOND M. PEARSON, Chief Justice.
Hon. WILLIAM H. BATTLE,
Hon. THOMAS RUFFIN.

JUDGES OF THE SUPERIOR COURT.

Hon. John M. Dick,
" John L. Bailey,
" Matthias E. Manly,
Hon. David F. Caldwell,
" R. R. Heath,
" R. M. Saunders,
Hon. J. G. Shepherd.

ATTORNEY GENERAL.

WILLIAM A. JENKINS.

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TO THE NAMES OF CASES.

VOL. IV.

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CASES IN EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

JUNE TERM, 1858.

MURDOCK McKINNON *against* ELIZA McDONALD *and others.**

The English doctrine, that a wife, by an arrangement with her husband, can become a *free-trader*, and hold the proceeds of her labor to the exclusion of his creditors, does not obtain in this State.

Where land was purchased by a feme with her earnings and the deed made to her, a sale of such land, under an execution against the husband, passes nothing.

If a party defendant, who has no interest in the subject matter in controversy, disclaim all right, the bill will be dismissed as to him, *with costs;* but if he set up claim, and insist upon a declaration of his rights, the dismissal, as to him, will be made *without costs.*

THIS bill was filed in the Court of Equity of Cumberland County, and removed by consent to this Court.

The plaintiff alleges that the defendant, Alexander McDonald, was indebted to him in the sum of $134, in two several notes, on which he recovered judgments before justices of the

*This case, and the one following it, were decided at the last term, and omitted by inadvertence.

peace, and took out executions thereon—that the same were levied on the tract of land which is the subject of this controversy, and that it was sold to the defendant McLeran, for the sum of one dollar, and that no part of his debt has been satisfied. He further alleges, that the land in question, was bought by the defendant, Eliza, wife of the said McDonald, and the deed taken in her name; that this was done on the ground and claim, that the said Eliza had been permitted by her husband to work for herself, and to have the proceeds of her own personal labor.

The plaintiff contends that the wife's labor belongs to the husband, and that by the policy of the laws of this State, no such protection is afforded to the earnings of the wife as to secure it to her, and that this land having been purchased with money, which in law, was the husband's, the same is subject to the payment of his debts; that the purchase by McLeran amounts to nothing, for that there was no legal or equitable estate in the husband which could be sold by execution, or if there was any such, he avers that the said McLeran purchased upon an exprees trust to hold for the defendant, Eliza, the wife. The prayer of the bill is to subject the land in question to plaintiff's debt.

The answer of the defendant Eliza, the wife, states that, her husband the defendant, Alexander, greatly neglected his family, and was much addicted to intemperance; that on this account, she was obliged to live apart from him; that she obtained the privilege from her said husband of working for the support of herself and family, with an understanding and agreement that whatever she could make, beyond such support, should be her own exclusive property, free from his debts, and beyond his control; that being a good seamstress, she was able, by dint of diligence and economy, to lay up, from time to time, small sums wherewith she purchased the land in question, and by the same kind of exertions paid for the building of a house thereon; that this was long before the indebtedness of her husband to the plaintiff arose; that it was very well known in the vicinity that she was permitted by her husba nd to trad

and work for herself; that she was credited and charged in the books of merchants in the town of Fayetteville, on her own account, and not on that of her husband, who, for a great number of years, was not at all looked to for any debt of her contracting, nor for any of the expenses of the family; that this purchase was made by her since the act of 1848, and that the object was to vest an absolute title in herself for her sole use and benefit.

The defendant, McLeran, says that he purchased the land without any concert or understanding with the defendant, Eliza; that he knew nothing of the previous judgments, or of the proposed sale; that happening to be present when the sheriff cried the sale, he bid one dollar, at which the land in question was knocked off to him, and he took the sheriff's deed for it. He further says, that after the sale, he made a public declaration, that if any friend of Mrs. McDonald would pay him back the sum paid by him, he would release the title to her. He insists, as the case now stands, upon the validity of his purchase.

The answer of McDonald, the husband, confirms the allegations in the answer of the wife.

The cause was heard upon bill and answers, and tramsmitted to this Court.

C. G. Wright, for the plaintiff, argued as follows:

1st. That the earnings of the wife, during the coverture, were the earnings of the husband, for which the husband could sue alone, or as matter of favor, join his wife. And that lands, so purchased, were, in Equity, the lands of the husband, unless under peculiar circumstances which do not arise in this case. But, where the legal title is in the wife, the husband has no such interest as is liable under the statute of 1812, because there is *no estate* as contemplated by that enactment. It is only a "*jus merum*," a mere right to a subpœna for the *declaration* of a trust, as distinguished from a trust actually in esse, or the *estate* within the meaning of the act. *Nelson* v. *Hughes*, Jones' Eq. vol. 2nd page, 37—top.; also, Rev. Code, for the statute of 1812.

2nd. It cannot be claimed for the wife that she is a "sole trader" by any general law or particular custom. The policy of our law, with an eye to domestic harmony, has been against it; hence the supposed merger of the existence of the wife into that of her husband. A man cannot grant to his wife during the coverture, albeit he may *devise* lands, for that takes effect after the death of the devisor. He may covenant *with another* to stand seized, or make a feofment to her use; Litt. sec. 168, 1 vol. But he cannot covenant with *her* to stand seized, because they are one. She may be his *agent*, and if she buys with his money, she becomes his trustee, and the lands his. The husband may repudiate the contract out and out, but because he may assent to such *agency*, it does not change the relation of the parties, nor vest in her an interest which flows from the consideration paid by the husband. In our case, the lands were purchased without consulting McDonald, without his knowledge, and at a time when he was *confessedly insolvent*. It is true, he assented afterwards, but not until he had obtained credit upon the faith of lands purchashed with his money.

The case of *Kee* v. *Vasser*, Ire. Eq., vol. 2d, p. 553, presents the question between the *executor* and the *wife of the testator:* as between them, the law is plain enough, but how it would be, if the complainant had been a *creditor*, (which is our case) the Court, in that event, did not decide. The land was evidently bought without his knowledge at the time, and he had the right to insist upon a conveyance to himself; he was insolvent then, and ever afterwards, and he cannot now assent to an arrangement which, while it procures credit, withholds the means of payment. It would be a blind, a trap if it were so. Whatever right McDonald, after the purchase, had to call for the estate, to that right a *bona fide* creditor succeeds.

3rd. As to the other defendant, McLeran, he can only have what he got *at law* under his sheriff's deed, which was the bare possession. McDonald had nothing more; he was not a tenant by courtesy inchoate, because a man cannot be that of a *mere right*.. The wife must be *seized*. And if McLeran got

nothing, and is in possession of lands that do not belong to him, he holds upon an *implied trust*, for the benefit either of McDonald, or any *bona fide* creditor, as is substantially set forth in *Page* v. *Goodman*, Ire. Eq., vol. 8, page 16. He is a volunteer; his condition is that of a speculator, and cannot by any peferred Equity call for the estate to the prejudice of complainant's right, who is a *bona fide* creditor.

4th. If it be insisted, that because McLeran got nothing, he is improperly made a party, the answer is, he is interested in the subject matter of the decree, and his rights to the possession, even, ought not to be passed upon without his being heard, because the prayer is a specific one, under the before recited case of *Page* v. *Goodman*; and this, too, whether he traverses the holding for the benefit of his co-defendant or not, for the reason before given.

5th. The case does not present that of a "naked trust," and, therefore, liable under the statute of 1812. It is not within the provisions of 13 Eliz., because it was no conveyance *by the husband* to defraud creditors, and for that reason void. It is not within the statute of 1848, for protection of feme coverts' estate, because not by descent or devise, but simply a *mere right* in the husband to have lands, purchased with his own money, to be declared his lands, and liable to his debts, to all of which rights, his creditors succeed, whether in the hands of the original holder or those of a voluntary purchaser at the sheriff's sale.

Banks and *Shepherd*, for the defendants.

PEARSON, J. The plaintiff, who is a creditor of the defendant McDonald, seeks to subject the land mentioned in the pleadings, to the payment of his debts, on the ground that, although the title is in the defendant, Eliza, the wife of the other defendant, yet the land was paid for with his money, and she holds the title in trust for him; which trust Equity will subject to the claims of creditors.

The defense is, that the land was paid for with the earnings

of the wife; that the husband being an intemperate, thriftless man, long before the plaintiff's debt was contracted, gave his wife the privilege of working for herself, and acting as a *free trader*, without being subject to his control, or to his marital rights; that she was a good seamstress, and by hard work, and economy, managed to support herself, and lay up enough of her earnings to pay for the land, and accordingly bought and paid for it, and had the deed executed to herself; which was also before the debt of the plaintiff was contracted. The case presents this question: does the doctrine of "pin-money," by which, in the English Equity jurisprudence, a husband is allowed to give his wife the privilege of working for herself, acting as a free trader, and of acquiring profits by her earnings, and savings, which neither he nor his creditors can reach, obtain in this State?

After much consideration, we are satisfied that it does not; because it is inconsistent with our legislation in regard to the rights and duties of husband and wife, it is at variance with the habits and usages of our people, and tends to produce an artificial and complicated state of things; so that, while at law, the wife's existence is considered as merged in that of her husband, her earnings are his, she cannot contract, or sue and be sued, in Equity she is entitled to her earnings—may act as a free trader, acquire property—contract, sue, and be sued, in respect thereto.

Adams, in his treatise on Equity, page 42, says the rule that the equitable ownership is subject to the same restraints of policy, as if the legal estate were transferred, has two *singular exceptions:* The one in what is called "separate use and pin-money trusts." The other is what is called "the wife's equity for a settlement." He classes them together, and speaks of both as in equal violation of principle, and a departure from the maxim, *equitas sequitur legem.*

In *Allen* v. *Allen*, 6 Ire. Eq. 293, it is settled that "the wife's equity for a settlement," is a doctrine that does not obtain in this State. RUFFIN, C. J., in delivering the opinion of the Court, says, in England, "there arose the clearest case ima-

ginable for the interposition of either the Legislature or the Chancellor, in aid of the wife's claim for protection against destitution. It happened that the Parliament left the matter to the courts." On which necessity, the chancellors based the doctrine. He then shows, that in this State, the Legislature has not left the matter to the courts; and then draws the conclusion, by a course of reasoning, which cannot be answered, that, in this State the wife has not an equity for a settlement. The same reasoning applies with equal force to the kindred doctrine of "pin-money," and will show that it also is superceded by our legislation. In addition to the legislation relied on to show that the former is superceded, in regard to the latter, the act of 1828, Rev. Code, ch. 39, sec's 4, 13, expressly provides for the cases, on account of which, the English Chancellors, in the absence of legislation, felt called on to devise and introduce the doctrine of *pin-money;* "When a man shall become an habitual drunkard, or spend-thrift, wasting his substance to the impoverishment of his family, his wife may claim alimony." "The court may decree that she may sue and be sued in her own name, and that all property she may procure by her own industry, or may accrue to her by descent, &c., shall be secured to her, and shall not be liable to the control or the debts of her husband, and on her death without a disposition by will, &c., it shall be transmissible in the same manner as if she were a feme sole."

Our courts, therefore, have no pretext for adopting the doctrine of pin-money, even if it commended itself by a fitness to the state of things existing among us; but it is surely the part of wisdom, and conducive to the general good, to require wives, whose condition imposes upon them the necessity to become *free-traders*, to give notoriety to the fact, by having it made a matter of record, in such manner that all may know it, and that their rights may be protected, as well in the courts of Law, as in Equity, instead of leaving it to be arranged by secret agreement between husband and wife, thereby opening the door to fraud and perjury, by enabling the husband to sail under false colors—acquire credit, and avoid the payment of

his debts, on the ground that he had allowed his wife to have her own earnings and acquire separate property.

Kee v. *Vasser*, 2 Ire. Eq., 553, was cited for the defendants. That case is distinguishable from this; for it was a contest between the wife, and the *executor of the husband.* It is, however, sufficient to remark in regard to it, that the point was not made, and the attention of the Court was not directed to its consideration. The Court simply cite the English cases on the subject, and do not enter into the question how far the doctrine is applicable here.

We thus reject another of those *refined doctrines* of equity jurisprudence, which render the English system so extremely ly artificial and complicated; and add "Pin-money" to the list of "Part performance," "The lien of a vendor for the purchase money." "The duty of the purchaser to see to the application of the purchase money," and "The wife's equity for a settlement."

The plaintiff is entitled to the relief asked for against the defendants.

As the title was in the wife, and the creditors had only a right in Equity to convert her into a trustee, it follows that the husband had no interest which was liable to execution at law, consequently the defendant McLeran acquired nothing by his purchase, and if he had disclaimed, the bill would have been dismissed as to him *with costs*, but as he insists on a declaration as to his rights, the bill will be dismissed as to him *without costs.*

PER CURIAM. Decree accordingly.

BANK OF THE STATE OF NORTH CAROLINA *against* DANIEL G. FOWLE *and others.*

Where, the interest of one of the partners, in the property of a partnership, is assigned by him as security for his individual debts, and such assignee

permits the business to go on in its ordinary course, such security becomes subject to the fluctuations of the business, and upon the subsequent dissolution, is only entitled to what remains to such partner after the payment of the debts of the firm.

CAUSE removed from the Court of Equity of Wake county.

The facts of this case, and the point discussed at the bar, sufficiently appear from the opinion of the Court.

Moore, for the plaintiff.

Husted, *Rogers*, *J. H. Bryan*, *Lewis*, *Winston*, *sen.*, *Busbee*, *Miller* and *the Attorney General*, for the defendants.

BATTLE, J. When this cause was before us at the last term, the only question upon which we were called upon to give an instruction was, as to the rights of the defendant Johnston, under the deed of trust mentioned in the pleadings as having been made to the defendant Pescud, and the defendant Fowle. We then held that he was bound to make an election, and that Cooke's creditors would be entitled to the residue of both funds. A petition to rehear the decree then made, is now filed by certain creditors of Cooke, intended to be secured by another deed in trust, made by Cooke to the defendant Pescud. In connection with this, by a general agreement among the counsel, for the various parties, the case is brought on to be heard upon the merits of the respective claims, set up by each party to the fund, now in the hands of the defendant Fowle.

There is some irregularity in this mode of proceeding, but as it is very desirable to all parties to have their respective rights ascertained, and the fund distributed, we have made no objection to having the cause brought on for argument now, and we are prepared to give an opinion upon all the points which are properly before us, and which it is necessary for us now to decide.

The main question is, what are the rights of the defendant Johnston under the deed in trust, executed for the benefit of him and others, by the defendant Cooke, to the defendant

Pescud, on the 24th day of July, 1851, by which he conveyed to the trustee all his interest in the "Manteo Paper Mills," on Crabtree creek, in the county of Wake, owned by James F. Jordan & Co.; of which firm the defendant Cooke was a partner.

A similar question is presented by the deed, in trust, executed by the defendant, James F. Jordan, on the 7th of November, 1851, to the defendant, William H. Jones, of all his interest in the same Mills, for the benefit of the defendant Buffalow, and others.

For the defendants, who claim under these deeds of trust, it is contended that the assignments by Cooke and Jordan, respectively, conveyed the interest of each in the partnership effects, at the date of the deeds; that the said partnership was then solvent, and that they have the right to claim the machinery and other things, or their value, as of that time, though they were subsequently, conveyed by James F. Jordan & Co., to the Corporation, the Neuse River Manufacturing Company, which, by a change of name, afterwards became the "Manteo Manufacturing Company." On the contrary, the defendants, who claim under the deed made by the "Manteo Manufacturing Company" to the defendant Fowle, contend that as the defendants, Johnson, Buffalow, and others, did not insist upon a dissolution of the partnership at the time of the assignments made for their benefit, but instead thereof, permitted the partnership business to be carried on with their knowledge and concurrence, they can claim the value of the interests of the said Cooke and Jordan, only as they existed at the time when they came forward with their claims, to have the business stopped, and their rights ascertained, and secured to them.

It is difficult to resist the force of this latter view of the case. There can be no doubt, that the general rule is, that an assignment of the interest of one partner in a firm, either absolutely, or as a security for a debt, is a dissolution of the copartnership, if the assignee insist upon his right to have the business closed, and the share of each partner ascertained and

paid to him, after the payment of all the debts of the copartnership. Without citing other authorities, the case of *Marquand* v. *N. Y. Manufacturing Company*, 17th John. Rep. 525, is directly in point, and the reasons, upon which the rule is founded, are there stated and explained. That was the case of an assignment as a security for a debt, and in that respect, is like the one which we are now considering. But there is nothing, either in the decision itself, or in the reasoning by which it is supported, which makes the assignment operate to dissolve the partnership against the will of the assignee. He may, if he choose, permit the business to go on in its ordinary course, but if he do, his security will be liable to its fluctuations, by which, if the business be prosperous, his security will be enlarged, but diminished, or lost, if it be adverse. That would certainly be the case of stock in an incorporated company, pledged for securing a debt; and it seems to us, that the rule must be the same, with regard to the interest of a partner, where the assignee concurs in the continuance of the business. If there be a loss to the assignee, by such a proceeding, he cannot complain of it; for, to him the maxim applies, *volunti non fit injuria*. That the *cestuis que trust*, for whose benefit the deeds in question were executed, concurred in the continuance of the partnership business, is manifest from the deeds themselves. Indeed, they show on their faces, that they were made for the very purpose of enabling the partners to carry on the business. The result is, that the *cestuis que trust*, can only claim the value of the interests of the respective partners in the "Manteo Manufacturing Company," at the time when that corporation made an assignment of its effects for the payment of its debts, and that value will be whatever remains after the payment of such debts.

We have considered the operations of the "Neuse River Manufacturing Company," which, by a change of name, became the "Manteo Manufacturing Company," as a continuation of the business of James F. Jordan & Co., so far as the *cestuis que trust*, under the deeds above medtioned, from Cooke and Jordan to Pescud and Jones, are concerned; be-

cause, with their knowledge, and without any objection on their part, James F. Jordan & Co., by a deed, dated on the 2nd day of February, 1854, assigned and transferred to the said Neuse River Manufacturing Company, "all the machinery, stock, tools, and personal property of every description," which they owned in the paper mills, on Crabtree creek.

This view of the case, makes it necessary that the exceptions of the defendant Pescud, who claims under the deed from the Manteo Manufacturing Company to Fowle, should be sustained; and as it is understood that the debts secured by that deed, will absorb all the funds in the hands of Fowle, it is useless to consider the questions discussed at the bar, as to whether the deeds to Pescud and Jones, were sufficient to cover what is called, in the civil law, the novation of the debts thereby intended to be secured to the defendant Johnston, and the release or payment of the debts intended to be secured to the defendant Buffalow.

PER CURIAM. Decree accordingly.

JAMES LEVISTER AND WIFE *against* W. F. HILLIARD, *Adm'r.*

Where the owner of a slave, employed a person to write a deed of gift, furnishing him with a form for that purpose, and such person wrote such deed accordingly, and having read it over to the donor, he executed it by signing his name, and at his request, such draftsman subscribed it as witness, and immediately retired from the apartment, leaving the instrument, so executed, lying on the table, in the presence of both the donor and donee, it was *Held* that this proof raised a presumption that it was delivered to the donee, and that such presumption was strengthened by the declarations of the donor, afterwards made, that he had executed a deed, for the property in question, to the donee.

CAUSE removed from the Court of Equity of Franklin county.

The bill, in this case, was filed to set up a deed, which it was alleged had been made by Stephen Sparks, to the feme

plaintiff, (then Mary Ann White) for two slaves, Candice and Minerva.

The plaintiff, Mary Ann, had lived in the family with the said Stephen and his wife Elizabeth, from her early infancy, until the death of both. It appeared that she was very serviceable, and that they were both greatly attached to her. Divers witnesses proved that Stephen Sparks spoke of Mary Ann in affectionate terms, and declared his intention of providing for her. She was the niece of Elizabeth Sparks, but was not of kin, by consanguinity, to Stephen Sparks.

The bill alleges that a deed was made, and delivered by Stephen Sparks in 1843, while Mary Ann was still an infant; that it was drawn up by Harrison White, the brother of the said Mary Ann, in pursuance of a copy, to which he was referred by the said Stephen, and that he subscribed the same as a witness; that the deed was delivered to her, and that she delivered it to her aunt, Mrs. Sparks, for safe-keeping; that Stephen Sparks died about the year 1846, and the said Mary Ann thence continued to reside with her aunt, for about two years, when the aunt died; that the slaves in question remained in the family of Stephen, during his life, and afterwards with his widow till her death, which took place in 1848, when they went into possession of one Shemuel Kearney, who kept them, (knowing of plaintiffs' claim,) under an apprehension that he might have to resort to them in aid of a fund which he had in hand, and with which he was paying off the debts of the said Stephen; that he (Kearney) held them until December, 1851, when they went into the possession of the defendant, Hilliard, who refused to surrender them on the demand of the plaintiffs. The bill was returnable to spring term, 1854. The prayer is for a surrender and conveyance of the slaves and their increase, and for an account of the hires and profits, while in defendant's possession.

The defendant answered, denying plaintiffs' equity, and requiring full proof of the execution of the deed. He also insisted, that he had more than three years' adverse possession of the slaves, and that he was, therefore, protected by the

statute of limitations. He asserted that the slaves were in the possession of Kearney, as his agent, and that that possession, added to his own, would make out more than three years.

The proofs, in the case, especially the testimony of *Harrison White* and *Shemuel Kearney*, are so fully set forth in the opinion of the Court, that it is not deemed necessary to repeat their statements here.

Moore and *Lewis*, for the plaintiffs.
Winston, sen., for the defendant.

PEARSON, J. Was the instrument delivered, so as to become the deed of Stephen Sparks? is the main question in the cause.

Harrison White, swears that he was called upon by Sparks, at his (Sparks') house, to draw a conveyance from him to Mary Ann White, for two negroes, Candice and Minerva. The witness told him he did not understand writing either a deed of gift, or a bill of sale. Sparks said he had given a bill of sale to Drucilla White; witness could get that and draw one by it. He did so, changing the names, and the sum of money, which was small. After it was written, he read it over to Sparks, who signed it by making his mark, and requested him to witness it, which he did, and left it lying on the table as he went off. No one was in the room but witness, Sparks, and Mary Ann White. Witness heard Sparks say afterwards that he had given, or sold the two negroes to Mary Ann White.

Several other witnesses swear, that they heard Sparks say that he had executed a deed of gift to Mary Ann White for two negreos, and particularly, that when he executed a deed of trust of all his other negroes, he refused to insert these two, saying he had given a bill of sale for them to Mary Ann White, and they were not his. The bill of sale from Sparks to Drucilla White, referred to by the first witness, is produced as an exhibit. It is in the usual form, and is signed and sealed by Sparks, and attested by two subscribing witnesses.

If Harrison White, the subscribing witness, were dead,

proof of his hand-writing, would be *prima facie* evidence that it was duly executed; i. e., was signed, sealed and delivered. His testimony, we think, is at least, equivalent to the inference that would be drawn from proof of his hand-writing, if he were dead. He proves a present purpose to execute the deed; that it was signed, and he attested it as a subscribing witness, at the request of the maker, and left it lying on the table, in the presence of the donor and donee. This being *prima facie* evidence, that it was duly executed, the question is, what is there to rebut the presumption? We can see nothing. On the contrary, the declarations made afterwards by the donor, confirm the presumption, if they do not, of themselves, furnish evidence of the fact of the delivery. *Baldwin* v. *Maultsby*, 5 Ire. Rep. 505, *Kirk* v. *Turner*, 1 Dev. Eq. 14, and *Newlin* v. *Osborne*, 4 Jones' Rep. 157, are distinguishable from this case. In the first, the donees were not present, and the subscribing witness left the donor alone in the room, the instrument lying on the table. After his death, it was found in his trunk. In the second, the donees were not present, and the subscribing witness handed the instrument to the donor, and went away. In the third, the bargainee was not present, and the subscribing witness handed the instruments to the bagainor, who carried them off with him. In these cases, the fact that neither the donees, nor any person, who could act for them, were present, and that the instruments were left with the donors, when *alone*, so that a delivery *could not be made*, necessarily repelled the presumption of a delivery.

The production of the deed to Drucilla White, and the testimony of Harrison White, that he drew the conveyance from Sparks to Mary Ann White, for the two slaves, using that as a form, changing only the names, and the small sum that was inserted as a consideration, fully meets the difficulty as to proving the contents of the deed, which is lost.

The position, that the defendant has acquired title by an adverse possession for three years, cannot be maintained. Mary Ann White lived with Stephen Sparks, and the negroes re-

mained on the premises until his death. She was then an infant, and there is no allegation, or proof, that Sparks was in the adverse possession. After his death, Mary Ann White, still being an infant, continued to reside with the widow until her death, about February, 1849, and the negroes remained on the premises. Shemuel Kearney then took the negroes into his possession, and held them until December, 1851, when the defendant took them into his possession. The bill was filed April, 1854, a few months over two years. The defendant alleges that Shemuel Kearney held possession by his permission, and as his bailee. This allegation is positively denied by Kearney. He swears that he took possession of the other slaves, claiming them under the deed of trust, and of these two slaves under the advice of his attorney, supposing that it might become necessary to resort to them, if the trust fund should prove insufficient, in order to pay the debts of Sparks, for which they were liable, notwithstanding the deed of gift, which was mentioned to him by Sparks at the time the deed of trust was executed for the other negroes. So, if the Kearney was the bailee of any one, it was of Mary Ann White, who was entitled to the negroes as against the defendant, the administrator of the donor.

Mary Ann White married in 1850. Whether she was then an infant or not, is left uncertain by the pleadings and proof; but an inquiry in regard to it is unnecessary, because, supposing her to have been of full age, the defendant did not have adverse possession long enough to defeat her title.

Per Curiam. Decree for plaintiffs.

DAVID T. AIRS *and others, against* JAMES BILLOPS *and wife.*

Where the only person who ought to have been made a party defendant in a bill, was named as such—an injunction prayed—a fiat made and an injunction ordered and issued against him, in which fiat a copy of the bill and a subpœna were ordered to issue, which was done, and the defendant came in and answered, and moved for the dissolution of the injunction, which was dissolved, and the bill stood over, and after replication, commission and proofs, the cause was set down for hearing, and sent to this Court, it was *Held*, to be too late to move to dismiss the bill on the ground that there was no prayer for process to bring in the defendant.

Where a cause is before the Court for a final decree, although the bill prays for a special injunction, it must be heard upon bill, answer, replication and and proofs like any other cause.

A bill can only be read as an affidavit, on a motion to dissolve an injunction.

This Court will not restrain the owner of a determinable estate in the enjoyment of his rights, on proof of an isolated conversation between him and the ulterior claimant, in which the former under the excitement of spirits, and of an angry quarrel, made a threat to run the property off and defeat the expectancy.

CAUSE transmitted from the Court of Equity of Washington County.

Under the will of David Airs, a negro slave, named Henry, was limited to the defendant Ellen, upon a contingency that, if she should die without leaving a child, the property in the said slave should go over to the surviving brothers and sisters.

The bill charges that the plaintiffs, David T. Airs, and Edward W. and Clarkie, the wife of the plaintiff Waters, are three of the children of David, the testator; and, as such, are entitled to the remainder in the said slave on the happening of the contingency aforesaid. They allege that the defendant Ellen has no child, and is now about fifty-two years old, and the defendant James, her husband, is older than she, and that there is now little probability that she will ever have issue; that the said James is insolvent, except as to the slave in question, and that he is very intemperate in the use of spirituous liquor. They allege that the defendant James intends to run the said slave beyond the limits of the State, or to sell him

with an intention that he may be so run off, and that being thus insolvent, there is great danger of their losing the benefit of their contingent property in this slave. They allege that the defendant James has frequently declared his purpose of so running off the said slave, and of selling him that he may be run off. They allege that the said James so declared to H. H. Watters, Thomas S. Johnson and A. S. Watters, and they call upon the defendants to answer specifically to these allegations. They pray for a writ of sequestration and injunction, to prevent the said James from running off the slave in question, and from making sale thereof.

The defendant James denies that he has ever made any threats to run off the slave Henry, or to sell him with the purpose of his being run off, or for the purpose of jeopardising the contingent rights of the plaintiffs. He admits that he has very little property, and that there is little prospect that his wife will bear a child. He denies in general terms that he has ever declared his purpose to be to run off the slaves, or to sell them for the purpose of their being run off. He says he has endeavored to sell his interest in this slave to divers persons, and insists that he has a right to do so. No response is made in the answer to the special interrogatories propounded in the bill. There were replication and proofs.

The only testimony filed by the plaintiffs, in direct proof of the allegations of the plaintiffs bill, is that contained in the deposition of *H. H. Davenport.*

"On the 26th of December, Mr. Billops said to Mr. Watters, at my store, in Martin county, that he had never done a mean act, but he meant to do one now; that he meant to sell Henry, and send him so far, that he should never be any benefit to David Airs or his children, or his children's children. Said Watters then asked him if he intended to sell him out of the State; Billops replied that he did if he did not get one hundred dollars for him; that Gray Griffin had offered him a few days previous, nine hundred dollars for the boy, but should sell him out of the State, and spend the money, if he had to drink it up; that a few days afterwards, he heard a similar

conversation between the same parties in which similar language was used, and very abuseful language towards David Airs by Mr. Billops. Mr. B. commenced these conversations, as I have said, without any thing having been previously said on the subject. Mr. B. was not, in my opinion, drunk at the time of these conversations. I have never heard or known him offer the boy for sale."

The witness was subsequently re-called and interrogated whether he was "sufficiently acquainted with Billops to know when he is drunk and when sober," and whether he was drunk or sober on the occasions referred to by him in his former examination.

To which he answered, that he had known him for about 18 years, and thinks he knows when he is sober and when drunk, and that he *considered* him sober on the occasion mentioned.

The cause being set down for hearing on the bill, answer, proofs, and exhibit, was sent up by consent.

Heath and *E. W. Jones*, for the plaintiffs.
Smith, for the defendants.

Pearson, J. On the opening of the cause, the defendants' counsel moved to dismiss the bill on the ground that the suit had never been properly instituted, for that the bill was fatally defective in this: It has no prayer for process to compel the defendant to appear and answer, which he contended was an indispensable prerequisite to the institution of the suit.—For this position, *Hoyt* v. *Moore*, 4 Ire. Eq. Rep., 175, was relied on. That case is explained and commented upon in *Williams* v. *Burnett*, Busb. Eq. 209, and it is sufficient to say it was put upon its peculiar circumstances, and the exceeding defectiveness of the bill in many particulars, and cannot be made a precedent. In the present bill, the only person who ought to have been named a defendant, is named as such; an injunction is prayed against him; the fiat directs not only the injunction, but a copy and subpœna to issue to him, which accordingly are issued, and executed in obedience thereto. He

appears at the return term; files his answer; upon his motion the injunction is dissolved; replication and proofs are taken; the cause is set down for hearing and sent to this Court for trial. The mere statement is enough to show that it is now too late to say the cause has never been constituted in Court. If a party will accept service, there is no necessity for process, or for a prayer for process, its only purpose being to compel the defendant to appear and put in an answer.

The cause is now before us for a final decree, and although it seeks for a special injunction and sequestration, it is to be heard upon bill, answer, replication and proofs, like any other cause. In the argument, the counsel on both sides seem to suppose that because a special injunction is prayed, the bill is to be treated as an affidavit in behalf of the plaintiffs. That rule is not applicable to this stage of the proceedings, but is confined to the hearing on a motion to dissolve the injunction. It rests on the ground, that at that stage of the cause, the plaintiff has had no opportunity of taking proofs in support of his allegations, and as the injury would be irreparable, the result of the motion ought not to depend solely upon the oath of the defendant. The plaintiff has now completed his proofs; so, the reason for considering the bill otherwise than as a mere statement of the grounds on which he puts his equity has ceased, and the question is, do the proofs and the admissions contained in the answer, establish the allegations of the bill, giving proper weight to any responsive denial?

The plaintiff seeks to have the slave of the defendant sequestered, whereby the rights of ownership will be essentially restricted, and rests his equity on the ground that he fears the defendant will run the slave off to parts unknown, or sell him with that intent; and in support of this position the bill alleges that the defendant is insolvent; the contingency of his wife's bearing a child is very remote, and that he has "*repeatedly* stated his intention of running the negro off and making sale." In reference to the last allegation, a particular interrogatory is put as to the threats to this effect, made to several different individuals, who are named. The answer admits the

first two allegations, but the last is expressly denied. No response, however, is made to the special interrogatories.

The only evidence which the plaintiffs are able to produce, having a tendency to support this allegation, is the testimony of Davenport, in regard to a conversation which took place in his presence, between the defendant and H. H. Watters, and was repeated in a few days. The special interrogatories not being responded to, this fact must be taken as sufficiently proved, although it rests upon the testimony of a single witness, notwithstanding the general denial in the answer; and the case is narrowed to this: Does the fact of this conversation establish the plaintiffs' equity, and support the allegation of the bill?

It is obvious, that at the time of the conversation, the defendant was either drunk, or so highly excited in a quarrel, as to repel any inference of a deliberate purpose, and although connecting it with the general allegations of the bill, treated as an affidavit, it may have been sufficient in a prior stage of the cause, to entitle the plaintiffs to have the property secured, pending the suit, so as to give an opportunity for a full investigation, yet, after that investigation has been made, and the cause comes on to be finally disposed of, and the result is, to show that this conversation is the only proof that the plaintiffs are able to offer in support of their allegation, we are forced to declare that the allegation is not proven, and that the plaintiffs have failed to establish an equity to interfere with the rights of the defendant to the enjoyment of his property; which consists not merely in the reception of the profits, or hire, but in the right to sell his estate in the slave, provided he does not sell with a fraudulent intent to defeat the ulterior interest. If the bill was sustained upon proof of this isolated conversation, those having future interests would be greatly encouraged, upon the slightest pretext, to embarrass the owners of determinable estates, particularly where they happened to own but little other property, by forcing them to give security for its forthcoming, or to sell, at an under value, to some one who is able to give security.

The bill must be dismissed, but we do not give the defendant costs. His unguarded conversation with one of the plaintiffs, gave them a plausible pretext for the investigation.

PER CURIAM. Bill dismissed.

JAMES H. WARD *and others against* THOMAS W. RIDDICK.

Where a testator bequeathed his slaves to be equally divided between his wife and children, deducting from the share of one of his children the value of certain slaves, theretofore conveyed to him by deed, it was *Held*, in analogy to the construction given by this Court, upon advancements, under the statute of distributions, that the valuation of the slaves conveyed, should be made as of the time when they were conveyed.

THIS was a petition for the partition of slaves, transmitted from the Court of Equity of Bertie.

The only question, in this case, arises on the following clause of the will of William Ward:

"5th. My will and desire is, that my negroes shall be divided between my wife Martha, and my children, in the following manner: I desire, and my will is, that the negroes, Mary, Jo, Amanda, Oscar and Turner, whom I have given to my son-in-law, Thomas W. Riddick, be deducted from his portion of an equal division of my negroes, and after that deduction, then I desire my negroes to be equally divided between my wife Martha, and all my children, my will and desire being, that my son-in-law, T. W. Riddick, should have an equal share of my negroes, by regarding the negroes, already given him, as a part of his share, or that he shall have in value equal to the negroes already given to him, and mentioned above, less in his share, than my wife and my other children."

The plaintiffs are the executor and the other children of the testator, the wife having died in the testator's life-time. The plaintiffs state that the parties had, at various times, en-

deavored to come to an amicable division of the slaves, but that this purpose had been thwarted by the unreasonable claim of the defendant, to have the valuation of the slaves conveyed to him, taken as of the time when he received them.

The defendant answered, insisting that he was entitled to have the value of the slaves ascertained at the time of the conveyance.

The cause was heard on the bill and answer.

Winston, *Jr.*, for the plaintiffs.
Smith, for the defendant.

BATTLE, J. The only question presented by the pleadings, arises upon the construction of the 5th clause of the will of the testator, William Ward, which is in the following words: "My will and desire is, that my negroes shall be divided between my wife Martha, and all my children, in the following manner: I desire, and my will is, that the negroes, Mary, Jo, Amanda, Oscar, and Turner, whom I have given to my son-in-law, Thomas W. Riddick, be deducted from his portion of an equal division of my negroes, and after that deduction, then I desire my negroes to be equally divided between my wife Martha, and all my children; my will and desire being, that my son-in-law, Thomas W. Riddick, should have an equal share of my negroes, by regarding all the negroes already given to him, as a part of his share, or that he shall have, in value, equal to the negroes already given to him, and mentioned above, less in his share than my wife and my other children." The slaves mentioned in this clause had been given to the defendant, Thomas W. Riddick, by the testator, by a deed, dated in August, 1853, and the defendant contended that in the division, directed by the will, these slaves were to be valued to him as of the time when they were given, while the other parties insist that they ought to be valued as of the time of the testator's death.

It is conceded by the counsel for the plaintiffs, that if the testator had died intestate, then the slaves, given to the de-

fendant, would have had to be accounted for as advancements, according to their value at the time of the gift, upon the principle settled in the leading case of *Stallings* v. *Stallings*, 2 Dev. Eq. Rep. 298. That case was decided upon the acts of Assembly, which will be found embraced in the Rev. Code, ch. 64, sec. 2, and it has been confirmed by repeated subsequent adjudications.

But while the counsel admits that such is the construction of the law, in providing for an equal division of the property of an intestate among his next of kin, he insists that the present case must be governed solely by the language of the will, and that the evident meaning of the words used by the testator, requires a division of the slaves, in such manner, that those given to the defendant shall be accounted for by him, as if they were just set apart for him, and of course according to their present value.

The counsel, for the defendant, admits that the valuation of the slaves, which the testator had given him, must be fixed upon a fair construction of the will alone, but he contends that, as the testator manifestly designed to provide for an equal division of his slaves between his wife and children, and as the law contemplates the same thing in the distribution of an intestate's estate among his wife and children, what has been approved and settled as the proper means to secure equality in the latter case, ought to be applied to the former. Hence, the counsel infers that where an advancement to one of the children is directed to be accounted for, it must be valued as of the time when it was made, and he refers to the case of *Spivey* v. *Spivey*, 2 Ire. Eq. Rep. 100, as favoring this construction.

We think that the force of this argument cannot be resisted. The testator had the right, undoubtedly, to have directed a division, according to the rule contended for by the plaintiff, but as he did not do so, in such terms as leave no reasonable doubt that such was his intention, we cannot have a better guide for the equality, which he clearly did intend, than that which the law provides for a strongly analogous case.

Indeed, the act of Assembly may be regarded as making a general will for all intestates, and what the Court has settled as a fair construction of that, ought to be followed whenever any individual testator has made a similar disposition, by will, of his property, or any part of it.

A decree may be drawn directing a division of the testator's slaves, upon the principle herein declared.

PER CURIAM, Decree accordingly.

JOHN D. CURRIE *against* NATHANIEL P. GIBSON.

A prior entry, which is vague, acquires no priority as against other enterers, until it is made certain by a survey.

CAUSE transmitted from the Court of Equity of Richmond County.

The bill, in this case, was filed for an injunction, and for a reconveyance of the land in controversy, upon the ground that the defendant had notice of a prior entry of the plaintiff, and that, notwitstanding such notice, he made his entry and had the land surveyed, and obtained a grant before the plaintiff obtained his grant. The plaintiff's entry is in these words: "John D. Currie enters one hundred acres of land in Richmond county, on the south side of Reedy branch, adjoining his own lands and the lands of James McInnis, deceased." This entry was made 25th of December, 1852; it was surveyed on the 30th of September, 1854, and a grant obtained on the 8th of November, 1854. The defendant made his entry of the same land on the 17th of January, 1853, had it surveyed and obtained a grant on the 5th of March, 1853.

After obtaining his grant, the plaintiff took possession and commenced using the timber, for which defendant brought an action of trespass at law.

The prayer is for an injunction and for a conveyance of the legal title.

The defendant denied that he had notice of the plaintiff's entry of the land; he says that he knew that he had made an entry, but supposed it related to other vacant land adjoining him.

There was replication, commissions were taken out, and proofs taken as to the defendant's knowledge of the land which plaintiff had entered; but as the opinion of the Court supercedes the enquiry, they need not be stated.

Kelly, for the plaintiff.

No counsel appeared for the defendant in this Court.

PEARSON, J. Where the terms of description in which an entry is made are so vague as not to identify any land, the entry is not void, and the defect may be cured by the survey, so as to make the grant which issues in pursuance thereof, valid as against the State. This liberal construction of the law is put on the ground that it is not material to the State what vacant land is granted. *Munroe* v. *McCormick*, 6 Ire. Eq. Rep. 85; *Johnson* v. *Shelton*, 4 Ire. Eq. Rep. 85; *Harris* v. *Ewing*, 1 Dev. and Bat. Eq. 369.

But such vague entries are not allowed to interfere with the privilege that other citizens have to make entries until the defect is cured by the survey, whereby the land is identified, and is made capable of being the subject of notice, for there cannot be notice of that which has no identity.

In *Harris* v. *Ewing*, supra, there was a decree against one who made his entry *after* the prior vague enterer had actually surveyed, and who had notice of the survey. In *Johnson* v. *Shelton*, supra, the Court say "that was going beyond the words of the act upon a very liberal construction. It certainly can be carried no further in support of vague entries which would be an encouragement to negligence and deception in enterers."

In our case, the defendant made his entry before the plain-

tiff *had surveyed*, and to deprive him of a right acquired before the plaintiff had identified any land, as the subject of his entry, would be carrying the construction much further than is done in *Harris* v. *Ewing*, or any other case, and would not only go beyond the words, but would violate the spirit and do manifest injustice.

The plaintiff alleges that the defendant had notice of his entry. The defendant positively denies having notice at the time he made his entry. It is unnecessary to examine the proof, because it is impossible that the defendant could have had notice of that which had no identity; and the character of the evidence taken in this cause shows the necessity of adhering to the principle established in *Munroe* v. *McCormick*, supra, "where an entry is vague it acquires no priority until it is made certain by a survey."

PER CURIAM. Bill dismissed.

BRYAN & CO. *against* B. J. SPRUILL *and others.*

A husband has a right to assign a legacy, or a distributive share, due to his wife, for the purpose of paying his debts, and if the assignee can reduce it into possession during the life-time of the husband, the wife, surviving, cannot recover it.

An allegation that a deed was fraudulent, without setting out how, or on what account, or in what particular, is not a sufficient one, and the admission of such allegation, by filing a demurrer, does not sustain a bill otherwise deficient in equity.

CAUSE transmitted from the Court of Equity of Washington county.

The bill charges that Benjamin J. Spruill was indebted to the plaintiffs, in the sum of $258,43, for which they sued and recovered a judgment in the County Court of Washington; that execution issued on said judgment, and was returned unsatisfied, except as to a small amount, and that the said Spruill

is insolvent; that the wife of the defendant Spruill, the defendant Mehetable, by the death of a sister, Harriet Ann Fesenden, intestate, became entitled to one-third part of the personal estate of the said Harriet Ann, and that these defendants, with the other distributees, had filed a petition in the County Court of Washington, and had obtained a decree for the sale of certain slaves for a partition among them; that plaintiffs had had the husband's interest in such slaves levied on; that with a view to defraud the plaintiffs, the said B. J. Spruill had conveyed this distributive share to the defendant Charles Latham, by deed, bearing date, &c., a copy of which is annexed, and prayed to be taken as a part of the bill. The conveyance referred to is a deed of trust, to secure certain creditors therein mentioned, in proper form and duly proven.

The bill is for an injunction to stop the sale under the decree in the county court, and for a decree to have their execution satisfied out of this distributive share.

The defendants demurred. Joinder in demurrer, and the cause was set down for argument, and sent to this Court.

E. W. Jones, for the plaintiffs.
Heath, Winston, Jr., and *H. A. Gilliam*, for defendants.

BATTLE, J. It is settled that a husband has a right to assign a legacy, or distributive share, due to his wife, for the purpose of paying his debts, and if the assignee can reduce it into possession during the life of the husband, the surviving wife cannot recover it; *Barnes* v. *Pearson*, 6 Ire. Eq. Rep. 482; *Arrington* v. *Yarbrough*, 1 Jones' Eq. Rep. 72. The interest of the husband, in such rights of his wife, cannot be seized under an execution at law, against him, nor will the execution have any lien upon it, either at law or in equity. So, that until a bill be filed, the husband may make a *bona fide* assignment of it for the payment of what debts he chooses; *Harrison* v. *Battle*, 1 Dev. Eq. Rep. 537. The counsel for the plaintiffs do not deny these propositions, but they insist that the bill charges that the assignment, in trust, to Latham,

was fraudulent; that the charge is admitted by the demurrer; and that consequently, the assignment cannot stand in the way of their right to relief.

The reply made by the defendants' counsel is, that there is no sufficient charge, in the bill, of fraud in the execution of the deed in trust, under which they claim, to prevent them from taking benefit under it; that on the contrary, the deed in trust is referred to and made a part of the bill; that it purports to secure the payment of debts, the *bona fides* of which is not impeached; that the debtor had a right to make it, and that, therefore, the allegation of the bill, that the deed was made "with a view to defraud" the plaintiffs, is the mere assertion of a legal conclusion, which is not sustained by the facts therein set forth. This reply of defendants is, in our opinion, conclusive against the plaintiffs. It *is* true, that the bill does not contain any averment of facts, to show that the deed in trust was fraudulent. It is not pretended that there was any fraud in the *factum* of the deed, nor is there any intimation that the debts therein mentioned, were not justly due from the grantor; and if he owed them, he certainly had a right to secure them in preference to that which he owed to the plaintiffs.

The general allegation, then, of a fraudulent intent, is not justified by the fact stated in the bill, and of course, is not helped by the demurrer, which admits facts only, and not the legal conclusions, which the bill may deduce from them. The demurrer must be sustained, and the bill dismissed with costs.

PER CURIAM. Decree accordingly.

JOHN N. WASHINGTON *against* THOMAS R. EMERY.

An injunction is a secondary process, (except it be for the prevention of torts) and must be asked in aid of some primary equity, which must be disclosed in the same bill that prays it.

Washington *v.* Emery.

An injunction to stay proceedings, at law, because another bill was pending, which embraced the same cause of action as that asserted in the suit at law, was *Held* to have been improvidently issued, and should be dissolved on motion. The proper course would have been to file a petition, or make a motion for the injunction in the suit already pending.

APPEAL from the Court of Equity of Craven county.

The bill alleges that the plaintiff, as administrator, with the will annexed, of Mrs. Vail, filed a bill in the Court of Equity of Craven county, in March last, against Thomas R. Emery, stating difficulties, and praying for advice as to the proper construction of certain items of the will of his testatrix, most of which difficulties are re-stated in this bill, and amongst others, that he had in good faith changed an investment from a note on one Blackwell, which he deemed doubtful, to one in Rail-road stock, which was much better and safer than the former, and of which the defendant refused to receive his proportionate part. The prayer of which pending bill was, that the equities of the defendant and the other legatees, under the will of Mrs. Vail, might be declared by the Court. The bill, in this case, alleges that notwithstanding the pendency of the former suit, and even after there had been a decree for the plaintiff to account, the defendant sued him as administrator, with the will annexed, of Mrs. Vail, with his sureties, upon the administration bond which he gave on his appointment, alleging as a breach, the non-payment of the legacies which were due him, and was pressing the said suit against him to judgment. The prayer is for an injunction to restrain the defendant from thus proceeding at law. The defendant answered, but the statements of his answer are not material to the question discussed by the Court. On the coming in of the answer in the Court below, defendant moved for the dissolution of the injunction, which was ordered, and the plaintiff appealed.

J. W. Bryan and *Stevenson*, for the plaintiff.
Haughton and *Hubbard*, for the defendant.

PEARSON, J. There is no error in the interlocutory order

appealed from. The injunction ought to have been dissolved, on the ground that it was improvidently granted. The bill discloses the pendency of another suit, in which the relief prayed for might have been obtained upon a motion, or by petition in that cause, so, there was no necessity for a second original bill.

In the second place, this bill cannot "stand alone." It seeks merely for an injunction against the action at law; and according to the course of this Court, except it be for the prevention of torts, an injunction is a secondary process, in aid of some primary equity which the bill seeks to have established. Here there is no primary equity in aid of which the injunction was asked for, which could be made the subject of this bill, or which it seeks to have established, because the plaintiff had already filed a bill for the purpose of having the equities of all the parties under the will of Mrs. Vail declared. That a bill will not lie simply for an injunction, except in case of torts, is clear. For instance, a mortgagor cannot maintain a bill to enjoin the mortgagee from taking possession; he must ground the bill upon his equity to redeem, and until that can be established an injunction will be issued, auxilliary. So one cannot maintain a bill to enjoin an execution on a judgment at law, except it be in aid of some equity against the legal right which the bill seeks to set up. So in all cases of the kind, some primary equity must be alleged, or the bill cannot stand.

In the third place, considering the bill as a distinct and independent proceeding, the other defendants in the action at law are necessary parties, and it is only when moving in the original cause that the plaintiff can be heard without joining the other obligors. He will then be permitted to make the motion alone in respect to the parties to that suit—it being necessary for the protection of himself and the other obligors who are *his sureties*—the rules concerning the *parties to a suit*, not being applicable to a motion or petition in a cause which is pending and has been properly instituted.

PER CURIAM. Decretal order affirmed.

JOHN N. WASHINGTON, *cum tes. ann., against* THOMAS R. EMERY *and others.*

Where there was a general residuary clause in a will, directing a division of the fund when A might come of age, between such of the testator's grandchildren as might then be alive, and one of the grandchildren died, in the lifetime of the testator, before A came of age, *it was held* that the part intended for such deceased grandchild fell into the residuum, as property not otherwise disposed of, and did not go to the next of kin.

Where a trustee changes an investment without the direction of a Court of Equity, he takes upon himself the *onus* of proving entire *bona fides*, and that there was reasonable ground to believe that the fund would be benefitted. Where, however, he is able to make such proof, the court will sustain his act.

Where a trustee making a change in an investment is interested in a large portion of the fund, he will be regarded in a different light from a naked trustee, and a presumption is raised that he acted with good faith.

This Court will sanction the act of a representative of a deceased person, in making small gratuities to slaves, at particular times, as encouragement to good conduct, where such had been the usage of the deceased owner.

Five per cent. commission is not an excessive allowance by the way of commissions on moneys raised on the hire of slaves.

The bill was filed by the plaintiff as the administrator with the will annexed of Mrs. Eliza Vail, for the auditing and settling the estate in his hands, and to that end he asks the Court to declare the rights of the legatees in several particulars wherein he thinks his duties, as administrator, are doubtful, and his course unsafe, without the instruction of the Court. One item, in the will of Mrs. Vail, gives a share of her estate to the plaintiff, in trust for her grand-son, Benners Vail, with a limitation over to his children if he should leave any. Another clause of the said will, provides as follows:

"When my grand-son, Thomas R. Emery, arrives at the age of twenty-one years, (or earlier, if he dies,) I wish the whole of my estate, of every kind and description, not otherwise given away, to be equally divided between such of my grand-children as may be then alive, and the lawful issue of such as may be dead; so that the child or children of such of

my grand-children as may be then dead, may take the part which his or her father or mother would have been entitled to, if alive."

Benners Vail died in the life-time of the testatrix, leaving the plaintiff's wife, and the other parties described in the pleadings, as the next of kin, and the question submitted to the Court was, whether they took the share that was intended for the said Benners Vail, or whether it fell into the residuum, and became distributable among the grand-children, who were then alive.

There was a charge upon the estate for the support of five superannuated slaves, and the administrator with the will annexed, asks the Court to instruct him as to the fund from which the same shall be taken, and the amount.

There are several annuities directed to be paid during the interval between the death of the testatrix and the arrival of Thomas R. Emery at the age of twenty-one; the annuities were running from January till January, and from the last payment, to wit, from January, 1853, to the time of Thomas R. Emery's death, there was the fraction of a year, and the question was, whether the annuities should be paid *pro rata* for that fraction?

The defendant answered at the Spring Term, 1857, of the Court, and at that term an order was made to take an account of the personal estate of the testatrix, in the hands of the plaintiff as administrator with the will annexed, with the power of examining the parties on interrogatories. An order was also made, appointing commissioners to divide the slaves.

At the ensuing term, the commissioner appointed to take the account reported, and exceptions were filed to the report by both plaintiff and defendant.

The first exception of the plaintiff is, that he was not allowed the sum of $5400, which he paid for sixty shares of stock in the Wilmington and Weldon Rail Road Company, and because the commissioner refused to recognize this stock as part of the intestate's estate. The money paid for this stock had been invested in the note of a man

by the name of Blackwell, and although his credit was generally good, yet he was known to be extensively engaged in speculations at the time of this change. He afterwards failed, quite suddenly, for a large sum, and many active and prudent business men lost their debts. The Wilmington and Weldon Rail Road stock, on the other hand, had, for many years, been paying dividends, and for several years last past had paid seven per cent. It appears that the plaintiff proceeded with considerable caution in making this change, taking the opinions of persons best informed on such matters. The evidence on this point, is set out by the Judge in the opinion of the Court as fully as is needed. The commissioner rejected the claim as a voucher, and plaintiff excepted.

The administrator having hired out the slaves between the time of the death of Mrs. Vail and the arrival of Thomas R. Emery at twenty-one, allowed them small sums at christmas, as gratuities, amounting, during the whole time, to $90. In this, he had followed the example of the testatrix, whose uniform practice it was to make such gratuities, and it was in proof, that such was the usage in that community. It was proved that the slaves of this estate were faithful and obedient. This item was rejected by the commissioner, and the plaintiff excepted.

The commissioner refused to allow plaintiff commissions on the receipts and payment over to the legatees, of money raised from the hires of slaves, dividends of stocks, &c., for which the plaintiff excepted.

The defendant excepted to the allowance of any commissions, upon the ground, that the plaintiff had not made *any due return* or proper inventory as administrator. 2nd. That the commissions allowed on the collection of notes, was excessive. The facts relating to these exceptions, are noticed by his Honor in the opinion of the Court.

After this cause was instituted, answers filed, and an order of reference for an account, the defendant Thomas R. Emery, caused an action to be brought for his legacies, on the plaintiff's administration bond, against the plaintiff and his sureties,

to stop which, the plaintiff filed a bill for an injunction, which was issued in vacation, and at the return term, on the coming in of the answer was ordered to be dissolved, as having been improvidently issued; the plaintiff appealed, and the decretal order below was affirmed. (See preceding case.) By consent, the bill was, by an order of this Court, allowed to be treated as a petition, or motion, for an injunction to issue in this cause, the plaintiff agreeing and undertaking to dismiss his other bill at next term of the Court below; and it was insisted by the plaintiff, according to this arrangement, that he had a right to have an order from this Court, that the defendant's suit at law shall be dismissed.

J. W. Bryan, for the plaintiff.
Haughton, *Hubbard* and *Donnell*, for the defendants.

PEARSON, J. 1st. The construction of the will: There is a general residuary clause, directing a division when Thomas R. Emery arrived at full age, between such of the grand-children as may be *then alive*, and the issue of such as are dead. The interest of the grand-children, in the residuum, was consequently contingent, and as it has turned out, Benners Emery, who died in the life-time of the testatrix, was entitled to no part thereof, it follows that *Johnson* v. *Johnson*, 3 Ire. Eq. 426, *Dickey* v. *Cotten*, 2 Dev. and Bat. Eq. 272, and the other cases cited, have no application. So, the share which would have belonged to Benners Emery, had he lived until Thomas arrived at age, was undisposed of, and falls into the residuum, and the grand-children, who were living at that time, and the issue of such as may have died, take this fund under the will, subject to a rateable deduction in respect to annuities and the support of the five old slaves, mentioned in the pleadings, charged on the estate, and do not take it as next of kin, free from those charges.

The day on which the payment of the annuties was to begin, not being fixed, it is clear that a rateable amount is to be paid, so as to cover the fraction of the last year. There will be a

reference to ascertain this sum, and the amount necessary for the support of the five old slaves.

2nd. The exceptions to the report:

The first exception on the part of the plaintiff is allowed. When a trustee changes an investment, without having applied to a court of equity for an order to that effect, he takes upon himself the *onus* of proving entire *bona fides*, and that under the circumstances there was reasonable ground to believe that the fund would be benefitted. The proofs sustain the plaintiff in both particulars. There is no suggestion that he made, or expected to make, any individual, or private gain by the change. He was interested in the fund to the amount of one-third. This puts the question on a different footing from that of a naked trust, and raises a presumption that the the trustee was doing what he believed to be for the best. Blackwell, whose notes were converted into rail-road stock, although his credit was not openly doubted, yet, was a man of such extensive speculative operations as were calculated to impair his credit in some degree; so that one, holding his paper, although he would not feel called on to force its collection, would desire a change, if an opportunity offered. The rail-road had been paying, and continued to pay, seven per cent as dividends, for several years, and the plaintiff had an opportunity of getting the stock at ninety dollars for a share. He did not make the investment hastily, but consulted with persons whose opinions were entitled to respect, and the stock of this road was looked upon as established, and stood upon a footing entirely different from that of a road just struggling into existence, where so many interests and considerations are collaterally brought to bear as inducements for subscribing, and subscriptions are often made under excitement. Besides all this, Blackwell has, in the mean time failed, suddenly, for a very large amount, so that but for the change of investment, this part of the fund might have been lost, without being chargeable to the trustee, unless he could have been fixed with greater negligence than that of the many prudent, business men, who lost their debts by Blackwell's failure.

The second exception is allowed. The point is fully covered by the doctrine discussed and established in the case of *Waddill* v. *Martin*, 3 Ire. Eq. 563, in regard to the crops of cotton, corn, &c., that masters allow their slaves to make for their private use. We entirely concur in the conclusion that policy, as well public as private, sanctions that degree of indulgence which justifies the personal representative in acting towards slaves as the master had been in the habit of doing, and it seems in that section of the State, it is usual for masters to give slaves, who are hired out, presents at christmas, when the year ends, and for the hirer to allow each slave twenty-five cents at the end of every week as an inducement to good behavior.

The third exception is also allowed to the extent of two and a half per cent as commissions on receipts, as set out. We take a distinction between receiving dividends on bank stock, state bonds and the like, and receipts by the way of negro hire, which is very troublesome, compared with the amount raised, and is often unpleasant, as it is difficult to find hirers against whom the slaves will not make complaint.

The exceptions on the part of the defendant are both overruled. The first is not sustained in point of fact. The plaintiff did file an inventory, which was sufficiently specific when explained by the statement, that he had charged himself with *all of the notes* of his testatrix as good, except those of Blackwell, which were invested in rail-road stock as referred to above, with which he is charged.

In respect to the second, we think five per cent upon the hires of slaves, is certainly not an unreasonable allowance, considering that it is troublesome and unpleasant, and the amount does not swell up as in the case of the sale of slaves.

Upon the hearing of a motion to dissolve an injunction brought up to this term by appeal, in a cause pending in the court below, between the plaintiff and Thomas R. Emery one of the defendants, the plaintiff had leave to treat his bill as a petition or motion in this cause, and the answer of the said Emery as a reply thereto, upon the undertaking of the plain-

tiff to dismiss his bill at the next term of the Court below. Thereupon, the plaintiff insists that he is entitled to an order directing the defendant, Thomas R. Emery, to dismiss the action, which he has commenced against the plaintiff and his sureties on the administration bond. The Court is of opinion that the plaintiff is entitled to the order. The jurisdiction of a court of equity for the settlement of estates is well established. After a decree for an account, the course of the court is to prevent any of the parties from resorting to a separate proceeding; on the ground, that it would interfere with the orderly action of the court, and defeat the end for which jurisdiction was assumed, and is supererogatory and vexatious. To this end, a petition may be filed, or a motion made in the cause. Adams' Eq. 483–4–5, and notes; *Simmons* v. *Whitaker*, 2 Ire. Eq. 129. If the proceeding was commenced *before* the decree for an account was entered, the order is to stay its further prosecution, but if it be commenced after the decree for an account, it is proper to require the party to dismiss, as being useless and vexatious. In this case, the action at law was commenced after the decree.

It is insisted that the defendant had a right to sue at law, and the proceeding is not obnoxious to the charge of being useless and vexatious, because it extends to the *sureties* on the bond, and is, therefore, a more certain remedy. In the absence of a direct allegation that the plaintiff is insolvent, or unable to perform the decree that the defendant expected to obtain against him, we are forced to look upon the action at law as useless and vexatious, or at all events, as interfering with the jurisdiction of this Court after it had undertaken to adjust the rights of the parties, and as not calculated to benefit the plaintiff in the action. If the bond covers only a breach of the plaintiff's duty as administrator, the party's remedy at law, is much more restricted than in equity. If the bond extends to a breach of the plaintiff's duty as trustee, (a question which we cannot decide, as the bond is not before us,) a court of law is clearly incompetent to "administer the right." It cannot put a construction on the will, nor can it decide upon

the liability of the trustee in respect to changing the investment of a part of the fund; so, the action can do no good, and ought not to have been instituted. If the plaintiff fails to perform the final decree, a supposition which we are not now at liberty to make, the remedy against his sureties will be open.

PER CURIAM. Decree.

MARY DEATON *against* JOHN MUNROE.

Dealings as to property between persons standing in the confidential relations of life, are looked upon with suspicion; and from *general policy*, a voluntary donation from the dependent to the superior party will be set aside, unless the utmost fairness is made to appear by the donee. But, where undue influence, circumvention or fraud, are relied on to set aside a deed, apart from the existence of these relations, proof must be made as in ordinary cases.

CAUSE removed from the Court of Equity of Moore County.

The bill seeks to set aside two conveyances made by the plaintiff herself; one in 1845, to the defendant's wife, and and the other in 1852, to the defendant Munroe.

The bill alleges that the defendant intermarried with the plaintiff's youngest daughter, and that he immediately became most obsequious and obliging to his mother-in-law, attending to her smallest wants, and waiting upon her with the utmost kindness, that this was done purely to acquire an influence over the old woman, who was weak-minded and illiterate, and with a view of obtaining these very conveyances; that by this extreme kindness and devotion to the service of his mother-in-law, the defendant did acquire much influence over her, and that he exerted it deceitfully, unfairly and fraudulently to obtain the deeds complained of. The deeds were voluntary, except that the one to Munroe contained a covenant to support the plaintiff and her aged sister, Sarah, out of his own resources, if the property conveyed should prove insufficient, and the other a like provision for her own support. It was also

provided, in the deeds, that the donor should retain the use and possession of the property during her own life. The prayer is to have the deeds surrendered to be cancelled, and the property reconveyed to the plaintiff.

The answer of the defendent denies that the deeds sought to be surrendered and cancelled, were obtained by fraud, circumvention, or, by any undue means, whatever. He says the plaintiff, although illiterate, was a woman of ordinary capacity, and well understood the purport and nature of these instruments. He says they were both executed at the mere motion of the plaintiff herself, and that the first one was prepared and executed without his knowledge, and delivered to his wife; that the second was a convenient and beneficial provision for the plaintiff and her infirm sister, whom she was solicitous to keep from actual want; that the property was not productive, and that its income was scarcely sufficient, with the best management, to support these two old ladies; but in her hands had proved totally insufficient for that purpose.— He avers that he had faithfully attempted to comply with his undertaking as to providing for the plaintiff and her sister, and is still willing to do so. He insists, that if he has failed to perform his covenant, in the particulars mentioned, the plaintiff has a complete remedy at law, and, therefore, has no ground to complain in this Court.

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

The particular circumstances under which the deeds were executed, and acts of the parties in relation to them at their execution, and afterwards, are detailed in the testimony, which is sufficiently recited in the opinion of the Court.

Kelly, for the plaintiff.
Haughton, for the defendant.

Battle, J. There are certain relations of social life, in which the persons stand in such confidential and fiduciary positions towards each other, that the Court of Equity views

with a suspicious eye every dealing between them in respect to property. The intimacy existing between such persons is so great, and the means of exercising undue influence by one over the other, is so constant and so subtle, that the Court, upon the principle of general public policy, will set aside a voluntary donation obtained, by what may be called, without disparagement, the superior over the inferior, during the existence of the relation. The relations to which this principle has been most usually applied, are those of parent and child, guardian and ward, trustee and *cestui que trust*, and attorney and client; but it is not confined to these, and will be extended to all the variety of relations in which dominion may be exercised by one person over another. Thus, in the celebrated case of *Huguenin* v. *Basely*, 14 Ves. Jun. Rep. 273, it was applied by Lord Chancellor ELDON to a voluntary settlement obtained by a clergyman from a widow whose affairs he had undertaken to manage. So, in *Dent* v. *Burnett*, 4 Myl. and Cr. 269, a gift obtained by a medical attendant from his patient, was set aside by Lord Chancellor COTTENHAM; and in *Harvey* v. *Mount*, 8 Beav. Rep. 437, a voluntary settlement by a younger sister of the whole of her present and future property, principally in favor of her elder sister, was annulled upon the ground that the latter had obtained great influence and ascendancy over her, and had been allowed to assume the management of all her affairs. So, in *Buffalow* v. *Buffalow*, decided in this State, 2 Dev. and Bat. Eq. Rep., 241, a conveyance of all his estate, upon an inadequate consideration, by an aged and weak-minded uncle, to his nephew, whom he had called in to counsel and assist him in a suit before a single magistrate, was set aside upon the same general principle.

In all the instances to which we have referred, the court did not proceed upon the ground of fraud, for that would have furnished a distinct and substantial claim to relief, but it acted upon a broad principle of public policy, the application of which was deemed necessary to secure the weak and confiding from the artifices of those in whom they are compelled,

from the very nature of the relation between them, in a great degree, to trust. But in the application, the court has always disavowed the assumption of a power to prevent the owner of property from disposing of it, either with or without consideration, in any way that interest, fancy, or even caprice, might dictate. Whenever, then, there is a legal power of disposition, and the intimate relations to which we have referred, do not exist between the grantor and the grantee, or donor and donee, the grant, or gift, will be sustained, unless fraud or undue influence be alleged and proved. Thus, in *Hunter* v. *Atkins*, 3 Myl. and Keene's Rep. 113, Lord BROUGHAM supported a gift by deed, subject to a power of appointment by the donor, Admiral Hunter, then upwards of ninety years of age, to Alderman Atkins, his confidential agent, who had, for many years, been in habits of friendship with him, although made without the intervention of a third person, the solicitor who drew the deed being the solicitor of the Alderman who took benefit under it; his Lordship being of opinion that the facts of the case did not warrant the Court ascribing the deed in question to an undue influence, or influence improperly exerted over a person either of insufficient understanding, or under the control or management of another. In the course of his able and and elaborate argument, he thus drew the distinction between the principle established by *Huguenin* v. *Basely*, and the one upon which he was then giving judgment. "The rule cannot be much more precisely stated than this—that where the known and defined relations of attorney and client, guardian and ward, trustee and *cestui que trust* exist, the conduct of the party benefitted must be such as to sever the connection, and to place him in the same circumstances in which a mere stranger would have stood, giving him no advantage, save only whatever kindness or favor may have arisen out of the connection, and that when the only relation between the parties is that of friendly habits, or habitual reliance and advice, and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired. The

limits of natural, and often unavoidable kindness, with its effects, and of undue influence exercised, or unfair advantage taken, cannot be more rigorously defined." To the same effect is the case of *Taylor* v. *Taylor*, 6 Ire. Eq. Rep. 26, decided in this State; where a deed of gift from an old lady, aged about ninety, to her grandson, for all her personal estate, thereby leaving a daughter and several grand-children unprovided for, was upheld, because there did not appear to have been any fraud, circumvention, or undue influence exercised in obtaining it, though it was clearly proved that the donor was very feeble, both in body in mind, and in a condition to be easily imposed upon.

It is upon the principles which we find to be thus established that the case now before us, must be determined. The plaintiff does not, herself, put her claim to relief among those cases of intimate and confidential relations in which the Court will set aside a voluntary conveyance upon the ground of general public policy, but she seeks to have her deeds to the defendant cancelled, upon the less stringent principle of undue influence actually exercised, and unfair advantage actually taken. She does not, by her bill, allege that the defendant, John Munroe, had ever been entrusted by her with, or had ever assumed the *general management* of, her affairs, or even that he was her confidential adviser. The only allegation is that he became her son-in-law by marrying her youngest daughter, and "being a shrewd, artful and designing man, and of considerable business habits, he became very attentive to her, and his little acts of kindness to her were frequent, without solicitation, and even remarkable, showing himself thereby apparently, the most loving, kind-hearted and devoted son-in-law," and she charges that he thereby won her entire confidence, as it was his purpose to do, and then abused it by obtaining from her, by the means of undue influence improperly exercised, the two deeds which she prays to have cancelled. Here, then, is a distinct charge of undue influence exercised for a fraudulent purpose, and resulting in the obtaining from the plaintiff, who is represented to have been an ignorant old

woman of seventy years of age, conveyances of all her property, upon the sole consideration that the donor was to have the use of it during her life, and that the defendant had covenanted to support her out of his own means, if the proceeds of her own property should not be sufficient for that purpose. All the charges of fraudulent intent and unfair practices, are directly and positively denied; and in the answer the defendant asserts that the conveyances were the voluntary and unsolicited acts of the plaintiff; that she fully understood their nature and effects, and was at the time entirely competent to make them. The parties are thus at issue upon the material facts which are alleged as the foundation of the relief sought, and the result of the cause must depend upon the proofs.—These, we have examined with care, and without stating them in detail, we will proceed to announce briefly the conclusion to which we have come in relation to them. The first deed was executed on 22d day of March, 1845, and purported to convey to the wife of the defendant, John Munroe, two female slaves, Breasy and Zilpha, one, four, and the other, two years of age, reserving a life-estate in them to the donor. The consideration recited, is love and affection for the donee, and also the sum of two dollars paid, and at the close of the instrument is a personal covenant from John Munroe, that if the donor, and her sister Sarah Smith, "should ever become a charge," he would support them. There is no testimony to show that this deed was unfairly obtained. The allegation in the bill, that the defendant desired it to be kept secret, is unsupported by proof. On the contrary, it appears from the entries on the deed itself, that it was within less than two months after its execution, carried and proved in open court, by the subscribing witness, and was registered upon an order to that effect, in the usual manner. The subscribing witness is, unfortunately, dead, and we have no testimony to explain the circumstances attending the execution of the instrument; but we are informed by the proof that the witness was a respectable man, and one in whom both parties had confidence. The other deed was executed on the 21st of December, 1852,

in the presence of two attesting witnesses. It recites that the donor "being conscious of approaching age and infirmities, and wishing, so far as may be, to secure herself against their effects, do make this covenant and agreement, for the purpose of securing to herself a maintenance during her life." It then proceeds to convey to John Munroe, in consideration of ten dollars paid to her, "all and every article, or species of property, or effects, that she owns, or may own at the time of her death, with the exception of one bed and furniture, and one half of her wearing clothes." The possession of the property was to remain with her during life, and the donee covenanted that he would so manage it, as to make her a comfortable support during life, "or otherwise furnish the same out of his own property." The principle articles thus conveyed, were a mare, a small stock of cattle and hogs, some plain household and kitchen furniture, and some provisions on hand, besides some notes for money, amounting to three or four hundred dollars. This instrument appears from the testimony of the two subscribing witnesses, to have been fairly obtained, and the donor knew and understood its contents, and that though she, herself, requested it to be kept secret from her other children, it was soon after its execution proved in open court by both the subscribing witnesses, and was duly registered. It appears abundantly from all the proofs, that the defendant John Munroe, after marrying the plaintiff's daughter, was very kind to her, attended to her many little acts of business for her, and never relaxed his attentions, or his kindness, until there was a falling out between them, about a year after the execution of the last instrument. What was the cause of the quarrel between the parties, does not appear. The plaintiff complained to some of the witnesses, that the defendant did not supply her with proper food and other necessaries, but it was proved by one of her own witnesses, (Neil Morrison) that "she was sometimes hard to please, and overbearing, and that when she got out of humor, it seemed hard for Mr. Munroe to satisfy her."

The testimony of every witness, who spoke upon that sub-

ject, shows that she, though illiterate, and incapable of understanding the technical language of a written instrument, unless explained to her, was a woman of good mental capacity for a person of her age, and that she was entirely competent to transact any ordinary business.

Taking, then, all the proofs together, and giving them a fair consideration, we are constrained to say that they have failed to satisfy us that the deeds in question were obtained, either by fraud, circumvention, or the exercise of undue influence, and we cannot, therefore, make a decree for setting them aside.

In the event of her failing to obtain this primary relief, the plaintiff's counsel has asked for a decree, under the general prayer, that a suitable allowance may be directed to be paid to her, and that an inquiry be ordered to ascertain the proper amount. We at first thought that this might be done, but it appears from the pleadings and proofs, that the defendant has always been willing, and is so still, to support and maintain the plaintiff according to his covenant, and we do not feel at liberty to vary his contract, or the stipulated mode of its fulfilment, in the absence of any sufficient proof of a default on his part. If there has been, in fact, any breach of his covenant, the plaintiff has a clear remedy therefor, at law.

The bill must be dismissed, but without costs.

PER CURIAM, Decree accordingly.

JOSEPH BLOUNT, *non compos*, BY JOHN W. NORWOOD, *his guardian*, *against* THOMAS D. HOGG, *Executor of* JAMES L. BRYAN.

Where A, by deed, directed his attorney in fact, to pay annually out of the income of his estate, a certain sum to B, during the joint lives of A and B, and A afterwards became insane—*Held*, that in law, this deed was a grant of an annuity, and not revoked by his insanity.

This bill was filed for an account of the estate and effects of the plaintiff, which have been managed for many years by Bryan, acting under a power of attorney from the plaintiff. There was no difficulty in the accounts, and the only question presented to the Court was this:

On the 20th November, 1850, Bryan being then alive, the plaintiff executed a deed, the material part of which was as follows:

"Know all men by these presents, that I, Joseph Blount, do hereby authorize, direct, and empower James L. Bryan, whom I have heretofore constituted my attorney in fact, to pay from the income of my estate, the sum of seven hundred dollars annually to Frances C. P. Hill, &c., and to continue to pay the same during the joint lives of myself and the said Frances, unless otherwise directed and required by writing, under my hand. And in case of my decease, without having made a revocation of the payment of the said annuity, I do hereby expressly declare that the payment of the same shall cease immediately thereupon." And by a subsequent part of the deed, the plaintiff directed in the same terms, a yearly sum of three hundred dollars, to be paid to Elizabeth A. Cheshire.

The question was, whether the payment of these yearly sums was revoked, or suspended, by the subsequent insanity of the plaintiff.

Fowle, for the plaintiff.

Badger, for the defendant.

Battle, J. We are of opinion, that upon the true construction of the instrument in question, it is, in legal effect, a grant of annuities to Mrs. Hill and Mrs. Cheshire, during life, payable semi-annually, as therein specified.

Being the grant of an incorporeal hereditament, under the hand and seal of the grantor, it required no consideration, and passed by the delivery of the deed, and was not revoked, or annulled by his subsequent insanity.

Per Curiam. Decree accordingly.

ORREN L. DODD *and another, against* JOHN W. B. WATSON *and others.*

Where a tenant in common, took the fixtures and implements belonging to a *mill, which* was out of use for the want of repairs, and used them temporarily in a mill of his own, and burnt some useless rotten timber pertaining to the mill-dam, which was in his way, *it was Held* that he was not guilty of destructive waste.

To subject a tenant in common, to spoliation, at the instance of another tenant, it must appear that he has used the common property, otherwise than in the *usual and legitimate* exercise of the rights of enjoyment.

It is no invasion of a privilege to cut timber for the use of a saw-mill owned by two, that one of the owners of the mill, who was also a life owner of the land, cut and used a few hundred dollars worth of timber, having left an abundance for the use of the mill, and all other purposes.

CAUSE removed from the Court of Equity of Johnston County.

Doctor Josiah O. Watson devised in the third clause of his will as follows: "I own lands in Johnston county, on the west side of Neuse river, called the Brooks and Lockhart lands, about two thousand acres or more, on which there are fifty slaves or more, belonging to the plantation, and the said slaves and land are in the occupancy, and under the management of my half nephew, Orren Lowry Dodd; the said land and slaves * * * I do hereby devise and bequeath to my half nephew Orren L. Dodd, to have and to hold to him during his life, and at his death, the same shall belong in fee simple to his child or children, if he has any alive at his death, * * * but if the said Orren L. Dodd should die without such issue living at his death, then the whole of the said estate and property shall belong to, and be divided amongst the children of his brother, Doctor Warren Dodd, who are, or may be living at his death without issue. I also devise, in the same manner in every respect as the foregoing, one undivided moiety of my mill on Neuse river, mill-seat and all improvements belonging to the said mill, including mill-race and canal, and water privileges at the place my mill is erected at in Johnston county, and along with the said moiety of the said mill, I devise the

privilege of getting timber for the saw-mill in all my lands adjoining, (but I do not devise the lands themselves.")

The other moiety of the mill was given to the defendant, J. W. B. Watson during his life, and to such child or children of his as may be living at his death, and in the event of his death without leaving issue, to be equally divided between George W. Watson, William H. Watson, Henry B. Watson, and Orren L. Dodd, in fee.

The bill alleges that the plaintiff Orren, is the father of the infant plaintiff, Warren, and that he has no other child; that J. W. B. Watson is still unmarried, and has no child or children; that while the mills above spoken of, were by an arrangement between them in the possession of the defendant, he took the machinery of the saw-mill, some of it attached to the free-hold, and carried it to another mill of his own, about one mile and a half distant, and attached some of it to his mill, among which were a circular saw, a turning-lathe and tools, and a large grindstone; that he took from the said mill, also, a mill-stone, and put it into operation in his own mill; also, that the defendant, J. W. B. Watson, *wantonly and deliberately* burned and destroyed the frame of a building attached to the mill-dam. The bill further alleges that the defendant had cut and carried to his own mill large quantities of timber, had sawed the same into plank and lumber, and he had sold the same, to the great detriment of his *privilege* of cutting timber for the saw-mill on the Neuse river.

The prayer is for an injunction to stay the further commission of waste, and that the defendant discover the amount and description of the property wasted, and account for the same.

The answer of the defendant, J. W. B. Watson, denies that it it is a proper construction of the will of Dr. Watson that the privilege of cutting timber for the Neuse river mill extends to the tract of land on which he got the timber complained of, but says there are other lands nearer to the mill-seat to which the term "adjoining" more properly applies. He says, further, that even if the privilege extends, as plaintiff contends, to the Gully tract, from which alone he has taken tim-

ber, that he has not impaired it by any unreasonable use of his own rights—that his mill is on a small creek which is often dry, and that he cannot, if he desired it, saw very large quantities of plank and lumber, and that what he has taken, would not amount to more than a few hundred dollars in value; and that most of the timber sawed, has been applied to repairing the buildings on the land; that he is advised, as a tenant for life, he has a right to use the timber in question prudently, and in the way he has been using it—that there is no lack of timber on the land adjoining the mill, but that with such a mill as had been heretofore on the premises, there is timber enough thereon to last for a thousand years.

He further answering says, that the mill on Neuse river went down for the want of repairing, that he urged upon the plaintiff, Orren, frequently, to join him in making the proper repairs, but that he declined doing so—that the millstone and saw were idle at the old mill, and he admits that he did take them, with the turning lathe and tools, to his new establishment, and there used them for a short time, but he says he then replaced them in the exact condition in which he found them. He insists, that as a joint-owner, he had a right thus to use these things.

The defendant denies that he wantonly and deliberately burned and committed waste in the frame of a building attached to the mill-dam. He says that in the original construction of the dam, a frame was put in that might serve as the foundation of a superstructure, if the same should ever be needed; that the same was covered over with timber which had become rotten and utterly worthless, and that to get it out of the way, he did set fire to it and destroyed about half of it, but he denies that this was any injury to the mill, or any other property, for that to be of any use, the whole reconstruction of the mill in question, would have to be made with new timber.

The bill was set for hearing on the bill and answer of the defendant, J. W. B. Watson, (the other defendants not having answered,) and sent to this Court.

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

PEARSON, J. The bill is filed to stay waste, and for an account. The right to relief is put on two grounds. The Court is of opinion that it cannot be sustained.

1. In respect to the removal from the mill, by the defendant, J. W. B. Watson, of the mill-stone, saw, turning-lathe and grindstone, and the burning of the logs at one end of the same: One half of the mill is devised by the late Dr. Watson to the defendant, J. W. B. Watson, in fee, and the other half to the plaintiff Orren, for life, with a contingent remainder to such child or children as he may have living at his death, in fee. The other plaintiff, Warren, is the only child of Orren *now* living.

The bill assumes that the plaintiff Orren and his child, the other plaintiff, represent one half of the fee simple estate as tenants in common, with the defendant, J. W. B. Watson, and it alleges that he has committed *destructive* waste in the particulars above set forth.

Putting out of the plaintiffs' way the objection in regard to the tenancy in common, and supposing that relation to exist, and treating the articles removed, as *fixtures*, and a part of the freehold, which we are inclined to think is the case, as between the executor and the devisee, especially the saw and mill-stone, without which the mill could not be used, we do not think the acts of the defendant, under the circumstances, stated in the answer, (all of which are to be taken as true, there being no replication) amount to such destruction as will call into exercise the injunctive power of this Court to restrain a tenant in common from enjoying and using the property in the manner he may see proper to do as owner.

The law applicable to this question, is settled, and is thus stated in 2 Story's Com., sec. 916: "Although Courts of Equity will not interfere by injunction to prevent waste in cases of tenants in common, or copartners or joint tenants, because they have a right to enjoy the estate as they please, yet

they will interfere in special cases; as where the party committing the waste is insolvent, or where the waste is destructive of the estate, and not within the *usual legitimate exercise* of the right of enjoyment of the estate."

If a mill be in running order, and one of the tenants in common is about to use it to grind stone for gold, or saw soapstone slabs, he may be enjoined, because that is not "a usual legitimate" mode of enjoyment. So, if he remove the stones, or saw, or any thing necessary for the use of the mill.

But, in our case, the mill was not in running order; on the contrary, it had been suffered to go down for the want of necessary repairs, and was in such a condition that it could not be used. So, the question is, must all the things which had appertained to the mill lie idle and be suffered to rust, rot, or be broken? and did the defendant, by removing them to another mill where he could use them, so far violate the rights of the plaintiffs as to entitle them to the interposition of this Court?

Both questions are evidently with the defendant.

So, in regard to the old logs. The defendant, by burning them did not, under the circumstances, make himself a *spoliator*, for they were rotten and of no account, and in the event of rebuilding the dam, it would be necessary to burn them or float them down the river, in order to get them out of the way. The charge in the bill, therefore, "that the defendant *wantonly and deliberately burned and destroyed* a building attached to the mill-dam," is not supported, and the plaintiff has subjected himself to the imputation of giving a false coloring to the act.

2. We are not at liberty, upon the facts of this case, to decide whether the "Gully tract" is, or is not embraced by the clause of the will, "along with the said moiety of the mill I devise the *privilege* of getting timber for the *saw-mill* on *all my lands adjoining*"; for, supposing it to be included, as a tenant in common the defendant had a right to use the timber which he had cut and sawed as a *usual and legitimate* mode of enjoying the property; but in fact he is not a mere tenant in

common; he holds an estate in severalty, subject to the incumbrance or privilege possessed by the plaintiffs of getting timber for the *saw-mill.* There is no allegation that the defendant has not left timber enough for the full enjoyment of this right; indeed, the answer avers, and such is evidently the fact, that there is upon all the land timber enough to support the mill, as it was used in the life-time of the devisor, for "a thousand years."

In taking this ground, difficulties accumulate upon the plaintiffs; they are forced to "change front" and put themselves on another clause of the will, by which all of this land is given to the defendant, J. W. B. Watson, for life, remainder to such child or children as he may leave living at his death in fee, remainder, in the event of his leaving no child, to the plaintiff Orren Dodd, George, William, and Henry Watson, in fee. It will be observed that the plaintiff, Warren Dodd, has no interest under this clause. So, in respect to this equity, he is an unnecessary party, and his joinder exposes the bill to the charge of being multifarious. But waiving that, and passing by also the fact that the plaintiff, Orren, has only a contingent remainder, the Court is of opinion that the acts of the defendant, in getting timber for the use of the buildings on the land, and in clearing some of the land and making sale of the plank to the very moderate extent which he has done, do not exceed his rights as a tenant for life, taking into consideration that there are some eight thousand acres of land, three fourths of which are still wood-land, and much of it only fit for timber. The bill must be dismissed; but we do not allow costs, as the defendant, J. W. B. Watson, by taking away the fixtures from the old mill, gave some pretect for the litigation, and the other defendants have not answered.

PER CURIAM. Bill dismissed.

MARY A. BLACKWOOD *and others against* ALVIN JONES *and others.*

One, who knowingly stands by and permits another to purchase, and *a fortiori*—one who misleads and induces another to purchase, shall not be allowed to set up an opposing equity, nor take advantage of the legal title by which it is supported.

Where one has notice of an opposing claim, he is put upon inquiry, and is presumed to have notice of every thing which a proper inquiry would have enabled him to discover.

CAUSE removed from the Court of Equity of Wake county.

William F. Blackwood, the husband of Mary A. Blackwood, and the father of the infant plaintiffs, contracted to buy the land in controversy, and took from the defendant Dempsy Powell, a bond to make title to him for the same; which said bond was drawn by the defendant Jacob Powell, and witnessed by him. In pursuance of said bond, Dempsy Powell, on the 24th day of December, 1851, executed to Blackwood a deed in fee simple, for the premises. Blackwood and his wife and children, entered into possession of the premises, and held the same until 1854, whence it was held by their trustee for a year or more, (about four years in all). Blackwood, the husband of the feme plaintiff, being much involved in debt, and unable to support his family by his own means, on the 1st day of November, 1854, conveyed this land to Taply O. Johnson, his wife's father. Johnson, on the 15th of February, 1855, conveyed the land, in question, to Andrew W. Betts in trust, to apply the rents and profits thereof to the use and maintenance of said Mary A. Blackwood and her children, during her life, and after her death, to convey the same to her children; which said deed was executed by the trustee, A. W. Betts, as well as by the grantor, T. O. Johnson; in which it was also provided, that Mrs. Blackwood and her children might live upon the land and cultivate the same if she should desire it.

Before the negotiation commenced with Blackwood, i. e., on the 6th November, 1846, Dempsy Powell had conveyed one

hundred acres of land to Alvin Jones, in trust, to secure a debt of $50, due to the above mentioned Jacob Powell, of which tract, the land above described, constituted a part. There were also conveyed in this deed of trust, for the like purpose of securing this debt, one cow and calf, two sows and pigs, all his crop of corn and fodder, four head of sheep, and all his household and kitchen furniture. On the —— day of ——, 1855, Alvin Jones, the trustee in the above deed of trust, advertised and sold the land therein contained, embracing the land in controversy, at public auction, to the defendant, Anderson N. Betts, for the sum of $305. At this sale, Andrew W. Betts appeared and proclaimed his title, as trustee, for Mrs. Blackwood and her children, and forbade the sale. Shortly after this sale, Anderson Betts issued process in ejectment, which was served on Andrew, the trustee, who had taken the possession of the premises, for the benefit of his *cestuis que trust*, and had it returned to the November term, 1855, of Wake County Court, at which term, Andrew Betts failing to appear and make defense to the suit, a judgment by default was taken against the casual ejector, and the purchaser, Anderson, was put into possession. Very shortly thereafter, Andrew rented the premises of Anderson, and after holding them awhile in the capacity of lessee of Anderson, he purchased and took a deed from him, (Anderson) for the whole tract of one hundred acres.

It was established by the proof, that when Blackwood was bargaining for the land in question, both Dempsy Powell and Jacob Powell, represented to him that the debt to the latter, to secure which, the deed of trust to Jones was executed, had been satisfied, and that the right to convey the land was in Dempsy. The prayer of the bill is for a reconveyance of the land to some trustee, for the benefit of Mrs. Blackwood and her children, and an account of the rents and profits of the land, and for general relief.

The defendants answered severally. They all denied that the debt, from Dempsy to Jacob, was paid. The defendant Anderson insisted, that the notice given by the trustee, An-

drew, at Jones' sale, did not give him any notice of the only fact upon which the plaintiff's equity rests, i. e., the representation of Jacob and Dempsy, that the debt to Jacob Powell had been satisfied.

Replications were made to the answers; commissions were issued, and proofs were taken; and the bill being set down for hearing, was sent to this Court by consent.

Miller, for plaintiffs.
Battle, *Rogers* and *E. G. Haywood*, for defendants.

PEARSON, J. It is not necessary to declare that the debt of $50, due by Dempsy Powell to Jacob Powell, to secure which, the deed of trust was executed to Jones, was in fact, satisfied, at the time Dempsy Powell sold the land to Blackwood, because the proof is full that, before, and at the time Blackwood bought, Jacob Powell represented to him, that the debt was satisfied, and thereby induced him to make the purchase, and was so far privy to the transaction as to have become the draftsman of the bond for the title, in pursuance of which, the deed was executed.

These facts are abundantly sufficient to postpone the equity of Jacob Powell, and to give priority to that of Blackwood, which was afterwards passed to the defendant, Andrew Betts, in trust for Mrs. Blackwood and her children. This rests upon a plain principle of justice, i. e., one who knowingly stands by and permits another to purchase, and *a fortiori*, one who misleads and induces another to purchase, shall not be allowed to set up an opposing equity, or take advantage of the legal title, by which it is supported: It follows that Andrew Betts, in behalf of Mrs. Blackwood and her children, had a right, prior to the sale by Jones, to call upon him for a conveyance of the legal title of the fifty acres of land in controversy. By the sale and deed of Jones, the legal title passed to Anderson Betts, he passed it for valuable consideration to Andrew Betts, and the question is, can he set up title in himself in opposition to his *cestuis que trust*, Mrs. Black-

wood and her children, for whom he had been constituted a trustee by the deed of Johnson. Anderson Betts had notice of this trust at the time he purchased at the sale made by Jones; indeed, he had express notice; for Andrew Betts proclaimed his title, as trustee, forbade the sale, and in addition to this, Blackwood and his wife had been in possession ever since his purchase from Dempsy Powell, except for a short time before the sale, during which, it was rented out by her trustee.

It was said in the argument; although these facts show that Anderson Betts had notice of the several deeds, under which Mrs. Blackwood claimed, yet they are not sufficient to affect him with notice of the particular fact, on which the plaintiff's equity depends, to wit, that Jacob Powell had misled Blackwood and induced him to purchase, by representing that his defendant was satisfied, and Dempsy Powell had a right to sell. The reply is, where one has notice of an opposing claim, he is put "upon enquiry," and is presumed to have notice of every fact, which a proper enquiry would have enabled him to find out. Had he asked Blackwood how it happened, that he had been so long in possession of the land, and why it was, that Dempsy Powell had made him a deed after he had conveyed it to Jones, in trust to secure a debt to Jacob Powell, he would have been told, it was because Jacob Powell had admitted that the debt was satisfied, and that Dempsy Powell had a right to sell, by reason whereof he had been induced to make the purchase. If after receiving this information, he, Anderson Betts, determined to purchase at Jones' sale, he took the responsibility, and acted at the risk, that the matter, of which he was thus informed, would not turn out to be the truth. Unfortunately for him, it was true; and he is not at liberty to say, that he shut his ears, or was content to believe what Jones and Jacob Powell told him by way of explanation.

These facts being sufficient to fix Anderson Betts with notice, are, of course, sufficient to fix Andrew Betts with notice; and although they both purchased, for valuable consideration, the plaintiff, Mrs. Blackwood, and her children, have a clear

equity to set up the trust, which had been constituted in their favor. It is not necessary to call in aid the fact, that he was trustee for them prior to his purchase.

There will be a decree directing Andrew Betts to convey the fifty acres in controversy, and also the three acres, included in the deed of trust, to some fit person, to hold for them upon the trusts declared in the deed to him, and there must be a reference to take an account of the rent received by him, and of the profits, which he has, or ought to have, received from the land, and he must be taxed with the plaintiff's costs, unless the administrator of Jacob Powell, who is liable primarily, has assets sufficient to pay the same. The other defendants will not be required to pay cost, but will be allowed none. In respect to the defendant Jones, as he admits that he holds the balance of the price, for which he sold, after deducting the amount paid to Jacob Powell, although it is not usual to decree among defendants, yet when the equity is plain, or is admitted, it is in the course of the court so to decree, for the sake of putting an end to the litigation; *Tyson* v. *Harrington*, 4 Ire. Eq. 329. Dempsy Powell was present, and did not object to the sale of Jones, and it is clear, from the proofs, that the fifty acres, in which he had a resulting trust, was not of a value exceeding $50, while the debt, with interest, amounted to near $50, so he has no equity to any portion of the fund. The defendant Jones will, therefore, be decreed to pay in such balance to his co-defendant, Andrew Betts.

PER CURIAM. Decree accordingly.

JOSEPH POTTS *and others against* JOHN BLACKWELL *and others.*

A deed of trust executed *bona fide* for the security of actual creditors, for debts, whether old or new, must be regarded as a conveyance for value under the Stat. 27 Eliz., and a mortgage is considered as standing on the same footing as a deed of trust.

Potts *v.* Blackwell.

A creditor of a firm has no such lien upon the partnership effects, as to prevent one of the partners, at the time of the dissolution of the partnership, from assigning them in payment of his individual debt.

Where, one partner mortgaged the effects of the firm, to pay a debt to another, which did not exist, and the mortgagee assigned the mortgage to secure a *bona fide* debt of his own, to one who had no notice of the state of the balances between the partners, it was *Held* that such assignment is good.

PETITION to rehear a decree passed, in this cause, at the last term of this Court, Jones' Eq. vol. 3, p. 449.

The whole facts of the case being set out in the report of the case as formerly heard, it is not deemed necessary to re-state them here.

Rodman, for the plaintiffs, argued as follows:

This case being an important one, and apprehending that some points did not attract sufficient consideration on the former argument, I have ventured, on behalf of the plaintiffs, to to ask the Court to re-examine its conclusions.

I submit the following propositions:

1st. A mortgagee or assignee in trust, who takes a mortgage or assignment, without giving any new consideration, but simply as security for a pre-existing debt, is not a purchaser for value, within the statute 27 Eliz.

2nd. Such a mortgagee, or assignee, represents the creditor, whose debt is secured in the conveyance; his equity is derived from, and measured by, that of the creditor. In this case, Potts, &c., represent the creditors, and possess the equities of creditors, under 13 Eliz.

3rd. A new and substantial consideration for the assignment did move from the assignees to Hanks, which constitutes them purchasers for value, under 27 Eliz. They possess, therefore, the equities both of creditors and of purchasers for value.

4th. There was no debt owing by Hanks to John Blackwell, and the mortgage being to secure a merely pretended debt, was fraudulent and void as to the plaintiff.

5th. The assignees of J. Blackwell, the mortgagee, stand

on no better footing than he did, and took his estate subject to all the equities, which existed against it.

1*st. Prop.* It is not material to plaintiffs, whether they are deemed creditors or purchasers for value; their equities, in either case, are the same. But it is essential to the argument I propose to submit, to have a clear conception of their position, and of the reasons, on which their equities are founded; and as the question is not, in my opinion, one of any difficulty, I will consider it shortly.

In a loose and general sense, the assignees are purchasers, beeause they take, by purchase, as opposed to descent. But a subsequent purchaser, upon *valuable consideration*, is the only one authorized by statute 27 Eliz., to avoid a prior voluntary deed. Twine's case, 1 Smith's Leading Cases, p. 46. And this Court has held, that the consideration shall be not only valuable, in a technical sense, but substantial, and not grossly inadequate; *Fullenwider* v. *Roberts*, 4 Dev. and Bat. 278.

It is true, that expressions may be found in the text books, Roberts' Fraud. Con.; Coote on Mort. 345; (68 Law Lib.) in which a mortgagee is called a purchaser, within the statute 27 Elizabeth. The expression is perfectly correct in reference to a mortgage, given upon a loan at the time, or any present substantial consideration. And it is believed that a reference to the cases cited, will show that it is *invariably* used in this sense; and that no case can be found in which a mortgagee, or assignee, who has received his conveyance simply as collateral security for a pre-existing debt, has been held a purchaser within the statute. In reason, it cannot be so. It is an abuse of language, to term one, who has paid nothing whatever, a purchaser for value. He is strictly a volunteer. A *past* consideration,—such as a precedent debt,—will not support an assumpsit; Smith on Cont. marg. p. 113, note citing *Hopkins* v. *Logan*, 5 Mees. and Wels. 241, and other cases.

As authorities directly sustaining this proposition see *Painter* v. *Zane*, 2 Gratt. 262, and cases cited by counsel; *Petrie* v. *Clark*, 11 Serg. and Rawle, 371; *Halstead* v. *Bank of*

Kentucky, 4 J. J. Marshall; *Dickson* v. *Tillinghast*, 4 Paige, 215; *Cole* v. *Muddle*, 13 Eng. L. and Eq. R. 27; *Reddick* v. *Jones*, 6 Ire. 107; *Donaldson* v. *Bank of C. F.*, 1 Dev. Eq. 103; *Harris* v. *Horner*, 1 Dev. and Bat. Eq. 455.

2*nd. Prop.* The creditors of Hanks, are co-plaintiffs with his assignees in this bill. That they are creditors, is admitted; or if denied, this Court would direct a reference to ascertain the facts. The assignees represent the creditors, and must, of necessity, possess the same equities. It is a mistake to say, that a creditor must, in all cases, get a judgment at law before he can come into a court of equity. The case of creditors' bills is a familiar instance to the contrary. It is true, that a creditor cannot sue in equity to recover a mere debt; because the remedy at law is adequate. Neither can he do so to enforce the collection of a debt out of the general equitable property of his debtor; a judgment at law, and a return of "*nulla bona*" upon his execution, are necessary to ascertain the debt, and *to give a lien on some specific property*, and perhaps, to exhaust the legal remedy. See the case of *Angel* v. *Draper*, 1 Vern. 399, and note, upon which our cases of *Peeples* v. *Tatum*, 1 Ire. Eq. 414, and *Rambaut & Co.* v. *Mayfield*, 1 Hawks' 85, are founded. Now, the assignment satisfies all the conditions required by the principle of these cases; it ascertains the debt against the assignor as a judgment does; *and it gives a lien on specific property* as the execution does. In short, it is a familiar practice to declare priorities between prior and later mortgagees. The only authority that I am aware of, requiring the creditor to get a judgment at law, in a case at all like this, is an obiter dictum of Lord Ellenbrough, in a short and unconsidered case, (*Colman* v. *Croker*, 1 Ves. Jr. 161;) a dictum not all necessary for the decision of the case; for the plaintiff, there, was not a creditor at all. See Hovenden's Sup. note. This case may be considered over-ruled in *Rider* v. *Kidder*, 10 Ves. 360, in which creditors obtained a decree without having got judgment at law, and in the case of *Lister* v. *Turner*, 5 Hare, 281, (26 Eng. Ch. R.)

3rd Prop. Two of the assignees, viz., Potts and Donnell, were sureties for Hanks, to a number of the debts secured in the assignment; they executed the assignment; and thereby became bound by its terms; in effect, they thereby agreed that in consideration of its being made, they would give up any attempt to obtain priority by actions at law on the debts, for which they were bound; and that the property should go according to the classification of the assignment, by which they were postponed. It is true, they were sureties, and not creditors; but as sureties, they might have maintained actions in equity, if the creditors had refused to sue. Also by execution of the deed, the assignees undertook certain onerous duties, which undertaking, of itself, constituted a valuable and substantial consideration.

If the plaintiffs have succeeded in establishing either of these last two propositions, it is sufficient to give them equities paramount to those of defendants, who, I hope to be able to show, have none. It is admitted that the plaintiffs must show a paramount equity; otherwise "*potior est conditio possidentis.*" If, however, the plaintiffs have a paramount equity, the mere possession of the legal estate by the defendants, whether fairly or fraudulently obtained, would be no bar to plaintiffs' relief. But, in fact, the assignment did not pass the legal estate; that still remains in John Blackwell, under the mortgage.

4th. Prop. The debt for which the mortgage was given, is alleged to have accrued by reason that Hanks had received from the concern $20,000 more than Blackwell had, and it was necessary that Blackwell should also receive that sum to equalize them *inter se.* Had the partnership creditors been first paid, this would be just enough. But in *Richardson* v. *Bank of England*, 4 Myl. and Craige, 165, (18 Eng. Ch. R.) it is said: "But if pending the partnership, neither law nor equity will treat such advances as debts, will it do so, after the partnership has determined, before any settlement of account, and before the payment of the joint debts, or a realization of the partnership estate? Nothing is more settled than

that under such circumstances, what have been advanced by one partner, or received by another, only constitutes items in the account. There may be losses, the particular partners' share of which may be more than sufficient to exhaust what he has advanced; or profits more than equal to what the other received; and until the amount of such profit and loss be ascertained by the winding up of the partnership affairs, neither partner has any remedy against, *or liability to the other for payment from one to the other of what may have been advanced or received.* See also, Pulling Mer. Ac. p. 40, note 6, (57 Law Lib.) Adams' Eq. 640. In Collyer on Part. p. 548, §575, it is said, "But if two copartners enter into a contract, for the purpose of defrauding their joint creditors, the one agreeing to permit the other to withdraw money out of the reach of the joint creditors, such contract is fraudulent and invalid." See *Anderson* v. *Maltby*, 4 Bro. 423, S. C., 2 Ves. Jr. 244, where this doctrine is directly maintained. It is submitted upon these authorities, that Hanks owed John Blackwell nothing; and that the attempt, under pretence of a debt, to permit J. Blackwell to withdraw money from the joint creditors, was a fraud. But whether the mortgage was actually fraudulent, or simply voluntary, and therefore fraudulent as to the plaintiffs, is immaterial; in either way, it is void as to them. And it is conceived that *a fortiori*, it is a fraud where the retiring partner is a *secret* one, whose claims were wholly unknown to the creditors.

5th Prop. It is respectfully submitted that the Court was in error in considering the mortgage from Hanks to J. Blackwell, and the assignment by J. Blackwell to R. M. Blackwell, &c., *as equivalent to a joint conveyance* by both partners to R. M. Blackwell, &c. Hanks did not concur in the assignment; he knew nothing of it; he was not a party to the assignment nor even informed of it. The passage of the title from Hanks to R. M. Blackwell (if it passed) was effected by two clearly distinct and successive steps, viz: 1. The mortgage; 2d, the assignment of the mortgage. To say that *in effect it was the same thing* as if there had been but one conveyance by both

partners—is to *beg the question if in fact* there were two conveyances—and if *in fact* it was not the *same* thing; for the very point to be established by the defendants is, that the two things, though not the *same in fact* were *equivalent in effect.*

If to this, it is said, that where there is a conveyance to a fraudulent donee, and he convey, for value, &c., there are two steps, and the first is void, and yet the terminus is reached, effect is given to the last deed, this is admitted; yet it is important to observe, what is clear, that in this case, effect is not given to the last deed, *because* the two deeds are equivalent in effect to one conveyance by both the first fraudulent grantor and his grantee, but *because* the purchaser for value has a permanent equity; and if the defendants in this case can bring themselves within the range of that principle, the full benefit of it will be conceded to them. I hope to show that they cannot. At present, all that I contend for is, that the two conveyances *were in fact distinct and successive;* that we must view them as separate things, as they really were, and not blend them into one; that we ought not to assume them to be different from what they were in fact; and that *if* they were *in effect* equivalent to one joint conveyance, that is a proposition to be established by those who maintain it.

The plaintiffs hope that they have shown satisfactorily that whether they are creditors or purchasers for value, as to them there was no valid debt from Hanks to J. Blackwell, and that consequently, the securities for that debt, at least, were voluntary, and if voluntary, fraudulent and void; and that if the mortgage had remained in J. Blackwell, they would have been entitled to the relief prayed for; and I will now proceed to argue that R. M. Blackwell, &c., to whom J. B. assigned the mortgage, have no higher equity than he had. The higher equity that is claimed for them, can only be claimed upon the ground, that they are purchasers of the land for a valuable consideration, without notice, under 27 Eliz. The want of notice is admitted, but it is contended that they are not protected by the statute, because:

1. They were not purchasers *for value* within the settled construction of the statute.

2. They were not purchasers of *land*, (to which the statute is confined,) but merely of a chose in action, and so not within the statute.

1st. They were not purchasers *for value*, upon the authorities heretofore cited to this point. There was no new consideration whatever at the time of the assignment. It was simply a collateral security for an old debt. The assignees did not execute it, they gave up no rights and assumed no new obligations. They took the equities of J. Blackwell and nothing more. It is doubtful whether they got even the legal estate in the lands; they took no endorsement of the bonds.

2d. They purchased only the chose in action—the mortgage debt; and a chose in action is not within the statute, 27 Eliz.

In equity the mortgage debt is universally considered as the principal, and the mortgage merely as the incident. Coote on Mort., marg. p. 301.

In *Cockell* v. *Taylor*, 15 Eng. L. and Eq. R. p. 110, it is said: "It has not been disputed, nor can it be doubted, that the purchaser of a chose in action does not stand in the situation of a purchaser of real estate for valuable consideration, without notice of any prior title, but that the purchaser of a chose in action takes the thing bought, subject to all the prior claims upon it."

In *Cole* v. *Muddle*, 13 Eng. L. and Eq. R. p. 27, Townsend, one of several co-executors had mortgaged leasehold property of the testator to secure his private debt, it was admitted that he had power to convey the legal estate, but it was said "but this mortgage was given to secure an antecedent debt previously due to Muddle by Townsend, and the equity of the general estate of the testator must prevail over the private debt of an executor."

See also *Barnard* v. *Hunter*, 39 Eng. L. and Eq. R. p. 569; *Ord* v. *White*, 3 Beav. 357, (Eng. Ch. R.); *Danberry* v. *Cockburn*, 1 Mer. 626-638; *Priddy* v. *Rose*, 3 Mer. 104; *Lister* v.

Turner, 5 Hare 281, (26 Eng. Ch. R.); *Brandon* v. *Brandon*, 39 Eng. L. and Eq. R. 188.

There is one observation to be made on all of these cases in reference to the first branch of this proposition. If it had been deemed admissible in them to ignore one of the two steps by which the title passed to the defendants, and consider the two as one, it would in some of them, probably have altered the result; but we find no such suggestion any where.

Fowle, for the defendants.

BATTLE, J. In the argument, on the petition to re-hear the decree which was made in this cause at the last term, it is contended by the plaintiffs' counsel, that the Court erred in the conclusion to which it came, and that such error will be shown by the establishment of the five following propositions:

1. A mortgagee or assignee in trust, who takes a mortgage or assignment, without giving any new consideration, but simply as a security for a pre-existing debt, is not a purchaser for value, within the statute of 27th Elizabeth, (Rev. Code, ch. 50, sec. 2.)

2. Such a mortgagee, or assignee, represents the creditor, whose debt is secured in the conveyance; his equity is derived from, and measured by, that of the creditor. In this case the plaintiffs represent the creditors, and possess the equities of creditors under the statute 13 Eliz. (Rev. Code, ch. 50, sec. 1.)

3. A new and substantial consideration for the assignment, did move from the assignees (the plaintiffs) to Hanks, which constitutes them purchasers, for value, under 27th Elizabeth. They possess, therefore, the equities, both of creditors and of purchasers for value.

4. There was no debt owing by Hanks to John Blackwell, and the mortgage being to secure a merely pretended debt, was fraudulent and void as to the plaintiffs.

5. The assignees of J. Blackwell, the mortgagee, stand on no better footing than he did, and took his estate subject to all the equities which existed against it.

The counsel for the defendants, admits that the plaintiffs, as the assignees of Hanks, are purchasers for value, under the statute of 27th Elizabeth, and that they also represent the creditors of Hanks; but he also insisists that a mortgagee, whether for a debt, newly created, or for a pre-existing one, is likewise a purchaser for a valuable consideration within the statute, and that the defendants, who claim as the assignees of the mortgagee, J. Blackwell, have a prior lien upon the mortgaged property, which they are entitled to retain.

The first disputed question then, is, whether a mortgagee, for a pre-existing debt, is a purchaser for value within the statute. It is not denied that he is so for a debt newly created; Coote's Law of Mortgage, 345, (68, Law Lib. 406); citing *Chapman* v. *Emory*, Cowp. 278; *White* v. *Hussey*, Prec. Ch. 13; *Lister* v. *Turner*, 5 Hare, 281. Whatever distinctions there may have formerly been supposed to exist between conveyances, either in trust, or by way of mortgage, to secure these different classes of debt, it must, we think, be regarded as now exploded; see *Riddick* v. *Jones*, 6 Ire. Rep. 109, and *Ingram* v. *Kirkpatrick*, 6 Ire. Eq. Rep. 463. In the last mentioned case, the subject of deeds of trust, the consideration on which they are founded, and the purposes for which they are made, is very fully and ably discussed by the Court, and it was held, in opposition to some English cases, that where a deed has been executed, conveying property in trust, for the payment of debts, and the trustee accepted the same, the grantor has no right afterwards to vary the trusts; and any of the creditors secured, may compel the trustee to execute the trusts as declared, although they were not privy to the execution of the deed. The idea of the deed in trust's being voluntary, in the sense of not being supported by a valuable consideration, is denied, and yet not the slightest intimation is thrown out, that debts therein secured, must be debts just then contracted. Indeed, if such were the case, nine-tenths of all the deeds of trust made in this State, would be deemed voluntary, and would be no protection to the creditor intended to be provided for as against executions in favor

of other creditors, or subsequent purchasers for value. That such is not the law, has been, as we believe, the almost universal impression among the members of the legal profession in this State, and if we were now to hold otherwise, we should unsettle the title to property, to an extent, almost incalculable. A deed in trust, executed *bona fide* for the security of actual creditors, whether for debts, old or new, must then, in our opinion, be regarded as a conveyance, for value, under the statute 27th Elizabeth; and a mortgage has always been considered as standing on the same footing as a deed in trust. The only remaining questions, upon which the counsel of the respective parties are at issue, relate to the mortgage from the defendant Hanks to the defendant John Blackwell, and his assignment of it to his brothers, the other defendants. The counsel for the plaintiffs, insists that the mortgage was void, and that the assignees acquired no equities under the assignment of it. The argument is, that there was either a fraudulent contrivance between the partners Hanks and John Blackwell, to cheat the creditors of Hanks, or of the firm, or that there was, in fact, no debt due from Hanks to John Blackwell, to support the mortgage, and that the assignees of the mortgagee stood upon the same ground as he did, and took his estate subject to all the equities which existed against it.

We are satisfied from the exhibits and proofs, that there was no actual intent on the part of Hanks and John Blackwell to defraud the creditors of the firm, and it is admitted by the plaintiffs, that the debts claimed to be due from John Blackwell to his brothers were *bona fide*, and justly owing at the time of the assignment of the mortgage to them. The question, then arises, did the creditors of the firm have such a lien upon the partnership effects at the time of the dissolution of the partnership as to prevent one of the partners from assigning them in payment of his individual debts. The case of *Rankin* v. *Jones*, 2 Jones' Eq. 169, decides expressly that the creditors of a partnership have no such lien, and in that case, where one of the members of a firm withdrew from it and assigned all the effects to the other partner, under an

agreement, that such partner should pay all the firm debts, and he conveyed all the partnership effects in payment of his own debts; it was held that the partnership creditors could not follow these effects, to subject them to the payment of the firm debts. The same principle, though not decided, is strongly intimated in *Holmes* v. *Hawes*, 8 Ire. Eq. 21. RUFFIN, Chief Justice, in delivering the opinion of the Court, said, "The principle of the bill is, that after the dissolution and division of the effects and debts between the partners, they still continued partnership property, or *quasi* partnership property, until the debts of the partnership were all paid. That might be questioned, even as between creditors of the firm, and the several partners, and those claiming under them, where the dissolution and division were *bona fide*—*Ex parte Ruffin*, 6 Ves. Jun. 109; *Clement* v. *Foster*, 3 Ire. Eq. 213.

It follows, as a necessary consequence, from this principle, that the mortgage from Hanks to John Blackwell, being made *bona fide*, and without any fraudulent intent, would have prevailed against the creditors of the firm, had the debt, which they supposed to be due from the former to the latter, turned out to be actually due. But assuming that, from the condition of the partnership and the state of accounts between the partners, there was no debt, and that the mortgage was to be regarded as a mere voluntary conveyance, still, as the assignees of the mortgage took it in payment of *bona fide* debts, without notice of the condition of the partnership, they are purchasers for value, and can hold against creditors of, and subsequent purchasers from, the mortgagor. In support of this position, it seems to us, that the case of *Major* v. *Ward*, 5 Hare, 598, (26 English Ch. Rep. 597,) to which we were referred by the defendants' counsel, is directly in point. There, a son took a conveyance of an estate from his father, and afterwards mortgaged it, for money borrowed, to a mortgagee, with a power of sale. The conveyance from the father to the son, was declared by a court of equity, to be void as to the creditors of the father, and yet, it was held that the mortgagee of the son, had a right paramount to the creditors of the fa-

ther, and consequently, could convey a good title to a purchaser. The Vice Chancellor, Sir James Wigram, in giving judgment, said, "The position of the parties is, in fact, somewhat anomalous. The creditors of William (the father) claim not under, but paramount to, Stephen (the son). There is no priority between William Beasley's creditors and Stephen's, and those who claim under Stephen. But the title of Major, (the mortgagee) who claims under Stephen, is paramount to that of the creditors of William. The creditors of William, in such circumstances, may have a right to redeem, and a right to require Major to account for the proceeds of the sale, but (not claiming under Stephen,) they have no right to interfere with the power of sale vested in Major, and which, his contract with Stephen, gave him." The only apparent difference between the case of *Major* v. *Ward*, and the one now before us is, that Major became a mortgagee, a *pro tanto* purchaser, for money advanced at the time, whereas, the defendants, Josiah, Robert and James Blackwell, became assignees of the defendant, John Blackwell's mortgage from Hanks, to secure the payment of pre-existing debts. But we have seen, that whether the debts secured were new or old, is now considered, at least in this State, as immaterial. Major was held to have acquired a good title from a person, who claimed under a conveyance which was decided to be void against the creditors of his grantor, and upon the same principle, Josiah, Robert and James Blackwell, must be held to have obtained a good title from John Blackwell, though his mortgage may have been void as to the creditors of Hanks, the mortgagor.

This view of the case makes it unnecessary for us to consider, whether the mortgage and assignment are to be considered as one conveyance from both the partners, or as successive conveyances, to wit, a mortgage from one partner to the other, and then an assignment by the latter. In form, there were, undoubtedly, two conveyances, but they have very much the appearance of being integral parts, only, of one and the same transaction. They were executed the same day,

upon the same sheet or sheets of paper, before the same subscribing witness, and were afterwards proved and registered together. We cannot doubt that, whatever legal interest either partner had in the property, passed by these conveyances to the assignees of the mortgage; and for the reasons, which we have already stated, we believe that they acquired a title paramount to the right of the creditors of Hanks, or of the firm of Hanks and Blackwell, and also paramount to the title of the plaintiffs, who became purchasers subsequently.

There is no error in the decree, and the petition to rehear, must be dismissed.

PER CURIAM, Petition dismissed.

JACOB RICH *and wife against* KINCHEN M. THOMAS *and others.*

Where an answer to a bill for an injunction does not respond to a material allegation, the Court will not dissolve the injunction on the coming in of the answer, but will order it to be continued to the hearing.

THIS was an appeal from an interlocutory order of the Court of Equityof Guilford County, continuing an injunction to the hearing. Judge SAUNDERS presiding.

The bill alleged that the plaintiff Sarah, then Sarah Albright, was a widow, living in the county of Guilford, and had agreed with the other plaintiff, Jacob Rich, to go to the county of Alamance, near where he lived, and on Thursday the 8th day of October, 1857, they were to be married; that on the monday previous to the marriage, the defendant, Thomas, with the co-operation and assistance of the defendant Whittington, and in combination with the other defendant, Dunn, by artful and deceitful representations, and with a view of cheating and defrauding the defendant Rich of his marital rights, persuaded and induced the plaintiff Sarah, to convey to him, Thomas, her dower, in a large and valuable tract of land, worth $2500,

for a sum much under its real value, to wit: for two hundred dollars a year for nine years, unless she should die within that time, when the annual payments were to stop, and he was to pay no more; that one of the means resorted to for procuring her to execute this conveyance, was an assurance that it was to be subject to the ratification of her intended husband, and that it was not to be registered before he should be consulted, and should sanction the contract; that not being satisfied with the conveyance thus obtained, they Thomas and Whittington intercepted her at Greensboro', on the morning of the marriage, on her way to the place appointed for the marriage, and under the pretext that the writing she had given was not correct, there prevailed on her to sign and execute another instrument to the same purport and effect as the former, but still subject to the same understanding and agreement as to the assent and ratification of the plaintiff Rich, and the promise that it should not be registered before he could be consulted on this point; but in total disregard of that agreement, she had scarcely arrived at the railroad station, where she took the cars upon the journey she was pursuing, when the defendant carried the deed into the court house and had it proved by Whittington, who was the subscribing witness, and that very shortly thereafter, it was registered; that after the marriage, in less than a week, the plaintiffs went to Guilford County, and the plaintiff Rich denounced the transaction as a fraud upon his rights, refused to give possession of the land, and they both demanded the surrender of the deed according to the previous agreement, which was refused by the defendants, and an action of ejectment was brought against them for the recovery of the possession of the premises. The prayer of the bill is for an injunction to stay the proceedings in the action of ejectment, and for a surrender of the deed.

The defendants answered, denying the fraud, and asserting that Thomas, alone, was the purchaser of Mrs. Albright's dower in the land; that he afterwards let in Dunn as a co-partner in the purchase; that the trade was made at the instance and request of the feme plaintiff, and the price to be paid was the

value of the plaintiff's life interest; that Mrs. Albright, (now Rich) told Thomas, before the marriage, that it was arranged between her and her intended husband, that she was to sell her dower interest in Guilford, and they were to live on the husband's plantation in Alamance; and that after the marriage, when Rich was complaining of the transaction, he did not deny but that such an arrangement was agreed on between them; that Whittington had no interest whatever in the transaction, but was called on, at the special instance and request of Mrs. Albright, to do the writing in the first instance, but that not having a full description of the land, he designated it by calling for the adjoining tracts; that not being altogether satisfied with what he had done, in this respect, having been furnished with a more particular description of the boundaries, he wrote another deed, in all things similar to the former, with this correction in the boundaries, and having sent word to the bargainor, Mrs. A., she called in his office in Greensboro', on her way to the railroad station, on the morning before the marriage, and without hesitation, executed the new deed which was witnessed by Whittington; that there was no promise, or agreement that the deed should be submitted for the ratification of the intended husband, and no promise that it should not be registered before he could be consulted.

Upon the coming in of this answer, the defendants counsel moved for the dissolution, which, upon argument, was refused by the Court, from which the defendant appealed.

Gilmer and *McLean*, for the plaintiffs.
Morehead, for the defendants.

Pearson, J. There is no error in the interlocutory order appealed from. The answer does not respond to the allegation that the feme plaintiff was hurried into the completion of the sale, and the execution of the deed on the eve of her starting from home for the purpose of being married. No reason, or cause, is suggested for the *hot haste* with which the transaction was closed, and there is room to infer that the real mo-

tive for it was a fear that the intended husband would not assent to the terms upon which the feme plaintiff had been induced to dispose of her estate. It may be, that the plaintiffs had, in anticipation of their marriage, arranged their plans for the future, by which the wife's estate was to be sold, and they should live together on the land of the husband, in Alamance, but, it is very certain that the plaintiff, Rich, was not privy, and did not assent to the particular transaction which is now called in question, as being in fraud of his marital rights.—Whether he had agreed that his intended wife might sell her estate before marriage in such a manner as to amount to a general assent, so as to make her act binding upon him, must depend upon the proofs. It was proper to continue the injunction to the final hearing.

PER CURIAM. Decretal order affirmed.

HARRIET GAYLORD *against* HOSEA S. GAYLORD.

Where, in a petition for a divorce, by a wife, a subpœna was issued and returned executed, but before an appearance was made, or an alias issued, an order for alimony *pendente lite* was made, it was *Held* good.

An affidavit of the petitioner annexed to her petition which sets forth the amount of the defendant's property, and of what kind it consists, was deemed sufficient *prima facie* to authorise the Court to act on the question of alimony.

Where the petitioner sets out that "the husband is then removing or about to remove his effects from the State," the wife need not state in her petition that the cause of complaint existed six months before the filing of her petition.

THIS was an appeal from the Court of Equity, from an order allowing alimony *pendente lite.*

The facts set out in the face of the petition, are sufficiently stated in the opinion of the Court.

——— ———, for plaintiff.
——— ———, for the defendant.

BATTLE, J. The allegations of the bill are unquestionably sufficient to entitle the plaintiff to a divorce from bed and board under the 3d section of the 39th chapter of the Rev. Code. Acts of such indignity to her person as are well calculated "to render her condition intolerable, or her life burdensome," are therein stated with distinctness and certainty, and she has set forth a case which clearly entitles her to relief, unless the objections, or some of them, urged on the part of the defendant, can avail to prevent it.

The question now before us, is whether the plaintiff has a right to the alimony *pendente lite*, under an order made in her behalf by the Court below. The counsel for the defendant objects that she has not:

First, because the order was made before the defendant had appeared, or an *alias* had been issued and returned according to the provisions of the 6th section of the act above referred to.

Secondly. Because no affidavits as to the value of the property, &c., had been taken and submitted to the Court; and

Thirdly. Because it was not stated in the petition that the facts upon which the application for relief is founded, had existed six months before it was filed.

The first objection is raised upon the language of the sixth section of the act, in which is contained the provision for the service of process. That section enacts that a subpœna shall be issued and served upon the defendant; and though it may be properly served, if he do not thereupon appear, an alias subpœna shall issue and be served in the same manner, before the court can proceed to determine the cause. Upon this, the counsel for the defendant argues that the first service of process upon him, does not constitute the cause in court, as to him, if he do not appear, and that, consequently the order for alimony *pendente lite*, was premature. In this view of the case, we do not concur. It is true, indeed, that the court cannot proceed to determine the cause until an *alias subpœna* has been issued and served, or some other steps have been taken to make the defendant a party when he cannot be found, but

it is expressly declared, in the same section, that "in the mean time such preparatory rules and orders in the cause may be made as shall be necessary to prepare it for trial." To some purposes, then, the cause is constituted in court after the service of the first process, and sufficiently so, as we think, to bring it within the operation of the 15th section, which authorises the Court, in its discretion, "at any time pending the suit," to decree a reasonable alimony for the petitioner and her family. It would, undoubtedly, be against the whole object and spirit of this section of the act, to allow the defendant to deprive the petitioner of the means of subsistence for six months, by refusing, or neglecting, to appear upon the service of the first process.

The second objection is clearly untenable. The bill sets forth the amount of the property owned by the defendant, and of what kind it consists, and the affidavit of the petitioner annexed thereto, affords the Court sufficient information to enable it to act understandingly in decreeing "such reasonable alimony for the support and sustenance of the petitioner and her family, as shall seem just, under all the circumstances of the case." It may be, that the Court would hear affidavits offered on the part of the defendant, to show that the value of his estate had been misrepresented; but, surely, in the absence of any such information afforded by him, the Court ought not to hesitate to act upon that given by the petitioner, in her bill.

We think that the third objection has as little to support it as the second. The act certainly requires that in ordinary cases, the facts, upon which the petitioner founds her claim to relief, shall have existed, to her knowledge, at least six months prior to the filing of the petition; and the 7th section expressly enacts that she shall so state and swear. But the 8th section makes an exception to this, whenever "the husband is then removing, or about to remove, his effects from the State." In such a case, the wife may exhibit her petition at any time, and if she shall state and swear "that she doth verily believe that she is entitled to alimony, and that by delaying her suit, she will be disappointed of the same, by the removal of her

husband's property and effects out of the State," any Judge "may thereupon make an order of sequestration, or otherwise, as the purposes of justice may seem to require." The present petition was filed under the authority of this section, and the case stated by the petitioner, clearly entitles her to its benefit. There is nothing in this, or any other section of the act which indicates a necessity that she should file another bill, or a supplemental bill, after the expiration of six months from the time when the facts which entitled her to relief, occurred.

The interlocutory order, from which the appeal is taken, must be affirmed, and this must be certified to the Court below, as the law directs.

PER CURIAM. Decree accordingly.

MURDOCK AND BAIN *against* THOMAS ANDERSON.

A receipt for a part of the purchase-money, for a house and lot, without any description of the property to be conveyed, is not a sufficient note or memorandum of an agreement, under the statute of frauds, and cannot be helped out by parol evidence.

Where a suit was brought for the enforcement of a contract to convey land, in which relief was refused, because the writing relied on was not sufficiently explicit, it is not within the province of the Court to decree a repayment of the purchase-money that had been paid; because that is recoverable at law.

CAUSE removed from the Court of Equity of Orange county.

The bill alleged a parol contract, which was, that the defendant should convey to the plaintiff, Murdock, a certain house and lot, in the town of Hillsboro', which is described in the bill according to certain metes and bounds, but the only memorandum, or written evidence of the contract, relied on, was the following:

"Received of A. C. Murdock one hundred dollars in tinware, and one carryall at seventy-five dollars, in part payment of one house and lot, in the town of Hillsborough, pur-

chased of me, by him, for the sum of three hundred and fifty dollars." Signed by the defendant.

The bill alleged further, that $175 had been paid by the plaintiff, as stated on the receipt, and that the plaintiff had requested the defendant to convey to him the premises, but that he had refused to do so. The plaintiff Bain claimed, as the assignee of Murdock.

The prayer of the bill was for a conveyance and for general relief.

The answer of the defendant denied the facts, as set forth in the bill. The main question was, whether the writing set forth, was a sufficient note or memorandum of the agreement, under the statute of frauds, or whether parol evidence could be introduced to supply the omissions of the writing in setting out the contract.

The cause was set down to be heard on the bill, answer, former order, proofs and exhibits.

Battle and *Bailey*, for the plaintiffs.
Phillips, for the defendant.

PEARSON, J. It is the misfortune of the plaintiffs that the contract was not reduced to writing, at the time it was entered into. The defendant denies the contract as alleged in the bill, and the plaintiff is forced to rely on a recital set out in a receipt for a part of the purchase-money. We think the evidence is insufficient, because the receipt contains no description of the house and lot, by which it can be identified.

This conclusion is fully supported by the authorities, *Mallory* v. *Mallory*, Busb. Eq. 80; *Plummer* v. *Owens*, ib. 254; *Allen* v. *Chambers*, 4 Ire. Eq. 125.

The distinction is this: where a sufficient description is given, parol evidence must be resorted to, in order to fit the description to the thing; but where an insufficient description is given, or where there is no description, (as in our case) such evidence is inadmissible. We deem it unnecessary to enter into a discussion of the subject; *Deaf and Dumb Institute* v. *Norwood*, Busb. Eq. 65.

This Court cannot assume jurisdiction to decree repayment of the $175; the contract being void, the money can be recovered at law, in an action for money had and received; *Ellis* v. *Ellis*, 1 Dev. Eq. 398; and there is no peculiar equitable ingredient presented by this case.

PER CURIAM, The bill must be dismissed.

THOMAS WHITEHEAD *and others against* THOMAS LASSITER.

Where a testator bequeathed, that at the death of his wife, his slaves, &c., should be equally divided "between all my children that are *now* living," it was *Held*

1. That children of the testator who died *before* the making of the will took nothing by this bequest.
2. That the children of a son, who died in the life time of the testator, *after* the making of the will, took (as purchasers) the share their father would have taken, had he survived.
3. That the distributees of a son, who died after the death of the testator, but before the time of division, (to wit, the death of the testator's wife) were entitled to his share, and that his widow was included in this class.

CAUSE removed from the Court of Equity of Chatham County.

The bill was filed against the executor of William Lassiter for an account and payment of legacies under his will.

William Lassiter executed his will in 1837, in which, after several specific bequests, he bequeathed to his wife a life-time enjoyment of the slaves and other personal property, and then provides as follows:

"At the death of my wife, or at any time when any part of the property not specially willed away, shall come into the hands of my executors, that they may proceed to an equal division of the same between all my children that are now living, or their lawful heirs." * * * "The point aimed at is an equal division of the property in my possession, at my death, between all and every one of my children that are now living."

The testator died in 1845, and his wife in 1853. The will

was proved, and the defendant Thomas, of several nominated, only qualified as executor.

When the will was written, the testator had children then living, to wit: John, Thomas (the defendant), Bennet, Elizabeth, intermarried with George Drake, Rebecca, intermarried with Thomas Clegg, and Susannah, intermarried with Lewis Meares.

Of these, John died in the life-time of the testator, leaving three children, Joseph, Thomas, and Rebecca, who are plaintiffs.

Bennet, another son of the testator, who was living at the time the will was executed, died after the death of his father, but before the time of division had arrived, to wit, the death of his mother—leaving a widow, but no children.

The testator had two other children, William and Catharine, who both died in the testator's life-time, *before* the execution of the will.

These facts are set forth in the plaintiffs bill, and not denied by the executor, but he makes the following questions, upon which he asks for the advice and protection of the Court:

Whether the representatives of Catharine and William, who died before the will was made, are entitled to any thing.

Whether John's representatives, or next of kin, are entitled to any thing.

Whether Bennet's representatives have any interest in this bequest, and if so, who succeed to it; and especially, whether his widow can come in for a share of his interest, if he be entitled to any thing under this bequest.

The cause was set for hearing on the bill, answers and exhibit, and transmitted.

Howze and *Bryan*, for the plaintiffs.
Manly, for the defendant.

PEARSON, J. The testator directs that, at the death of his wife, the property shall be equally divided "between all my children that are now living, or their lawful heirs." It is

manifest that "now" is used in opposition to the time of the death of his wife, consequently, the will had reference to the time of its execution, and speaks as of that date. We are of opinion that all of the children, who were living at that time, are embraced by its terms. Catharine and William, who both died before the date of the will, are excluded, and their children are not entitled to a share in the division.

In respect to John, who died after the execution of the will, but before the testator, leaving children, we are of opinion that the share which he would have been entitled to, is given to his distributees, as purchasers, and not as claiming under his personal representative. It is settled, that the word "heirs" when used in reference to personal property, (as it is in the clause under consideration,) means distributees, and as the limitation over, is to the children now living, *or* their heirs, at the death of the wife, the distributees of John take under that description, which prevents a lapse by his death, which would have taken place had the limitation been to the children now living *and* their heirs.

In respect to Bennet, who died after the testator, leaving a widow, and no children, we are of opinion that the share of the property did not vest in him, but that his distributees, including his widow, are entitled thereto as purchasers, answering the description at the time of the division. If the words "children now living *or* their heirs" stood unconnected with any thing else, we should construe the word *or* to mean *and*, so as to give each child an absolute estate, for *nemo est hæres viventes*, and "the heirs" of a living person can only be used to limit his estate; but as the division was to be at a future time i. e. at the death of his wife, there is no inconsistency in describing the persons who are to take at that time, as the children now living, or the heirs (distributees) of such of them as are now living, but may then be dead. So, we have no ground for making "*or*" mean "and," or for making the word "heirs" a word of limitation, and not a word of purchase, which is the sense given to it by the use of the word "or."

PER CURIAM. There will be a decree, declaring the rights of the parties in pursuance of this opinion. The costs will be paid out of the fund by the executors.

ELIZABETH M. ERWIN *against* JAMES M. ERWIN.

The statute, Rev. Code, ch. 39, requires the acts which are alleged to amount to indignity, to be set out particularly and specially, so that an issue may be taken upon each severally, and will tolerate no generality in making the charges.

Where a petitioner, for a divorce, alleged that her husband had become jealous of her without a cause, had shook his fist in her face, and threatened her, and declared to her face, and published to the neighborhood that the child, with which she was pregnant, was not his; that her condition had, from such treatment become intolerable, and her life burdensome, and that she had been compelled to quit his house and seek protection of her father, it was *Held* that she had set out enough to entitle her to alimony *pendente lite.*

APPEAL from the Court of Equity of Cabarrus County, from an order of his Honor Judge DICK, allowing alimony to the petitioner *pendente lite.*

The petition set forth that she was a widow of forty years old when she married the defendant, who was about the same age; that the match was determined on quite suddenly, she having very little acquaintance with the defendant, but having heard of him an excellent character; but that in about three months after their intermarriage, she found the defendant to be intemperate; that she could not please him—that in about eight months after they were married, he became jealous of her; that during that month he charged her to her face with infidelity, and made the same accusation to the neighbors amongst whom they lived; that in this way the slander against her became a public rumor; that he assailed her with low accusations, amongst other things accused her of stealing; that not

long after her marriage she became pregnant by him, discovering which, he accused her of infidelity, and said that the child of which she was pregnant, was not his; that he deported himly violently towards her, and made various assaults about her face with his fists, but never actually struck her; that so rude, violent and offensive was his conduct and language, that her condition became intolerable, and her life burdensome; and that she was thus compelled to quit the defendant's house and throw herself upon the kindness of her father for support.

Upon the return of the process issued in this case, the plaintiff moved for alimony *pendente lite*, which was resisted by the defendant on the ground that the bill did not set forth enough to entitle the plaintiff to the relief which she sought.

The Court, however, made the order for alimony as moved for, and the defendant appealed.

Wilson and *Boyden*, for the plaintiff.
Barringer and *Jones*, for the defendant.

PEARSON, J. For the purpose of this motion, all of the allegations set out in the petition are to be taken as true. We are satisfied that both the matter, and manner of stating it, bring the petitioner's case within the statute. Questions of this kind must, in a great measure, depend upon the peculiar circumstances of each case, and for the purpose of aiding in making the application, some pains were taken in *Everton* v. *Everton*, 3 Jones' Eq. 202, to review the English, and our own law, upon the subject of cruelty and indignity to the person. It will be seen from the exposition there given, that our law is more liberal than the English; for instance, living apart in adultery, is, with us, a ground for absolute divorce, and not merely a divorce from bed and board; and in respect to the latter, such indignities to the person of the wife as render her condition intolerable, or her life burdensome, are made a distinct ground, in addition to such cruelty as endangers her life, which in the English books is termed "*sævitia*." But, to keep the line distinctly marked, between a mere outbreak of passion, accom-

panied with abusive language, in which the wife is apt "to maintain a contest of retaliation," unless her spirit is broken, and she is in fear of bodily harm, and such indignities as render her condition intolerable or her life burdensome, the statute requires the words or the acts which are averred to amount to such indignity, to be seth forth particularly and specially, so that an issue can be taken upon each, severally, and will not tolerate generality in the manner of making the charges.

In this case, there is the requisite certainty in charging the indignities, and no one can read over the petition, and fail to be satisfied that the matters charged amount to such indignities to the person of the wife, as to render her condition intolerable or her life burdensome, as distinguished from such cruelty as endangers her life. Where a husband charges his wife with infidelity and disowns the child of which she is pregnant, if he does not believe the charge to be true, he is a brute—drunk or sober, and the only motive that can be imputed to him, is a desire to be rid of her, and a determination either, to break her heart, or force her to leave him. If he believes the charge to be true, he is dangerous, and the wife's safety requires her to leave him. So, in either view, the petitioner had good cause for the separation. Patience had ceased to be a virtue, and she was entitled to alimony until the husband could be heard, and the matter fully investigated.

In *Everton* v. *Everton*, *supra*, the petitioner did not allege that she separated from her husband in consequence of the indignities offered to her. She seems to have taken the thing quietly, and to have left at her own good pleasure. "The language is singularly vague and indefinite upon this point of her being ordered to leave the defendant's house." This consideration had much weight in the decision of that case, and distinguishes it from our case, and that of *Coble* v. *Coble*, 2 Jones' Eq. Rep. 392, and *Earp* v. *Earp*, 1 Jones' Eq. Rep. 239.

PER CURIAM. Decree below affirmed.

HENRY CARVER, *Ex'r., and others against* SAM'L D. OAKLEY *and others.*

It is a general rule, that where property is given to a class, as many of that class will be included as can be, without doing violence to the instrument.

Where, therefore, an estate was given, by will, to such grand-children of A, as should be alive when B died, and B died in the life-time of the testator, it was *Held* that the grand-children born after the death of B, but in the life-time of the testator, take under the bequest.

CAUSE removed from the Court of Equity of Person county.

The bill was filed by the executor of the will of Josias Carver, senr., and certain legatees therein named, to obtain a construction of the following clause of the will: "I lend unto my daughter-in-law, Betsy Carver, widow of my deceased son Josias, during her life or widowhood, the following property, that is to say, (describing several slaves,) and at her death, or marriage, I direct the same to be equally divided between the grand-children of my said deceased son, Josias, or such of them as may be living, and in being at that time." Elizabeth Carver died in the life-time of the testator, leaving her surviving the following grand-children of the said Josias, jr., to wit, Martha J. George, Elizabeth Oakley, Elizabeth F. Renn, Jas. B. Hutchins, Nancy Hutchins, John Hutchins, Martha Carver, Elizabeth Carver, Sarah Carver, James Carver, John Paul Carver, Sarah J. Carver and Elizabeth Carver, jr., who were all in being at her death, and at the death of the testator. These are plaintiffs with the executor. Subsequently to her death, there were born the following persons, to wit, Samuel D. Oakley, Thomas Renn, William Hutchins and Josias Carver, junior, grand-children of the said Josias Carver, jr., who were all in being at the death of the testator. The executor sets forth that the plaintiffs, to wit, the grand-children of Josias Carver, born, and in being, previously to the death of Mrs. Betsy Carver, claim the whole of this bequest, while the defendants, those other grand-children, born subsequently to death of the intended first taker, Betsey Carver, contend that they are entitled to participate therein. They were call-

ed on to appear and interplead, so that the executor might be protected by a decree of this Court in paying over the said legacy.

The defendants, the younger grand-children, answered, not denying the statements of the bill, but insisting on their rights to share equally in the bequests aforesaid.

The cause was set down on bill, answer and exhibit, and transmitted.

J. H. Bryan, for the plaintiffs.

No counsel appeared for the defendants in this Court.

BATTLE, J. We think that there cannot be any reasonable doubt as to the proper construction of the will of the testator, Josias Carver, sen. The testator certainly supposed that the intended legatee, for life, Betsey Carver, would survive him, and the slaves given to her, for life, were, at her death, or marriage, to be equally divided between such of the grand-children of his deceased son, Josias Carver, jr., as might be then living. The death of Betsey Carver, in the life-time of the testator, removed her life estate out of the way, and the grand-children of Josias Carver, jr., must take immediately upon the death of the testator, just as if no previous life estate had been mentioned in the will. That being the period for the division of the property, all the grand-children, who were then living, are entitled to a share in it. It is a well established rule of construction, that when property is given, by will, to a class, as many of the class shall be included in the benefit of the gift as can be, without doing violence to the language of the instrument. Here, the period of division among the grand-children, as a class, is the death of the testator, and we think all must be embraced, who were then in being. Let a decree be drawn for a division according to this opinion.

PER CURIAM, Decree accordingly.

ROBERT F. JOHNSTON *against* STEPHEN L. HOWELL.

Where the administrator of an estate, permitted two slaves to go into possession of a distributee, before all the debts were paid, upon condition that he should give a refunding bond, which he sold to another without giving the bond, and an action of trover was brought by the administrator against the purchaser, and recovery had for the value of the slaves, in a bill by the purchaser to enjoin the collection of this judgment, for all beyond the distributees' share of the unpaid debts, it was *Held* that his liability is that which would have existed against the distributee on his refunding bond, had he given one.

APPEAL from an interlocutory order, made in the Court of Equity of Davie county, dissolving an injunction. Judge BAILEY presiding.

The bill filed by the plaintiff, upon which the injunction issued, stated, in substance, that Wm. F. Kelly died intestate, in the county of Davie, leaving his wife and ten children, him surviving; that he had a large property, real and personal, but was much involved in debt; that the defendant administered on his estate; that before he had paid the debts, he concurred in a petition, filed in the County Court of Davie, for a partition of the slaves, and that such partition was accordingingly made, but that before the defendant gave up his right to the property, he required and took refunding bonds from the next of kin, in every instance, except that of one of the son's, John Kelly, who got possession of two valuable slaves, Kerr and Amy, under an understanding, and upon condition, (as it afterwards appeared) that he would execute and deliver to the administrator forthwith, a refunding bond, such as is required by law; that the said John Kelly might then have given the bond, if the administrator had urged it, but that afterwards becoming insolvent, he was totally unable to comply with this requisition; that John Kelly, after getting possession of the slaves, sold them to the plaintiff, for a full price, and delivered them to him, and the plaintiff avers that he then had no knowledge of John Kelly's insolvency, nor of the condition upon which the slaves had gone into the possession

of the said John, and had no ground to doubt the entire sufficiency of the title which he made him; that afterwards on being called on to deliver up the slaves in question, or give the refunding bond required by the agreement with Kelly, in the full belief that he was not bound to do so, either in law or equity, he refused to do either; that the defendant, as administrator, brought an action of trover against him, for the conversion of the slaves, and finally obtained a judgment in the Supreme Court, for the value, to wit, $———; that execution was taken out for that amount, and was at the time of issuing of the injunction in the hands of the sheriff of Davie county; that he went to the defendant and offered to make a refunding bond in behalf of John Kelly, and requested him to stop the execution, except as to the costs, which the plaintiff proposed to pay, and also offered to pay the defendant a proportional part of the debts that had come against him, as the administrator of Wm. F. Kelly, since the partition, that is, the proportion in respect to the value of these slaves, for which the recovery was had, but that the defendant refused to stop the progress of the execution, and was threatening to enforce it for the whole amount.

The defendant states, in his answer, that there are several important debts unpaid, which will require about $500 of the recovery made against the plaintiff in the court of law, as the proportion of John Kelly, that in this estimate is included about $150, which the said John Kelly owes for property purchased by him at the administrator's sale; that he had given instructions to the sheriff only to raise the sum of $500 upon the execution in his hands, and that it is not his intention to collect the residue, unless other claims arise against the estate of his intestate, of which he has no knowledge.

On the coming in of the answer, the defendant moved for the dissolution of the injunction, which was ordered, and the plaintiff appealed.

Boyden, for the plaintiff.
Clement, for the defendant.

BATTLE, J. Had the plaintiff given the refunding bond, which we think the defendant, as administrator of William F. Kelly, had a right to demand, he would have been responsible thereon, for the whole liability of John Kelly, in the contributions necessary for paying the outstanding debts due from the estate of the defendant's intestate. At least, such would have been the equity of the plaintiff, as against the distributees of the estate of the intestate, other than John Kelly, from whom the plaintiff purchased the slaves mentioned in the pleadings. As the defendant permitted the next of kin of his intestate to divide the slaves before he had paid off the debts and settled the estate, relying on the refunding bonds, which they respectively gave, we think he can not, in a court of equity, call upon the plaintiff for more than may be necessary to pay his share of the outstanding debts. From this, it appears that the injunction ought not to have been dissolved *in toto*, but only *pro tanto*, the amount indicated above; and in that amount, is not to be included the sum due the defendant from John Kelly, on account of his purchases at the sale. That is a debt which the defendant ought to have collected, or at least secured, before he permitted the division of the slaves, and for it, the plaintiff is in no way responsible.

The interlocutory order, dissolving the injunction *in toto*, must be reversed, and this opinion must be certified to the Court below, to the end that the proper order may be there made as herein indicated.

PER CURIAM, Decree accordingly.

SARAH B. COAKLEY *and others against* HENDERSON L. DANIEL *and others.*

Where a testator evinced, by the context of his will, a clear intention to divide an estate equally between two of his sons, and a daughter and her children, the following devise to wit, "all the property to be divided be-

tween S and A and B, share and share alike,—to A and B and their heirs and assigns as gifts—to S as a loan for the benefit of her and her children," was *Held* to mean a limitation to S, for her life, remainder to her children, as well those in being, as those that might be born thereafter.

CAUSE removed from the Court of Equity of Wake County.

This was a petition for the sale of land for partition. The The plaintiffs, William A. Coakley and his wife Sarah B. Coakley, set forth in their petition that the latter was the daughter of Zadoc Daniel, who devised to her and her two brothers, Henderson and Thomas, the land in question as tenants in common in fee simple, to take effect and be enjoyed after the death of their mother, Mrs. Martha Daniel; that she had lately died, and that before her death, Thomas, one of the joint legatees above mentioned, died intestate, without ever having married, and without leaving issue; that the plaintiff, Sarah and the other sisters and brothers of the said Thomas, of whom there are ten in all, are entitled, as heirs at law, to his third part of the land in question. Henderson Daniel, and the rest of the children and heirs at law of Zadoc Daniel, as also the infant children of Mrs. Coakley, are made defendants. Several of the defendants answered, and judgment *pro confesso* was taken as to the others. The heirs at law of Zadoc Daniel insisted that the share of Mrs. Coakley is only a life estate to her during her life, and that afterwards descends to them as the heirs of the said Zadock, the reversion not having been disposed of by the said will. The children of Mrs. Coakley, by their guardian *ad litem*, also answered, insisting that one third of the land in question was devised by the will of Zadoc Daniel to their mother for her life, and after her death, to them in remainder.

The portions of the will of the said Zadoc, upon which these controversies arise, are as follows:

After providing for the children of a former marriage, and for his existing wife, by giving her a considerable number of personal chattels, and a life estate in the land in question, the will proceeds:

"The residue of my property to be sold, and divided be-

tween my three youngest children, (the issue of the second marriage,) viz: Sarah B. Coakley, Henderson L. Daniel and Thomas P. Daniel, in the following manner, to wit: having advanced to Henderson L. Daniel one hundred dollars, to Thomas P. Daniel thirty dollars, and I have also loaned to my daughter, Sarah B. Coakley, seventy dollars, Thomas P. Daniel to receive as a gift seventy dollars, and Sarah B. Coakley to receive thirty dollars as a loan, and the residue, if any, to be equally divided among the three, to Henderson and Thomas, as gifts, and to Sarah, as a loan." * * *

"In case my wife should not marry, at her death, all the property to be divided between Sarah B. Coakley, Henderson L. Daniel and Thomas P. Daniel, share and share alike—to Henderson and Thomas and their heirs as gifts—to Sarah B. Coakley, as a loan, for the benefit of her and her children."

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

Rogers and *Fowle*, for the plaintiffs.
E. G. Haywood, for the defendants.

BATTLE, J. No person who reads the will of the testator can, for a moment, doubt that his intention was to give what he called the balance of his property to be equally divided between his two sons, Henderson and Thomas, and his daughter, Sarah B. Coakley, and her children; the two sons, taking a third part, each, and the daughter, and her children, taking the remaining third part. His desire for such an equal partition, was so strong, that in one part of his will, he directed that one of his sons and his daughter should each be paid sums sufficient to make up one hundred dollars, the amount which he had advanced in money to the other son. The only question, then, is, whether that intention, in favor of the daughter, and her children, is expressed in terms sufficiently explicit to enable the Court to give it effect. The language in which the residue of the testator's property is given to the three children, is in one clause of the will "to be equally divided between the

three, to Henderson and Thomas as gifts, and to Sarah as a loan." In another clause, where he provides for a division, after the death of his wife, the testator expresses himself thus: "all the property to be divided between Sarah B. Coakley, Henderson L. Daniel and Thomas P. Daniel, share and share alike, to Henderson and Thomas, and their heirs and assigns, as gifts, to Sarah B. Coakley, as a loan, for the benefit of her and her children." The counsel for Mrs. Coakley and her children, contend that by a fair construction of the language contained in these clauses, she took an absolute interest in the property, to be held in trust for the benefit of herself and children, born, or to be born; or, that she and her children, then born, took an absolute interest in the property; or, that she took it for life, with remainder to the children which she then had or might afterwards have. The counsel for the other parties contends, on the contrary, that she took a life estate only for the benefit of herself and her children, and that the remainder in the property is undisposed of by the will, and must be distributed accordingly among the heirs at law and next of kin of the testator.

It is not very easy to conceive what precise idea the testator attached to the word "loan." It is very certain that he did not intend a mere bailment; because he uses it in connection with the thirty dollars which his daughter was to receive to make her advancement in money equal to what he had given to one of her brothers. He speaks, also, in two separate clauses, of an equal division of the property between her and her brothers, and yet, nothing could be more unequal if she, or she and her children, were to be mere bailees for life of one third of the property, and her brothers were to take, each, his share, absolutely. Besides, the "loan" is not confined in express words to a life estate, but it is to her indefinitely. We must, then, seek for another meaning of the term "loan," and we are satisfied that the testator intended to use it in a sense opposed to the absolute interest which he gives to his sons.—In other words, he meant that she should not take it to be disposed of absolutely at her pleasure, but that her interest in it

was to be limited to her for life, and then it was to be for the benefit of her children. It will be noticed that the devise and bequest is not to her *and* her children, which, as she had children at the time of her father's death, would have given the property to her and them, as tenants in common, according to the case of *Moore* v. *Leach*, 3 Jones' Rep. 88, but it is to her "for the benefit of her and her children." The clause is to be construed like those which were the subject of decision in the case of *Bridges* v. *Wilkins*, 3 Jones' Eq. 342, and *Chesnut* v. *Meares*, ibid 416. The last was the case of a trust, but we held that for the purpose of carrying out the manifest intent of the settler, we were at liberty to put the same construction upon it, as we would upon a like limitation in a will. It has been suggested, that the cases of *Moore* v. *Leach* and *Bridges* v. *Wilkins*, were opposed to each other, because one of the sisters of the testator, in the latter case, had a child living at his death, and yet, we held that she took a life estate, only, in the property given, with a remainder to all her children, as a class. But, there is this manifest difference between the two cases, that in the former, the devise is to one woman only, and her children, she, at the time, being a married woman, and having children, while in the latter, the bequest was to all the testator's sisters and their children, most of whom were then unmarried, and without children. In the case of the unmarried sisters, the intention of the testator, in favor of any children which they might have, could only be carried out by giving the sisters, estates for life, with remainders to their children respectively as a class, which would, of course, embrace all they might have during life. As the married sister was embraced in the same clause, and as no distinction whatever was indicated in the will between her, and the others, the same construction was applied to her also. The cases of *Crawford* v. *Trotter*, 4 Madd, Rep. 362, and *Morse* v. *Morse*, 2 Sim. 485, referred to in *Chesnut* v. *Meares*, show clearly, that when the intention of a testator, or settler of a trust requires it, the children will not take with their mother, but in remainder after her.

We admit that the language of the testator, in the will under consideration, is untechnical, and of doubtful import, but where we discover a clear intention in him to make an equal provision out of certain property for two of his sons and his daughter and her family, we feel bound to put a construction on it (even though it may seem somewhat forced) which will effectuate that intention.

PER CURIAM. The plaintiff may have a decree in accordance with the principles herein declared.

EDWARD GRAHAM *against* CHARLES SKINNER *and others.*

Every order of a court of equity, by which the rights of the parties may be affected, may be reviewed in the Supreme Court.

An appeal, therefore, to the Supreme Court, will lie from an order of a court of equity, allowing an amendment to an answer.

Before amendments to an answer are allowed, the Court should be satisfied that the reasons assigned for the application are cogent; that the mistakes to be corrected, or the facts to be added, are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence, and that the mistakes have been ascertained, and the new facts have come to the knowledge of the party since the original answer was put in and sworn to.

An order, therefore, made in the Court of Equity allowing an amendment to an answer, upon motion, merely, without being supported by an affidavit, and without its being shown that an amendment was needed, or what amendment was proposed, was *Held* to be erroneous.

The modern practice in amending an answer, is to let the original remain on the file, and to put in a supplemental answer containing the new matter or correction.

A bill of exceptions, or a case stated by the presiding Judge in the nature of a bill of exceptions, is inadmissible upon an appeal from an inferior, to a superior, Court of Equity.

APPEAL from an interlocutory order, made in the Court of Equity of Wake county, his Honor, Judge MANLY, presiding.

This cause was before the Court at June Term, 1857, vide

Jones' Eq. vol. 3, page 152, upon an appeal from an interlocutory decree, refusing to dissolve an injunction. It was certified back to the Court of Equity of Wake, that there was no error, and it stood on the docket of that Court at the Spring Term, 1857, when, on being called, a motion was made by the plaintiff to set down the cause for hearing upon the bill and answers, and immediately thereafter, a motion was made by the defendants to amend their answers. The motion of the plaintiff was disallowed, and that of the defendants allowed, and it was ordered by the Court that the defendants might amend their answers; from which order, the plaintiff prayed an appeal to the Supreme Court, which was allowed.

Accompanying the transcript of the record of the Court below, is the following statement, made by the Judge, who heard the motion below:

"On calling of this cause, motions were made by the respective parties, viz., on the part of the plaintiff to set the cause down for hearing on the bill and answers, and on the part of the defendants to amend their answers. The plaintiff contested the amendments of the answers, on the general ground, that it was not fit to be done at this time, but the Court allowed the same, and the plaintiff prayed an appeal, which was granted." Signed by the Judge.

E. G. Haywood, for the plaintiff.
Moore, for the defendants.

BATTLE, J. This is an appeal from an interlocutory order from the Court of Equity, for the county of Wake, and in deciding upon it, we can take into consideration only the question which is presented by the record of the pleadings and proceedings in the cause. A bill of exceptions, or a case stated by the presiding Judge, in the nature of a bill of exceptions, is unknown to, and inadmissible in an appeal, or any proceeding in the nature of an appeal, from an inferior to a Superior court of chancery.

It was introduced into trials in courts of law by the statute

of 13 Ed. 1 ch. 31, was continued in our revised statutes of of 1836, (Rev. Stat. ch. 31, sec. 103,) and is contained in the Revised Code, ch. 31, sec. 9, but it has never been applied to the proceedings of a court of equity, either by statute, or by the practice of the court. We do not, therefore, feel ourselves at liberty to notice the statement of the Judge, which is attached to the transcript of the record, in this case, but must confine our attention, altogether, to the questions which the pleadings and proceedings present for our determination.— From these, it appears that a bill was filed in the court of equity for the county of Wake, to enjoin the collection of a sealed note made by the plaintiff to one of the defendants, a fiat for an injunction was made by a Judge in vacation, upon which a writ of injunction issued; at the proper time the defendants filed answers, and thereupon moved for a dissolution of the injunction, which was refused, and the injunction continued to the hearing, and they appealed from the interlocutory order to the Supreme Court, which Court declared there was no error in the order appealed from, and this was certified to the court below. The record of the latter court then states as follows:

"This cause coming on, motion is made by the plaintiff to set the cause down for hearing upon the bill and answers, and immediately thereafter, motion was made by the defendants to amend their answers; and the motion of the plaintiff was disallowed, and the motion of the defendant is allowed; and it is ordered by the Court that the defendants may amend their answers, from which order of the Court, the plaintiff craved an appeal to the Supreme Court, which is granted by his Honor; the plaintiff filing immediately in court, his bond for the appeal, which is approved by his Honor."

The question which is thus presented upon the record, is whether the order of the Court allowing the defendants to amend their answers was, under the circumstances, a proper order; and, preliminary to that, is another question, which is, whether the order was not a discretionary one, into the propriety of which, this Court cannot enquire. Upon the question of

the power of this Court to review the order from which the appeal was taken, we have no doubt. The 23d section of the 4th chapter of the Revised Code, which authorises the Judge of a court of equity to allow an appeal to the Supreme Court from an interlocutory order, is certainly broad enough in its terms to embrace the present case, whether the order was made in the exercise of a discretionary power or not. But it is argued that the allowance of an appeal from an interlocutory order of the superior court of law, is embraced in the same section, and is given in precisely the same terms, and yet it has always been held that the Supreme Court cannot review, upon an appeal, the exercise of a purely discretionary power in the superior court. That is undoubtedly true, and yet it is equally well settled that the superior court will review, upon an appeal, a discretionary order of the county court, though the right of appeal is given in terms not more comprehensive than in the case of an appeal from the superior to the Supreme Court. The distinction, and the reason for it, are clearly pointed out in the arguments of the plaintiff's counsel. In appeals from the superior court of law, the Supreme Court is strictly an appellate tribunal, and can review only questions of law, as if they were brought before it by a writ of error. Hence, when the question decided, in the court below, is one of discretion for the Judge, there cannot be any error in law, because the Supreme Court has no means of ascertaining whether the discretion was properly exercised or not. But the superior court is not solely an appellate court with power to review and correct the errors of the county court, in matters of law only; on the contrary, an appeal from the county to the superior court, may take up the whole cause to be heard *de novo*, upon matters of fact, as well as matters of law. The latter may examine testimony, if necessary, in every case, even those in which there may be an appeal from an interlocutory order, which does not take up the whole cause; and it has every means of deciding, which could be had by the county court. Hence, it has been allowed, in every instance, to review orders of the county court which have always been

deemed discretionary. Strongly analogous to this, is the relation between the Supreme Court and the court of equity, as established by the statute law of this State. In matters of equity, the former is not solely an appellate court to correct errors of law. Causes may be removed into it from the latter, to be heard for the first time, upon questions of fact, as well as of law; and, in appeals from the final decree of the court of equity, the causes are heard in the Supreme Court, in the same way. The Supreme Court has, therefore, the same materials for forming a correct judgment, as the court of equity, in every case, and upon every question, whether discretionary or otherwise. Hence, we conceive, that every order of the court of equity, by which the *rights of the parties* may be affected, may be reviewed in the Supreme Court. There may be, indeed, some orders of a discretionary kind which do not affect the merits of the cause, as, for instance, an order for its continuance, or for giving time to a defendant to file his answer, from which no appeal would be entertained by the Supreme Court, as, in like case, no appeal would lie from the county to the superior court; but from all interlocutory orders which do or may affect the merits of the cause, an appeal may be taken from the court of equity to the Supreme Court, and the question, whether one of law or fact, will be there considered, and either reversed or affirmed. In every such case, it will be found that the question, though called discretionary, is not strictly so, but is one which ought to be decided upon the authority of established principles, or by the settled course and practice of the Court.

Having ascertained that we have the power to entertain the appeal, and to review the interlocutory order from which it is taken, we have no hesitation in saying that the order for the amendment of the defendants' answer was, under the circumstances, improper, and ought to be reversed. In considering this subject, we must bear in mind, that in questions of pleading and practice, our courts of equity, are to be governed by the rules of the English Court of Chancery, except where such rules have been abrogated, altered, or modified by our statute

law, or, where our courts, themselves, have been compelled to vary them, for the purpose of adapting them to their peculiar organization. In the question of allowing a defendant to amend his answer, we are not aware of any established innovation by our courts, upon the practice in England. Very few cases are to be found, in our Reports, where the subject is mentioned, at all; and, in those, it is merely said, or intimated in general terms, that the courts of equity have the power to allow amendments in answers; (see *Williams* v. *Williams*, 2 Hay. Rep. 220, and *Daggett* v. *Hogan*, 5 Ire. Eq. Rep. 347.) But the rules and regulations under which, and the extent to which, they will be allowed, are not specified. In the absence of cases decided, in our own courts, then, we must resort to the English cases for information on the subject. From a note to the case of *Livesay* v. *Wilson*, 1 Ves. and Beame's Ch. Rep. 149, we learn that, in cases of mistake, defendants have been indulged in amending their answers:

1. In small and immaterial matters. 2. Where a mistake had crept into the engrossment. 3. Where new matter has been discovered since the original answer was put in. 4. In case of surprise. And 5. In mistakes of names. But where the defendant mistook, first, the law; secondly, where he had unintentionally perjured himself, and an indictment was suspended over him; and thirdly, where from the circumstance, that at the time of the answer put in, the defendant had not set forth his defense from an inability to state it with precision, the court has refused him the indulgence of amending. From the same note, we learn, that "as to the *mode* of amending, the practice formally was, to allow the answer to be taken off the file, and a new answer to be put on it. But the present practice is understood to be to permit a supplemental answer to be filed, leaving to the parties the effect of what was originally sworn, with the explanation of the subsequent answer."

From these rules, it will be seen that the English practice in allowing defendants to amend their answers, is very strict, and that the courts never lend a willing ear to such applications. Thus, in the case of *Livesay* v. *Wilson*, *ubi supra*,

where a defendant had stated in his answer that he had taken possession of the whole of certain property, and afterwards applied for leave to amend, upon the ground of a mistake in saying that he had taken possession of *the whole*, when in fact he had taken possession of a part, only, of the property, the Lord Chancellor, ELDON, said, that as the fact was a very material one, he would not permit the amendment to be made—"unless the defendant will tell me, on his oath, that, when he swore to his original answer, he meant to swear in the sense in which he now desires to be at liberty to swear; if he did not, I will not suffer him to avail himself of the fact, as he now represents it."

The courts of equity in this country have followed the English practice, whenever the the question of permitting amendments to answers has come before them. The whole subject was considered fully, and with his usual ability, by Judge STORY, in the case of *Smith* v. *Babcock*, 3 Sumner's Rep. 583. In the course of his opinion, he enunciated the following propositions: In matters of form, or mistakes of dates, or verbal inaccuracies, courts of equity are very indulgent in allowing amendments of answers. But they are slow to allow amendments in material facts, or to change essentially the grounds taken in the original answer.

Where the object is to let in new facts and defences, wholly dependant upon parol evidence, the reluctance of the court to allow amendments, is greatly increased, since it would encourage carelessness and indifference, in making answers, and open the door to the introduction of testimony manufactured for the occasion. But where the facts sought to be introduced, are written documents or papers, which have been omitted by accident or mistake, there the common reason does not apply in its full force; for such papers and documents cannot be made to speak a different language from that which originally belonged to them.

The whole matter is in the discretion of the court; but before the amendments to the answers are allowed, the court should be satisfied, that the reasons assigned for the applica-

tion, are cogent and satisfactory; that the mistakes to be corrected, or facts to be added, are made highly probable, if not certain; that they are material to the merits of the case in controversy; that the party has not been guilty of gross negligence; and that the mistakes have been ascertained; and the new facts have come to the knowledge of the party, since the original answer was put in and sworn to. See also, *Bowen* v. *Cross*, 4 John. Ch. Rep. 375. In all the cases where material amendments to the answers are proposed to be made, it will be seen that the defendant must support his application by an affidavit, wherein he must set forth the cause of the omission or mistake, and the mistakes which he wishes to correct, or the facts which he desires to add. In the case now under consideration, nothing of this kind was done, and yet it is difficult to imagine one, in which all the safe-guards, which the courts of equity have thrown around the amendments of answers, ought more strictly to have been attended to. The Supreme Court had decided that, upon the answers as they stood, the plaintiff was entitled to his injunction. It is manifest that no amendments could have been of any use to the defendants, unless the answers could, thereby, introduce and set up new defences. But, although such was the state of the case, the Court below, upon a mere motion, unsupported by any affidavit, and without being informed, so far as we can see, why any amendment was wanted, or what was wanted, allowed the defendant to amend, *ad libitum*. Such an order cannot be supported, and must be reversed. If proper grounds be laid for the application, according to the well established rules of practice on the subject, the court of equity, from which this appeal is taken, will, no doubt, allow such amendments to be made to the answers, or rather supplemental answers to be put in, as under all the circumstances of the case, are just and proper.

The case of *Bowen* v. *Cross*, referred to above, was like the present, an application to amend an answer, after an unsuccessful motion to dissolve an injunction. The Chancellor, KENT, allowed an additional or supplemental answer to be put in, but it was done upon an affidavit of the solicitor, who drew

the answer, that the matter desired to be inserted in the amendment, was omitted by a mistake of his own, and not of the defendant. The Chancellor, after referring to the cases decided in the English Court of Chancery, upon the question, concludes thus: "There can be no doubt that the application ought to be narrowly and closely inspected, and a just and necessary case clearly made out. In the present case, the defendant moves to make sundry amendments, but there is no ground for the indulgence, except as to the mistake sworn to have arisen on the engrossment of the answer, and not discovered until it was filed; and as to the omission of the solicitor to make the schedule, referred to in his affidavit, a substantial part of the answer. The defendant handed the document to the solicitor when he was to prepare the answer; and, no doubt, it was his intention that it should have been used in a way the most fit and proper for his defence. The omission to annex it, may be imputed to a mistake of the solicitor; and, after some hesitation, we are inclined to permit a supplemental answer to be filed in respect to those two omissions, and *as to them only.*" We have thus for our guidance, the opinions and practice of three of the most eminent equity Judges of modern times; and, by them, we are taught, that while supplemental answers may be put in by amendment, at almost any time during the progress of the cause, the permission to do so, is given with extreme caution, and never, in any substantial matter, except upon affidavit. The order made in the Court below is reversed, and this opinion will be certified as the law directs.

PER CURIAM. Order reversed.

JAMES LATHAM *against* JOHN McRORIE.

Where the plaintiff claimed that the defendant had purchased a tract of land at sheriff's sale, under an agreement that they were to be joint owners o·

it, and the defendant took the sheriff's deed to himself, proof that the plaintiff, in the assertion of his right, received the rent for one year from a tenant with the knowledge and approbation of the defendant, was *Held* to be a fact *dehors the deed* inconsistent with an absolute purchase to himself, and being corroborated by defendant's declarations admitting the plaintiff's equity, was a good ground for relief.

CAUSE removed from the Court of Equity of Davie County.

In the year 1847, the defendant bid off, at a sheriff's sale, three tracts of land, lying in the county of Davie, and having paid the money, to wit, $244, he took from the sheriff, a deed, conveying to him the said several tracts. Afterwards, he re-sold the premises at a profit of about $300. The plaintiff alleges that having met with some loss, by having been the surety of the former owner of the land, one Veach, he conceived the purpose of purchasing the land at the sheriff's sale, and re-selling at a profit, but not having the money to pay for it, he applied to the defendant, who was a merchant, in Mocksville, to borrow the necessary amount; that the defendant refused to lend him the money, but agreed that he would bid off the land, if it should go at less than its value, and let the plaintiff come in as a joint purchaser with him, he advancing the whole of the necessary funds; that a part of this agreement was, that the land should be afterwards re-sold, and that the two should share equally in the profits made on the resale; that this re-sale was in the year 1848, on a credit, the defendant taking the notes of the purchasers for the price; that he frequently afterwards, applied to the defendant for his share of the profits, but that defendant always put him off with the declaration that he had not yet collected the money; that finally, upon his urging his claim, in the year 1855, he denied, altogether, the plaintiff's right to participate in the profits, and insisted on holding the same for his own exclusive use and benefit; whereupon, he immediately brought this suit. The prayer of the bill is for an account of the rents and profits of the land, received by the defendant while he held the lands in question, and for the payment to him of one half of the sums realised upon a re-sale of them.

The defendant, in his answer, totally denies the equity set up by the plaintiff. He says no such trust or agreement ever was entered into by him; that he purchased the land for his own exclusive use, and has never recognised the plaintiff's interest therein in any way, and he insists upon the statute of limitations as a bar to the plaintiff's claim.

There were commissions and proofs filed in the case. The plaintiff proved by *John A. Lefler*, that in December, 1848, he purchased one of the tracts of land sold as the property of Thomas Veach; that when he first applied to McRorie to make the purchase, he referred him to Latham; that he and the latter not being able to agree, as to the price, he, witness, and Latham went to Mocksville together, and there, after a private conference between the plaintiff and defendant, McRorie said to the witness, they found "they could not afford to take less than $450," the price which Latham had asked him; that thereupon he completed the bargain at that price.

J. M. Gabard deposed that some months after the sale, the defendant asked him if he did not want to buy one of the tracts of land bought at Veach's sale; that he and Mr. Latham had bought the land to make themselves safe; that they did not want it, and would sell it.

Samuel Rose deposed that between the time of the purchase of the lands by the defendant, and the re-sale of them, he heard the defendant say that he and Mr. Latham had bought the lands jointly, and that the profits were to be divided equally between them.

Ishmael Williams deposed that shortly after the sheriff's sale, he applied to the defendant to buy one of the tracts bid off by him, that he told him that he and plaintiff had purchased the Veach lands to save themselves; that he then applied to the plaintiff for the same purpose, who said that he was interested in the lands, but told him any trade that he would make with McRorie, would be satisfactory to him; whereupon he returned to the defendant and effected a purchase of one of the tracts.

John McCulloch states in his deposition, that he was a tenant

on one of the tracts of land, and had a growing crop of corn on it, when it was sold by the sheriff; that the plaintiff came to him and told him that he and the defendant had bought the land jointly, and requested him to let him know when the corn would be shucked, so that he might come and get the rent, which was one third of the crop; that he gave him notice, as requested, and the plaintiff received the whole rent, which was a hundred bushels, and that "McRorie never mentioned to him any thing about the rent, from that day to the present."

Joseph B. Jones testifies that he was present, in 1855, when the plaintiff demanded his share of the profits arising on the re-sale of the land, when the defendant said he had lost by Veach; that he could have the corn that he had already taken, but he should hold on to the proceeds of the land to save himself.

The cause being set down for hearing, on the bill, answer and proofs, was transmitted by consent.

No counsel appeared for the plaintiff in this Court.
Clement, for the defendant.

BATTLE, J. The ground upon which the plaintiff places his claim to relief, is the allegation, that by an agreement made between him and the defendant, the latter was to purchase the tracts of land mentioned in the pleadings, on the joint account of himself and the plaintiff, and that upon a re-sale, they were to share equally in the profits or loss. The defendant denies the allegations in the most positive terms; insists that he purchased the lands for himself alone, that he took the sheriff's deed to himself, and that he re-sold the lands as his own, and for his own benefit. He insists, also, upon the statute of limitations, and the lapse of time. The plaintiff put in a replication to the answer, and the parties proceeded to take their proofs. From these, it appears, that if the plaintiff has made good his claim to relief, neither the statute of limitations, nor the lapse will bar it, and consequently, such

a bar has not been insisted on in the argument before us. In examining the proofs, we find from the testimony of four witnesses, to wit, Messrs. Rose, Gabard, Lefler, and Williams, that the defendant, at different times, and under circumstances in which they could not well be mistaken, acknowledged that he had purchased the land on the joint account of himself and the plaintiff. The witness McCulloch testifies that during the year, in which the lands were sold by the sheriff, he was cultivating one of the tracts as tenant, and that the plaintiff claimed and took a part of the crop as rent, upon the ground that he was interested in the purchase; and the defendant had never objected to it, nor said any thing to him about it. Mr. Jones, another witness, states that he was present in February or March, 1855, when the plaintiff claimed from the defendant an account of the profits derived from the re-sale of the lands, when the defendant said that the plaintiff might have the corn that he had already taken, but that he, defendant, would hold on to the proceeds of the lands to save himself, as he had lost by Veach, the former owner.

This testimony makes out a case against the defendant so strong, that his counsel allege nothing against it, except that the testimony proves nothing but the declarations of the defendant, and that they alone are not sufficient to convert the deed taken from the sheriff to himself, into one to himself and the plaintiff jointly; and for this position, he relies upon the case of *Brown* v. *Carson*, Busb. Eq. Rep. 272, as one directly in point. That case was decided upon the ground that, except the declaration of the defendant, there was no proof of any fact *dehors the deed*, inconsistent with the idea of an absolute purchase. But the case is no authority for the present, because here, there was *a very significant fact*, inconsistent with the idea of the defendant's having purchased for himself alone: the plaintiff claimed and took the rent of one of the tracts of land as a joint purchaser, and the defendant never claimed it himself from the tenant, nor objected to the payment of it to the plaintiff. It is true, that the defendant says in his answer, that he sold this corn to the plaintiff,

who promised to pay him for it, but this allegation is not supported by any proof, and is discredited by the testimony of Mr. Jones. This, then, lets in the declaration of the defendant, as corroborating proof, and compels us to declare that the plaintiff is clearly entitled to the relief which he seeks.

PER CURIAM, Decree accordingly.

ROBERT HOLDERNESS *and wife and others against* LAVINIA J. PALMER, *Executrix.*

An estate, in the hands of an executor, turned out to be greatly more in debt than was anticipated by the testator, in consequence of which, it becoming necessary to sell property specifically disposed of by the will, the executor procured an order of the Court of Equity, and sold lands, specifically devised, instead of slaves. Several of these slaves, while in the executor's hands, died, without any fault or neglect on his part; it not appearing that this substitution of the slaves for the land, was prejudicial to the general interest of the legatees, and the executor having acted in good faith in making it, it was *Held* that he was not, in equity, accountable for the value of the slaves that had died.

CAUSE removed from the Court of Equity of Caswell county.

The main purpose of the bill, in this case, was, to call upon the executor for an account and payment of legacies, under the will of Nathaniel P. Thomas; by a reference to the clerk and master, and upon a confirmation of his report, a decree passed upon all the matters involved in the pleadings, except whether the loss of several slaves, who died while the estate was in the hands of the executor, should fall upon him or upon the legatees, to whom they were beqeathed.

The question, and all the facts bearing upon it, are so fully stated in the opinion of the Court, that it becomes unnecessary to recite them here.

Hill and *Morehead*, for the plaintiffs.

Winston, sen., and *Norwood*, for the defendant.

BATTLE, J. All the matters in contest between the parties have been settled and adjusted, by a former decree in the cause, except the question, whether the executor of Nathaniel P. Thomas shall be charged the value of certain slaves, who died between the time of the death of the testator and the period when they were to be delivered up to his legatees. The testator, in his will, had directed as follows: "That the negro slaves, given to my son Junius, and daughters, Virginia and Rebecca, shall be left and worked on my home tract of land, given to my son Junius, for the mutual support of my said daughters and son; each of my said daughters to receive their share on their arriving at lawful age or marrying. And the said place, if they desire it, is to be their home as well as that of my son Junius. Until that time, the said negro slaves to be placed under the direction of a suitable overseer, and in the employment of such an overseer, a preference is to be given to my friend William Bryant, if his services can be procured at a reasonable price, to be judged of by my executor." In the course of his settlement of the estate, the executor ascertained that it was much more indebted than the testator seemed to suppose, and that to pay the debts, he would have to sell property specifically devised and bequeathed. He accordingly procured an order of the Court of Equity for Caswell county, to sell the home tract which had been devised to the devisor's son Junius, and upon which the slaves were directed to be kept, according to the provision of the above recited clause of the will. In the bill which the executor caused to be filed for the sale of this tract of land, it was alleged that the sale would be for the best interests of the infant owners, but nothing was said about the necessity of the sale for the payment of debts. Lands devised to the devisor's daughters, were also sold, under an order of the same court, at the instance of the executor, upon an allegation, not only that the best interests of the infants would be promoted by it, but also that it was necessary for the purpose of paying debts, with the view to prevent the sale of slaves for that purpose. The sale of all the land was made by the clerk and master, and

reported by him to the Court, which, by an order, confirmed the sale, and, upon the purchase-money being paid, directed titles to be made to the purchasers. After the home tract had been sold, the executor hired out the slaves bequeathed to the testator's son Junius, and his daughters, Virginia and Rebecca, until they were delivered to the legatees, during which time several of the negro children died.

The counsel for the plaintiffs contend that the executor violated his duty by selling the home tract of land, contrary to the express provisions of the will, which he had undertaken to execute; that in consequence of such sale, he had himself made it necessary to hire out the women and children, whereby they were not properly taken care of, and several of the children died, and that the executor ought to bear the loss. For this position, the counsel cite, and rely on, the authority of the case of *Beall* v. *Darden*, 4 Ire. Eq. Rep. 76.

The counsel for the representative of the executor, who is now dead, contends on the contrary, that the executor ought not to be held responsible for the loss. 1st. Because the land was sold by an order of a court having jurisdiction of the cause, and the propriety of the sale cannot now be impeached collaterally in the present suit. 2ndly. That a sale, either of land or of slaves, was necessary to pay the testator's debts, and if it be supposed that the executor erred in selling the land instead of the slaves, it was only an error of judgment, for which, if he acted *bona fide*, he ought not to suffer; and that he acted in good faith, could not be doubted, because he was in no way himself benefitted by the sale of one kind of property more than the other. 3rdly. That it did not appear that the plaintiffs were, upon the whole, injured more by the sale of the land than they would have been by the sale of the slaves.

In support of his first ground, the counsel relies upon the case of *Harrison* v. *Bradley*, 5 Ire. Eq. Rep. 136; but it is unnecessary for us to consider it, as we are satisfied that the case is, with him, upon his second and third grounds. In the case of *Beall* v. *Darden*, above referred to, it was held that

where an executor delays an unreasonable time, as for instance, three years, to sell slaves, whom it is his duty to sell, and they are then lost, he will be answerable to the creditors, for their value as assets. So, where an executor or administrator is guilty of gross neglect in suffering slaves to remain with an improper person as bailee, for a long period, and they are sold by him, so as to be lost to the estate, the executor, or administrator, will be answerable for their value to the legatees or next of kin. But in the same case, it is said that an executor, like any other trustee, is not to be held liable as an insurer, or for any thing but *mala fides*, or want of reasonable diligence. We do not controvert these positions; on the contrary, we admit their correctness, and intend to apply them as a test to the present case.

The executor, having sold the home tract of land, contrary to the directions of his testator's will, is to be considered as having *prima facie* acted in bad faith, and the burden of showing that he acted *bona fide*, and as a man of ordinary prudence would, or might have done, under similar circumstances, is thrown upon him. This, we think, he has done, by showing that the estate was in debt, and that it was absolutely necessary to sell, either land or negroes, to pay the debts. An exigency had occurred, not foreseen, and therefore, not provided for by the testator; for he no more expected the slaves, which he had specifically bequeathed, would be sold, than that the land would be disposed of. Had the slaves been sold instead of the land, they could not have been kept together on the home tract, and thus the testator's will would have been disappointed as much as it was by the sale of the land. The executor, then, was in a strait, and yet he must do the one thing or the other, sell land or sell negroes; for the debts must be paid. Is it certain that he did not act for the best in selling the land? Does it any where appear, that the increase of the slaves, notwithstanding the death of some of them, and the rise in the value of the others, did not make them to be worth as much to the legatees when they received them, as the land would have been worth, had that been kept? An-

other consideration must not be overlooked. The testimony shows that not one of the children, who died in this State, did so from the want of proper attention. Two of the most valuable of them died of scarlet fever in the possession of the executor, on one of the plantations left by the testator, and under the care of the testator's favorite overseer, William Bryant. Others were infants, from one to two or three years old, and died from the effects of teething. The remainder died in Virginia, in the possession of Wm. Thomas, a brother of the testator, who had very shortly after the testator's death, taken them by force from the home tract, and carried them out of the State. For those, thus carried off against the will of the executor, we presume there can be no pretense to hold him responsible; and as to those who died in this State, is it certain, or even more probable, that the scarlet fever and teething might not have caused their death on the home plantation as well as any where else? We are by no means satisfied that the plaintiffs were not, on the whole, as much benefited by the executor's keeping the negroes, as they would have been by his keeping the land. But if that were not so, and it were an error to sell the land instead of the slaves, it was a mere error of judgment, committed in good faith, and one which any man of ordinary prudence might have committed. The executor was not intended to be, nor was he in fact, benefited by it, and it would, therefore, be too broad a rule to make him responsible for a loss which did not, after all, follow as a necessary, or even a probable, consequence of his acts. It must be declared, then, that the estate of the executor shall not be charged with the value of the deceased slaves in question, and the exception is therefore overruled.

Per Curiam, Decree accordingly.

JOSEPH WEISMAN *against* THE HERON MINING CO. *and others.*

If a defendant wishes to avoid a full answer, he must demur to the relief and discovery sought.

But a defendant cannot answer a bill in part, and introduce new matter as going to defeat the plaintiff's equity, and insist on that as a reason why he shall not answer another part of the bill.

Where he wishes to avoid an answer in respect to a particular matter, (as that it will criminate him, &c.) he must answer the other parts of the bill, and demur to the discovery of such particular matter.

Where defendant wishes to avoid a full discovery, on the ground, that there is a fact which defeats the plaintiff's equity, he must allege such fact by plea.

The Court disapproves of the practice of setting forth *arguments* in support of the equities relied on, either in a bill, or answer.

THIS was a suit removed from the Court of Equity of Wake county.

The general scope and object of the bill was to enforce the equities, growing out of a contract, in writing, between the plaintiff, Weisman, and Richard Smith, the testator and devisor of the defendants, Penelope and Mary A. Smith, and against the latter and their alienees.

The plaintiff sets forth, in his bill, that in 1842, at great pains, and outlay, he discovered a large extent of plumbago in the vicinity of Raleigh, and not having the requisite means to purchase, he engaged the testator, Richard Smith, husband of defendant Penelope, to join him in purchasing the land, upon which this mineral existed; that accordingly, they entered into a covenant, in writing, in which it was stipulated that in consideration of the plaintiff's disclosure of his discovery, the said Smith should, from time to time, advance the funds requisite to purchase these lands, to an amount, not exceeding $10,000; that as soon as any such tracts shall be purchased, Smith was to convey one-half thereof to him, Weisman, in fee; also, that he should convey to plaintiff one-half of all the land he, Smith, had purchased, in furtherance of their plans of manufacturing and selling mineral, before the

execution of this covenant, and that he, Weisman, was to convey one-half of all the lands which he had purchased, or might purchase, with the same object and views; that plaintiff was to pay Smith $3,500, at the expiration of five years, with interest, for his moiety, for which plaintiff pledged his interest; that should the purchase of these lands exceed $10,000, the excess should be a charge upon the profits of the concern, and that neither party should appropriate any part of the profits until such excess and expenses of the business were paid off; that as soon as the purchases were made, the parties should commence the business of raising, preparing for market, and selling this mineral, and that plaintiff should devote the whole of his time to the superintendence of the business; that each party should keep proper accounts of the business, and that if no profits should arise, each party was to pay one half of the excess over $10,000; that all monies should be paid into the hands of Smith, who should make advancements to carry on the business, and that all transactions should be carried on under the name of "Smith & Weisman." And that it was further covenanted as follows, to wit: "That if either party shall, at any time, wish to withdraw from said concern, he shall not be at liberty to sell or convey his share, or moiety, or any part or portion thereof, to any other person before he shall have given to his copartner at least 12 months notice thereof, and to whom the refusal to purchase shall always be given, within that time. And the said parties do severally agree to bind, and do bind themselves, their heirs, executors, administrators, to the strict performance of this last article."

That the said Smith, in pursuance of the covenant, purchased the following tracts of land in Wake county, viz: the "Cook tract" of 460 acres; although the conveyance was prior to the covenant, yet it was purchased in pursuance of the agreement afterwards embodied in the covenant above recited; the "Saunders tract" 82½ acres; the "Collins tract" 537¼ acres; the "Haywood or Harrison tract"; the "Robeteau tract" 50 acres; the "Malone tract" 176 acres; the "Finch

tract" 55 acres; the "Johns tract" 700 acres; the "Spikes or Jeffrey's tract" 340 acres; the "McDade tract" 130 acres; the "Stuart tract" 176 acres; the "High tract" 400 acres; one half of the mining interest in the "May tract"; the mining interest in a tract owned by William Hill 700 acres; the "Evans' Heirs tract" 256 acres; the "Alfred Jones tract" 556 acres; the "Hollister tract" 880 acres, also a small tract of 4 acres called the the "Mill tract;" amounting in the whole to 5956 acres; the titles of all of which were made to the said Smith, as plaintiff alleged, for the benefit of plaintiff and himself, and in which, he insisted under their contract he was entitled to a pre-emption or refusal. The bill alleges that the said Smith bought for the like use other lands, the boundaries and description whereof, were unknown to the plaintiff and which he prays may be discovered, to the end that he may be admitted to his rights in the same, as above set forth. He asks for a discovery as to whether there were not other lands bought by Smith, than those stated in the bill..

To the interrogatory, based upon this allegation, neither of the answers responded, and for this the plaintiff excepted. This is the plaintiff's *fourth exception* to the defendants' answers.

FIRST EXCEPTION.

The bill alleges that after the death of Richard Smith, his widow Mrs. Penelope Smith and his daughter Mary A Smith, to whom these lands were by him devised, sold the same to the defendant Winder, in fee simple, and avers that he had notice of the covenant above set out, and of the plaintiff's pre-emption right under it. He professes his willingness to pay the amount which Winder actually gave for the land, but suggests that that sum was much less than the consideration money inserted in the deeds of conveyance to him, and that the sum was exaggerated in order to deter him from making the election which he claims to be his right under the deed of covenant above recited. He calls on these defendants Winder, Mrs. Smith and her daughter to discover whether any part of this price was paid and if so how much

To the interrogatory shaped upon these allegations, the defendants Penelope and Mary Smith say, they decline to answer as being "impertinent, irrelevant and useless." The defendant Winder in response to this interrogatory says 1st. That he never heard of this pre-emption claim until after he purchased, and had no knowledge of it. That the plaintiff himself in many instances acted as if none such existed, or as if he had abandoned it. The answer goes on here to state various passages between the plaintiff and himself and others, inconsistent with the claim. 2ndly. That this right was settled, compromised and given up in a new arrangement between Smith, Weisman and one Hepburn, whereby one half of all these lands, except the mill tract, was conveyed by Smith to Hepburn and the plaintiff. 3rdly. That even when the contract of 1843 was in force, the provision for a pre-emption was a nullity, because it was utterly impracticable of execution. 4thly. That if practicable it was personal, and was annulled by the death of Smith, and likewise by the sale to Hepburn, when the interests of the parties became unequal. 5thly. That the covenant did not run with the land, and as this defendant purchased, without notice, he is not affected: and that for these reasons this defendant is advised, and being so advised, he insists that the demand made by the plaintiff to be informed by this defendant of the price at which he bought, or contracted to buy of the devisees of Richard Smith, their interest in the said mineral lands, is "irrelevant and impertinent, and that he is not bound to answer the same, or make any discovery thereof and this defendant therefore declines to make answer thereto." To both these answers to this interrogatory the plaintiff excepts, which is his *first exception.*

SECOND EXCEPTION.

Mrs. Smith and her daughter had been sued by Winder upon their covenant of seizin and recovery had againt them in the Supreme Court upon the ground that there was a contingent limitation in the will of Richard Smith to the children of Mary Smith if she should ever have any, which disabled the

bargainors from conveying an absolute fee. The plaintiff prays, in this same connection, a discovery whether the price agreed to be paid by Winder for these lands was not greatly abated on account of this recovery. To this inquiry the defendants decline to answer, alleging the same reasons for not doing so as to the other branch of the inquiry.

THIRD EXCEPTION.

The pleadings show that after this covenant between Smith and Weisman in 1843, Weisman went to Philadelphia to establish a factory and store-houses where the mineral in question was to be refined and sold; he alleges that he went to great expense in making preparation for this business, but Smith sent him on little or none of the material; that he, hearing that Smith was endeavoring to thwart and harrass him because his means were limited, sold one half of his interest to one Hepburn, a capitalist of that city, for $10,000 with the purpose of raising the means thus acquired in performing his part of the mining and manufacturing business more vigorously, but when they went to Smith to convey the legal title of his fourth to Hepburn, he refused to do so unless this whole sum of $10,000 was paid to him, Smith; he alleging that by the contract $3,500 was due him for the land on the first $10,000, and that the remainder, to wit, $6,500 was due on account of the excess of land over the sum first specified in the deed of covenant; that Hepburn, not having the money beyond the $3,500, gave his bonds to him, the plaintiff, for the remainder, which he endorsed to Smith, and Smith having conveyed a fourth of the land to each, both Hepburn and himself mortgaged their interest in these lands for the payment of these bonds. The plaintiff alleges that he and Hepburn had a controversy which was adjusted by arbitration, and the latter sold his share in this property to the defendant Winder; afterwards when the defendant Winder bought Smith's half from his devisees, the bonds which Hepburn had given (endorsed by plaintiff) were assigned by Mrs. Smith, the executrix of R. Smith, without recourse, to R. F. Stockton, but delivered to the defendant Winder, by whom it is alleged in plain-

tiff's bill, they were sent to Philadelphia, where plaintiff lived, and suit brought against him for the purpose of harrassing and oppressing him and to worry him into a sacrifice or abandonment of his rights. The plaintiff alleges that this indorsement to Stockton was illusory ; that he did not pay any thing for the bonds, or if so, a mere nominal sum, and prays a discovery as to this fact. Neither of the answers respond as to the amount paid to the Smiths for these bonds or whether any thing was paid by him, either for himself or for R. F. Stockton, nor do they answer as to the imputed design of harrassing the plaintiff, and for these omissions the plaintiff excepts, which is the third exception.

The cause was set down to be argued on the exceptions and sent to this Court.

Graham and *G. W. Haywood*, for the plaintiff.
Moore and *Mason*, for defendant Winder.
Miller, for the Smiths.

PEARSON, J. It is the settled practice of this Court, when the defendant wishes to avoid a full answer, and to raise the question that the plaintiff has no equity upon his own showing, he must demur to the "relief and discovery," on the ground, that it is not material for him to answer, inasmuch as the plaintiff, admitting every thing for the sake of argument, has not made out a case. When he wishes to avoid an answer in respect to a particular matter, on the ground that it would criminate him, or disclose matter confided to him as counsel, or an affair of State, he must answer the other parts of the bill, and demur to the "discovery" of such particular matter. When he wishes to avoid a full answer, on the ground, that there is some fact which defeats the plaintiff's equity, he must allege the fact by plea, so that the plaintiff may take issue; and when he wishes to avoid an answer to some particular matter, on the ground, that there is a fact, which excuses him from making a discovery in respect thereto, he must answer the other parts of the bill and allege the fact by plea, as that he is a purchaser for valuable consideration, without notice, and

therefore is not obliged to discover his title. With these exceptions of a demurrer to the discovery of a particular matter, and a plea in respect to some particular matter, as to which a discovery is asked for, the general rule is, "a defendant, if he answers at all, must answer fully" to all allegations which are material to the *equity set up by the bill:* so that if the answer is excepted to, as not responsive to a particular allegation, and he puts the omission on the ground of its being immaterial, the exception is heard upon the assumption that, according to the plaintiff's own allegations, and supposing him entitled to the equity which he seeks, the particular allegation is impertinent. The defendant Winder, in this case, attempts to make an entire departure from this practice. After setting out many matters by way of defense, and responding to other facts of the bill, he declines to answer a particular allegation, and sets out *in extenso*, *five reasons* for doing so; which involve new matter introduced by his answer, in regard to which, of course, at this stage of the proceeding no declaration can be made, and upon the hearing of the exception, it is insisted, in his behalf, that an answer should not be required, because the allegation was immaterial, on the broad ground, that according to the plaintiff's own showing, he had no equity; thus attempting to draw in question the plaintiff's equity, upon an exception to the answer, instead of doing so by the orderly mode of filing a demurrer, which gives notice to the opposing counsel, and upon which the whole matter, being fully debated by counsel, on both sides, and being considered by the Court, its opinion may be declared, and a definite action taken, either by dismissing the bill for the want of equity, or by a declaration of the plaintiff's rights, and an order that the defendant answer. One or two cases were cited, by which it appears, that in several of the States a departure has been made from the practice stated above, and by the case of *Hardiman* v. *Harris*, 17 Curtis, 372, it seems that the Supreme Court of the United States, on an exception to the answer, will decide upon the plaintiff's equity. It may be, that the inconvenience of the

practice is not so perceptably felt in that Court, because the opposing counsel, and the Court are furnished with printed briefs, containing a list of the authorities that are relied on. But we are satisfied that this new practice is both inconvenient and unfair. The inconvienence is readily perceived, and the unfairness consists in this: if the plaintiff has no equity, the defendant is not obliged to answer, and when, instead of demurring, he puts in an incomplete answer, the motive must be to take advantage of the occasion, in order to make a favorable impression, by setting out his matters of defense, and denying all the allegations of the bill as far as his conscience will permit, and stopping short on the ground that the plaintiff has no equity any how! For these reasons, we will not permit a departure from our practice.

While upon the subject, we enter our protest against the practice, which we perceive, not only by the pleadings in this, but in several other cases, within the last few years, is growing up; we refer to setting out in the bill, or answer, the reasons or causes of argument, which tend to support the case, or the defense. The place for all this is upon the argument of the cause and not in the pleadings, and the practice, besides incurring unnecessary costs, is productive of very great inconvenience; for when it becomes necessary to look over the pleadings for a particular point, it is literally "hunting for a needle in a hay stack."

The present case is complicated, because the plaintiff seeks to set up *three* equities distinct, but still somewhat connected, as they all grow out of one original transaction. The pleadings, therefore, are necessarily voluminous, and we are not to be understood as applying the rule, "a defendant, if he answers at all, must answer fully," to these three distinct equities. He may, of course, demur, plead, or answer, to each severally; but when he undertakes to answer as to one, he must do so fully in regard to it.

The first exception is allowed, and also the second, which rests upon the same ground. The third is allowed, on the ground, that the answers do not respond *directly* to the alle-

gations and the interrogatories framed therein. The defendant Winder, in an evasive and exculpatory manner, admits, inferentially, that he did not take a proper view of his obligation to indemnify Hepburn, who was the principal in the notes to Smith, the plaintiff being his surety, but he does not answer the allegation, that he caused the plaintiff to be sued, &c., for the purpose of harrassing him, &c., or thereby forcing him to abandon or compromise his rights.

The 4th exception is also allowed. The plaintiff is entitled to a direct answer, as to whether Richard Smith did not purchase other land, in pursuance of the covenant, than those specifically set out in the bill, and if so, what tract or tracts?

PER CURIAM, There will be an order requiring a more full answer.

CASES IN EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT MORGANTON.

AUGUST TERM, 1858.

ELI ASHLEY *against* JOHN SUMNER.

A person who makes a vague and indefinite entry of land, which he ascertains does not cover the land aimed at, cannot *shift* the entry to another piece of land which was entered before such attempted transfer; especially if he has notice of the prior entry.

Where it is alleged in the bill, and admitted in the answer, that one having an equity in the subject matter of the controversy, had transferred the same to the plaintiff, for a valuable consideration, the omission of such person as a party, forms no objection to the bill.

CAUSE removed from the Court of Equity of Buncombe county.

The defendant, John Sumner, made an entry of vacant land in the office of the entry-taker of Buncombe county, on the tenth day of November, 1851, which describes the land as follows: "One hundred acres of land, on the west side of French Broad River, joining his own lands, and the lands of James Case," which was intended to cover certain land adjoining his own and James Case. Afterwards, to wit, on 2nd

of November, 1852, William B. Lance entered the land in controversy, and described it in his entry as "fifty acres of land, on the west side of French Broad River, on the waters of Asten's branch, joining the lands of Jackson Shipman, John Sumner and Polly Steward," and obtained a grant from the State for the same, dated 15th day of August, 1854, which, while it was yet an entry, was sold to the plaintiff by Lance, for a valuable consideration.

After Lance made his entry, Sumner proceeded to survey the land according to his entry, and on doing do, he found that the land, which he intended to enter, and which was a piece adjoining his own land and that of James Case, was already embraced in a grant which he had taken out. Thereupon, he had the land, which is the subject of this controversy, surveyed, and obtained a grant for the same as above stated. This land does adjoin his (Sumner's) own land, but does not adjoin that of James Case, being separated therefrom by another tract of land, owned by a third person. At the time Sumner shifted his location to the land entered by Lance, he had notice that the latter location covered the land entered by Lance.

The prayer of the bill is to convert the defendant into a trustee for the plaintiff's use and benefit, and to compel him to convey the land, thus held by an elder grant, to himself as the assignee of Lance.

The answer admits that the defendant failed on the first survey to find the land which he then surveyed, under his entry, vacant, as it turned out to be within the boundaries of a tract which had been formerly granted to him. He further admits, that he transferred his location to the land that had been entered by Lance, and that this does not adjoin the lands of James Case. He admits the conveyance of Lance's right to the plaintiff for a valuable consideration.

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

Shipp and *Merriman*, for the plaintiff.
J. W. Woodfin, for the defendant.

PEARSON, J. It is the policy of the public to have all the vacant land appropriated by individuals. So far as the State is concerned, it is a matter of indifference who appropriates the land, provided it be paid for. Upon this ground it is settled, that where an entry is made in terms of general description, it may be made certain, and the particular land identified by a survey, if it be done before the right of another enterer has attached; *Johnston* v. *Shelton*, 4 Ire. Eq. 85; *Monroe* v. *McCormick*, 6 Ire. Eq. 85; *Fulton* v. *Williams*, Busb. Eq. 162, and *Currie* v. *Gibson*, ante 25. In this case, according to the proofs, the defendant "shifted" his entry, so that the land, which was surveyed, and for which he obtained a grant, does not answer the general description used in making the entry; for although it adjoins his own land, it does not adjoin the land of *James Case*. This, it would seem, goes beyond the principle established by the above cases.

But waiving that objection, at the time he made his survey, the land in question was entered by Lance, under whom the plaintiff claims, so as to give him a prior right, and take from the defendant the right to shift his entry for the purpose of including it. The restriction upon the right to make a vague, or general entry certain by a survey, that it shall not interfere with the rights of a prior enterer, is recognised in all the cases, and the good sense and justice upon which it is made, will strike every one as soon as it is suggested. Add to this, the fact, that at the time the defendant shifted his entry, and had his survey made, he had notice that he thereby covered land which had been before entered by Lance, and it is manifest that it is against conscience for him to do so. It follows, that in regard to the legal title, afterwards acquired by him, he must be held a trustee for the plaintiff, who, it is admitted by the answer, has succeeded to all the rights of Lance for valuable consideration. This admission, in the answer, also meets the objection that Lance was a necessary party, for it thereby appears that he has no interest in the subject of controversy.

PER CURIAM, Decree accordingly.

HOSEA LINDSAY & CO. *against* ISAAC RORABACK *and another.*

Where the seller of a patent right for an improved mode of making soap, by artfully keeping back the patent itself, and by the exhibition of printed forms and receipts falsely stating its purport, and by other arts and contrivances, induced one to purchase a much less extensive and valuable improvement than that bargained for, it was *Held* to be a case within the ordinary jurisdiction of our State courts of equity.

Where it becomes necessary for our courts of equity, in the exercise of their ordinary jurisdiction, to pass collaterally on the validity of a patent right, there is no reason why they may not do so.

CAUSE transmitted from the Court of Equity of Buncombe county.

The defendant, Isaac Roraback, took out a patent from the patent office, securing to him "the exclusive right and liberty of making, constructing, using, and vending to others, a certain mixture," a description whereof is given in the schedule annexed to the letters patent, and made a part of them.

The schedule, referred to, recites that the defendant, Roraback, had "invented a new and improved article of compound chemical soap," and declares that the following is "a full and exact description of the ingredients for making the same: 5 lbs. of white opodeldoc soap of commerce; ¼ lb. sal soda, one tablespoon full spirits of turpentine, one tablespoon full spirits of wine, one tablespoon full of hartshorn, one and half gallon of river, or soft water." The schedule then describes the mode of using these materials, and concludes as follows: "What I claim as my own invention, and desire to secure by letters patent, is the propounding of them in such proportions, (as described above) as to form a solid of suitable consistency, which I believe excels any other soap in its suitableness for cleaning clothes of every description, and for toilet purposes generally, as well as in point of cheapness and conveniency and despatch with which it is made."

The plaintiffs, in their bill, allege that on the 16th day of September, 1857, the defendant Roraback, professing to act for himself and the defendant Lyons, sold the said patent right

to them, in and for the State of North Carolina, excepting the 8th congressional district, and made a deed in the name of himself and the said Lyons, for the same; that they received as consideration therefor, a house and lot in the town of Asheville, which is particularly described in the bill; that in making the said sale, the defendants fraudulently represented to the plaintiffs, that the said patent secured to them the exclusive right of making, using, and vending two kinds of soap, one of which was called "Roraback's compound chemical toilet soap," and the other, "Roraback's compound chemical washing soap;" that they were ignorant of the extent of the rights conferred by the said letters patent, and relied on the representations made by the defendant Roraback; that to give semblance to his false representation in this respect, he furnished the plaintiffs with a printed form of directions for making these two kinds of soap, which was formally headed in large letters, "Roraback's compound chemical toilet soap," and "Roraback's compound chemical washing soap;" that the first of these recipes, pursues the schedule affixed to the letters patent, with the exception that the spirits of wine is omitted, and six pounds of the soap of commerce is stated in the recipe and five in the schedule, and gives 18 pounds as the result. The other form or recipe, requires six gallons water, three pounds opodeldoc soap of commerce, one pound of sal soda, four tablespoons full of spirits of turpentine, and four tablespoons full of spirits of hartshorn, (omitting also the spirits of wine). The result of this compound is stated in the form as "fifty pounds of jelly soap." On the back of the paper containing these forms, is a blank receipt for "fifteen dollars in full for the right and liberty of making and constructing for the sole use of himself (the purchaser) and family, Roraback's improved soap mixture within described. Patented March 3d, 1857."

This paper was delivered, with the deed aforesaid, being on the same sheet with it, and at the same time the said Roraback took from the plaintiffs a bond in $1000, conditioned not to reveal any thing contained in the letters patent. The plaintiffs allege that the letters patent themselves were

kept back and concealed until this bond was executed, and as soon as they were delivered, they were advised by the defendant Roraback, that it was necessary, forthwith, to have them recorded, which he accordingly did. They aver that, by the means and contrivances here resorted to, and by the false representations as to the scope and meaning of the letters patent, they were deceived into making the contract. They say that the second mode is the only one of any value, and they believe would be remunerative; but that the one specified in the patent is of very little value.

The bill further alleges, that the patent itself is void, for that the process of making soap therein set forth was not new, but was known, and in common use, several years before this patent was taken out; he shows an extract from a newspaper of prior date to the letters patent, giving a formula for making soap exactly like that set out in the printed direction, No. 1, above set out. They pray that the defendants may be decreed to pay back what the plaintiffs have expended in trying to sell the patent rights, and for a reconveyance of the house and lot in Asheville.

To this bill the defendants pleaded to the jurisdiction of the Court, insisting that the circuit court of the United States has jurisdiction of the case, as being a matter requiring the adjudication of a right growing out a patent, and the patent laws passed by Congress.

Shipp, *Dickson* and *N. W. Woodfin*, for plaintiffs.
Gaither and *Merriman*, for defendants.

Pearson, J. It may be, that questions involving the infringement of patent rights, and proceedings to repeal, and declare such rights void, are within the *exclusive* jurisdiction of the circuit court of the United States; at all events, there are many weighty considerations for so construing the Act of Congress. We do not, however, enter into the subject, because it is not presented by the facts of our case. The allegations of the bill do not require this Court to "adjudicate

and pass upon the patent right therein mentioned." It is alleged that the defendants committed a fraud in making sale of a patent right to the plaintiffs, by falsely representing, that the patent embraced *two* modes of making soap; whereas, in point of fact, it was confined to *one*, and certain means and contrivances, by which the fraud was effected, are set out in the bill; (all of which allegations, for the purpose of passing on the plea, are to be taken as true). These allegations make a case of *fraud*, within the ordinary jurisdiction of a court of equity. If in order to the exercise of this well-known subject of equity jurisdiction, it should become necessary, collaterally, to pass upon the validity of the patent right, we can see no sufficient reason, wherefore, this Court may not do so. But that point, as we have said, is not involved; for this is purely a case of fraud, in which we are not called on to adjudicate and pass upon the patent right, but are confined to the means and contrivances, by which the alleged fraud was committed. The plea must be overruled, and the defendants required to answer.

PER CURIAM, Decree accordingly.

CALVIN EDNEY *and others against* AMBROSE J. EDNEY.

Where a legatee purchased property at the sale made by the executor, and gave bond with sureties for the price, it was *Held* that a decree in favor of the principal, in a court of equity in another State, to which such sureties were not parties, declaring the said bond to be set-off by the claim for a legacy, is not evidence in a suit brought by the sureties to establish the same set-off, and that the executor is not estopped by such decree from proceeding to collect the bond from the sureties.

CAUSE transmitted from the Court of Equity of Henderson county.

One Joseph Pickett, purchased of the defendant, A. J. Edney, as the administrator *pedente lite* of Mrs. Sarah Edney, a

negro woman and child belonging to the testatrix's estate, for which he gave a bond for $435, with Calvin Edney, Marvel Edney and Samuel J. Edney as his sureties. After the litigation was over, during which he was appointed administrator, and the will of Sarah Edney was established, the said Ambrose J. Edney qualified as executor to the same, and brought suit against the plaintiffs Marvel and Samuel J. Edney, in the Superior Court of Henderson, and recovered judgment for the principal and interest of the said bond. Joseph Pickett, having before the commencement of of this suit, removed to Gilmer county in the State of Georgia, the bond in question was sent thither and put in suit in the Superior Court of that county, and a judgment at law was recovered in that court against him, the said Joseph Pickett, for the principal and interest due thereon, from which he took an appeal and while the appeal was pending, Pickett filed a bill in the court of Equity for Gilmer county, Georgia, for an injunction, alleging that in right of his wife, who was a daughter of the testatrix, he was entitled to a legacy under the will of Mrs. Sarah Edney, and that the plaintiff in the suit at law, as executor of her will, had in his hands, over and above what was reqired for the payment of the debts of the estate, a sum applicable to the payment of his legacy, and more than sufficient to pay all the unpaid balance of the said note and interest, and praying that this fund might be declared to be an equitable set-off to the action, and that the further proceedings at law be perpetually enjoined. To this bill the said Pickett only was made a party plaintiff. The defendant answered and made an exhibit of the state of his dealings as executor, and insisted that there was nothing in his hands applicable to the legacy coming to Pickett in right of his wife. There was replication to the answer and the cause finally heard in the court of equity of which the result is set forth in the following extract from the record certified from that court:

"State of Georgia, Gilmer county, May Term, 1854, present, his Honor DAVID IRWIN, Judge of the said court. Appeal Docket—verdict:—We the Jury find and decree that the note

sued on in the common law action which is now pending on the appeal in the Superior Court of Gilmer county, in favor of Ambrose J. Edney against Joseph Pickett, is paid off, and fully satisfied, and we further decree that the plaintiff in the said common law action, now pending as aforesaid, be, and is hereby, perpetually enjoined from prosecuting said action, and we further decree that Ambrose J. Edney pay fifty-five dollars and all costs. May 11th, 1854. Signed by John M. Sharp, foreman, and the other jurors." * * *

"Whereupon it is ordered and adjudged and decreed by the Court, now here, that the note sued on in the common law action, which is now pending on the appeal in the Superior Court of Gilmer county, in favor of Ambrose J. Edney against Joseph Pickett, is paid off and fully satisfied; and we further decree, that the plaintiff in the said common law action, now pending as aforesaid, be, and is hereby, perpetually enjoined from prosecuting said action, and that the said plaintiff cease further to prosecute the said action against the said Joseph Pickett, and that the said Joseph Pickett do recover from the said Ambrose J. Edney, the sum of ——— for costs in this behalf laid out and expended." Signed by the Judge.

The bill alleges that, notwithstanding the fact, that the plaintiff has in his hands a fund, to which the said Picket, the principal, in the bond, is entitled, and notwithstanding that he is perpetually enjoined from collecting the said bond out of the principal debtor, he has caused an execution to issue on the judgment obtained against Marvill and Samuel Edney in the Superior Court of Henderson, and threaters to have their property sold to satisfy the same. The prayer of the bill is, to have it declared that the debt, due on said judgment, is set off and discharged by the claim of Pickett for a legacy, and that the defendant be perpetually enjoined from enforcing the execution.

Defendant denied that there was any thing in his hands applicable to the legacy of Pickett, and says the debt, sued for, is coming to him for commissions, and other charges incurred in selling the estate of Mrs. Edney.

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

J. W. Woodfin and *N. W. Woodfin*, for plaintiffs.
Shipp, for defendant.

PEARSON, J. The equity of the plaintiffs is put upon two grounds: That Pickett, the principal debtor, is entitled to an equitable set-off, by reason of an amount due him, in right of his wife, by the defendant, as executor of her father, and the plaintiffs, as sureties, are entitled to have the benefit of this set-off. In the second place, that by the proceedings in Georgia, it is judicially ascertained and declared, that the debt in question has been "fully paid off and satisfied" by Pickett, and it is thereupon decreed, that the defendant be perpetually enjoined from proceeding further against the said Pickett in respect to the debt.

If the plaintiffs had proved the existence of the supposed equitable set-off as between Pickett and the defendant, there could be no question as to their right to have the benefit of it. But in respect to such proof, there is an entire failure, and this Court cannot make the declaration, which is essential to their equity, to wit, that the defendant, as executor, has in his hands, or is chargeable with a fund, in which Pickett is entitled to share. The answer denies that after payment of debts, &c., there is any residue subject to distribution, and the plaintiffs, instead of asking for a reference to have an account stated, which is necessary, according to the course of the court, whenever the object is to settle an estate, and ascertain the existence of a fund, rely upon the verdict and decree in the proceeding in Georgia, for the purpose of establishing that allegation. The proceeding in Georgia is a bill in equity by Pickett, against the defendant, in which it is alleged that the defendant, as executor of the father of Pickett's wife, has in his hands, or is chargeable with, a residuary fund, in which Pickett is entitled to a share; that such share is of an equal or greater amount than the debt sued for, and the prayer is

for an account, that Pickett may have the portion of the residuary fund, to which he is entitled, applied in satisfaction of the debt, and that the defendant be enjoined from the further prosecution of the action at law. An answer is filed, in which the defendant denies that there is any residuary fund in his hands, or with which he is chargeable, and avers that after paying the debts, &c., the assets of the estate of his testator are exhausted, leaving a balance due to him for commissions, &c. The proceeding then, sets out a *verdict* and a *decree* in favor of the plaintiff.

Laying no stress upon the fact, that no account is stated, which ought to have been done according to the course of a court of equity, and that a jury is unfit to deal with a matter of account, which involves a complicated settlement of an estate; and laying no stress on the further fact, that the verdict and decree go beyond the allegations of the bill, and find that the debt has been *fully paid*, in which there is a variance, for the bill does not allege a payment, but simply an equitable set-off, this Court is opinion that the *verdict* and *decree* are not admissible as evidence on the part of the plaintiffs, in this suit, because they were not parties, and the rule *res inter alios acta* applies. So, that the proceeding in Georgia, cannot be used as evidence, either for or against them, in reference to the truth of the facts therein found or declared.

Upon the second ground, insisted on in support of the plaintiffs' equity, the decree is evidence of its own existence; and the question is, what is its legal effect as between the parties to this suit?

It is urged, that as the defendant is enjoined from collecting the debt out of Pickett, it would be an indirect violation of the injunction, if he collects it out of the plaintiffs, who are his sureties, and that it is an anomalous state of things for a creditor to be at liberty to collect a debt out of the sureties, when he has no right to collect it out of the principal. The suggestion is plausible, but it is fallacious. The principal is protected because, in *his suit* against the creditor he was able, in some way, to establish the allegation of an equitable set-off

or of payment in full, and if the sureties, *in their suit* against the creditor, could establish either of these facts, they would be protected in like manner. But they are unable to establish either of these facts, and consequently have not entitled themselves to the like protection, and their inability to do so, proves that, although as between the principal and the creditor, these facts are to be taken as true, yet, in point of fact, *they are not true*, and the creditor is not estopped as against the sureties by the former proceeding, to which they were not parties. "Estoppels must be mutual, and bind only parties and privies." For the sake of illustration: suppose one of two joint and several obligors is sued, and the plea of payment is found in his favor, afterwards the other obligor is sued, and pleads payment by the obligor who is first sued, and in support of the plea, offers no proof but the verdict and judgment in the former action; it is certain such evidence is not admissible as to the truth of the fact alleged, and it is equally certain, that in the absence of proof, the issue must be found against him, and he will have the money to pay, notwithstanding the fact of the verdict and judgment in favor of his co-obligor; in other words, as he was not a party to the first action, he is not bound by it, nor is he entitled to the benefit of the event of that suit; under the rule *res inter alios acta*.

PER CURIAM, Bill dismissed.

HIGH SHOALS MINING AND MANUFACTURING COMPANY *against* THOMAS GRIER *and others.*

Where a purchaser of mining lands, machinery and slaves, gave a mortgage on the property to secure a balance of the purchase-money, and on account of difficulties arising in the title to portions of the property, it was agreed, in writing, on certain conditions as to paying interest and a sum down, that the payment of the residue of the purchase-money should be postponed until certain suits, about the slaves, should be settled, it appearing that

such conditions had been complied with, it was *Held* that an injunction to restrain the mortgagee from selling for the purchase-money due, ought not to have been dissolved on the coming in of the answer.

APPEAL from an order continuing an injunction made in the Court of Equity of Gaston county, by Judge BAILEY, at the Spring Term, 1858.

The plaintiffs, a number of inhabitants in the city of New York, constituted one Groot their agent, to purchase the property of the "High Shoals Manufacturing company," (a corporation authorised by the Legislature of North Carolina,) which consisted of a number of gold mines, iron mines, a lime quarry, erections for mining and manufacturing, and seventeen slaves. The real property consisted of some fifteen thousand acres of land, which had been obtained by this company and their predecessors, from several distinct sources and in several quantities. Groot, the plaintiffs say, had been employed as an agent of the High Shoals Manufacturing Company, to effect a sale for them, but he was afterwards employed by plaintiffs, and proceeding to Gaston county, and having examined the property very diligently, he agreed to take the same at $75,000; accordingly, one-third of that sum was paid down, and Groot executed two bonds, payable on the 1st days of March and September, 1855, for $25,000, and Andrew Hoyl, the president of the said corporation, made and executed a deed of conveyance, but without warranty, for the said property, which was immediately thereafter conveyed back by Groot to Mr. Hoyl by a mortgage, dated 24th of February, 1854, to secure the payment of the two bonds of $25,000.

About this time the individuals, for whom Groot was acting, became a corporation by, and under the laws of, the State of New York, bearing the name and style of the "High Shoals Mining and Manufacturing Company," to whom he transferred and delivered all the property he had received from the North Carolina company.

The president of the North Carolina company, Andrew Hoyl, having died, and having, by will, constituted William P. Bynum and Thomas Grier his executors, they advertised

the whole of the property mortgaged to their testator, to be sold for the payment of the two bonds aforesaid, which had, in the mean time, both became due.

This bill is filed by the New York company, to enjoin the proposed sale until certain defects in the title of the property, bought by them, shall be cured, and certain incumbrances removed, which greatly impair the value of the property; that one Ephraim Friday claims 120 acres of the land adjoining him; that Benjamin Ormond is claiming about 300 acres near the Ormond ore-bank; that Samuel Black, with others, claims about 500 acres; that Daniel Shuford claims sixty-three acres; that the chief gold-mine, on the property, was under a lease to one B. F. Briggs for ten years, which was yet unexpired, and that they had to give Briggs $12,600 to get rid of his lease; that a certain tract of land, called the lime quarry tract, described as being in Cleaveland county, could not be found at all; that lime-stone was a very important item in the operation of making iron, and the loss of this part of their purchase would be very disastrous to that branch of their business; that twenty-three acres in another parcel, containing the principal ore-bank, pertaining to the manufacturing operations, known as the Ormond ore-bank, is claimed by Oats and Fronebarger, under one Ormond, and they have brought a suit for the same, which is now pending in the Superior Court of Gaston county; that with this mining property, they bought, and had delivered to them, a quantity of gold-ore lying at the mine, and having taken possession thereof, they were sued for the same, by the administrators of one Joseph Shuford, who claimed the same as the property of their intestate, and the plaintiffs paid $1300, upon a compromise, to get rid of this claim; that the slaves are claimed by Messrs. Osborne and Graham, and the plaintiffs have been threatened with divers suits as to them by these persons; that these slaves are stated to be worth from 18 to 25 thousand dollars; that not wishing to be involved in litigation about them, they insisted that Hoyl should take back the slaves at a fair valuation, or sale, and give them credit on their bonds for the

amount of their value, and that the residue of the purchase-money should be paid as it became due; that unless they, the defendants, would do this, the plaintiffs would resist the payment of the bonds in a court of equity, until the litigation about to arise as to the title of the slaves, could be thus settled; that afterwards, two suits were actually brought by Osborne and Graham for the hire of these slaves from them by the plaintiffs; that in July, 1855, in reply to the proposition of plaintiffs, the president of the High Shoals Manufacturing Company, (the N. C. Co.) wrote the following letter to the plaintiffs:

"I have agreed with Mr. W. F. Olcott, your agent at High Shoals, to postpone the payment of certain bonds and mortgage, executed to me by P. W. Groot, for the sum of fifty thousand dollars, ($50,000) bearing date on or about the 24th of February, 1854, until the title to certain negroes, owned by the said mortgage, now in litigation, shall be determined, on condition, that the interest, which will be due on the 1st of September next, be paid by that day; and also, on condition, that should W. E. Rose, one of the directors of the old High Shoals Manufacturing Company, refuse to concur in this, that you furnish me, on or before said 1st of September, the sum of $8,300, to enable me to buy out his interest in the same."

The plaintiffs further allege, in their bill, that the interest above required, was promptly paid at the day, and $5,000, which was all that was required to adjust the claim of Rose, was also paid by the plaintiffs; that if a sale is forced, in the present depressed state of the money market, with these clouds upon the title to their property, the plaintiffs will suffer great detriment, and as they think, will be greatly oppressed. It is upon these grounds that they ask for an injunction to stay the sale of the property under the mortgage deed.

The defendants answer, denying that Groot was their agent in the transaction of the sale and purchase of the high shoals company, but that he acted throughout as the agent of the New York company, of which he was a member; that as to the lease

to Briggs, the said Groot was fully aware of its existence at the time he made the contract in behalf of the plaintiffs; that the same was the case as to the other difficulties in the titles to certain tracts of land now complained of, and that he distinctly understood the whole matter, and was willing and agreed to take the deed for the property without any warranty of the title, notwithstanding these difficulties; that in fact, these difficulties are greatly magnified in the plaintiffs' statement; that as to the "lime quarry" tract, it was sold without any description of boundary, other than the adjoining tracts and its *name*, but that by these it is well known and identified, and has been so for more than fifty years, all of which time, it has been the source from which the proprietors of the works at High Shoals, have obtained their lime-stone for fluxing; that as to the ore-bank, the suit by Fronebarger in Gaston Superior Court, is a contest as to where the line between the late company and one Ormond, shall be run; that their deed calls for Ormond's line, and as such, they sold to the plaintiffs, and if it does not include the ore-bank, they are not liable on their deed, or in anywise to blame; but they do not suppose there can be much difficulty as to these lines, as the plaintiffs have had possession for more than fifty years, claiming this particular ore-bank as their property; that as to the claim of Daniel Shuford, it is admitted by him to be untenable, but he is unwilling to surrender it voluntarily, as he has a covenant of warranty from one Passour, from whom he bought it.

As to the slaves, the defendants in their answer say, that the title of Osborne and Graham grew out of a conveyance made by Groot, after he had bought of Hoyl, and reconveyed to him by the mortgage deed, and that it cannot possibly affect the dealings between the plaintiffs and defendants. They deny the allegation that the ore was sold by Hoyl to the plaintiffs. As to the letter above set forth they say, that whether it be genuine or not, they do not know, but that if it be so, it was, nevertheless, superseded by another contract, which they say was to the effect, that the plaintiffs were to have 'till

the 1st of January, 1859, to pay the two bonds of $25,000, on condition that the interest should paid yearly as it accrued, and as evidence, they produce what purports to be a copy of a letter from Mr. Hoyl to the plaintiffs, dated December, 1856, proposing those terms, and that the interest was in arrears when they urged the executors of Hoyl to advertise.

The executors say, that their testator was willing to take the slaves back, make sale of them, and give credit on the bonds as proposed by the plaintiffs, and they have been willing to do the same, but they have been deterred from that course by Osborne and Graham, who insist that the land shall be first sold, and they believe such was the motive of their testator for not accepting this proposition.

Upon the coming in of this answer, the defendants moved for the dissolution of the injunction, which was refused by his Honor, and the same was ordered to be continued until the hearing. From this order the defendants appealed.

Guion, for the plaintiffs.
Boyden, *Lander* and *Gaither*, for the defendants.

PEARSON, J. The title of the slaves had become complicated by reason of the claim set up by Osborne and Graham under the deed of Goot, and the slaves constituted a very considerable proportion of the property which had been purchased by the plaintiffs. A difficulty was also presented by the lease of the gold-mine. This, the plaintiffs were forced to remove by the payment of some $12,000. It is true, the conveyance of the property, which was made to them, was without warranty, but it purported to convey a *present* interest, and they had, at least, a plausible ground for insisting that it was the duty of the North Carolina company, (as it was termed in the argument,) the vendor of the premises, to remove the incumbrance. There was likewise a difficulty as to the "gold ore," which had been raised and was lying on the land, and the plaintiffs paid some $1,300 to remove it. So, there was a difficulty and a law-suit both in respect to the iron ore-bank

and the "lime-quarry." Under these circumstances, the plaintiffs, to avoid litigation, propose to waive all other grounds of complaint, and pay the residue of the purchase-money, *provided* the North Carolina company would take, in part payment, the slaves at a proper valuation, so as to relieve the plaintiffs from the embarrassment caused by the claim of Osborne and Graham. This proposition is met by a "counter project," to wit: The North Carolina company will not require the payment of the principal money until the litigation in respect to the slaves is determined, *provided* the interest, which will be due on the 1*st of September next*, be paid, and also an amount sufficient to enable the company to make an arrangement with W. E. Rose. This proposition was accepted, the interest was paid, and also $5000, which the bill alleges, was the amount of cash required in order to effect the arrangement with Rose. The North Carolina company afterwards propose to postpone the collection of the principal money until February, 1859, provided the yearly interest is promptly paid.

This is a *special*, as distinguished from a *common* injunction. So, the bill is to be read as an affidavit, and taking "the whole together," the question is, ought the injunction to be dissolved, so as to permit the sale of the property at this time. We are clearly of opinion that, under the circumstances, it would be against conscience and fair dealing, to force the property into market until the title is cleared. We, therefore, concur with his Honor in the Court below. The motion to dissolve the injunction was properly refused. But the interlocutory order must be reversed; because the plaintiffs ought to have been required to pay the interest yearly accruing on 1st of September, in each and every year, so long as the injunction is continued.

There will be an interlocutory decree continuing the injunction "until further order," the plaintiffs paying the interest accrued up to the 1st of September last, and such as may accrue on the 1st of September in each year hereafter.

The purpose of holding up the injunction *until further or-*

der, instead of *until the hearing*, is to allow the defendants to move in the cause as they may be advised should the interest accruing after this time not be promptly paid, or should the litigation in respect to the slaves be sooner determined.

We see in this case and several others at this term, that the original papers are sent instead of a transcript. This is irregular, and the clerk of this Court is directed not to allow the original papers to be withdrawn from his office until a proper transcript is sent, to be filed *nunc pro tunc;* so that each court may preserve a proper memorial of the proceedings pending before it.

PER CURIAM, Decree according to the opinion.

JOHN DERR *and others against* JOHN McGINNIS *and others.*

Where a person of weak intellect, (though then competent) made a will, giving the bulk of his estate by a residuary clause to his children *equally*, which was made known to them and concurred in by them all, and afterwards some of them took conveyances of a part of the residuary fund, thus destroying the equality of division provided in the will, on a bill to set aside these conveyances on the ground of mental infirmity in the donor, it was *Held* that the *onus* of establishing the donor's sanity devolved upon these donees.

CAUSE removed from the Court of Equity of Gaston County.

George Rutledge made his will in the year 1850, in which, after providing for his wife, he bequeaths as follows: "Also, I give to my three grand children, Valentine Derr's children, John, Louisa and Lavirah, the twelfth part of my estate, to be equally divided between said children. My will and desire is, that the residue of my estate be equally divided and paid over to my seven children in equal proportion, share and share alike to them, and each of their executors, administrators and assigns." The plaintiffs are the children of Valentine Derr,

and two of the children of the testator, and as such, are entitled to residuary shares, given in the will. The disposition made in the residuary clause of this will, was known to all the parties interested in it, and had their concurrence.

After this will was made, to wit, in 1853, the testator made a voluntary gift by deed, of a valuable slave called Eliza to the defendant, John McGinnis, one of the sons-in-law who, in the right of his wife, was interested to the amount of one seventh part in the residuary bequest above stated. About the same time, the testator, voluntarily and without consideration, surrendered to Eli Linebarger, another of his sons-in-law, in like manner interested in this residuary fund, a note on him for $175; and about the same time he surrendered to Rufus Beaty, another son-in-law, also interested in the residuary fund, voluntarily, and without consideration, a note which he held on him (Beaty) for $200, thus diminishing the residuary fund by the amount of the value of the slave, Eliza, and the two notes, and giving these sons-in-law a preference to these amounts.

John McGinnis, above mentioned, and Robert Rutledge, are the executors appointed in the will of George Rutledge, and they both qualified, and are made parties defendant, as such.

The bill alleges that shortly after the testator, George Rutledge, made his will, he lost his intellect, and that in 1853, when he made the deed of gift of the slave to McGinnis, and surrendered the notes to Linebarger and Beaty, he was unable to understand the nature of these transactions, and that he was fraudulently prevailed upon by McGinnis, Linebarger and Beaty, to do the acts severally above complained of. The prayer is, that the said slave, Eliza, may be held by the said McGinnis, not for his own use, but for the benefit of the residuary fund in the hands of the executor, and that Linebarger and Beaty re-deliver the said notes for the like purpose, and that the whole fund, thus re-instated, may be divided by the executors in the proportions set out in the testator's will; and that the executors otherwise account, &c.

The defendants answer, and insist that the donations to them were free and voluntary, and on their part there was no unfairness or fraud; they insist also, that the testator was entirely competent in point of intellect to do these acts. Replication, commissions and proofs.

Cause set down for hearing and sent to this Court.

Bynum and *Guion* for the plaintiff.
Thompson, *Lander* and *Avery*, for the defendants.

PEARSON, J. The donor, who was a very old man, and whose faculties were evidently impaired to some extent, had disposed of his estate by his will, and therein provided for a fair and equal division among his children, who were then living, and the children of his deceased child. This "family settlement," as it may be termed, was at the time, concurred in by all of the members of the family; consequently, any alteration which was afterwards made, having the effect to defeat this equality of division, must be looked upon, by this Court, with suspicion; and the *onus* of proving entire fairness on the part of McGinniss and Linebarger, at whose instance the deed of gift, mentioned in the pleadings was executed, and the notes of Linebarger and Beaty were surrendered up and cancelled, and also, that the donor had sufficient mental capacity to understand that the deed of gift and the surrender of the notes defeated, *pro tanto*, the equality of division provided for by the will, is upon the parties who procured these acts to be done.

After full examination of the pleadings and proofs, we are satisfied that no unfair means were resorted to, or used, and the only question is, did the donor, at the time he executed the deed of gift and surrendered the notes, have sufficient mental capacity to understand that these acts defeated the equality of division which he had provided for by his will, and gave to McGinnis, Linebarger and Beaty, a preference to the value of the property given to them over and above his other sons-in-law and children. In respect to this question,

owing to the very loose and defective manner in which the depositions are taken, we are unable to arrive at a satisfactory conclusion. We therefore direct that the following issues be submitted to a jury by the Superior Court of Law, for the County of Gaston, to wit:

1. Was George Rutledge, at the time he executed the deed of gift, and caused the notes to be surrendered as mentioned in the pleadings, of sound mind?

2. Did George Rutledge, at the time he executed the deed of gift, and caused the notes to be surrendered, have sufficient mental capacity to understand that the deed of gift, and the surrender of the notes, would have the effect of defeating the equality of division provided for in his will, and give to McGinnis, Linebarger and Beaty a preference to the value of the negroes given, and of the notes surrendered, over his other sons-in-law and children?

The interlocutory order will provide for reading in evidence the deposition of any witness who may be dead or removed from the State, &c.

PER CURIAM. Decree accordingly.

ALEXANDER GILREATH *by his guardian, against* NOAH GILREATH.

A child is allowed to use fair argument and persuasion to induce a parent to make a will or a deed in his favor.

CAUSE removed from the Court of Equity of Wilkes county.

Alexander Gilreath, the plaintiff, in December, 1846, made a deed of gift of several slaves and other property, to the defendant, Noah Gilreath. The said Noah was the youngest son of nine children, and in 1822, on arriving at the age of twenty, all the other children, but two daughters, having left their father's house, the defendant remained with him and assisted upon his farm and in his other business. The father

was 96 years old when he died in 1852, and up to that time the defendant remained with him. From the time the defendant came of age the plaintiff was not able to labor, and the support of the family, which consisted of the father and his wife and two daughters, with two slaves, a man and a boy, devolved mainly on him.

After a few years Noah married, and his family increased rapidly and became numerous. Shortly after his marriage, he built a house near his father's, and the two families lived in common. When the defendant's children got old enough they were put to work on the farm. During the time elapsing between his arriving at age and the making of the deed of gift, the plaintiff bought a female slave, who had children very fast; these, as they grew up, with the two slaves above mentioned, and defendant's children, under his superintendence and active assistance, during the whole period aforesaid, on a small tract of inferior land, made a comfortable living, which was used by the two families indiscriminately. A mill, a blacksmith shop, an orchard and a pension of about $35, which the plaintiff received for military services in the war of the revolution, brought in from time to time some funds, which were laid out and used for the common support and maintenance of these families, and most generally laid out by the defendant, but no account was kept of these receipts and expenditures. After a few years, the two sisters got married and left the family, the mother became frail and helpless, and the defendant's family waited on her; they were also kind and attentive to the old man, and much affection was manifested by him for all the defendant's family. In July, 1847, the plaintiff sold a negro girl, who had become refractory, for the sum of $525, which went into the hands of the defendant. In the year 18—, an inquisition, as to the state of the plaintiff's intellect, was ordered by the county court of Wilkes; and upon the report of a jury that he was of nonsane memory, a guardian was appointed, who instituted this suit in the name of his ward, the plaintiff.

The bill alleges that the deed of gift above mentioned, was

obtained by fraud and undue influence, and the prayer is that the same may be set aside, and the defendant surrender the slaves and other property, and account for the profits of the same during the time he had the use and management of his father's concerns; also, that he account for the proceeds of the farm, the mill and blacksmith shop.

The defendant answered, alleging the facts as above set out in the case, denying all fraud and undue influence in obtaining the deed of gift from his father, but insisting that it was the free gift of his father, as was the money raised by the sale of the slave, and was by no means an adequate compensation for all the toil and service rendered to his father and family. He insists that it was never expected of him to keep an account, and he therefore kept none, and is totally unable to give a statement of the receipts and disbursements of the small sums that came to his hands during the long time he resided on the plantation, and conducted the business of his father.

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

Boyden, for the plaintiff.
Mitchell and *Jones*, for the defendant.

Pearson, J. After a full examination of the pleadings and proofs, we are of opinion that the allegations that the deed of gift mentioned in the pleadings, dated 4th of December, 1846, was executed by Alexander Gilreath at a time when he had not sufficient mental capacity, and that its execution was procured by fraud and undue influence, are not proved. The deposition of William Masten, one of the subscribing witnesses, who is admitted to be a man of intelligence and respectability, clearly establishes the mental capacity of the donor, at the time the deed was executed. The deposition of James Calloway, the other subscribing witness, also establishes the mental capacity. It is true he states some circumstances tending to show weakness of mind and loss of memory, and ex-

presses the opinion that the donor had so far lost the force of his intellect as to be easily made the subject of imposition, but he was not present at the execution of the deed, and did not see the donor, until five or six weeks afterwards, and in the whole mass of testimony, there is nothing tending to show that the defendant did any thing more to procure the execution of the deed, than was consistent with law and good conscience. A child is allowed to use *fair* argument and persuasion to induce a parent to make a will or deed in his favor.

We are also, of opinion, that the allegation that the defendant acted as the guardian of his father, or undertook the management of his affairs, or a general agency in respect thereto, whereby he became bound to keep an account of the *money*, produce, &c., that was at various times received by him, or passed through his hands, is not proved. On the contrary, we are satisfied, from the pleadings and proofs, that he did not undertake to keep an account, and that what was made on the farm, and by the mill and blacksmith shop, and the money that was from time to time received on account of the pension or otherwise, was used by the father and son and their families as an indiscriminate fund for their support and maintenance, without any agreement, or expectation that an account would ever be called for, or could be made out, with the exception of the sum of $525, the price of a negro girl sold by the father, which amount the defendant admits came into his hands. In reference to this sum, the agreement and understanding above referred to, did not apply, so as to make it fall into the fund which was to be used indiscriminately for their mutual support. Indeed, this is not alleged by the defendant, and he seeks to avoid a liability to account for it, by averring that his father made a gift of the money to him. But he fails to prove this averment, and we are satisfied from the circumstances, and the relation of the parties, it being in *July*, 1847, when, according to the weight of the evidence the old man had, failed very rapidly in mind and body, so as to be nearly helpless, that the defendant received this sum in trust, and with the understanding that he should account therefor.

The plaintiffs are entitled to a decree for this amount $525 with interest from the first day of July, 1847.

PER CURIAM. Decree accordingly.

WILLIAM W. ALLEN *and others against* ALFRED O. MILLER *and others.*

A bill by the next of kin, setting forth a claim against one defendant as administrator of the estate for an account of the assets, and for a settlement and a claim as heirs at law, setting forth a fraudulent purchase of the real estate of their ancestor, at an execution sale, and some of them setting forth the same claim as sureties who paid money for the deceased, and also setting forth the widow's claim for dower in the lands thus fraudulently held by the purchaser, is multifarious.

CAUSE removed from the Court of Equity of Watauga.

The bill is filed in the name of William W. Allen, Cyrus F. Campbell, and his wife Martha, James L. Allen, Harvey W. Allen, Cyrus W. Allen, the children and heirs at law of C. A. Allen, and by Clarissa Allen, his widow; and charges that the defendant, John S. Davis, is the administrator of the estate, and that assets to a considerable amount came, or ought to have come, to his hands more than sufficient to pay the debts of the estate, and praying for an account and settlement of the same. That, since the death of the said intestate, a certain tract, called the the home tract, belonging to the intestate was sold by the sheriff, under an execution, which was in his hands at the death of the said intestate, and bought by the defendant, Alfred O. Miller, who interfered at the sale, and fraudulently and falsely represented that the intestate had no title to the premises, and represented that he wished to bid off the land for the benefit of the plaintiffs, or of the estate of C. A. Allen; that by these representations, he prevented persons from bidding for the land, and was thus enabled to buy it for a very inconsiderable sum, far below its real value; that since

the sale, the said Miller has taken possession of the tract of land, and is claiming it as his own, and utterly denies any claim or equitable interest of the plaintiffs in the same. In the same bill it is alleged that a tract of land, belonging to the plaintiff, Wm. Allen, and which had never belonged to C. A. Allen, and was not levied on or sold by the sheriff, was nevertheless included in the deed from the sheriff to A. O Miller, and that its value is greatly injured by this false claim. It also alleges that the plaintiffs, William W. Allen, James H. Allen and Harvey W. Allen, were compelled to pay large sums of money for the deceased, C. A. Allen, which has not been refunded to them by the defendant Davis, the administrator; that he has neglected to collect the personal assets, and wholly neglects to have the real estate sold and the money collected for the payment of the said plaintiffs debts, to the great prejudice of these plaintiffs as creditors, and as heirs at law and distributees.

In the same bill, the plaintiff Clarissa, the widow of C. A. Allen, sets forth her claim for dower in the land, thus fraudulently held by the said Miller.

The bill prays that the defendant Davis account for his administration, and that Miller may be compelled to convey the land conveyed to him by virtue of the sale, and that the widow shall have her dower in the premises; that the funds thus sought, may in the first place, be applied to the payment of the debts of the creditor plaintiffs, and the remainder of it, if any, be distributed among the plaintiffs as next of kin.

The defendants demurred to this bill on account of its multifariousness. There was a joinder in demurrer, and the cause being set down for argument, was sent to this Court.

Lenoir, for the plaintiffs.
Mitchell, for the defendants.

BATTLE, J. Multifariousness in a bill is when a plaintiff combines distinct claims against the same defendant, or where he unites in the same suit, several defendants, some of whom

are unconnected with a great portion of the case. Adams' Eq. 309. It may also arise from a misjoining of plaintiffs, whose causes of action are not sufficiently connected to admit of their being united in the same suit. According to these principles, the bill before us is multifarious in several particulars, of which it is necessary for us to notice one or two only, as upon them the demurrer must be sustained. The defendant Miller is alleged to have purchaseed the home tract of land at a sheriff's sale under an execution against C. A. Allen, deceased, from whom the plaintiffs claim, and that by fraud and misrepresentation, he succeeded in purchasing it for a very inadequate price, under the pretense that he was buying for the benefit of the plaintiffs. If this allegation be true, the equity of the plaintiffs consists in the right to have him converted into a trustee for them, upon their re-paying him the purchase money. This claim is certainly distinct from that which the plaintiffs can have, either as creditors or next of kin of C. A. Allen, to call upon the defendant Davis, as his administrator, for an account and settlement of the estate. These two claims are founded upon equities of a very different character, and have no connection with each other, and therefore, ought not to have been joined in the same suit. It is not pretended that the sheriff did not have authority to sell the land under the executions in his hands, and upon its purchase by the defendant Miller, it ceased to be assets of the estate, and the claim which the plaintiffs may have to it is founded solely upon their allegation that it was purchased for them by Miller, and that he, in fraud of their rights, took the title to himself.

The claim of the plaintiff, Clarissa Allen, for her dower in the home and other tracts, of which her husband died seized, is distinct from that of the other plaintiffs against the defendant Miller. As against him, she is entitled to dower, whether he purchased fraudulently, or otherwise, because the sale was made after the death of her husband. *Frost* v. *Etheridge*, 1 Dev. Rep. 30. This certainly is a distinct claim from that of the other plaintiffs, and is not sufficiently connected with theirs to admit of their being united in the same suit.

The demurrer must be sustained, and the bill dismissed with costs.

PER CURIAM. Decree accordingly.

NARCISSA JENKINS *against* WM. T. JOHNSTON *and another.*

Where a decree has been passed by the court upon a formal hearing, dismissing a bill upon its merits, a second bill, alleging facts, which, if established, would entitle the plaintiff to the same measure of relief as the facts set forth in his former bill would entitle him to, will be dismissed upon a plea in bar.

APPEAL from the Court of Equity of Henderson county, Judge PERSON presiding.

The plaintiff filed a bill in *forma pauperis* in the Court of Equity of Henderson county, at the Spring Term, 1855, alleging that on 4th of August, 1852, she entered into a written contract with the defendant Johnston, to convey to her a small tract of land at the price of forty dollars—whenever the same should be paid; of which sum, twenty dollars was to be paid on 1st of January, 1853, the remainder on 1st January, 1854; that this contract was drawn by the defendant Johnston, and was deceitfully and fraudulently written and read to her; that the bargain was for her to have a good fee simple title, but the writing expressed that she was to have a good *quit-claim deed;* that she is illiterate, and was unable to detect the fraud, and executed the contract, on her part, in ignorance of its contents; that she proceeded to improve the land by building and clearing it; that when the first instalment became due she paid it promptly, but before the second payment became due, she discovered the fraud and imposition practiced upon her, and refused to pay the second instalment, unless the defendant Johnston would agree to make her a title in fee simple, which he refused to do; that shortly afterwards, he

sold and conveyed the land to the defendant Ruth, and they commenced an action of ejectment to turn her out of possession; that this was a fraudulent arrangement between the defendants, Johnston and Ruth, to prevent her from paying the second instalment and to cheat her out of the land.

The prayer of the bill is, that the defendants be compelled to convey the fee simple in the land to her, or in case the Court should be of opinion that she is not thus entitled, that the defendant Johnston be decreed to pay her the money advanced, together with the value of the improvements made by her on the land, with a prayer for general relief.

The defendants answered, and the cause was duly set down for hearing. Upon the hearing, the Court made this decree:

"This cause coming on to be heard upon the bill, answers and replication, and the matter being considered by the Court, it is adjudged and decreed that the said bill be dismissed—that no costs be taxed against the plaintiff, and that the clerk's office have execution against the defendants for their costs."

At the Spring Term, 1858, of the Court of Equity of Henderson county, the plaintiff filed this bill against the same defendants, setting out the same facts, except that she subsequently tendered to Johnston the residue of the purchase-money and demanded a title, which he refused to make, and explains that the reason she did not make the tender before she filed her former bill, was, that she had learned that the defendant Johnston did not have a title to the land, and that she was afraid she might lose both the land and her money.

The prayer of the second bill, which is the one now before the Court, is that the defendants be compelled to convey a good title, and that they be enjoined from proceeding further in the action of ejectment against her.

The defendants filed a plea, setting out the former suit and all the several matters as above stated, and insisted on the decree therein passed, as a bar to the relief sought in the present bill. The Court below overruled the plea, and ordered the defendants to answer over, from which they appealed to this Court.

Shipp, for the plaintiff.
Merriman, for the defendants.

BATTLE, J. The question raised by the plea of the defendant is, whether the facts stated, and the relief sought, in the present bill, are the same as in the bill which the plaintiff formerly filed against the defendants. The test by which this question may be decided is whether, upon the facts set forth in each bill, the plaintiff would be entitled substantially to the same measure of relief. Tried by this test, we think it will be found that the plea was sufficient, and ought to have been sustained.

The only fact of any consequence, alleged by the plaintiff in her last bill, which was not contained in the first, is that she had tendered the residue of the purchase-money for the land, before the latter bill was filed, whereas, in the former, she stated that she refused to pay it for the reason therein set forth. But notwithstanding this, she might have had, under the alternative prayer of her first bill, a decree for at least the title, which the defendant Johnston had, by his written agreement, bound himself to make upon the payment by her to him, of the amount still due for the purchase-money. In ordinary cases, she might under such circumstances, have been required to pay costs, but as she had been permitted to sue in *forma pauperis*, even the payment of costs for having filed her bill before the payment or tender of the whole of the purchase-money, would not have been decreed against her. This is the same relief which the Court might have given her on the last bill, without proof of the fraudulent practices of the defendant Johnston in having a good quit claim deed inserted in the written agreement instead of a good deed of bargain and sale in fee simple. If proof of the fraud alleged would have entitled her to any or further relief, she might have had it just as well under her first, as under her last bill, and it was her own fault not to have dismissed her first bill without prejudice, if she were forced to a hearing before she had prepared her proofs. This, she had a right to

do under our practice; (see Adams' Eq. 373, as to the English practice, before the order of May, 1845). So, if the Court erred in dismissing her bill, instead of giving her the relief first above indicated, it was her fault not to appeal to the Supreme Court, where the error would have been corrected.

Our opinion is that the order, overruling the defendants' plea, was erroneous, and must be reversed, and that the bill must be dismissed.

PER CURIAM, Decree accordingly.

MARCUS BOYD *against* MIDDLETON KING *and others.*

Where an obligee in a bond procured a young man, inexperienced in business, to sign the instrument as co-obligor with another who had signed it, by asking him to sign it as a witness, and when he was about to sign it, by pointing to the place where his name was subscribed as the proper place for a witness to sign, it was *Held* that the bond should be surrendered to be cancelled.

CAUSE removed from the Court of Equity of Lincoln County.

The plaintiff was a young man, living about eight miles from Lincolnton, quite inexperienced in business, and ignorant of its forms.

On the day of this transaction, he came into the town upon business, and being in the store house of Moss & King, the latter asked him to witness a bond which Moss had made to him for the penal sum of ten thousand dollars, he took him to the writing desk, and producing the bond, asked Moss if that was his act and deed, Moss answered in the affirmative; he then presented the paper to the plaintiff, who asked King where he should sign as a witness. He pointed to the space under the name of the principal, where there had been a scroll written for a seal, and the plaintiff, with a belief that he was signing it as a witness, subscribed his name there as a co-obligor.

The paper proved to be a penal bond in ten thousand dollars payable by the defendant King and conditioned that Moss should pay all the debts of the firm of Moss and King which was insolvent for a large amount. The prayer is, that the said bond be declared void, and be surrendered for cancellation.

The defendant having left the State, there was judgment *pro confesso* as to him. The other partner, Moss, answered, and was examined as a witness; he proved the fraud as above stated.

The cause was set down for hearing on the bill, answer, proofs and former orders, and sent to this Court.

Lander and *Avery*, for the plaintiff.

No counsel appeared for defendant in this Court.

BATTLE, J. The material allegations upon which the plaintiff founds his title to relief, are clearly proved by the testimony on file, and he is therefore entitled to a decree to have the obligation mentioned in the pleadings delivered up to be cancelled as to him, and he may have costs against the defendant King.

PER CURIAM. Decree accordingly.

RULE MADE AT THIS TERM.

In order to prevent, or repress applications for rehearings on frivolous or insufficient grounds: It is ordered that, hereafter no petition for a rehearing of any decree, final or interlocutory, shall be received, or considered, unless the same shall be accompanied by a certificate, signed by two counsel, (of whom one shall not have been of counsel at the time of making the decree complained of,) to the effect that, in their opinion, the cause is proper to be reheard upon the grounds set forth in the petition.

*** His Honor, the CHIEF JUSTICE, was absent during the whole of these terms, on account of sickness.

CASES IN EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

DECEMBER TERM, 1858.

EBENEZER PERRY *against* G. C. MENDENHALL, *Adm'r, and others.**

Where three attachments were levied on land and judgment taken on all three, but it turned out that the land did not sell for enough to satisfy the former two judgments, which had been levied before the one in question, it was held that the third attachment was, nevertheless, properly constituted in the court to which it was returnable by its levy on the land, and that the judgment thereon rendered was valid.

Aliter as to a levy of an attachment on personal property.

A *fieri facias* taken out on a judgment in an attachment, waives the priority of lein which the levying of the attachment gave the plaintiff, but it does not invalidate the judgment rendered in the case.

CAUSE removed from the Court of Equity of Stokes County.

It appears from the record of the County Court of Stokes, that an attachment was returned into that court at the instance of the plaintiff against the defendant, George W. Folger levied on 231 acres of land on the waters of Belew's Creek, on

* Decided at the last term.

which a judgment was rendered at March Term, 1827, for $119, 90. It turned out that two other attachments had been previously levied on this land, and that the sum raised by its sale was exhausted before the plaintiff's debt was reached. The plaintiff did not take out a *venditioni exponas* to sell the property levied on, but took out two successive writs of *fieri facias*, returnable to the two next terms after the rendition of the judgment on which the sheriff returned "nothing found," and the costs were paid by the plaintiff.

At June Term, 1854, upon the return of a second *scire facias* to revive the judgment, the judgment was taken according to the *scire facias* for $119 60, with interest, and former costs, upon which a *fi. fa.*, issued to the next term of the court, and returned *nothing found.* Paul Worth, of the county of Guilford, died about the spring of 1854, upon whose estate the defendant, Mendenhall, took letters of administration. The defendant, George W. Folger, is one of the next of kin of the said Worth, and as such is entitled to a distributive share, and is not an inhabitant of the State. The bill is filed under the 20th section of 7th chap. of the Revised Code, to subject this distributive share to the satisfaction of the plaintiff's claim.

The administrator and the next of kin of Paul Worth, including the defendant, Folger, are made defendants. The administrator admits the sum of $184, as being in his hands, belonging to the said Folger. The other answers do not vary the case as stated above.

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

Miller and *McLean*, for the plaintiff.
J. H. Bryan, for the defendant.

PEARSON, J. The bill is filed under the statute Rev. Code, chap. 7, sec. 20, giving a creditor the right to subject any fund in the hands of an executor or administrator to which a non-resident debtor may be entitled, which cannot be reached by an attachment at law.

The question is, has the plaintiff offered the proof necessary to establish his debt.

He relies upon a judgment rendered in his favor under an attachment, in the County Court of Stokes. The record of that proceeding sets out a levy on 231 acres of land, a judgment by default after due advertisement, and at a subsequent term, to-wit: March 1827, the verdict of a jury "assessing the plaintiff's damages to $119 90, of which, $115 is principal money—*judgment of the court accordingly.*" At June Term, 1827, a *fieri facias* which had been issued on this judgment, was returned "nothing found." The bill alleges that after the judgment was rendered, the land levied on was sold, but the proceeds of the sale were all consumed by prior levies, so that nothing was applied to the plaintiff's debt, which remains unsatisfied.

It was insisted, on the part of the defendant, that the judgment was void, and consequently did not furnish evidence of the debt, because there was no property of the debtor attached, which was necessary to constitute a case in court. In respect to the land, it was insisted, it was not the property of the debtor at the time it was attached under this proceeding, for that the title had been divested by the prior levies which consumed all it had been sold for, according to the plaintiff's own showing; for this position, *Armstrong* v. *Harshaw*, 1 Dev. Rep., 187, was cited. The plaintiff's counsel replied that in that case the property levied on was *a quantity of corn* upon which there had been older levies beyond its value; here it was *land*—and he insisted that the difference in the kind of property distinguished the cases.

We are satisfied the distinction is a sound one. A levy upon personal property divests the title of the debtor and transfers it to the officer for the purposes of the writ. So that in an ordinary *fi. fa.* the debt is satisfied by a levy upon personal property of sufficient value, unless it is restored to the debtor. If the officer goes out of office, or if he dies, he, in the one case, or his personal representative in the other, must complete the execution, and not his successor in office. It is

otherwise as to land. The levy does not divest the title of the debtor. If he dies before the land is sold, his widow is entitled to dower, notwithstanding a previous levy. *Frost* v. *Etheridge*, 1 Dev. Rep., 30, where the distinction is pointed out and established. It is well settled that in regard to land, the successor of the officer must complete the execution.

The result is, that this land did belong to the debtor at the time of the levy, although there were older levies; so a case was duly constituted in court, and the judgment was valid at the time of its rendition. This being so, it cannot be rendered void by the fact that, at a sale subsequently made, the land did not bring enough to satisfy all the debts in respect to which levies had been made. The validity of a judgment cannot depend upon the accident that a tract of land sells for a large or a small sum.

The defendant's counsel also insisted, although it may be that the judgment would have been valid if the plaintiff had followed out his levy by a *venditioni exponas*, he has waived the levy by issing a *fieri facias;* consequently the judgment was left without any ground to rest on, and is void; for this *Amyett* v. *Backhouse* 3 Murp. 63, is cited. There is no doubt in regard to the position that a prior levy is waived by issuing a *fieri facias*, but the conclusion insisted upon by the learned counsel, is a *non sequitur.* Issuing a *fieri facias* waives the *lien* created by a prior levy. For instance: if there be two executions levied on land, and the creditor, having the prior lien, instead of following it up by a *venditioni exponas*, chooses to issue a *fieri facias*, he thereby looses his priority, provided the other creditor takes advantage of it. For he must depend upon his new writ, which creates a lien from its teste—whereas the other goes back to the levy, which he has followed out by a process in continuation. So, if after a levy the debtor conveys the land *bona fide*, if the creditor follows up his levy by a *venditioni exponas*, it overreaches the conveyance; but if he issues a *fieri facias*, which is a new and independent writ, he loses his lein, and the purchaser has priority. That was the point decided in *Amyett* v. *Backhouse*, sup. HALL,

Judge, "when the final judgment was rendered, the land levied on was thrown into the general mass of landed property belonging to the defendant by taking out an execution against his property generally. The lein created by the attachment was lost, and the title to the land vested in the plaintiff."

The effect of taking out an execution against the property generally, i. e., a *fieri facias*, is confined to a loss of the *lien* created by the former levy, and it is not intimated that it would be extended so as to make the judgment void. Upon what principle, or for what reason, should it have this effect? Suppose the creditor had issued no execution—neither a *venditioni exponas*, nor a *fieri facias*, then, it is clear, there could be nothing to affect the judgment, and it would remain as record evidence of the debt. If he chooses, finding that the proceeds of the sale of the land will be consumed by older levies, to issue a *fieri facias*, in order to reach other property, if any could be found, and no other property is found, then the issuing of the *fieri facias* is, at most, a mere act of supererrogation, and it is not seen how or why it can affect the validity of the judgment, supposing it to be valid in the first instance—which is the conclusion arrived at above in considering the effect of the prior levies.

The plaintiff is entitled to a decree for the amount admitted by the defendant, Mendenhall, to be in his hands, as the judgment, with interest, exceeds that sum.

PER CURIAM, Decree accordingly.

WILLIAM A. BLOUNT *and others against* JOHN D. HAWKINS *and others.**

Where real and personal estate were given by will to one for life who was also appointed executor, with discretionary power to sell all or any of the said property at any time during the continuance of the life estate, for the

* Decided at the last term.

payment of debts, and such life-tenant appropriated the property thus willed without paying the debts, it was *Held* that he should have kept down the interest during his life, and that not having done so, his estate was held liable to that extent to those in remainder.

Where slaves ranaway from a holder for life to a free State without the fault of such life-holder, and he in efforts to obtain them back, expended more than the value of the slaves, it was *Held* that the remainderman was bound to contribute to such expense in proportion to the value of his interest in the property.

CAUSE removed from the Court of Equity of Wake County.

The bill was filed against the defendant, Hawkins, as the executor of Sherwood Haywood and against R. W. Haywood, as the executor of Elenor Haywood, who was one of the executors of the said Sherwood Haywood, by some of the residuary legatees in remainder, after the death of Mrs. Haywood, praying an account of the said estate and payment of their legacies. The other legatees, under the said will, were made parties defendant, and having answered, an account was ordered to be taken by *Mr. Freeman*, as the commissioner of this Court. Upon the coming in of his report, exceptions were taken to the same by the plaintiffs, as follows:

1. That the commissioner allowed the tenant for life interest paid by her on the debts of the testator accrued before and after his death.

2. That the commissioner did not charge the executor with the proceeds of the sale of the fugitive slave.

3. The third exception is not important.

4. The fourth exception that the commissioner allowed the defendant the whole sum paid by the executor to the Bank of New-Berne on a compromise of the testator's indebtedness; whereas, it was contended by the plaintiffs a part of such sum was for interest, and ought not to have been allowed.

5. The fifth exception is explained in the opinion of the Court.

The clause in the will of Sherwood Haywood, out of which the question of the payment of interest arises in this case, is recited below in the opinion of the Court.

The cause was set down to be heard upon the report of the commissioner and the exception to it.

Fowle, *Rodman* and *Busbee*, for the plaintiffs.
B. F. Moore, for the defendants.

BATTLE, J. The first exception is, that the commissioner has allowed the tenant for life, interest, paid by her on certain debts of the testator accrued before and after his death. This exception is founded upon the following clause of the testator's will: "In the first place, I do hereby devise all my estate, both real and personal, to my wife, Elenor Haywood, to have, hold, occupy and use the same, for her comfort and maintenance, and for the maintenance and education of my younger children, for and during the term of her natural life; and, whereas, also, I am somewhat involved in an important law-suit, of a doubtful issue, and it may be deemed expedient to sell a part or the whole of my real estate in preference to slaves, for the purpose of paying my own debts, and those for which I am bound as security, I do hereby authorise my wife, Elenor Haywood, by and with the advice and consent of my executor, hereinafter mentioned, to sell, mortgage or convey in fee simple absolute, all, or any part of my said real estate, whenever she and my said executor may think it most advantageous to do so; and upon a sale of the same, or any part thereof, I do hereby authorise my said wife, or my executor after her death, to convey the same in her or their names in fee simple, or for a less estate."

By another clause of the will, the remainder in the property is given to the testator's children, and grand-children by a deceased daughter.

The exceptants contend that the widow, as tenant for life, was bound to keep down the interest during her life; while the defendants, admitting the general rule, insist that it is varied by the plenary power given to her as an executrix, as well as tenant for life, as to the time and manner of paying the debts.

The exception must be sustained upon the authority of the cases referred to by the plaintiff's counsel; *Smith* v. *Barham* 2 Dev. Eq. Rep. 420; *Jacocks* v. *Bozman* 1 Dev. and Bat. Eq. 192, and *Jones* v. *Sherard* 2 Dev. and Bat. Eq. 179.

The subject was fully discussed in the case of *Jacocks* v. *Bozman*, which was a bequest of the testator's whole estate, consisting principally of slaves, to his wife for life, and after her death, in certain proportions, to other persons. The difficulty was felt and expressed of applying the rule to all cases alike; because, sometimes the property, while yielding great immediate profits, is gradually diminishing in value, while in other instances just the reverse will be the case. If the property given consist both of land and slaves, as in the present case, and the executrix and tenant for life elect to keep both, either during her whole life, or for any indefinite period after the death of the testator, instead of selling immediately for the payment of debts, we cannot imagine any just rule which can be applied other than to require her to keep down the interest of the debts during her life.

2. The second exception is overruled. It appears that some of the slaves, after the death of the testator, ran off and escaped to a free State, and the executrix expended a large sum in having them recaptured and brought home. They were afterwards sold by her for a less sum than the amount of the expenses incurred in their recapture. The commissioner did not charge the estate with the proceeds of the slaves, nor credit it with the expenses of retaking them. The plaintiffs except because the estate was not debited with the proceeds. We think the commissioner was right. There is no pretence that the escape of the slaves was caused by the misconduct or neglect of the tenant for life. They were, while gone, lost to the remainderman, as well as to her. They could be recovered only by the outlay of a large sum of money. Surely, that ought not to have been borne altogether by her, as the interest of the remainderman was much greater than hers. Yet it was her duty, both as a temporary owner of these, as well as the holder of other slaves, to have them brought

back if she could. She acted in good faith, and it is not shown that the object could have been accomplished at a less expense. If the slaves had runaway, and not gone beyond the limits of the State, then, any small expense which might have been necessary in recovering them might, very properly, have been borne by her alone; but where they were lost to all parties, the rule should be different. In most cases, the life tenant would not attempt a recapture of the slaves, if he had to bear the whole or any considerable part of the expense. Where the whole value of the property is not expended in the effort to regain it, the expense should be borne by each party in proportion to his respective interest; but where the whole is expended, then, in the absence of *mala fides*, the loss must be total to each. As the commissioner has not, in the present case, credited the estate of the tenant for life with the expenses, he did right in not debiting it with the proceeds of the recaptured slaves.

4. The fourth exception must be over-ruled, because the executrix was in no default in not paying interest on a debt which was not ascertained until the compromise. Besides, we cannot see that the compromise embraced any amount which bore interest from an antecedent period of time. The plaintiff in the suit which was compromised, claimed a large sum as being due from the testator, which was resisted by him, and after his death, by his executrix. The compromise in question was then effected, by which the plaintiff agreed to take, and the executrix to pay, a round sum in which there was no distinction of principal and interest, and we cannot say, therefore, that any interest was included in it; but, if there were, the executrix had no means of ascertaining what it was, and on that account ought not to be charged with it.

5. The fifth and last exception is also disallowed. The executrix had duties to perform in that capacity before she took the property as tenant for life. In collecting the assets, converting them into money, and paying the debts due from the estate, she was acting as executrix, and as such we can-

not see why she should not be allowed commissions as well as any other person acting in that capacity. It appears from the report that the commissioner has allowed her five *per cent.* on the amount of the receipts and nothing for disbursements—making the sum of $1320 27, which we think is nothing more than a reasonable allowance for commissions.

The report of the commissioner must be reformed in conformity with this opinion, and may then be confirmed.

PER CURIAM, Decree accordingly.

ELISHA EASON *and others against* WILLIAM SAWYER.*

A cause pending in the Court of Equity, cannot be divided and sent as to one, or some of the defendants to this Court, while as to another, or other defendants, it remains in the Court of Equity for the county.

CAUSE removed from the Court of Equity of Perquimons county.

The original bill is filed against Willis Bagly, executor of Martha N. Turner, praying for an account of the estate, and suggesting a misapplication of the funds. Afterwards, a supplimental bill is filed against Sawyer and others, alleging that they have received from Bagly certain property belonging to the estate of the testatrix, for which they are accountable. Sawyer answers, alleging that he is a *bona fide* purchaser. Whereupon, it is ordered by consent of partes, that this cause, as to William Sawyer, be removed to the Supreme Court for trial.

Heath, for the plaintiff.
Smith and *Jordan*, for the defendant.

*Decided last term.

PEARSON, J. The cause is not properly in this Court. In the first place, there is no order setting it for hearing; but waiving this, it is only sent here *as to William Sawyer;* with respect to the principal defendant, Bagly, or his representative, the cause still remains in the Court below. With every disposition to try causes that are sent to us, we do not feel at liberty to allow them to be split up in this manner; there is no statute which authorises it to be done. The cause is still pending in the Court below, and the question in which the defendant, Sawyer, is concerned, cannot be presented to us as a distinct branch of the cause. The case will be stricken from the docket, and the original papers, which have been sent up here, will be sent back. The necessity of sending the original papers, was suggestive of the incongruity of having the same cause pending in two courts at the same time.

PER CURIAM, Decree accordingly.

THOMAS JONES AND LUCY ANN BAIRD *against* JOHN BAIRD *and another, Executor.*

Where a party made a bill of sale of a slave, for a *valuable consideration*, which was inoperative, because there was no subscribing witness to it, it was *Held* that the purchaser had a clear equity to call for a conveyance; either upon the ground that it was an attempt to pass the title, which failed by reason of a mere formal defect, or upon the ground that the inoperative instrument was evidence of an agreement to convey.

Where, by an ante-nuptial deed, it was provided that the slaves of the wife were to remain in the possession and use of the husband, during coverture, in a suit, brought to compel the husband's personal representatives to perfect the conveyance of a slave which the testator had attempted to convey to the wife's trustee, in lieu of one of her's, which he had sold, which conveyance was inoperative, for the want of a subscribing witness, it was *Held* that the possession, by the husband, of the slave, intended to be substituted, was, during the coverture, not adverse to the wife's trustee; so that, neither the statute of limitations, nor the act creating a presumption of abandonment from the lapse of time, was applicable.

CAUSE removed from the Court of Equity of Person county.

William Baird and Lucy Ann Jones, being about to be married, entered into a contract, in writing, called herein a marriage settlement, reciting that both were possessed of considerable property, and conveying the estate and property belonging to her, consisting of land, slaves, &c., to her two brothers, Thomas, and Roger A. Jones, in trust, to permit the said William, during the joint lives of himself and wife, "to cultivate the said tract of land, and use the said slaves, and other personal property, and to have, receive, take, and enjoy all the crops, hires, rents, issues and profits, to and for his own use and benefit," and on the death of Mr. Baird, she surviving, the property may to go to her, but on her death, leaving him surviving, then to her appointees or legatees, and in case she should make no appointment or testamentary disposition, then to her heirs and next of kin, according to the laws of Virginia. After several provisions securing his estate against the wife's claim for dower, distributive share, &c., the deed provides, "And whereas, the said Lucy Ann, by agreement, entered into with her brothers, is bound to pay a certain portion of the debts of her father, it is hereby agreed that the funds, necessary for her compliance with this agreement, shall be raised from the sale of crops, made on the above mentioned plantation, or, if necessary, by the sale of some part of the property herein conveyed; it being the intention of the said Lucy Ann, that the said William shall not be required to pay the whole, or any part thereof, out of his own estate."

In the year 1828, it became desirable to sell one of the slaves, above conveyed, a young negro woman, named Jenney, whose conduct had become displeasing to her mistress; whereupon, by the consent of the trustees, a sale was made by Mr. Baird, the husband, and the price received and used by him. At the same time, he executed an agreement, in writing, to substitute in her place another female slave of equal value with the one sold; but some two years afterwards, not being satisfied with the instrument containing this agreement, he executed to Thomas Jones, the surviving trustee, an-

other instrument—a deed, dated 26th of June, 1830, of which the following is a copy: "Whereas, in the year 1828, with the consent of my wife, Lucy Ann, I sold a negro woman, named Jenney, daughter of Cloe, which negro woman Jenney, by marriage contract between me and my said wife, was conveyed in trust to Thomas and Roger A. Jones, for purposes therein expressed, which contract is recorded in the clerk's office of Halifax county, Va., and as far as necessary, is intended to be considered a part of this instrument of writing; and whereas, it was understood at the time of the sale of Jenney, that I would substitute my negro woman, Mary, daughter of Molly, and the said Thomas Jones consenting to the said sale and substitution, as far as he is competent to consent, as surviving trustee: Now, therefore, know all men by these presents, that I, William Baird, in consideration of the premises, and for the further consideration of one dollar, paid to me by the said Thomas Jones, the receipt whereof is hereby acknowledged, in order to make the said substitution, have granted, bargained, and sold, substituted, and conveyed, and by these presents do grant, bargain, and sell, substitute, and convey, unto the said Thomas Jones, in trust, for the same purpose and benefit expressed, or intended in the said marriage contract, the said negro woman, Mary, and her child, Washington, born since my agreement to substitute Mary in the place of Jenney, to have and to hold, &c.," expressing the trusts as declared in the marriage contract.

This deed, on its being executed, was delivered to the trustee, Thomas Jones, and after remaining in his custody several days, was handed to the bargainor, who promised and agreed to take it to the county of Person, in North Carolina, where he and his wife resided, and where the slaves in question were, and *have the same registered.* This was not done by him, and the deed is still unregistered. This deed has no subscribing witness. It remained in the possession of the defendant's testator, Mr. Baird, for several years, and was by him handed to his wife, the plaintiff, Lucy Ann, who produced it after his death in the year 1857. The bill further alleges that after the

death of Mr. Baird, the plaintiffs demanded the slave, Mary, and her increase, of the executors, who refused to give them up.

The prayer of the bill is, that the defendants, who are the executors of Mr. Baird, shall be decreed to surrender the woman, Mary, and her offspring, born since the year 1828, and make a proper conveyance of the same to the trustee for the use and benefit of the plaintiff, Lucy Ann, according to the terms of the marriage settlement, and for an account of hire, &c.

The defendants, being executors, in their answer, do not profess to know any thing of the matters above stated, but they express a belief that, as their testator had to pay a large sum for his wife, (over three thousand dollars,) which she was bound to pay to the United States on account of her father's liability as a custom house officer—he altered his purpose of making this conveyance, and that in this way its not being registered is accounted for. They insist, further, that if the plaintiffs have any equity in the premises, that out of such claim should be deducted the sum paid as above mentioned, with interest thereon, being paid out of his own means by their testator, for and on account of his wife; which by the marriage contract he was to be entirely exempted from.

The defendants also rely upon the statute of limitations and the presumption of abandonment arising from the length of time.

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

Badger and *Norwood*, for the plaintiffs.
Reade and *J. H. Bryan*, for the defendants.

PEARSON, C. J. The evidence establishes the execution of the deed by William Baird, the testator of the defendants, to the plaintiff, Thomas Jones, bearing date of the 26th of June, 1830, and by the force and effect of that deed the plaintiffs are entitled to the slaves in controversy.

The fact that William Baird, after the marriage, paid a large amount of money in satisfaction of a debt of the father of the plaintiff, Lucy Ann, for which she was liable, did not justify the failure of the said William to have the deed registered as he had undertaken to do, and does not furnish to the defendants, his executors, any ground upon which they can resist the claim of the plaintiffs. If the existence of that debt had been concealed from the testator, the case would have presented a different aspect. It was, however, not only made known to him, but by the deed of marriage settlement, under which he was entitled to the profits of the land and other property during coveture, and all of which he enjoyed during his life-time, it is expressly stipulated that the portion of the debt for which the plaintiff, Lucy Ann, was liable, should be paid out of the crops made on the plantation, and he took the use thereof subject to that charge.

The statute of limitations and the lapse of time cannot avail the defendants, whether the deed of the 26th of June, 1830, be treated as an executed conveyance by which the title passed, or as evidence of an executory agreement by which the one slave and her child were to be substituted for the other. If the title passed, then the plaintiff, Jones, held the slaves for the use of Baird during his life, and he was, by the provisions of the deed, entitled to the possession; so it was not adverse, and the statute has no application. If it was an executory agreement, being by deed, it does not fall under the provisions of the statute, and no presumption of a release or abandonment of the claim can arise from the lapse of time, because the covenant was not broken and Jones had no cause of action at law until a performance was demanded and refused; and in equity under the maxim that "that is considered as done which ought to be done," the possession of Baird was "congeable," and there being no conflict, there was nothing to induce a presumption inconsistent with the respective rights of the parties; in other words, where the possession of the parties is not adversary, mere inaction or a failure to require the formal execution of a muniment of title in pursuance of an

agreement, will give rise to no other presumption than that of the fact that they were acting under the agreement as if it was executed.

The Court met with more serious difficulty in this question: If the deed of the 26th of June, 1830, passed the title, then Jones ought to have had it registered, and the plaintiffs have no standing in equity; for, although Mrs. Baird, being a *cestui qui trust*, could maintain a bill against her trustee and the present defendants upon an averment that he refused to bring an action at law by collusion with them, yet such is not the fact in our case.

We are satisfied, however, that this deed did not pass the title because it was inoperative as a bill of sale having no attesting witness according to the provisions of the statute. Rev. Stat. chap. 37, sec. 19.: "All sales of Slaves shall be in writing, attested by at least one credible witness, or otherwise shall not be deemed valid."

It is held in some of the old cases, that the act of 1784, as to sales, and the act of 1806, as to gifts of slaves, apply only in favor of creditors and purchasers, being intended merely to prevent *fraud*, and that as between the parties, sales and gifts of slaves are valid at common law. The correctness of these decisions has always been questioned, and it was thought the statutes were intended to prevent *perjury*, as well as fraud. In respect to the act of 1806, one of its provisions makes valid a parol gift by a parent to a child, if the parent dies intestate. This branch of the statute, by its very terms, applies *inter partes*, and accordingly it has been held, in many cases, that such a parol gift is not valid as well between the parties as in favor of creditors and purchasers, unless it stands unrevoked until the contingency happens. In respect to the act of 1784; the act of 1819, Rev. Stat. ch. 50, sec. 8, requires all *contracts to sell slaves*, to be in writing. This, of course, applies *inter partes*, and is intended to prevent perjury as well as fraud, and was a Legislative construction of the act of 1784; for manifestly, the same ceremony should be required in regard to a *sale*, as was deemed necessary in regard to an *agree-*

ment to sell, there being the like danger of perjury, and the provision, in respect to sales, "which are *accompanied* with the *actual* delivery of the slave to the purchaser," did not weaken the inference; for, if the statute only applied in favor of creditors and purchasers, and left a parol sale good between the parties, at common law, the title would pass without delivery, and so, although perjury was guarded against, in a contract to sell, yet the door was left wide open for it in the case of a sale, and it was only necessary to procure witnesses to swear that the parties sold, and did not simply contract to sell. We will not enter further into the question, because it is settled by the case of *Tooley* v. *Lucas*, 3 Jones' Rep. 146.

As the deed, on the 26th of April, 1830, did not pass the title for the want of the ceremony of an attesting witness, its due execution having been established, and it appearing thereby that, for a valuable consideration, the testator of the defendants had agreed to convey the woman and child, named in the pleadings, in the place of the one whom he had been permitted to sell, and the price of whom he had applied to his own use, the plaintiffs have a clear equity now to call for the execution of a formal conveyance, upon two grounds: if the parties intended, by the deed, to pass the title, as is to be inferred from its terms, and the intention failed to take effect, by the omission of a mere formal act, equity, there being a valuable consideration, will require the conveyance to be perfected; as a surrender is supplied in the conveyance of a copy-hold estate, or the informal execution of a power of appointment is aided; and if the legal effect of the deed is merely to furnish evidence of an agreement to convey, as a note or memorandum thereof, in writing, signed by the party, equity will enforce a specific performance.

PER CURIAM, Decree for plaintiffs.

MARCUS C. BOGEY *against* WILLIAM H. SHUTE *and others.*

A mortgagee in a bill for foreclosure cannot bring in one who is in possession of a part of the mortgaged premises claiming it adversely, and pray to have his title deed set aside as having been voluntary and antedated to defraud the mortgagee and other creditors, the bill not alledging any impediment in the way of the plaintiff's suing at law.

A bill for an injunction to stay destructive waste cannot be sustained against one in exclusive possession, claiming, colorably, the absolute estate, where no action at law has been brought and none contemplated.

CAUSE removed from the Court of Equity of Craven county.

On the 22d of January, 1840, Rhoderick S. Shute executed to the plaintiff a mortgage in fee of several tracts of land to save him harmless as his surety in several bonds and notes given by them to several persons and registered on the 29th of January, 1840. In April, 1848, the plaintiff filed an original bill against the mortgagor stating the payment of the debts by the plaintiff and praying a foreclosure or sale of the premises for his satisfaction. Rhoderick S. Shute died without putting in an answer, and by a bill of revivor and amended bill filed in October, 1850, the suit was revived against William H. Shute the younger, the only child and heir at law of the mortgagor. The latter bill also states that the other defendant, William H. Shute, the elder, had set up title to a certain part of the mortgaged premises in fee, by virtue of a deed therefor from Rhoderick S. Shute to him, bearing date the 1st of May, 1838, and purporting to be made upon the consideration of $295 paid, which was registered upon the acknowledgment of the bargainor, in August, 1841. The bill charges, that at the time the deed to him bears date, the defendant, William H., the elder, was a small child and had not the means of purchasing the land, and that, in fact, he paid nothing for it; that the deed was ante-dated, so as to overreach the mortgage to the plaintiff, and was devised by Rhoderick S. Shute to defraud him and his other creditors, as he was in failing circumstances, and became insolvent several years before his death.

The prayer is for a discovery on those points, and that the deed may be declared fraudulent and void as against the plainiiff and decreed to be delivered up; or that the defendant, William H., the elder, shall release, and for general relief.

By a supplemental bill it is stated that the land is poor and not fit for cultivation, but has on it a large number of pine trees, valuable for timber, and also for turpentine—and charging that William H. Shute, the elder, had got into possession of the land, and was cutting, removing and selling the timber, in large quantities, and thereby destroying the value of the land so that it would be rendered an insufficient security for the sum due to the plaintiff on his mortgage, before the cause could be brought to a hearing; and that he is insolvent, and praying an injunction restraining that defendant from the destructive waste; and upon this bill the injunction was ordered.

A formal answer was made for the infant heir-at-law.

To both the bills the other defendant, William H. Shute, the elder, answered, that the deed to him was not ante-dated, but was executed on the day it bears date, and for the consideration of $295, mentioned in it, which was advanced and paid for him by one Ann Foscue, the grand-mother of this defendant, for his preferment in life, and was *bona fide*, and not intended to defraud the plaintiff, or any creditor of Roderick S. Shute. The answer admits that the defendant is in possession of the land covered by the deed to him, and has been for several years, and that he is cutting the timber and disposing of it, but says that he is not doing so wastefully, but, as any other prudent proprietor would, and as the legal and rightful owner, he has a right to do; and it then insists, that both as to the title to the land, and the alleged trespass on it, the matter is triable at law.

By a consent of the parties, there was a reference to ascertain the sum due to the plaintiff on the footing of the mortgage, and there was a sale of those parts of the mortgaged premises not claimed by the defendant, William H. Shute, the elder; and the master reports that after applying the pro-

ceeds of the land sold, there is a balance due to the plaintiff of $574 08, with interest, from June 20th, 1857.

Badger, *Green* and *Mason*, for the plaintiff.
J. W. Bryan, for the defendant.

RUFFIN, J. The plaintiff is entitled, as a matter of course, to a decree of foreclosure as against the heir of the mortgagor; but, as that defendant is an infant, the costs cannot be given against him, and are chargeable on the mortgaged premises, as the debt and interest are.

With respect to the other part of the case, the Court is of opinion that the bill cannot be sustained. The parties have taken much testimony to impeach and sustain the deed under which the defendant, William H. Shute, the elder, claims. But we do not meddle with it, because that is a question concerning the legal title merely, and is not properly cognizable in equity. The plaintiff does not come into court upon an equitable title, but upon his legal title as mortgagee, for the purpose of getting his debt, or having his legal title quieted by terminating an equity of the mortgagor to redeem. Thus far the bill is a proper one. But finding, as he says, that the other defendant was also claiming the land, as the legal owner in fee, under a deed from the plaintiff's mortgagor, prior in date to the the mortgage, the plaintiff alleges that deed to be fraudulent and void as against the creditors of the maker of it and against himself as mortgagee—because, supposing it to have been executed at its date, it was a voluntary conveyance by an insolvent man; and also that it cannot defeat the the plaintiff's title, because, though bearing date prior to the mortgage, it was, in fact, executed afterwards. Upon both of these points, the parties are at issue, and it is apparent that they involve, simply, the legal title, as between these parties. The bill states no impediment in the way of the plaintiff's suing at law, nor any reason for suing here. It is, upon its face, an ejectment bill, and every question raised here, as to the title, could be raised and would be triable in an action of

ejectment; and, therefore, this Court ought not to assume the jurisdiction of deciding them. There are a few cases in which some of the courts of this country have said, that where the defendant submits to the jurisdiction by answering on the merits without raising the objection, and the parties bring the cause to a hearing on the proofs, the question will be entertained, because the court is competent to decide a question of fraud. But that depends upon the nature of the fraud, and the kind of interest affected by it; and as a general proposition it may, therefore, well be questioned. But, certainly, it cannot apply to a case like this, in which the questions are peculiarly proper for a jury, and on which, if the court would assume the jurisdiction at all, issues would probably be directed. And, more especially, it is not here applicable—because the defendant distinctly raises the objection in his answer, and it was, therefore, the folly of the plaintiff by taking replication to proceed to proofs, and compel the other party to do so too.

Nor is the plaintiff's case any the better upon the supplemental bill, on which he obtained an injunction against cutting the timber on the land. It does not seek an account of the produce of the timber, but merely an injunction on the ground of the insolvency of the defendant and the injury to the substance of the estate, by acts in the nature of destructive waste. Such a bill cannot be sustained against one in exclusive possession—claiming, colorably at least, the absolute estate, until the plaintiff has established his title at law—or, at all events, an injunction can be granted only when the plaintiff is endeavoring to establish his title at law, and until he should have a reasonable time allowed for that purpose. For, the court of equity acts in such cases, not as superseding the jurisdiction of the courts of law over a legal title, but only in aid of a legal remedy, defective, because dilatory. These principles were so fully settled in the case of *Irwin* v. *Davidson*, 3 Ired. Eq. 311, that they need no further illustration on this occasion. Here, there has been no trial at law, and no case put in train for trial. On the contrary, the plain-

tiff, clearly, does not contemplate such a course, but proposes to change the jurisdiction altogether; for, the reason assigned in the bill for the necessity for the injunction is, that without it, the timber would all be felled and sold before the hearing of this cause, so as to destroy the value of the land as a security for the debt at the making of a decree for foreclosure.

In no respect, therefore, can the bill be entertained as against the defendant, William H. Shute, the elder, and as against him it must be dismissed, with costs.

PER CURIAM, Decree accordingly.

BENJAMIN I. DUNLAP *against* THOMAS INGRAM *and others.*

A bequest of slaves, with a request that the legatee will permit them to have the result of their own labor, is a bequest for emancipation, and a trust in them results.

An undisposed of surplus of a testator's estate, must be distributed among *all* the testator's next of kin, although words are used in the will, manifesting an intention to exclude *some* of them from participating in his estate.

It is reasonable for a testator to say, when he makes a gift to one, that it is in bar of a claim the donee has, or may set up against *him*, and that the legatee must release the claim before he can have the legacy.

The course of the Court of Equity in respect to elections, is, not to compel a party to choose between the opposing interests, until they are in such a state as to enable the party to see on which side his interest lies.

Where an interest is given to each one of a class of persons severally, upon a condition, that they *respectively* release a joint claim against the testator, it was *Held* that each individual was to perform the condition for himself, and further, that a forfeiture arising from a nonperformance of the condition, fell into the undisposed of surplus.

CAUSE removed from the Court of Equity of Anson county.

Jeremiah Ingram, of Anson county, died in February, 1856, having made his will in December, 1853, in which he made the following dispositions:

"Item 1st. My will and desire is, that all my negroes, in this State, be kept together and worked on my plantation, un-

til the lease that Presley and Elizabeth Stainback have on my plantation shall expire, except such of them as I shall otherwise dispose of.

"Item 2nd. I give to my brother, Ebenezer, my Leake tract of land during his natural life; and at his death to be sold, and the proceeds divided among my heirs, as herein-after mentioned.

"Item 3rd. I bequeath to the American Bible Society, the sum of six hundred dollars, to be paid within two years after the probate of my will.

"Item 4th. The Missionary Society of the South Carolina Conference of the Methodist Episcopal Church, South, six hundred dollar.

"Item 5th. I give to Riston H. Bennett, the sum of five hundred dollars, as his full share of my estate.

"Item 6th. I give to my nephew, Benjamin Ingram, son of Lemuel Ingram, deceased, the sum of five hundred dollars, as his full share of my estate.

"Item 7th. I give to my nephew, Presley N. Stainback, the sum of one thousand dollars.

"Item 8th. I give to my sister, Elizabeth Stainback, the sum of one thousand dollars, in addition to an equal part of my estate.

"Item 9th. I desire that the tract of land, on which I live, be valued at cash valuation, and that one of my legatees take it at that valuation.

"Item 10th. My wish is, that all my land, in this State and in Mississippi, not otherwise disposed of, be sold, and the proceeds divided equally among the heirs of Willliam P. Ingram, all entitled to one share, and the heirs of Lemuel Ingram, deceased, (except Benjamin Ingram and Riston H. Bennett) and entitled to one share jointly, and my brother Thomas, my sisters, Elizabeth Stainback and Hannah P. Dunlap, to receive a share each.

"Item 11th. My desire is, that all my negroes, in the State of Mississippi, (except Reuben) together with all the

other property I may possess in that State, be disposed of, and the proceeds disposed of, as in item ten.

"Item 12th. I give to my friend, Horatio Tyson, my negro Reuben, now in Mississippi.

"Item 13th. My will and desire is, that all my negroes in this State, except such as may hereinafter be disposed of, which I may die in possession of, be equally divided or sold, and the proceeds divided among the heirs of William P. Ingram, deceased, all entitled to one share, the heirs of Lemuel Ingram, deceased, (except Benjamin Ingram and Riston H. Bennett) entitled to one share, my brother, Thomas Ingram, my sisters, Elizabeth Stainback and Hannah P. Dunlap, each entitled to one share. My further desire is, that if any of my negroes should have a choice of homes, they be valued at a low price, to such one of my legatees as they may wish to live with; and that all the claims I hold against any of my legatees, of whatever date may be taken into consideration in the final division.

"Item 14th. I give and bequeath to my nephew, John B. Ingram, my negroes, Edmund, Tempe, George, Dick and Judy, in trust, with a desire that he permit them to enjoy the proceeds of their labor in all respects, in as full and ample a manner as the laws of the State will permit, and that they may have the use of a sufficient portion of my land in the Patterson tract, for making their support. I also give and bequeath to the said John B. Ingram my negroes, Viger and her children, John, Alexander, Washington and Franklin, in trust, with a desire that he will permit them to enjoy the benefit of their own labor in as full and ample a manner as the laws of the State will permit, and that they be permitted to have a home on my plantation."

The testator appointed three executors, of whom the plaintiff alone proved the will. He afterwards executed the following codicil, dated April 8th, 1854:

"Whereas, in my last will, bearing date, &c., I have given and bequeathed to Riston H. Bennett, $500, as his full share of my estate, and to Benjamin Ingram, son of Lemuel, deceased,

the sum of $500, as his full share of my estate; and whereas, I have given and bequeathed in my said will, in the 13th clause thereof, to the heirs of Lemuel Ingram, deceased, (except Benjamin Ingram and Riston H. Bennett, who married Anne, a daughter of said Lemuel) one share jointly between them of all the residue of my estate, not otherwise disposed of in my said will, the said share being the one 5th part of the said residue; now, being desirous of modifying my will, in respect to the aforesaid legacies, I do hereby alter the said legacies, and declare that it is my will and intention, that if the said Riston H. Bennett and his wife Anne, and the said Benjamin Ingram, or Samuel P. Ingram, Presley Ingram, Martin P. Myers, and his wife Winny, Roland Crump, and his wife Sarah, and John B. Ingram, or either of them, who are the rest of the heirs of Lem. Ingram, deceased, shall prefer or set up any claim or debt or demand against me in my life-time, or executors, or administrators, after my death, for any matter or thing arising from, or in any way growing out of my execution of the will of the said Lemuel, deceased, as his executor, shall forfeit all right to his, her, or their legacies aforesaid, in my will mentioned, and all interest in my estate; and I do further declare it to be my will and intention, that my executors shall not pay to to the said Riston H. Bennett, or to Benjamin Ingram, this legacy of $500, nor to the other children of Lemuel Ingram, their respective portions of the aforesaid share of the residue of my estate, bequeathed to them, until each one of them, applying for his legacy, shall execute to them a full release and acquittance of all demands, actions, and causes of action, which he may have against my representatives for, or on account of, any matter or thing arising from, or growing out of the execution of the will of the said Lemuel, by me, as his executor. And I do hereby ratify and confirm my said will, in every thing, except, in so far, as the same is hereby revoked or altered."

The bill is filed, by the executor, against the American Bible Society, and the Missionary Society of the South Carolina Conference of the Methodist Episcopal Church, South, and

against the specific legatees, and the brother and two sisters of the testator and their husbands, and against John B. Ingram, Riston H. Bennett and wife, and Benjamin Ingram, and the other children and heirs-at-law of the two deceased brothers, William P. Ingram and Lemuel Ingram, and prays to have the duties of the executor, and the rights of the several legatees, and of the next of kin, declared upon the following points:

1st. Whether the bequests to the American Bible Society, and the Methodist Missionary Society, are valid, and ought to be paid by the plaintiff.

2nd. Whether the disposition of the slaves to John B. Ingram, in the 14th item, for the purposes therein mentioned, is valid, and, if not, whether they, being a part of the testator's negroes in this State, pass with the others under the 13th item of the will, or go to the testator's next of kin, including, or excluding, Benjamin Ingram and Riston H. Bennett and wife; or whether they belong absolutely to John B. Ingram in his own right.

3rd. Whether the terms and conditions imposed by the codicil on the legatees, Benjamin Ingram, Riston H. Bennett, and the other children and heirs of Lemuel Ingram, in respect to the forfeiture of their legacies, if they should prefer a claim arising out of the testator's administration of Lemuel Ingram's estate, or refuse to execute releases, are valid, and ought to be enforced or not; and if yea, whether the preferring a claim or a refusal to release by one of them, would work a forfeiture by all of them; or would only he, she, or they, thus claiming or refusing to release, incur the forfeiture; and within what time must those persons accept their legacies and execute the releases.

4th. Whether the conditions imposed by the codicil, attach to the legacies to the heirs of Lemuel Ingram, given in the 10th and 11th items, as well as to those in the 13th item.

5th. And should any forfeiture, in the whole or in part, be incurred by any of those persons, what disposition is to be made of the legacy or legacies, thus forfeited.

6th. The bill states further, that, exclusive of the specific legacies and the negroes bequeathed to John B. Ingram, there is not a sufficient fund to pay the debts and pecuniary legacies, and prays directions as to the fund for their payment.

Ashe, for the plaintiff.
Winston, Sr., *Osborne* and *Strange*, for the defendants.

RUFFIN, J. No observations are required on the first point, as the counsel for all the defendants agree, that the charitable bequests for religious purposes shall be paid.

There is no doubt on the second point, that the legatee, John B. Ingram, cannot hold the negroes, beneficially, as he takes them on an express trust. And there is as little doubt that the trust expressed is unlawful, as it is very plainly for the emancipation of negroes who are to reside here. The words in this will are much the same as those in the will in *Sorrey* v. *Bright*, 1 Dev. & Bat. Eq. 113—in which, and in numerous other cases, it has been held, that the trust was void, and results. The fund would fall within a general residuary clause, according to the case cited, if the will contained such a clause. The codicil speaks of the residue of the estate having been given by the 13th clause of the will. But when that clause is looked at, it is seen that it does not give any thing as a residue of the estate. The only sense in which the testator could have called what is there given away, a residue, is, that he thought by the previous gifts in the will he had exhausted his estate, saving only as to those parts of it which he was disposing of by that clause. Having nothing else to dispose of but the negroes in North Carolina, he considered that in giving them he was giving the residue of what he was worth. But he did not give them as the residue of his estate, nor even as a general residue of his negroes, since by the exception in that item of such negroes as he might thereinafter dispose of otherwise, and by the subsequent disposition of some of those negroes, he turns the gift into one of a special residue, if it be a residue at all. Indeed, upon the words "All *my* negroes *in*

this State of which I may die in possession," it would rather seem to be a specific legacy than residuary. *Nisbet* v. *Murray* 5 Ves. 150; *Everitt* v. *Lane* 2 Ired. Eq. 548. In either, as put, the negroes excepted, and afterwards disposed of for emancipation can never fall back into it, whether they are effectually disposed of or not in the subsequent part of the will. Those negroes only are given in the 13th clause which are not taken out of it; and those excepted turn out not to be legally disposed of, and, consequently, result to the next of kin.

The question then arises, on which the parties ask the declaration of the Court, which of the next of kin succeed to that surplus, and in what proportions? Naturally, they succeed to such an interest as next of kin do when there is a total intestacy. They take, because as to this fund, the deceased is intestate, and there is no other rule for the distribution of it but that furnished by the statute of distributions. In England, it formerly belonged to the executor, unless upon the will it was seen he was an executor in trust, as he was called; and every executor is such an executor here since the act of 1789. It was contended, however, at the bar, that the terms in which the legacies are given to Benjamin Ingram and Bennett repel their claim, and that of the wife of the latter, to any part of this surplus; and the point was argued with learning and ability by the counsel for the other next of kin. Yet, it has failed to satisfy the Court of the correctness of the position, and our opinion is to the contrary. If the question concerned the Bennetts alone, it might be of some interest to enquire, whether or not the wife is within the terms of exclusion used in this will. But, as the opinion of the Court is, upon the general question, in favor of both Benjamin Ingram and the husband, Bennett, it is not worth while to consider the particular point respecting the wife. It was admitted in the argument, that the exclusion of all the next of kin, would not defeat them of the surplus—though it was said the exclusion of one among two or more would be effectual as to that one. Now, the ground on which the next of kin take, in the

first case, is, that the testator has left the surplus undisposed of, and they must take, because there is no one else who can. Then, it is plain, they take by the law, and not by the will. The same reason applies as directly and conclusively where there is an exclusion of one of several next of kin, and the contrary doctrine is absolutely inconsistent with the nature of the fund, which is a residue undisposed of—not touched by the will, and left to the law alone. If, then, the exclusion of one be effectual, it must be because, by reason of the exclusion, there is a gift by implication to the other next of kin, and they take as general residuary legatees. The interpolation of such a general residuary clause upon implication is inadmissible upon any proper principle of construction. Such an implication could only be justified upon the clearest intention, and in this case, it is plain, the testator thought, he had given away all his estate, and the partial intestacy arises, as it generally does, from a defect in one of the dispositions from which a surplus arises, which was not in his contemplation, and about which he had, therefore, no particular intentions. Among the numerous cases adduced in the argument, there is but one directly in point—that of *Vachell* v. *Breton*, 1 Bro. Parl. Cases, 167. There, the testator gave ten shillings, each, to two children, whom he called the children of his wife, and who, it appears, were born during his separation from her, and he added to the gift the words "and no more," and it was decreed that a surplus should be distributed amongst the testators next of kin, excluding the children. It may be observed on that case, in the first place, that the decree in the court of chancery was the other way; *Vachell* v. *Jeffries*, Pr. in. Ch. 169, and that no reasons are given for the judgment, and it does not appear that any one of the Judges gave an opinion. It seems to have been decided simply by a vote of the Lords. What influenced that body one cannot undertake to say. It may have been that the children were not deemed akin to the testator; for, although born in wedlock, they might have been bastards, if the separation was of a kind to exclude access; or it may have been an act of arbitrary ex-

clusion on account of an obvious suspicion of the imposition of spurious issue on the testator, without considering the question of bastardy in a legal point of view; or may have been on the construction of the will. If the decision went on either of the two first grounds, it has no application here. If on the last, it seems to us not to be law, for the reasons already given. The authority of the case is to be further doubted, because it has not been followed, as far as our researches extend, nor mentioned with approbation, by any Judge or respectable commentator. On the contrary, an undisposed of residue has always been divided among all the next of kin, as in a case of total intestacy, with the exception, only, as to hotchpot, and that because the statute which provides for it has only a total intestacy within its purview. Besides, the recent decision in *Johnson* v. *Johnson*, 4 Beav. 318, lays down the law in direct opposition to the case in the House of Lords. In that case, the testator cut off his widow and one of his daughters from any part of his property, and directed that they should not recieve any benefit therefrom; but he made no disposition of it. It was held, nevertheless, that the negative words could not exclude one of the next kin, and therefore that the widow and daughter were entitled to their share of the residue. That such was well understood to be the state of the law in England, is deducible from the recital in the modern statutes in that country, converting executors into trustees, (in respect of any residue not expressly disposed of,) for the persons who would be entitled to the estate under the statute of distributions, if the testator had died intestate. Our act of 1789, though not so much in detail, is the same in substance, in providing that the executor shall retain only his charges and disbursements, and that at the end of two years, all the estates remaining, shall be delivered and paid over to such persons to whom the same may be due by law or the will of the deceased. That due by the will is whatever the will disposes of, and that due by law is, necessarily, that not disposed of by the will, and is the surplus now under consideration. By what law is it due? There is no other that can be meant but

the statute of distributions. As, therefore, the next of kin take in this case by law, negative words cannot exclude them, and they must all take. Although in *Jones* v. *Masters*, 3 Mur. Rep. 110, it was not the precise point before the Court in the action at law, yet the remarks of Judge HENDERSON, in alluding to it, incidentally, denote very explicitly his opinion on it. He said that although one could not claim as legatee under a will in opposition to the intention of the testator, yet there are many cases, where the next of kin take in express opposition to the words of the will; because they take under the law, and not under the will, and their right can be defeated only by the substitution of some person to take in their place, and not by a declaration that they shall not take.

The Court concludes, therefore, that Benjamin Ingram and Bennett and wife, take their shares, of this fund, with the other children of Lemuel Ingram, as representing their father.

There is no reason for not putting the children of Lemuel Ingram to the election imposed on them in the codicil. It is reasonable for a testator to say, when he makes a gift to one, that the gift is in bar of a claim the donee has, or may set up, against him, and, that the legatee must release the claim, before he can recover the legacy. The election here goes to all the provisions in the will, in favor of Benjamin Ingram and Bennett, and the heirs of Lemuel Ingram; for, although, the codicil recites only the provision made in the 13th clause, yet the forfeiture, upon preferring a claim arising out of the testator's administration of Lemuel's estate, is not confined to the legacies given in that clause, but it is added, "and all interest in my estate.' The election of each one is to be made for him or herself, and does not affect any other. The codicil is not, in every part, distinct on the point, but that is the effect as a whole; for, in requiring releases, it directs that "each one of them applying for his legacy, must release all demands he may have," before the executor shall pay their "respective portions," and the forfeiture is of "all right to his, her or their legacies aforesaid;" from which, the inference is, that the act of each is to operate on his several interest.

As to the time within which those persons are to execute releases, the testator, having limited none, it is to be determined by the general rule of Equity. It is the course of the Court not to put one to his election, until the estate is in such a condition as to enable the party to see on which side his interest lies; for Equity does not put a surprise on persons in this situation, but leaves them to decide after an opportunity of comparing the value of their original rights with that derived under the will. Therefore, the executor has no right to call for an election until the accounts of the testator's estate shall be so far made up as to satisfy the legatees on those points, and, indeed, if necessary for that purpose, the Court would, at the instance of either party, direct such an account in this cause. *Newman* v. *Newman*, 1 Bro. C. C. 186.

If any of the parties should elect not to take under the will, the legacies to those parties would also fall into the surplus, because the will does not, in case of a forfeiture, give the legacies over, nor in any way dispose of them, since, the gifts are not of the whole share to such of the legatees as may release, but they severally take a share of the fifth part and no more.

It arises from the nature of an undisposed of surplus in the hands of an executor, that it should be the primary fund in the payment of debts and pecuniary legacies, as the testator must always be supposed to intend that his legatees shall have their legacies without abatement, if there is any other fund for the satisfaction of creditors and general legacies. A surplus is such a fund, just as lands descended stand before those devised in respect to charges on both.

Per Curiam, Decree accordingly.

JACKSON DAVIS *and others against* WM. A. MARCUM.

When an administrator was ordered by court to sell property for distribution, on a credit, taking bond with sureties for the purchase money, he is only responsible in respect to the sufficiency of the bond, for wilfully or negligently taking such sureties as were not good, or such as he had not good reason to believe were sufficient.

A delay by an administrator, of one month, to bring suit on a bond taken on the sale of property, made under an order of court for distribution, will not make the administrator liable for the loss of the debt by the insolvency of the obligors, where there appeared to be no likelihood of such insolvency at the time.

APPEAL from the Court of Equity of Chatham County.

The bill is filed by the next of kin of Turner Mason, who died in Orange county intestate, against Marcum, who administered on his estate. The defendant submitted to an account; but by his answer objects to being charged in the account for the value of two slaves, whom he sold on credit and for whom he received nothing, by reason of the insolvency of the purchaser and the sureties in his bond. On that point the cause was heard in the court of equity, and the master was directed, that in taking the account he should not charge the defendant therewith; and from the order the plaintiffs were allowed to appeal.

The material facts with respect to the question, appear, from the pleadings and proofs, to be these: In November, 1853, the county court of Orange ordered the defendant to make sale of two slaves, left by the intestate, on a credit of six months, for the purpose of distribution amongst the next of kin, who were numerous, and among whom was the defendant. Early in January, 1854, the defendant offered the slaves for sale at the late residence of the intestate, and they were bid off at the price of $2,265, by one McDuffie, of Cumberland county. Several of the next of kin were present at the sale, and were well satisfied with the price. But the purchaser was unable to give sureties at that place, and, in order to complete the sale, which was deemed advantageous, it was

agreed between the parties that the defendant should carry the negroes to Cumberland for delivery, where McDuffie should give a satisfactory bond. Accordingly, in a few days, the defendant took them to Fayetteville, where McDuffie offered his bond with Nathan King, Robert F. Murphy and A. McMillian, as sureties. The four obligors were then in possession of property to the value of sixty or seventy thousand dollars, and each of them was generally considered to have independent and unembarrassed property. The defendant was a stranger in Cumberland, and declined taking the bond until he could ascertain its sufficiency; and, upon enquiring of the sheriff of the county, and several other respectable men of business in the town and county, he was told by them that the parties were men of large property, and that their bond was undoubtedly good, and he thereupon accepted the bond and delivered the slaves. The purchaser and his sureties were, respectively, largely engaged in making turpentine, and soon afterwards the article fell very much in market, and those persons became, in reality, much embarrassed, though the fact was not known to the public until deeds of assignment in trust from them were registered as hereinafter mentioned, but they were still in good credit. In fact, however, McDuffie executed a general assignment of his property on the 2d of April, 1854, which was kept secret until it was registered on the 17th of August, 1854; and King made a similar assignment on the 28th of March, which was not registered until the 2d of November following, and Murphy made an assignment on the 17th of January, 1855, which was immediately registered, and in the latter part of 1854, McMillan's property was all sold by himself, or under execution, so that in December, 1854, or January, 1855, those persons, all, became notoriously insolvent. The defendant might have brought suit on the bond to the county court of Chatham, where he lived, which sits on the second Monday in August; but he did not; and the answer states his reason to be, that the debtors were still reputed to be intirely responsible and in as good credit as they had ever been, and that he believed

so, and also that he should probably receive payment sooner by not suing than by suing. Finding that they did not make payment, he brought suit to the next November court, when the defendants put in a plea to delay judgment, so that he could not obtain one until February, 1855, when the debtors had became insolvent, and his execution, then issued, was returned *nulla bona.*

Haughton for the plaintiff.
T. Ruffin, Jr., and *Phillips* for the defendant.

RUFFIN, J. As the law requires administrators to sell the effects at auction on a credit of not less than six months, and to take from purchasers bond with good sureties, the defendant was in no default in making the sale, nor in taking the bond on that time. It follows, too, that he is only responsible in respect to the sufficiency of the bond for the purchase-money for wilfully or negligently taking such as were not good at the time of taking them, or such as he had not then good reason to believe sufficient. For, he is not to be held to guarantee the solvency of the purchaser. If he be of good credit, and the administrator were to refuse to complete the sale, and a loss were afterwards to arise from the death or destruction of the property, he would be chargeable with it. He is to act honestly for the estate, as he or any other prudent men would act for themselves, and he will then be justified in either completing or not completing the sale. The residence of the purchaser in another county, cannot materially affect the question, except so far as it may be evidence of a rash confidence in persons whose circumstances the defendant was not acquainted with. But persons from a distance are often the best bidders, and it is the duty of the administrator to get the best price; and when he gets such a bid, he ought not capriciously to reject it, upon a pretense of his want of knowledge of the bidder's affairs, if upon due inquiry he receives reliable information of the property and the credit of the bidder. The difference is, that when the purchaser is

of the neighborhood, an administrator may, with propriety, act on his information of the known wealth and credit of the purchaser and his sureties, without proceeding at the time to make particular inquiry of others on those points; whereas, in the case of strangers, it is clearly incumbent on the administrator to enquire in proper quarters as to the sufficiency of the bond offered by the purchaser. But, if he recieve satisfactory information—such as would lead a prudent man to trust to those names for the amount of the bond—then he ought to complete the contract, and therefore the law will not treat him as being in default for having done so. The present defendant seems to have used every prudent precaution which even a suspicious person would have used, and he had the best reasons to think the debt entirely safe, as, indeed, it would have been, but for the sudden fall of turpentine, in which those persons seem all to have been dealers. Then the alleged liability of the defendant for this loss is reduced to the single fact that he did not sue on the bond to the first term of the county court, which came about one month after the bond fell due. That seems to be a very short time, on which to charge an administrator to next of kin, in a case where there was no suspicion and apparently no cause for suspicion, and the defendant swears that he, in fact, believed the debtors to be perfectly responsible, and his sincerity is attested, not only by his obligation to good faith in his office, but by personal interest as one of the next of kin. It may be, that as to creditors the utmost diligence is required, and that the administrator ought to give no indulgence on sale notes; as, at common law, the sale of the goods made them assets at once, and it is a forbearance in the law merely, to allow the sale, and not to make the administrator answerable for the proceeds until the money is received or might have been received. But, without determining that point, it seems to the Court that where there was no likelihood of insolvency, or none known, but the contrary was believed, and was apparently true, one month's delay in bringing the suit is not, of itself, such evidence of bad faith or gross neglect as

renders an administrator liable to the next of kin for losing a debt by the insolvency of the debtors. It is not the custom of this country to put sale notes in suit the day after falling due; nobody does it, unless in particular cases—where the debtors are suspected, or the money may be immediately required for the payment of debts; moreover, in this case, if the defendant had sued to the first court, it is obvious that the suit would not have saved the debt; for the deeds of trust, though unknown to the public, were executed and held ready for registration whenever it might be necessary to give them operation against judgments and executions, and there cannot be a doubt that, if suit had been brought by the defendant to August court, it would have been unavailing, by reason of the registration of those deeds in time to defeat the recovery, —one of them, indeed, having been registered on the 17th of August, the week after the first court. The degree of diligence requisite to excuse an executor, will, of course, vary with circumstances—such as the amount of the debt, the necessity the estate is under for the present use of the money, and the probable sufficiency or insufficiency of the debtors to answer the demand. There has been no case before the Court on which it has been held that the loss of one court, when the debt fell due a month before the court, would subject the executor; and, if, in any case it would not, we think it ought not in that before us, since the defendant had every reason to think the security ample up to the time he sued, and for some weeks afterwards, so that he might well believe that payment would be received sooner without bringing suit to the first court than by bringing it, and he certainly did not delay with any sinister purpose.

The decree of his Honor is therefore affirmed, and this will be certified to the court of equity so that further proceeding may be there had in the cause.

PER CURIAM, Decree accordingly.

B. I. HOWZE *and others against* E. MALLETT *and others.*

After payment by the testator, expressly in satisfaction of a pecuniary legacy, a second payment cannot be enforced against the executor.

The act of 1844, in relation to the operation of wills, and the time to which their operation is to be referred, cannot be construed to set up a satisfied legacy.

CAUSE removed from the Court of Equity of Bladen county.

William H. Beaty, made his will on the 16th of May, 1849, and therein bequeathed to Margaret Holmes and Lucien Holmes, the children of a deceased daughter, the sum of $500 each. Afterwards, the grand-daughter married Benjamin I. Howze, and in May, 1852, Mr. Beatty paid to him $500, and took from him a written receipt therefor, "to be deducted from a legacy left by said Beatty to Margaret Holmes, now Margaret Howze, in his last will, made on the 16th of May, 1849." When the grand-son came of age, Mr. Beatty paid him $300, and took his receipt "in part of $500 said Beatty has, in his last will, dated 16th of May, 1849, directed his executors to pay me, his grand-son;" and on the 24th of June, 1853, Mr. Beatty paid him the further sum of $200, and took his receipt therefor, expressing the payment to be "in full of the legacy of $500, to the said Lucien Holmes, in his last will, dated May 16th, 1849."

The bill is brought by Howze and wife and the grand-son against the executors, claiming the two legacies of $500; and the defendants resisted, on the ground, that they were satisfied.

Strange and *Fuller*, for the plaintiffs.
William A. Wright, for the defendants.

RUFFIN, J. The only question is, whether, after payments by the testator, expressly in satisfaction of a pecuniary legacy, a second payment can be enforced from the executor. It would seem strange if it could, for, it would not be more di-

rectly contrary to the intention of the testator than to right and justice. The delivery by the testator to the legatee, of a specific thing bequeathed, has always been held to a be a satisfaction or ademption of the legacy. Although the tenor of the will stands, yet the gift is ineffectual, because the legatee, having got the thing intended for him, cannot get it again. In that respect it must be the same with the pecuniary legacy. Express anticipated payment by the testator, must exclude a claim for a second payment of the same sum, since the testator intended but one gift, and that he completed in his his life-time. To say the contrary, amounts to this: that nothing but revocation can work an ademption or satisfaction, and that the whole law, on those heads is abrogated. It was contended, at the bar, that such is the case, by force of the act of 1844; which provides, that no conveyance or act, subsequent to the execution of a will, of real or personal estate, except revocation, shall prevent the operation of the will, with respect to such estate or interest, as the testator shall have power to dispose of by will at the time of his death; and also that a will shall be construed, in respect to the real and personal estate comprised in it, to speak and take effect, as if it had been executed immediately before the death of the testator, unless a contrary intention appear in the will. But the act cannot be received in a sense, which sweeps away such important heads of equity and leaves a satisfied legacy in force, when, apparently, it was passed *diverso intuitu*, and, as far as can be discovered, this case was not in the contemplation of the Legislature. The Court has already held, in *Robbins* v. *Windly*, 3 Jones' Eq. 286, that the third section could not be construed so as, under color of the doctrine of election, to defeat an intention of the testator to adeem a legacy. Both the sections were, in truth, meant not merely to establish uniformity in the construction of wills, but as provisions in aid of the intentions of testators by giving effect to wills so as to pass after-acquired lands, and also to operate on estates or interests which did not remain in the same state at the death of the testator, in which they were at the making of the will; as if

the testator took a conveyance for lands he had contracted for at the date of the will, or mortgaged his estate, or renewed a term, and the like. Cases of that character give scope to the act which carries out the intention of the testator in a great majority of instances. But the ademption or satisfaction of legacies is founded on a doctrine of natural as well as artificial equity against double payments of one bounty. And the abrogations of that principle would not only not aid in effectuating the intention of testators, but, in almost every case, would defeat the intention. If a will say on its face, after giving a pecuniary legacy, that if the testator should pay it in his lifetime, it shall not be paid again by his executors, surely, the fact, and the intention of a payment by the testator, may be shown in satisfaction; and that, although the will is, in general, to speak as of the moment of his death, and thus, apparently, would exclude the possibility of prepayment of a legacy given in that moment. It is in the nature of a conditional legacy. So, indeed, are all legacies in respect to this point of satisfaction, upon the principle of equity forbidding two satisfactions. Then the act, and the intention, when express, of a payment by the testator is here, as clear a satisfaction of the legacy as in the supposed provision in the will itself.

Again, it has been settled, that republication makes a will speak from that time, and that a codicil, referring to the will, amounts to republication; so that case is just the same, in principle, as ours is, under the provision in the statute, that it shall speak from the death of the testator. Yet, in *Powys* v. *Mansfield*, 3 Myl. and Craig, 359, though there had been some difference between Lord HARDWICKE and Lord THURLOW on the point, Lord COTTINGHAM said, as the result of all the authorities that, although republication would make a will speak from that time, for the purpose of passing after-purchased lands, it would not, for the purpose of reviving a legacy revoked, adeemed, or satisfied. He supposes a legacy, in the will, to be revoked by a codicil, and then a second codicil made, by which the will is republished and made to speak from the last codicil, and says, that would not set up the leg-

acy against the previous express revocation. He adds, that republication does not undo the acts by which a legacy has been adeemed or satisfied, but only acts upon the will as it existed at the time of the republication, when, in the view of the Chancellor, the legacy revoked, adeemed, or satisfied, formed no part of the will; that is, as it is to be understood, no part of it which is still to be carried into execution. In other words, the legacy stands in the will; but it stands there as a satisfied legacy.

The same reasoning is precisely applicable to those parts of our statute, which touch the operation of wills, and the time to which their operation is to be referred, and the bill must be dismissed with costs.

PER CURIAM, Decree accordingly.

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

Where a surety is liable for several different debts of the same principal, the latter has a right to assign a debt due him by his surety, for the security of any such debt as he may think proper; so that it be equal in amount to the one assigned.

Where a surety is privy to a deed of trust, which includes, as a part of the fund, a debt due by him to the trustor, and the deed being greatly to his advantage, makes no objection to the insertion of the debt at the time, *he is held* to have waived, for a compensation any equity he may have had against the insertion of it as part of the trust fund.

THIS cause was heard at December Term, 1856, and is reported 3 Jones' Eq. 25, and Samuel B. Spruill has filed a petition to rehear a part of the decree then made. The facts material to that part of the case, are as follows: The partnership of Clary and Spruill, the estate of the deceased partner, Clary, and the surviving partner, B. J. Spruill, are hopelessly insolvent, and were so on the 10th of February, 1855. At that time, Samuel B. Spruill had an unsettled account with the firm, for

dealings in the store, to what particular amount does not appear, though the balance due on it is much less than the amount applicable, according to the decree, to the debts, for which he was the surety of the firm, which are to be paid in the first class, under the deed of trust made by B. J. Spruill, as surviving partner, on that day. The deed enumerates a large number of debts of different dates, and coming due at different times—amounting, altogether, to upwards of $30,000—and assigns to the trustees, Miller, J. B. Cherry and Samuel B. Spruill, among other things, all the debts due to the late firm, whether by note, bond or account, and authorises the trustees to collect them in the name of the surviving partner, and then directs the funds to be collected, and that out of them, all the said debts shall be paid in the order in which they become due, and then certain other debts are to be paid; and, thirdly, that the trustees shall apply any surplus of assets to a debt to one Hardy, and then the residue, if any, to the payment of all the debts of the firm *pro rata.* The assets turn out to be about $22,000, including the debt of Samuel B. Spruill to the firm, and according to the deed and the decree, much the larger part of the trust fund is applicable to those of the preferred debts for which Samuel B. Spruill was bound as surety. In his answer he states that he was privy to the execution of the deed of assignment, and insists upon the application of the fund, according to the terms of the deed, to those of the enumerated debts which were due at the date of the deed, or should first fall due afterwards—that being much the most to his advantage. And waiving no defense thereto, the answer admits there is an unsettled account with the firm, and states that this defendant is surety for the firm for debts to the amount of $700, which are not secured, except in the fourth class in the deed, none of which will be paid, as the fund is insufficient to pay the first class; and he insists that whatever may be due from him on the account, shall be applied to such debts secured in the deed, for which he was bound as surety as he, the defendant, may choose, without any *pro rata* distribution, so far as that account may

go. The decree declared the opinion of the Court, that Samuel B. Spruill was not entitled to deduct the store account, which he owed to Clary & Spruill, from the amount of his liabilities for them, as surety, and that it constitutes a part of the trust fund.

The petition to rehear, alleges two errors in the decree. That it declares, first, that the petitioner is bound to pay into the trust fund the gross amount due from him to Clary & Spruill at the time of the execution of the deed of trust, without any deduction, by reason of the indebtedness of that firm, on account of mutual debts subsisting between them at that time. Secondly, that he is bound to pay it without any deduction on account of his suretyship for the debts of the firm not provided for in the deed of trust, which he was obliged to pay by reason of their insolvency.

Winston, Jr., for the plaintiff.
Moore, for the defendant.

RUFFIN, J. It is to be observed that there is a mistake of fact in the petition as to the declarations in the decree, in which the errors are assigned. The decree does not deny the right of this defendant to deduct from his debt any sums due to him from the firm up to the execution of the deed. There was no declaration on that point, and could not be, because it was not in issue. If the defendant had made payments, undoubtedly he is entitled to credit for them. So, if mutual debts existed, constituting a set-off at the time of the assignment, the defendant is entitled to the benefit of them by an abatement of his debt *pro tanto*. The law gave him the absolute right to use his counter claims by way of set-off and there is no equity to restrain him from such use. No such declaration as that supposed in the petition would have been made, had the question arisen. But it did not, for the pleadings contain no allegation of such mutual dealings, but raise a very different question. In alleging the second error, there is also a mistake of fact. It supposes the decree to declare, that, as

to certain debts of the firm, for which the defendant was surety, and for which there was no provision in the deed, he could not claim a deduction for their amount. But the defendant set up no such claim in his answer, nor alleged that any such debts existed. It is plain that they did not: for the deed provides expressly for "all other debts" being paid, *pro rata*, out of the surplus, if any. For these reasons, the petition would necessarily be dismissed, since the petitioner is confined to the causes assigned for the rehearing. But as it may be desirable to all parties to have a decision on the real controversy, and since, upon reconsideration, the Court is satisfied with the decree, it is thought best to dispose of it finally.

What the answer does state, is this: that there were debts for about $700, for which the defendant was surety, and which were not among the enumerated preferred debts, and fell into the last class of "other debts," which would remain wholly unpaid, because of the deficiency of the fund; and the claim of the answer is that the defendant has the right of applying his debt to those demands, if he chooses.

The answer raises the point in the case, fairly. It is, whether, in the view of a court of equity, the insolvent principal could assign the surety's debt, subject, of course, to legal defenses existing at the time, for the purposes set forth in this deed, so as to conclude the surety; or whether the latter has the absolute right of applying, as he chooses, the money, he owed, to any of the debts for which he was bound. As a general proposition, the equity of a surety is, evidently, that an insolvent principal shall not assign a debt the surety owes him, so as to throw a loss on the surety, by his being compelled to pay both debts. Hence, it is often said, that a surety, though he may not have paid the debt, for which he is surety, yet, has the rights of a creditor, and may use his liabilities as equitable set-offs against his debt, as against an assignee. But it is manifest, that this equity of the surety may be much varied by circumstances; and to enable us to understand its nature, it may be well to look at it under different aspects. Now, although the surety is called a creditor, yet, he is not one

in fact, even in the view of the court of equity. He is only so ideally, for the purposes of subrogation, and by that means defeat an assignment of his debt, which would divert it from his indemnity. Hence, if the surety be insolvent, as well as the principal, the surety has no equity in the matter, or, at all events, but a dormant one; for, the common creditor is not bound to let the surety have the benefit of his security, that he may use it in satisfaction of his own debt; but he has a right to keep it for the purpose of obtaining payment from either the principal or the surety, whichever shall first get effects. The surety's liability, then, does not work an extinguishment of his debt, but only gives him a right to insist that his debts shall not be so used as to make him a loser thereby. That is his whole equity. If the surety, then, be bound for but one debt of the principal, his own debt cannot be assigned, or, rather, the assignee will take it, subject to his equity; that is, considering the equities of the parties upon their intrinsic force, unaffected by agreement express or implied. But if the surety be bound for several debts amounting together to more than his own debt, upon what principle can he, as an equity, claim the power of determining to which of those obligations his debt shall be applied? His debt still subsists, and is the property of the principal, and, as such, he may dispose of it as he will, provided only it be not so disposed of as not to exonerate the surety, on his liabilities, to the amount of it. But if the assignment be made for the purpose of paying one of those liabilities, the debt of the surety does the very thing to which the surety's equity dedicated it. When the surety applies to the assignee of a bond over-due, for example, to surrender it, the latter may reply, I acknowledge your equity, and have not interfered with it, but, in furtherance of it, I took your bond in satisfaction of another executed by the same principal, and yourself as his surety. Would not that be a complete answer? Indeed, if the surety be considered to all intents a creditor to the amount of his liabilities, still, upon the acknowledged rule as to the right of applying payments, it would be the

privilege of the principal, as a debtor, to designate the particular debt to be credited. There is no equity affecting that right.

That is our case, except that this debt was assigned as a part of a common fund for the payment of many debts, for some of which this defendant was not the surety. It is admitted, that may make a difference; for, the surety is entitled to the benefit of his whole debt for his indemnity. If this assignment embraced nothing else but the defendant's debt, it being for the benefit of others as well as the defendant, the argument would be unanswerable. But, in fact, it formed but a small amount of a fund of about $22,000—and for the debts secured in the first class, the defendant was the surety to the amount of upwards of $16,000, according to a schedule of those debts filed by the acting trustee. For the portion of his debt taken from him for the benefit of the common fund, it thus appears that the defendant was compensated, probably, tenfold; and his equity not to have a loss thrown on him by his principal, has been respected. By making the assignment of the debt with other things, and directing the application so that this surety gets from the aggregate fund more than he would from his debt, the assignment works no loss to him, but a gain. Upon the defendant's original equity, then, he has now no right to exempt his debt from the operation of the assignment, because, as it stands, it was to his advantage. But his privity to the arrangement makes the case still stronger. Why did he not say at the time, my debt must be excepted out of the assignment? The reply would have been, take your debt and make the most of it, and then the other debts and effects will be conveyed to secure debts for which other persons are sureties. He made no such demand, but allowed a general assignment of all the debts, which is broad enough to cover his, and other property upon trusts for the payments of debts to a much larger amount than the fund, in a prescribed order, whereby he got much more than he would without the assignment. He, in truth, waived his equity for a compensation more than adequate; and he cannot, now, set

it up in opposition to the provisions of the assignment, as to the order in which the debts are to be paid.

The decree must, therefore, stand.

PER CURIAM, Rehearing refused.

ELIZA PURNELL *and others against* C. H. DUDLEY *and others.*

The general intention of a testator, if declared in a will, must so far control a particular clause, as to prevent an absurdity and an incongruity with other provisions of the will.

Where, therefore, a testator left seventy-five slaves to three of his sons, and a number of others to be sold, and out of the proceeds, for his debts to be paid, and to each of his three daughters, a sum equal to the estimated value of the share of the sons, and provided, that if such shares of the daughters were not equal to those of the sons, they should be made so by paying his daughters such sums as would make their shares equal to the value of the slaves given to the sons, and it turned out that the debts absorbed the whole fund; it was *Held* that the daughters could only claim from the sons so much as would make all their shares equal.

CAUSE removed from the Court of Equity of Onslow County.

Edward B. Dudley, made his will on the 15th of October, 1852, and therein, after providing for his wife, devised and bequeathed as follows:

"Thirdly. I give to my sons, Christopher, William H. and Robert, and their heirs, as tenants in common, all my plantation and lands in Onslow county, and sixty slaves, including Jim and his wife, &c., and the balance of the sixty to be chosen by my sons; and I direct that the whole of the said sixty slaves, when chosen, shall be valued by Edward Montforth and George Ward. I also give to my said sons, all my horses, mules, cattle, hogs, sheep, and poultry, farming utensils, and plantation stock of every kind, and I request my sons to keep this property and work it together."

"Fourthly. I direct that all the residue of my slaves, except those mentioned in the ninth clause, be sold as soon as

convenient, and out of the money, arising from the sales, my executors shall pay my debts, and the residue of the said money, after payment of my debts, if not more than the value of the sixty negroes given to my sons, estimated, as above, I give and bequeath, to be equally divided between my daughters, Eliza A. Purnell, Jane Johnson and Margaret McIlhenny. And if the said residue, after payment of my debts, be less than the estimated value of the said sixty slaves, then I desire and direct that my said sons make up the deficiency to my said daughters, by paying them such sum as will make the said residue equal to the said estimated value, and I charge the said deficiency upon the lands and slaves given to my said sons. And if the said residue shall be greater than the estimated value of the sixty slaves, then, the excess shall be equally divided among all my said children—my object in the disposition of my slaves, being to make the shares of all my children, in them, and their proceeds, of equal value."

By the fifth, sixth, and seventh clauses, the testator gives specific legacies of stocks to his three daughters, respectively, and, by the eighth, he confirms some gifts of slaves he had made to his children; and in the ninth clause, he gives certain lands, and certain slaves, by name, to his executors, in trust, for a gentleman and lady, named, during their lives, and that of the survivor; and upon the death of the survivor, in trust, to be sold, and the proceeds divided equally among all his children; and the rest and residue of his estate, of every kind, is then given to all his six children equally.

By a codicil, dated June 9th, 1853, he disposes as follows: "I increase the number of slaves, given to my sons, from sixty to seventy-five—hereby altering the third and fourth clauses of my will, so as to provide for the said increase in the number of slaves, but in no other respect whatever."

His two sons, Christopher and William H., are the executors.

The three daughters brought this bill against the three sons, praying for an account against the executors, and that what might be found due to the plaintiffs, respectively, should be paid by the executors, or be raised out of the land and slaves

given to the sons. Those slaves were selected by the sons, and valued at $37,425, by the persons designated in the will. After answers, submitting to an account, it was referred to the master to take the account of the administration, and ascertain the balance, after payment of debts, applicable to the satisfaction of the legacies to the plaintiffs. The report is, that the residue of the slaves, after taking out seventy-five for the sons, sold for $13,212 90, and that the general residue of the estate, consisting of cash, debts, sales of crops on hand, and furniture, and a balance of interest received, amounted to $10,115 30—making an aggregate of $23,327 93, and that the disbursements, without the allowance of any commissions, amounted to $21,948 39, and, therefore, that the balance of this fund is only the sum of $1,379 54.

There are two exceptions to this report—one on the part of the plaintiffs that the master did not charge the defendants with $100, the value of the cotton-seed which had been put up at the testator's death, for planting, the succeeding year; and the other, on the part of the defendants, because no commissions were allowed to the executors.

Moore and W. A. Wright, for the plaintiffs.
J. H. Bryan, for the defendants.

RUFFIN, J. The plaintiff's exception is allowed. Cotton seed is no more a part of "plantation stock," than corn or wheat for seed, or, indeed, for provisions for the year, and it therefore belongs to the general residue.

The executors do not appear to have claimed commissions before the master, and therefore he very properly did not allow them, and the defendants exception is overruled. But it would be futile to claim them, since that would only reduce the residue, and that reduction the sons would have to make good out of their land and negroes, according to their argument upon the main question which is now to be considered.

Upon the finding of the master that the proceeds of the residue of the slaves, after the payment of debts, is only $1,379 54, it is

contended, on the part of the plaintiffs, that the sons must pay them in money as much as will, with $1,379 54, be equal to the estimated value of the seventy-five slaves, that is, $37,425. The argument is based on the force of the terms used in the sentence of the will, respecting the case that has happened: "If the said residue be less than the estimated value of said slaves, then I direct that my sons shall make up the deficiency to my daughters, by paying to them such sum as will make the said residue equal to the said estimated value," and it takes those terms, as standing by themselves, in their literal sense, and creating, strictly, a contingency on which the value of the whole of the negroes must go to the daughters. But the testator had no such meaning in that clause. On the contrary, it was merely to provide, in part, a mode by which the daughters and sons should divide equally the two funds, consisting of the residue and the slaves, by leaving the property in the slaves with the sons, and charging it with money, in favor of the daughters, for equality. He expressly says that was the "object" of the several particular directions for the sons' paying more or less, and the declaration of that purpose is added as explanatory of those directions. They are, that if the residue should not be more nor less than the value of the slaves—that is, just equal to it—the daughters were to have the whole of it; if it should exceed the value of the slaves, the daughters are to take as much of it as the slaves are valued at, and the excess equally divided between the six. That produces an exact equality in the two cases according to the declared intention. Then comes the case of the residue happening to be less than the value of the slaves, and in that case the daughters are to have it, and the sons are "to make up the deficiency" to the daughters, in money. What deficiency? Plainly, that by which the daughters got less than the sons; so as by that payment to produce equality again. It is said, however, that there are express directions how the deficiency is to be made up, namely, "by paying them such sum as will make the residue equal to the value of the slaves," and that such directions cannot be controlled by the use of any gen-

eral term in other parts of the will. But a will is to be taken all together, and each part may be more or less affected by the context; and, certainly, different clauses are to be reconciled, if possible, and if that cannot be done, then the general intention of the testator, if declared in the will, must so far control a particular clause as to prevent an absurdity, and an incongruity with other provisions which might arise from its own terms—the particular intent yielding to the general intent where they are incompatible. Here it is impossible to doubt the purpose of the testotor; and the construction contended for by the plaintiffs is incongruous with the alternative provisions for equality in the other two cases of an equality or excess of the residue with or above the value of the slaves, and directly inconsistent with the general declared purpose, "to make the shares of all my children in the negroes or their proceeds of equal value." Therefore, that general provision may be transposed so as to annex it to each of the directions for the dispositions of the residue—which is always admissible to effectuate the intent; and the clause under consideration will then read, "by paying to my daughters such sum as will make their *shares* of the slaves and their proceeds, and the *shares* of my sons, equal in value." That is the only sensible meaning to be given to the will, as a whole, and makes it consistent with itself; and that was evidently the intention of the testator, and just between the children.

PER CURIAM, Let the rights of the parties be declared accordingly

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ALONZO T. JERKINS *against* ALEXANDER MITCHELL AND WIFE *and others.*

Advancements in land, by a father, are not to be brought into *hotchpot* and accounted for in the division among his children of his real estate, unless the father dies totally intestate.

[*Johnston* v. *Johnston*, 4 Ired. Eq. 9, and *Brown* v. *Brown*, 2 Ired. Eq. 309, cited and approved.]

CAUSE removed from the Court of Equity of Craven County.

Thomas Jerkins made his will in 1829, and died in 1855, when it was admitted to probate. The will contains several devises of real estate, as well as bequests of personalty, but it turns out that all the realty which he owned at the date of the will, was disposed of by him before that time, but the testator had acquired other and valuable estates in the town of New-Berne, and the county of Craven, and elsewhere, which are set out and described, specifically, in the plaintiff's petition. The petitioner alleges that he and the feme defendants are the only children and heirs-at-law of Thomas Jerkins; that previously to his death, his father had advanced his two sisters, by valuable donations of real estate, conveyed by deed, and prays that partition may be made of the lands descended to them, and now held by them as tenants in common, and that in making such partition, the advancements of realty made in the testator's life-time may be taken into account, and charged against the defendants.

The defendants answered, admitting the allegations of the petition, and submitting to a division, but denying the right of the plaintiff to have their advancements brought into hotch-pot for his benefit.

Donnell, *B. F. Moore* and *Stevenson*, for the plaintiff.
Hubbard, *Haughton*, *Greene* and *Badger*, for defendants.

BATTLE, J. In the pleadings, and in the argument of the counsel, it is assumed that the testator, Thomas Jerkins, died intestate as to his real estate. The reason of this is, that though he owned many tracts and parcels of land at the time of his death, in the year 1855, yet they were purchased after his will was made, which was in the year 1829, and therefore did not come within the operation of the act of 1844, ch. 88., sec. 3, which declares "that every will shall be construed with reference to the real and personal estates comprised in it, to speak and take effect, as if it had been executed immediatey before the death of the testator or testatrix; unless a

contrary intention shall appear by the will." This Court had decided in the case of *Battle v. Speight*, 9 Ired. Rep. 288, that this act did not apply to any will executed before its passage, and the parties to this cause were right in treating the question as settled. But there is another chapter of the act of 1844, which has an important bearing upon the case now before us, and is, in our opinion, decisive of it. The chapter to which we allude, is the 51st, which provides in the first section, "that where any person shall die intestate, who had in his or her life-time advanced to any of his or her children personal property of what nature or kind soever, of value more than a distributive share of the personal estate of said intestate, said child or children, or those legally representing them, shall, in the division of the real estate of the said intestate, if there be any, be charged with the excess in value which he or she has received as aforesaid, over and above an equal distributive share of said personal estate, and the said excess shall be a charge upon the share or shares of the real estate of such child or children as have been excessively advanced, as aforesaid." The second section enacts, "that where any person shall die intestate, seised and possessed of any real estate, who had in his or her life-time settled any real estate on any child or children of said intestate, of more value than equal to the share which shall descend to the other children of the intestate, such child or children, or their legal representatives, shall, in the distribution of the personal estate of the said intestate, if there be any, be charged with the excess in value of the said real estate settled as aforesaid, over and above the share which shall descend to the other children; and the said excess in value shall be a charge upon the shares of the personal estate of the child or children having real estate settled on him or her, as aforesaid." The provisions of the act of 1844 were subsequently revised, and are contained, substantially, in the Rev. Code; (see ch. 38, sec. 2, and ch. 64, sec. 2,) but as the testator died before that Code went into operation, we have referred to the language of the original act.

Under the English statute of distributions, as well as under

our act on that subject, it has always been held that no advancements were to be accounted for except in cases of total intestacy. See *Walton* v. *Walton*, 14 Ves. Jun. 324; *Brown* v. *Brown*, 2 Ired. Eq. 309. A different rule was laid down by the Supreme Court, under its former organization, in the case of *Norwood* v. *Branch*, 2 Car. Law Reps. 599, upon the construction of the acts of 1784, and 1795, (see 1 Rev. Statutes, ch. 38, sec. 1, Rule 2,) regulating the descent of real estate, and providing for bringing advancements of land into hotchpot. That case was, however, brought into doubt by this Court in deciding the above-mentioned case of *Brown* v. *Brown*, and was entirely over-ruled in the subsequent one of *Johnston* v. *Johnston*, 4 Ired. Eq. 9. In the latter case, the Court felt itself at liberty, upon the strength of the principle established by the before-recited act of 1844, to decide that advancements in land by a father, are not to be brought into hotchpot, and accounted for in the division among his children, of his real estate, unless the father dies totally intestate.

In the present case, the father died after the passage of the act of 1844, intestate as to his real estate, but testate as to his personal property; and the question arises, whether the act applies, so as to compel such of the testatator's children as had received from him advancements in land, to account for them in the division among all his children, of his real estate. We answer, unhesitatingly, in the negative; and we are saved the trouble of entering now into the process of reasoning, by which we are brought to this conclusion, because it has been already clearly and forcibly expressed in the case of *Johnston* v. *Johnston*, to which we have just referred. It is there said, that "the Legislature intended an equality between the children, where the parent did not himself produce inequality. Therefore, when the parent dies intestate, the act operates. But where he disposes of his own estate by will, the law does not interfere; and if he disposes of a part only, the law does not interfere with his dispositions, as far as he made them by his will, but suffers that inequality to stand, and divides the residue equally. Suppose a father to have two sons, and to the el-

der he devises land worth £1000, and to the younger, land worth £500, and personalty worth £500, and leaves personalty undisposed of to the value of £1000, and land undisposed of to the value of £500. It could not be possible the Legislature meant the second son should have all the land descended, making his share of the realty £1000, as well as his brother's, and then that they should divide the £1000 personalty equally, as it is admitted, notwithstanding his legacy of £500, they must do in respect to the personalty. So the very giving to one son by the will more than to another, shows that the parent, for reasons satisfactory to his own mind, intended a greater bounty to the one than the other; and that intention the law did not mean to counteract. It directs an equality, because it presumes the parent would naturally wish it. But here the parent creates the inequality by his own will, and the law never intended to thwart him." These remarks, in extracting which we have corrected a misprint in the published Reports, show conclusively that *Norwood* v. *Branch* was decided upon a mistaken construction of the act of 1784, and 1795, and that those acts were never intended to apply to a case of partial intestacy as to real estate. The process of reasoning is equally strong to prove that the act of 1844 was designed to operate only on cases of total intestacy, both as to realty and personalty. The act makes both kinds of estate one fund in respect to advancements, and is expressly confined to cases where "any person shall die *intestate*, who in his or her life-time advanced to any child personal property," &c., and "where any person shall die *intestate*, seized and possessed of any real estate, who in his or her life-time settled any real estate on any child," &c. The intestacy here spoken of, must mean a total intestacy as to both real and personal estate, because a partial intestacy as to both, considered as one fund, caused by a total intestacy as to one and not as to the other, would manifestly produce the same inequality by the will of the parent, as if it were caused by a partial intestacy as to each kind of property. The act was never intended to interfere in any case where the parent himself had by his will

produced an inequality by giving to one of his children either land or chattels, and not to the others. But where he dies totally intestate as to all his property of every kind, then the act provides for an equality, as near as it can, by directing that such of the children as have been advanced by the intestate in his life-time, in either realty or personalty, shall account for the advancement in the division of both.

We conclude, then, that as Thomas Jerkins did not die altogether intestate, the plaintiff, his son, cannot call upon the feme defendants, his daughters, to bring into hotchpot the lands which had been settled upon them by their father in his life-time. This view of the case makes it unnecessary for us to consider whether the defendant, Mrs. Mitchell, was advanced in such a manner as would have made her accountable had her father died without leaving a will, or whether in such a case the defendant, Mrs. McIlwain, would have had to account for one-half, or the whole of the land given to her and her husband, and the survivor in fee. The plaintiffs may have a decree for the partition of the lands mentioned in the pleadings upon the principal announced in this opinion.

PER CURIAM, Decree accordingly.

JAMES TOWE *and others against* JAMES NEWBOLD *and another.*

Where a surety has paid money, he is entitled to an assignment of all the securities that the creditor held, and to substitution, and in that case, the creditor need not be a party; but where he has not paid the debt, he may have relief, but the creditor must then be a party.

Where it appeared that a party took, without endorsement, from a guardian, notes, payable to him as such, by paying the money in full, which was done at the request of the makers, to avoid being sued thereon, it was *Held* that the circumstances repelled the idea of fraud, and that there was no ground to seek for exoneration, by following the notes.

CAUSE removed from the Court of Equity of Perquimons co.

Four notes, of $300 each, with an amount of interest thereon, drawn by William T. Sumner and J. M. Sumner, and payable to Willis H. Bagley, guardian, to Anderson Woodly, were, at two several dates, delivered to the defendant, James Newbold, by the said Bagley; and the plaintiffs, who were the sureties on Bagley's guardian bond, seek to be substituted to the rights of the ward, alleging that these transfers were with notice of the character of these instruments, and that the same were fraudulent, and with the full knowledge that Bagley was raising the money on them for his own private purposes, in anticipation of insolvency. The bill alleges, that Bagley became insolvent after using his ward's money, and that the plaintiffs, as his sureties, were liable for large sums of money on account of this guardianship.

The answer of Newbold denies the fraud alleged, and says that, as to two of the notes, William T. Sumner called on him in the year 1853, and desired him to pay to Bagley the amount of them, take them up, and to permit him and his brother to make a note to him for the amount; he said he had been notified by Bagley to pay the same, and was afraid he would be sued on them, if they were not paid; that he agreed to do so, but not being prepared to complete the arrangement, it was delayed for some time; that in the mean time, seeing the surety to the notes, Mr. J. M. Sumner, he told him what his brother had proposed, and he acquiesced in the plan, and professed his willingness to go into the new note; that shortly thereafter, meeting with Bagley, he told him what had been proposed by the Sumners, and he, Bagley, shortly after sent the notes to him, by his son, with authority to receive the money, and hand him over the notes; that he did pay the full amount, called for in the papers, with the interest that had accrued; that he being the guardian of a child of a Mr. Harrell, took from the Sumners new notes for the amount paid for them, payable to him, as guardian, and delivered the former notes to the makers; and he had no other view than to invest his ward's money; that as to the other two notes, he says, at February term, 1850, of Perquimons County Court, he was

appointed guardian to the heirs of James Harrell, and the administrator passed to him a claim, which was in the hands of Bagley for collection; that the latter told him he had collected the money, and wished to know if a bond, with sufficient sureties, payable to him, as guardian, would not suit him; to which he agreed; that Bagley told him he was not just ready to make the note, but handed to him a bundle of notes to make him safe until he could comply with the proposed terms, stating that two of the notes included were on the Messrs. Sumners, for about $300 each; that having full confidence in the responsibility of Bagley, he at first declined receiving the deposit, but on being urged to do so, he reluctantly took it; that he kept the bundle, thus committed to him, without having opened it till the 18th of April, ensuing, when Mr. Bagley gave him, as guardian, his note, for the whole amount due his wards, with W. T. Sumner and J. M. Sumner as sureties, whereupon, he handed him the package back again, in the exact condition it was in when he received it, with no other knowledge as to the character of its contents than was conveyed by Bagley's remark above stated. The answer of Bagley, gives the same account of these transactions, and he adds, that he transferred the latter notes afterwards to another person. The testimony does not contradict Newbolds's answer.

The bill, filed, does not allege that the plaintiffs ever paid the money for which they became liable for Bagley, nor is the ward made a party to the suit.

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

Smith and *Pool*, for plaintiffs.
Jordan, *W. A. Moore* and *Brooks*, for defendants.

PEARSON, C. J. The plaintiffs are the sureties of the defendant, Bagley, on his bond, as guardian; they allege that Bagley fraudulently transferred four notes, which he held, as guardian, to the defendant, Newbold, and that Bagley is in-

solvent, and the object of the bill is to be substituted to the rights of the wards, to follow the fund for exoneration.

The bill is fatally defective in this, there is no averment that the plaintiffs have paid the amount due to the wards, and they are not made parties. Where a surety pays the debt, he is entitled to an assignment of the securities, held by the creditor, and to substitution; *Brinson* v. *Thomas*, 2 Jones' Eq. 414; where he has not paid the debt, he may have relief, but the creditor must then be made a party; *Bunting* v. *Ricks*, 2 Dev. and Bat. Eq. 130.

As this objection was not taken on the hearing, and the argument was put on the evidence, which seems to be full on both sides, it is proper to decide the case on the merits. The allegations of the bill are not sustained by the proof in contradiction to the answer of the defendant, Newbold, in respect to the four notes, mentioned in the pleadings. As to two of them, the allegation that they came to the hands of Newbold, is very indefinite, and he denies it positively; it is matter about which he could not be mistaken, and the evidence is not sufficient to establish it in the face of his answer.

As to the other two, he alleges that he advanced the money, in full, for them, at the request, and as the agent of the obligors, William and James Sumner; the Sumners admit that they requested him to take them up, and afterwards substituted their notes, payable to Newbold, and took them up from him; but they say the agreement was, that he should take them up by giving Bagley a credit on a note, which he (Newbold) held against him, and upon which, William Sumner was a surety. It is clearly proved that Newbold did pay to Bagley the *full amount* of the notes, *in money*, and that he discharged them at the *request of the obligors*. Whether he ought to have done so, with the money, or by a credit on Bagley's note, is a matter which does not concern the plaintiffs, for the allegation of fraud, in respect to them, is met by the fact, that the notes were taken up at the request of the obligors.

Per Curiam, Bill dismissed.

ROBERT REDDING *and wife and others against* O. F. LONG AND A. FINDLEY.

A provision in a deed, conveying slaves to one, "in trust for the grantor, during her life, and then to send them to Liberia, or some free State, if they make choice to go within one year after the grantor's death," is not against the provisions or policy of our statutes on the subject of slavery.

Though slaves have no capacity to make contracts, or acquire property, yet, they have both a mental and moral capacity to make an election between remaining here and being slaves, and leaving the State and being free, when the alternative is proposed to them by the deed or will of the owner.

CAUSE removed from the Court of Equity of Orange county.

On the 23rd of September, 1852, Anne L. Woods, of Orange county, by deed, conveyed to the defendant, Osmond F. Long, three slaves, in trust for her, during her natural life, and upon her death, upon trust "to send them to Liberia or some free State, if they make choice to go, within one year after my death, and if Ellen should have any children, they are to go with her; but if the negroes should not choose to go, then they are all to belong to Alexander Findley, with the increase of Ellen, if any." Anne L. Woods had the use of the negroes, according to the deed, until she died intestate, in 1857; and then the defendant, Long, took them into possession, and they elected to go to Liberia or to one of the United States, in which slavery does not exist, in order to be free there.

The plaintiff, Redding, administered on the estate of Mrs. Woods, and filed this bill against Long and Findley, alleging that the deed was obtained by undue influence, or other unfair means, and when Mrs. Woods was in extreme old age, and without mental capacity to make a contract or conveyance of property; and also insisting, that the deed is void by reason of the illegality of its purpose of emancipation, and that a trust, therefore, resulted to the grantor; and it then prays, that the defendants may be declared trustees for the plaintiff, and surrender the slaves to him, and account for the profits since the death of the intestate.

Graham, for plaintiffs.
Phillips and *T. Ruffin, Jr.*, for defendants.

RUFFIN, J. The answers and proofs establish very satisfactorily the capacity of the party to the deed, and that there is nothing in the manner in which it was obtained to impeach it.

It was insisted, however, that it is void, because it is a deed of emancipation, or for emancipation, and such a deed cannot be effectual, in in our law, since the only emancipation provided for, in the statute, is either by the owner himself, upon petition to the superior court, or by an executor under the direction of a will, and on petition. It is inferred that the deed is void, because the act declares, that no slave shall be set free but according to the provisions of the act; which are supposed to exclude every mode of emancipation, but the two just mentioned. That seems, to the Court, to be an entire misapprehension of the act. Neither a deed of emancipation by the owner, nor a direction in a will to that effect, constitutes a valid emancipation here, until allowed by the court, as prescribed in the statute. But when a deed is made by the owner of a slave to another person, upon a trust, to have the slave emancipated, there, the trustee becomes the owner, and he may, as such, either proceed to procure the emancipation here, under our law, or carry the slave to another country, where he may be free without observing the ceremonies which we require. It is totally immaterial to this purpose, by what kind of instrument the trust, for emancipation, may be created, whether a deed or a will. It is most commonly, indeed, a will, because most persons wish to keep the control of their property as long as they live, and, therefore, prefer a revocable, to an irrevocable instrument, on such occasions. The question, however, on each, is always the same; namely, whether the particular kind of emancipation prescribed, or contemplated, contravenes the provisions or the policy of our law. If it does not, the trust is not illegal, and will be executed; while, if it does, that trust becomes ineffectual, and will

result to the donor, or go over to some other person, according to the limitations contained in the instrument. It happens, that one of the earliest cases, on this subject, arose on a deed, that of *Stevens* v. *Ely*, 1 Dev. Eq. 493; and it did not occur to any one, that any thing depended on that circumstance, but the decision was founded exclusively on the fact, that upon the face of the deed, there was a trust for keeping the negroes here, "on the said Ely's land," either in an emancipated state, or in one of qualified bondage; and whether it were the one or the other, it was equally against law. Therefore, the Court held, that the trustee could not hold them as slaves, but that the trust resulted to the donor and her administrator. It was argued, indeed, in that case, that the Court would give no relief against the trustee, because the purpose being unlawful, and the deed having passed the legal title, equity would help neither party. In reference to that point, Chief Justice HENDERSON, states clearly, that there can be no difference between a trust declared by deed, or by will, and that, if it be illegal, a trust will result in both cases. Now, by repeated decisions, it is the settled law of this State, that such a trust as the one before us, for carrying the negroes out of North Carolina, to live as free persons, in a free country, is not illegal, but perfectly valid. The cases were all reviewed, and the question fully discussed in *Thompson* v. *Newlin*, when finally decided on the petition to rehear, 8 Ire. Eq. 32, and has ever since been considered at rest.

It was further objected, that the the trust for emancipation fails, because it is made to depend on the election of the slaves to go away as free persons, or to stay here as slaves, and they have not a legal capacity to make an election. It may be remarked on that, first, that the point will not bear debate in the courts of this State, as the contrary has been so often held and acted on here as to be concluded. In the next place, it is not true in point of fact or law, that slaves have not a mental or a moral capacity to make the election to be free, and, if needful to that end, to go abroad for that purpose. From the nature of slavery, they are denied a legal capacity

to make contracts or acquire property while remaining in that state; but they are responsible human beings, having intelligence to know right from wrong, and perceptions of pleasure and pain, and of the difference between bondage and freedom, and thus, by nature, they are competent to give or withhold their assent to things that concern their state. All that is implied, necessarily, as assumed in law, where emancipation is allowed at all; for, it changes the relation between the owner and the slave, and that requires the assent of both, and is sanctioned by the law as existing in nature. It may be regulated or even prohibited by the law. But no one ever thought that it required a municipal law to confer the right of manumission on the owner, or the capacity of accepting freedom by the slave. They pre-exist, and are founded in nature, just as other capacities for dealings between man and man. Hence, too, dispositions of property, as a provision for them, after emancipation shall have taken effect, have been sustained as executory devises upon the same principle, that a legacy to one, *sui juris* is. The power of emancipation includes not only the power of absolute emancipation, but of one on a condition; provided the condition be not of a nature to defeat the provisions or policy of our law prohibiting emancipated negroes from residing in this State; and that is, plainly, not the case where the trust is that they shall remain here as slaves, unless they can be sent away, with their own consent, given within one year, for the purpose of being free elsewhere. The Court cannot hesitate in holding, that to the admitted capacity of accepting emancipation, there is inherent a legal capacity to assent to all those incidents which go to make the emancipation itself effectual.

But, if those positions were all untrue, the case for the plaintiff would be none the better: since, in this case, the trust for the other defendant, Findley, effectually disposes of the whole property, and leaves nothing to result. The deed is not tainted by any immoral or illegal purpose avoiding the whole deed. The most that has been, or can be said against it, as affected by its contents merely, is that one of the trusts cannot be carried

into effect. But that cannot prevent another trust, which in itself is entirely lawful, from being executed. It is like the case of a will, which directs emancipation here, and an application to the Legislature to allow it, and, if that shall fail, gives the slaves over, as property, to another person; in which case there is no doubt that, supposing no secret illegal trust attached to the ulterior limitation, it would be good. When, therefore, the capacity of the donor in this case to execute the deed is established, it puts an end to all right in the plaintiff.

PER CURIAM, Bill dismissed with costs.

SAMUEL V. BARKER *against* MARMADUKE SWAIN *and another.*

Where a bill is filed by one in possession of a fund which he alleges is claimed by two persons whom he calls upon to interplead and settle the matter of right between them, so that he may be indemnified, shows, *affirmatively*, that neither of the defendants is entitled to the money, a demurrer by one of them will be sustained which will virtually decide the cause as to both.

Where a slave was permitted by his owner to exercise his own discretion in the employment of his time, acting really as a freeman, such owner cannot recover from a third person the proceeds of property which the slave had acquired and which had come into the hands of such third person as the agent of the slave. Nor can the party who let the slave have the property, recover the proceeds thereof from the agent of the slave, although he may have sold it on a credit, and not have been paid for it.

CAUSE removed for argument from the Court of Equity of Guilford county.

The bill states the following case: A negro, called Daniel Jones, employed the plaintiff to sell a buggy and jackass for him. The plaintiff took the articles to South Carolina, and sold them for $450; of which, the sum of $250 was to be paid at a subsequent time, and was secured by a note of the purchaser to the plaintiff. On his return, the plaintiff delivered

to the negro what he had received, and agreed to collect the money due on the note and account to him for it; and the plaintiff afterwards collected the money, and after deducting his wages and some specified charges, there remained a balance of $225,96, in his hands. Each of the defendants, Stanly and Swain, claimed the money, and the plaintiff desired to pay it to the one to whom it belongs, as he sets up no claim to it. The bill states the manner in which the defendants respectively claim, as follows, as the plaintiff has been informed: Some years before the foregoing transactions, one McMasters sold and conveyed the negro, Daniel, to Joshua Stanly, at the price of $300, for which Stanly and seven others, gave their bond, with an understanding between all the parties, that the negro was to have his own time, and the proceeds of his labor, and was to pay the bond as he could earn the money; and upon the full payment, he was to be free; but that there was, in fact, such an understanding, or whether the price was ever paid, or if so, by whom, the plaintiff is not informed. The bill states, also, that the negro did have his time, and the proceeds of his labor, for a considerable period, and carried on the business of making and selling buggies, in the county of Guilford, where all the parties lived; and while so engaged, he employed the plaintiff in the agency before-mentioned. Afterwards, Joshua Stanly died, and the defendant, Abigail Stanly, administered on his estate, and, in that character, took the negro into possession, and holds him as part of the estate, and also demands the money in the plaintiff's hands, as the earnings of the slave. The bill further states, that while the negro was working for himself, and carrying on his shop, the defendant, Swain, sold to him the jackass in question, at the price of $350; but whether it was paid or not, the plaintiff does not know, though Swain alleges that it has not been, and on that ground he claims the money from the plaintiff as part of the price of the jackass. The bill states that the plaintiff informed each of the defendants of the sum in his hands, and that he set up no claim to it, and was desirous of paying it to whomsoever it belonged, and requested them to come to an

adjustment between themselves, so that he might safely pay the money to one of them, without the risk of being sued by the other; but they refused, and both threatened to sue him. The bill disclaims all interest of the plaintiff in the money, and states that with the bill he deposited it in the master's office, and submits that it may be paid out to that one of the defendants in whom the Court may decree the right to be; and it prays that the defendants, Stanly and Swain, may be compelled to interplead, and the plaintiff discharged from further liability for the money. There is annexed to the bill the usual affidavit, denying collusion; and, it adds, that the facts stated in the bill are true.

Swain answered, and the plaintiff took replication. Stanly put in a demurrer for want of equity, which was set down for argument; and the cause was then transferred to this Court on the bill and demurrer, and retained in the Court of Equity as between the plaintiff and the other defendant.

Gorrell, for the plaintiff.
McLean, *Kittrell and Lanier*, for the defendant.

RUFFIN, J. The cause is brought here under the new provision in the Revised Code, ch. 32, sec. 21, which, it may be feared, will prove inconvenient—especially in a case of this sort, where a decision for one of the defendants probably disposes, virtually, of the cause as to both, without its being known what state the answer may put the case in as to the other defendant. But as the law is clear, the Court must assume the jurisdiction.

The demurrer raises the question, whether the bill makes a case fit for an interpleading bill? In *Shaw* v. *Carter*, 8 Paige 339, Chancellor WALWORTH says, that if a bill states a case, which shows that one defendant is entitled to the duty, and the other is not, both may demur; the one, because the plaintiff has a defence at law against him; the other, because the plaintiff has no legal or equitable defence against him. Therefore he warns plaintiffs, in bills of this kind, of the dan-

ger of stating, affirmatively, the facts on which the legal rights of the defendants depend, since the foundation of the relief asked, is, that the plaintiff is, from ignorance of the rights, and from doubts of the facts, unable to ascertain to which of the defendants he is to account. Without adverting minutely to the several allegations in the bill, it is sufficient to remark, that there are affirmative statements in it, sufficient to show that, in truth, neither of the defendants has a right to this money, and, therefore, that the bill must be dismissed on demurrer; for, to sustain it, would be requiring the defendants to engage in a litigation, by which neither of them can gain, and both must lose time and costs.

It is apparent that the claim of Swain is unfounded. After a sale to the slave, he cannot treat the property as remaining in himself, and claim the price for which the plaintiff sold the jackass, as money had and received to his use. If the negro paid the price, manifestly the seller, with the price in his pocket, could not recover the thing also, from the person to whom the negro had sold it, nor, by consequence, the price received from the negro's vendee. If the negro did not pay the purchase-money, and was trusted for it, there would be the same result; for, by the sale and delivery—an executed contract—the seller divested himself of the property, and no equity or lien would follow the property, whether it be in the slave or the master, or the vendee of the slave, but the seller can look only to the slave, whom he trusted. But, in truth, the law makes such dealings with a slave unlawful and criminal; and a person thus dealing by an executed act of sale to a slave, cannot found an action on his own illegal act, upon a suggestion that the sale was ineffectual to pass the property. The purpose of the law is to suppress such transactions, and, therefore, it will give no aid to a party to them touching any matter growing out of the breach of the law. If it be said, that this sale might have been by consent of the master; the reply is, that then the sale would not be void, but the property would pass and vest either in the slave or the master, and in either way it would be divested out of the sel-

ler. So that in no conceivable manner can any right vest in Swain upon which he can have an action for the thing, or the proceeds of the sale of it.

Then, as to the title of Stanly. It is an indictable misdemeanor in the owner of a slave to hire to him his own time, or let him go at large as a freeman, exercising his own discretion in the employment of his time. The purpose of the law is to keep a slave always under the dominion and immediate ordering of the master. It would completely defeat those provisions to allow the owner actions against third persons founded on dealings with the slave in that situation, upon the idea that the earnings of the slave, or the things bought by him, belong, in law, to the master. If the master can get hold of the earnings, or things that are called the property of the slave, he may, and of course he can keep them; for there is none to deprive him of them. But he ought not to recover from another, things sold to him by the slave, while the owner was illegally allowing him to act as a freeman, nor a debt, so to speak, due to the slave upon transactions during the period of *quasi* freedom. The law would be false to itself, and to good faith towards third persons, if it gave such an action, and thereby held out inducements to breaches of the law, and deceptions on the public, who deal with a slave allowed by the owner thus to hold himself out as a freeman. Hence, in such cases, the owner cannot impugn the executed contracts of the slave, nor enforce those that are executory. Although the slave cannot recover this money from the plaintiff, yet that does not authorise the owner to do so. The slave is concluded by his incapacity, and the owner by his demerits. It follows, that in this case, as in many others, the maxim *potior est conditio possidentis*, applies; and the plaintiff, while he cannot maintain this bill, may hold the fund, since neither of the defendants can get it from him. The demurrer ought, therefore, to be sustained, and the bill dismissed with costs as to Stanly. As that defendant declines interpleading, and it cannot now be decreed, the plaintiff must have leave to withdraw his deposit, and be at liberty, notwithstanding the

decree, to set up all defences in any litigation he may hereafter have, touching this fund, with the defendants, or either of them. This opinion must be certified to the court of equity with instructions to proceed in the cause in conformity to it.

PER CURIAM, Decree accordingly.

J. J. JAMES *against* SAMUEL NORRIS *and others.*

Where the defendants, in their answer to a bill for an injunction, disclose the fact, that they have no substantial interest in the subject-matter of the bill, but that a third person, who is not a party, is alone interested, the Court will not dissolve the injunction at the instance, and for the benefit, of such third person.

APPEAL from an interlocutory order of the Court of Equity of Wake county, made at the Fall Term, 1858, CALDWELL, J., presiding.

On the 15th day of August, 1855, the defendant, James F. Jordan, by a deed of trust, conveyed a house and lot, in the city of Raleigh, to John G. Williams, to secure a debt to the plaintiff, of about $4000, which was registered 23rd of August, 1855, under which, the lot in question was afterwards sold to the plaintiff, and a deed made to him for the same. At the August Term, 1855, of Wake County Court, which began its session on the 20th of that month, the defendant, Samuel Norris, obtained a judgment against the defendants, Jordan and Cooke, for the sum of $230,33, with interest and costs; in which debt Cooke was the surety of Jordan. At the time of the rendition of this judgment, it was agreed between Norris and Jordan, that no execution should issue, until ordered by the plaintiff, or his attorney, and a memorandum, to that effect, was entered on the court docket. No execution was issued until a few days before the November term following, when one did issue, and was levied upon the house and lot in question. A *venditioni exponas* was issued upon this

levy, which was regularly continued to the time of the issuing of the injunction in this case. At August Term, 1856, the sheriff of Wake county, William H. High, paid to Norris, the plaintiff, out of his own money, the full amount of the execution against Jordan and Cooke. After the rendition of the judgment in favor of Norris against Jordan and Cooke, and before the issuing of the execution thereon, Jordan conveyed to divers persons real and personal property, more than sufficient to have satisfied this judgment and execution. The plaintiff alleges that the stay of the execution, by Norris, was for the ease and comfort of Jordan, whereby the lien was attempted to be kept up upon the property conveyed to the plaintiff, James, while Jordan was, at the same time, to have the use and enjoyment thereof, and as such, it was a fraud practiced upon his rights. He further insists, that the payment of the money to Norris, the plaintiff, in that case, by whomsoever paid, whether by Jordan, or Cooke, or by the sheriff, was a full satisfaction of the execution, and that any further attempt to enforce it, by the sale of the plaintiff's property, is against equity and conscience, and he prays an injunction to prevent the same.

The defendant Cooke answered the bill, and stated that High paid the money above mentioned of his own accord, and without any request or desire, on his part, that he should do so, and without any knowledge that he was about to do it. Norris also answered, not, however, varying the above statement of facts.

On the coming in the of the answers, the defendants moved for the dissolution of the injunction, which was ordered, and the plaintiff appealed.

Moore and *Fowle*, for the plaintiff.
Winston, Sr., for the defendants.

BATTLE, J. The injunction was, as we think, improperly dissolved, upon the motion of both or either of the parties, whose answers were filed in the Court below. Neither of the

defendants, Norris or Cooke, had any interest in the cause, which could possibly be injured or prejudiced by the continuance of the injunction, while the plaintiff might be put to serious inconvenience by its dissolution. Norris admitted that the money had been paid him on his execution, but he did not know by whom the payment had been made. The execution as to him, therefore, was satisfied, and he had no further interest in it. The defendant Coke, who was the surety of Jordan, the principal debtor, stated that the money was paid on the execution, but not by him; and that he was informed, and believed, that it was advanced by High, the sheriff of Wake county, in whose hands the writ of *venditioni exponas* had been placed for execution. Cooke, therefore, had no such interest in the matter, as authorised him to move in the cause. The sheriff High, then, it seems, was the only person interested in the enforcement of the execution, and he was not before the Court. The counsel for the defendants, contends that, as High was a stranger to the judgment and execution, his payment of the money to the plaintiff, in the execution, could not be a satisfaction of it. That may be true, and for the sake of argument, we may take it to be so, but that will not authorise him to move in a cause, to which he is much a stranger as to the judgment and execution. As we have seen that neither of the defendants to the suit, as it now stands, had any interest in the dissolution of the injunction, it ought to have been continued. Whatever steps either the plaintiff or High may think proper to take, we leave to their consideration.

PER CURIAM, Order reversed.

PETER G. EVANS *against* J. B. MONOT AND THE GOVERNOR'S CREEK STEAM TRANSPORTATION AND MINING COMPANY.

The act of Assembly, Rev. Code, ch. 7, sec. 20, institutes an anomalous proceeding the object of which is to subject to the debts of our citizens any

estate which a non-resident may have in the hands of any person, which cannot be reached by attachment, without reference to the place where the debt was contracted; and, therefore, the sixth clause of the fourth rule, ch. 32, Rev. Code, regulating the proceedings in courts of equity, does not apply.

It seems that a corporation created by an act of our Legislature, having its property and carrying on its operations within this State, has its *existence* here, although its office business be carried on in another State.

It seems that shares of stock in an incorporated mining company, belonging to a non-resident, are "effects or estate" owned by him here, and that they cannot be attached at law.

APPEAL from the Court of Equity of Chatham County.

The bill alleges that the defendant, Monot, on the 22d day of June, 1853, executed to the plaintiff a bond for the sum of $3,750, payable on the 1st day of January, 1857, with interest from the date, which was given, in part satisfaction, for a tract of land, purchased from the plaintiff by the said Monot; that the said Monot now lives in the State of New York, and has no property or effects in this State subject to attachment or execution at law.

The bill further alleges that the Legislature of this State, at its session begun in 1850, incorporated a company by the name of The Governor's Creek Steam Transportation and Mining Company, for the purpose of mining and transporting in the county of Chatham, in this State; that the said corporation purchased lands of great value, lying in the county of Chatham aforesaid, on Deep River, and other valuable property, and divided their capital stock into shares of $100 each, of which, the said J. B. Monot holds, and is entitled to, a large number, and of great value, the number and value of which is to the plaintiff unknown; by virtue of which shares, the said J. B. Monot is a member and corporator of the company; that the said J. B. Monot, not being an inhabitant of this State, the ordinary process of law cannot be served on him, and his interest in the corporate property aforesaid, not being tangible, cannot be reached by attachment at law, he therefore prays that the defendants discover the number and value of the shares of the capital stock of the said company, owned

by the said Monot, and that they be enjoined and restrained from transferring these shares of stock to any other person, and that the same be subjected by a decree of this Court to the payment and satisfaction of the plaintiff's demand.

To this bill the defendant, Monot, filed the following plea, viz: "And the said J. B. Monot, in his own proper person, comes and says that this Court ought not to have, or take, any further cognisance of the bill aforesaid, because, he says, that the contract or bond upon which the said suit is based, was entered into and made in the State of New York, where the said defendant, at the time, resided, and where he resided at the commencement of this suit, and now resides, and where the said supposed cause of action also accrued, and has now no property within the State of North Carolina to give the courts thereof jurisdiction over him; wherefore the said defendant insists that this Court cannot entertain the plaintiff's said bill, for the want of jurisdiction thereof. And this the said defendant is ready to verify; wherefore, he prays judgment whether this Court can or will take further cognizance of the bill aforesaid."

The affidavit accompanying this plea, after alleging that it is true in substance and in fact, adds: "and he further states that the Governor's Creek Steam Transportation and Mining Company keep their office, books, records, etc., in the city of New York, beyond the jurisdiction of this Court, and that the president treasurer, and secretary, and board of directors, are also non-residents; that the shares of stock in said company are, by the charter of the same, and the general law, personal estate, incapable of being transferred, save at the office and on the book of said company."

This plea being set down for argument, was argued by counsel, and on consideration thereof, his Honor sustained the plea and ordered the bill to be dismissed, from which judgment and order the plaintiff appealed.

Haughton and *Badger*, for the plaintiff.
Cantwell and *Bragg*, for the defendants.

PEARSON, C. J. In Daniel's Ch. Plead. 714, it is said, "It nowhere appears that any practical consequence results in equity from the distinction between pleas in abatement, and pleas in bar. At law, the distinction is important, with reference to the conclusion of the plea; but, in this court, there is not the same difference; the office of a plea in equity being merely to introdnce the facts, which, combined with the bill, destroy the plaintiff's case, or make it defective; the uniform conclusion of pleas is a submisson that the defendant is not bound to put in any other or further answer."

We are inclined to concur in this opinion, and should be reluctant to over-rule the plea, on the ground that the conclusion fixes its character as that of a plea to the jurisdiction, for in truth the conclusion is not an appropriate one, either for a plea to the jurisdiction, or a plea in bar; and, without deciding the many nice questions that are raised in the argument, treating it as a plea to the jurisdiction, we put our decision on the ground, that, considered as a plea of either kind, the facts introduced by it do not show that the plaintiff is not entitled to the relief which he seeks, under the provisions of the statute, Rev. Code, ch. 7, sec. 20.

Independent of that statute, it is clear, that the plaintiff would not be entitled to relief in the courts of equity of this State, or of any other State; for his is a mere legal demand. The statute, however, amends the attachment law, and gives relief to a creditor who is a citizen of this State, by enabling him to bring his bill in equity, when the debtor resides beyond the limits of this State, and is entitled to any personal estate or effects, or to the use thereof, in the hands of an executor, &c., or any estate in the hands of any one resident in this State, which cannot be attached at law; in other words, it gives the extraordinary remedy of an attachment in equity. And the counsel for the defendant put in the plea under a misapprehension in supposing that the 6th subdivision in the 4th rule in ch. 32 Rev. Code, which prescribes "the rules and methods of proceeding in courts of equity," applies to, or controls this particular proceeding; on the contrary, it is an

anomalous one, and its object is to subject any estate or effects which a non-resident may have in the hands of any person in this State, which cannot be reached by attachment, to the payment of debts owing to our citizens, without reference to the place where the debt was contracted.

The facts appearing upon the pleadings are: that the plaintiff is a citizen of this State; the defendant, Monot, is a citizen of the State of New York, who is indebted to the plaintiff. The other defendant is a corporation, chartered by the Legislature of this State, for the purpose of carrying on mining operations, in the county of Chatham, where it owns land and other property of great value, but its books are kept in the State of New York, where its officers reside; and the defendant, Monot, is a stockholder; the shares are personal estate, transferable only on the books of the corporation.

To give the plaintiff a standing in this Court, it is necessary for him to maintain three propositions: that the corporation has its existence in this State; that the shares of stock are "effects or estate" of the defendant, Monot, here in the hands of the corporation; and that the stock cannot be attached at law. These questions present themselves "in limine" as bearing upon the peculiar and limited jurisdiction which the statute confers upon our courts of equity, in respect to a mere legal demand; so that if either position be untenable, the Court would, of its own motion, decline to proceed, on the ground that the subject, i. e., a plain note of hand for the payment of money, does not fall under any known head of jurisprudence.

We, however, incline to the opinion, that all of them are tenable. 1st. The corporation having been created here, and the land upon which it is to operate, being situate here, it is difficult to conceive how it acquired the ability to remove itself; so as to have an existence in another State, and cease to exist here. The proposition seems too plain for argument; the corporation is a mere *creature of our law*, and it must of necessity have its existence in our State, notwithstanding the fact that its officers, for their own convenience, keep the books

and transact office business, as distinguished from its mining operations, in the city of New York.

2d and 3d. These two propositions involve the same consideration, and may be discussed together. A share of the stock of the corporation is a thing incorporeal—a mere right which entitles its owner to participate in the general management of the concerns of the corporation, by being a member, in the meeting of the stockholders, to elect officers and do other acts of the kind; to demand and receive from the corporation a dividend of profits, whenever dividends are declared, and to demand and recieve a portion of whatever may be on hand at its dissolution. It is true a share of the stock is personal estate in the sense that it will, at the death of the owner, devolve upon his personal representative, but, it would seem, that it cannot be so in the sense of attending his person, for it is but one of many parts, the aggregate of which make an artificial body, which has its existence fixed in this State, and creates a right or duty which must be yielded and performed here, and cannot be enforced in any other country; in other words, it is estate of the shareholder *here*, in the hands of the corporation, for his benefit. It would seem, also, that stock is estate of the debtor, which cannot be attached at law; a "debt" or any "property or effects" of the debtor, may be attached, in the hands of a third person, as garnishee; but, upon a perusal of the statute, it will be seen, that the sense in which these terms are used, does not include stock; a "debt," as thus used, means a liquidated sum of money which the garnishee owes to the absent debtor. A corporation does not owe its stockholder a debt, but a duty which cannot be enforced by an ordinary action at law. So, property or effects means something tangible, which may be delivered by the garnishee, in exoneration of himself, to the officer levying the attachment. This is wholly inappropriate to stock. Indeed, as judgments of courts of law are absolute, and cannot be moulded and shaped to fit peculiar circumstances, stock is a thing which these courts are incompetent to deal with, and a creditor who seeks to subject it, must apply to a court of

equity, where a transfer may be compelled, or a sale made, or some mode devised for effecting the purposes of justice; as is the course in reference to legacies and distributive shares, and other rights which a court of law cannot administer; for which reason the amendment of the attachment law, under consideration, was made in order to embrace these subjects within the principle, by means of a proceeding in a court of equity.

The Court, however, will not now declare its opinion upon these questions of law, but will reverse the order of the court below, by which the bill was dismissed, over-rule the plea, and require the defendants to answer, "reserving the benefit of the plea until the hearing." Adams' Eq., 342. The same order is made in reference to the plea of the other defendant.

We are induced to "pursue this intermediate course," because the strength of the argument was spent upon objections to the form of the pleas, and the questions upon the application of the statute are new and very interesting and likely to become of frequent occurrence, owing to the great number of corporations that have sprung up in our midst with non-resident stockholders; and because it does not appear from the pleadings in this case that the president, or any of the directors, or other officer of the corporation upon whom process could be served reside in this State, and difficulties may arise as to the mode of enforcing the decree, should one be made, in favor of the plaintiff.

PER CURIAM, Decree below reversed.

S. W. McRARY *against* F. FRIES *and others.*

Where an insolvent debtor had a resulting interest in a deed of trust, it was *Held* that an assignment of it, by him, after a judgment creditor had commenced a suit in equity to subject such resulting trust to the payment of his debt, should be postponed to the debts sought to be secured by such suit.

A discretion left in a trustee, as to what debts he would pay after discharging certain ones specified, is controlled and limited by the filing of a bill in equi-

ty by a judgment creditor, to subject the debtor's resulting interest to the payment of his debt.

CAUSE removed from the Court of Equity of Davidson county.

THIS cause was set for hearing upon the original and supplemental bills and the answers and exhibits, and upon them the following appears to be substantially the case:

In April, 1848, William J. McElroy conveyed to Francis Fries, sundry tracts of land, situate in Davie county, fifteen slaves, and other articles of personal property, in trust, to secure and pay a debt of $6000 to the said Fries, as the guardian of Miss Shober, and a debt of $844, to another person. Some payments were made on these debts, but a balance remained due on them after all the property, conveyed to Fries, had been disposed of by him and McElroy, except fourteen of the slaves; and on the 1st of September, 1854, McElroy sold those slaves to Fries for the sum of $8000, of which, the sum of $2000 was paid at the time to McElroy, and of the residue, $2000 was to be paid on the 1st of November, the 1st of January, and the 1st of March following; and it was a part of the agreement, that out of the said residue of the purchase-money, Fries should retain enough to discharge the balance due on the debts secured by the deed of trust of 1848. On the 22d of September, 1854, McElroy having become insolvent, made a deed of general assignment to Fries of all his real and personal estates and effects, including slaves, notes, judgments, and all debts, horses and other things, in trust, to sell the property, collect the debts, and out of the proceeds, pay a debt of $3575, 72, to the Greensborough Mutual Life Insurance and Trust Company, and he thereby constituted Fries his attorney with directions to pay, in the next place, out of the proceeds, all McElroy's other debts, as the said Fries might deem best, and find most convenient. The only real estate owned at the time by McElroy, was a house and lot in the town of Greensborough, in Guilford county. Besides the above mentioned debt to Fries, McElroy owed him other sums, as the answer states, and also owed a debt to a

mercantile firm, of which Fries was a member; and he alleges, in his answer, that McElroy owed many other persons, and that to some of them, he, Fries, made payments, or promises of payment, at different times, up to the 1st of March, 1855.

On the 14th of November, 1854, the plaintiff, McRary, recovered two judgments before a justice of the peace, in Davidson county, against McElroy; one for $74,24, and the other for $6,40, both bearing interest from that day; and on 15th of November, 1854, Hunt & Adderton obtained a similar judgment against him for $46,56, with interest from that day, which they assigned to the plaintiff on the same day. On the three judgments, writs of *fieri facias* were issued immediately to the sheriff of Davidson county, who, thereon, returned that he had levied the same on the resulting trust and equity of redemption of McElroy, in all the property conveyed by him to Fries, by the deed, bearing date September 22d, 1854.

On the 24th of November, 1854, McRary filed this bill against Fries, McElroy and the Insurance and Trust Company, alleging that McElroy had conveyed and assigned to Fries, all his estates and interests of every kind, by the deed last mentioned, and there was nothing on which an execution could be served, but the resulting trust in the house and lot in Greensborough, and praying that Fries might be compelled to get in, and dispose of the effects assigned to him, and thereout pay the debt to the Insurance and Trust Company, and out of any balance remaining, satisfy the debts to the plaintiff, and that proper accounts might be taken. On the same day the subpœnas were taken out, and were served on the next day. Fries, by his answer, sets out, amongst other things, that McElroy, on the 2d of January, 1855, made a second deed of trust, whereby, as security for the payment or certain debts to James P. Stimson, and many others mentioned in the deed, he conveyed and assigned to Stimson, in trust, all the property before conveyed to Fries, and all the proceeds of it, then, or that might be, in the hands of Fries, under the conveyance to him, after paying the debt to the Insurance and Trust Company; and that he had been informed thereof by Stimson, and

certain dealings had taken place between them, touching parts of the property. The answer insists that Stimson ought to be made a party, for the protection of Fries. By leave of the Court, the plaintiff then filed an amended and supplemental bill, bringing in Stimson, and charging that the deed, to him, as above set forth, was made to defeat the plaintiff of his debts, and that the debts secured in it, were not just, but pretended, and that the plaintiff's right to satisfaction out of the fund, was preferable, at any rate. Stimson answered, that the debts mentioned, in the deed to him, are all just and true, as he believed, and, that those to himself are so; and he denies having any knowledge whatever of the plaintiff's judgments, or of his bill having been filed, at the time the deed of trust was made to him.

Gorrell, for the plaintiff.
Fowle, for the defendants.

RUFFIN, J. The Court considers the material points, in this case, to have been determined by previous adjudications of this Court. The plaintiff cannot have any benefit from his executions, as creating a lien at law on the resulting trust in real estate, because, in truth, no lien was created. The executions were issued by a justice of the peace, in a different county from that in which the land was, and could not be served on it. But had they been in the same county, the plaintiff did not proceed far enough on them to create a lien; *Presnell* v. *Landers*, 5 Ire. Eq. 251. If a plaintiff establishes a legal lien on a equity of redemption in land, there is no doubt, that he may come into equity to aid in enforcing it by clearing the estate of the incumbrances, or taking an account of them and ascertaining the amount so as to bring the debtor's property fairly into market under the execution, or under the decree; and in such a case, the legal priorities between the execution creditor and other creditors, or assignees, will *not* be disturbed. This has been held, in several cases, particularly in that of *Presnell* v. *Landers*, and in *Harrison* v.

Battle, 1 Dev. and Bat. Eq. 537. And there is as little doubt, that a judgment creditor may apply to this Court, in the first instance, for satisfaction out of an equity of redemption in realty, or a resulting trust in the nature of it, as equitable property, having no other legal property subject to the execution. For, originally, equity had that jurisdiction exclusively, and the act of 1812, while it made a *fieri facias* run against such an interest, as land, did, in no degree, oust jurisdiction, and, therefore, according to the general principle, it continues. The principle is exemplified in the ordinary case of relief between sureties, notwithstanding one may have an action at law against another; *Shepherd* v. *Munroe*, 2 Law Repos. 624; and is particularly applicable to a case of this kind, in which the remedy is more perfect, and the estate is brought to sale in this Court, more beneficially for all parties, and especially for the debtor, or his assignees. If, therefore, the creditor elects to give up the advantages of the lien of an execution, and seek satisfaction out of an equity of redemption in land, as equitable property, he may, and it may often be to his advantage to do so, where real and personal property is complicated in the same deed, as one trust fund, which is the case before us. By pursuing that course, however, he incurs the risk, that the debtor may have disposed of his equitable interest by assignment; for, as there is no lien on such interest by execution, there is nothing to restrain the debtor from dealing with it as his own, until it be brought within the juriction of the court of equity, by filing a bill, and duly prosecuting it. Upon the filing of the bill, and serving the subpœna, a *lis pendens*, is constituted, which, it is settled, arrests the power of a party to alter the state of the subject of controversy by a sale or conveyance even of the legal estate, and much more is that true of a mere equity. This rule has been sometimes complained of as operating hardly upon purchasers without actual notice of the pendency of the suit. But there is no greater hardship in this case than in that of a purchase over-reached by the lein of an execution of a prior teste, but not actually sued and delivered to the sheriff at the

time of the purchase. In each case, the purchase is superseded, upon the principle that there is an absolute necessity for upholding the rights of the plaintiff in the execution, or in the suit in equity in that manner; because otherwise litigation would be interminable and fruitless, and defendants could always defeat recoveries by conveyances and assignments. *Garth* v. *Ward*, 2 Atk. 147; *Bishop of Winchester* v. *Paine*, 11 Ves. 194. Indeed, in the latter case, Sir WILLIAM GRANT says that the purchaser is bound by the decree against the person under whom he derives title, and the litigating parties are not bound to take notice of a title so acquired; for, as to them, it is no title. That rule, being thus established, it is then to be considered, how it affects the parties in this cause. In the first place, it effectually disposes of the second assignment to Stimson; which was executed five or six weeks after bill was filed and process served on the original defendants, and must therefore be postponed until the plaintiff's debts are first satisfied. The declaration on that point may, probably, enable the parties to adjust their differences without incurring the delay and expense of taking an account or further steps in the cause, since, if there was any surplus worth assigning to Stimson, it must amount to enough to discharge the small demands of the plaintiff, and leave a balance for the operation of that assignment. But, as the Court cannot anticipate, certainly, the determination of the parties on that point, it is necessary, in the next place, to consider how the defendant, Fries, will stand towards the plaintiff. The balance of the purchase money for the negroes bought by Fries, namely, $6000, exceeds the debts to him as the guardian of Miss Shober and the other mentioned in the agreement between McElroy and himself. They are, therefore, to be deducted out of that purchase-money, and considered as retained by Fries; and only the balance of the $6000 was the debt to McElroy, applicable to the purposes of the assignment of the 22d of September, 1854. That balance, and all the rest of the fund arising from that assignment, is to be applied to the debt to the Life Insurance and Trust Com-

pany, which, according to the deed, is to be paid "first of all." As to the other debts of McElroy, there is no specific direction in the deed. It recites, in the beginning, that McElroy owed that company the debt mentioned, "and also other debts," and was desirous to make an assignment to Fries, and also make Fries his general agent and attorney to dispose of and sell all his property, and collect debts due to him, and pay all his debts, and then appoints Fries his attorney to sell, &c., and pay the debt to the company first of all, and "next such debts as said Fries may deem best, and find most convenient," and then "in consideration, &c., conveys and assigns to Fries and his heirs all the property, &c., for the purposes aforesaid." Under those provisions, Fries claims to retain out of the fund, before an application of any part of it to the plaintiff's demands, debts of several descriptions. One class consists of debts alleged to be owing to himself; and another to himself and others as his copartners. If there be such debts, the Court holds that they are to be paid before those of the plaintiff, because they were known to the parties at the time, and it is to be presumed that, in the discretion allowed to Fries as to the debts to which the assets should be applied, he would select those in which he had a personal interest, and that it was expected and intended he should. But debts to other persons stand on a different footing. As none are specifically mentioned in the deed, the case seems to fall more within that of *Wallwyn* v. *Coults*, 3 Mer. 707, 3 Sim. 1 (note;) and 2 Russ & Mylne, 451, and the principle deduced from it in England, in subsequent adjudications, than any one which has come before the Court; and the defendant, Fries, more like a mere attorney of the grantor, or a trustee for him, and under his control, than a trustee for creditors constituted by the deed of assignment usually made in this country. *Ingram* v. *Kirkpatrick*, 6 Ired. 462. But that question concerns the defendants, between themselves, claiming the one under an assignment for all creditors generally, as he might choose to pay them, and the other, under an assignment of the residue of the fund for the benefit of numerous specified creditors.

Between them the Court has already passed, in *Stimson* v. *Fries*, 2 Jones' Eq., 157. The plaintiff has no concern with it. For, in either aspect, the fund was an equitable interest, belonging to McElroy, which the plaintiffs had a right to pursue in equity, and which, after the service of the subpœna, the trustee, Fries, could not apply so as to defeat the plaintiff. For, it is to be observed, that the bill does not seek satisfaction upon the footing of a trust for the plaintiffs, as one of the creditors secured in the deed, but upon his being a judgment creditor, pursuing a resulting trust vested in his debtor. In that view of the case, the Court is of opinion, that a general declaration of trust in favor of such creditors as the debtor, or his attorney, or his trustee may choose, or think best, and most convenient to pay, contained in a conveyance of all the debtor's property, is not such an appropriation of the estate as can be upheld to the prejudice of a creditor who prosecutes his demand to judgment, and files his bill for satisfaction. It is not like a positive security for all creditors, but reserves a power over the estate in the debtor, or, which is the same thing, in his attorney, incompatible with the rights of the creditors, by means of which the debtor may compel them, respectively, to make terms with him, greatly to his benefit, and to their prejudice. It may be doubted, therefore, whether any of the "other debts" not named ought to stand before the the plaintiff's. But, at present, that point need not be determined conclusively, as its necessity cannot directly arise until, upon an inquiry, it shall appear what debts were paid by Fries before the bill filed or at least assumed by him, so as conclusively to bind him, personally, for them. The answer does not give any definite information on that head, but only sets out a schedule of payments or assumpsits up to the 1st of March, 1855, which includes a period of more than three months after this suit was brought, when the hands of both McElroy and himself were tied from further dispositions or incumbrances of the fund to the prejudice of the plaintiff. If, therefore, the defendants think proper to go into an account of the debts satisfied or assumed by Fries, payable

out of this fund, the master must distinguish such as accrued before this suit from those that were subsequent, so as to present the point with precision, that the Court may see that the decision will be on the rights of the parties, and not on abstract questions. In the mean time, while the Court declares that the plaintiff has a right to satisfaction preferably to Stimson, and has also a right to an account from Fries, and, in taking the account, the master will ascertain the sum due to the plaintiff for principal, interest, and costs, at law, on the footing of his judgments and for his costs in this cause, and also state the account of the fund in the hands of Fries, upon the principles now laid down.

PER CURIAM, Decree accordingly.

J. HOLDERBY *and others against* M. C. HOLDERBY *and another.*

A bequest of slaves and other property to A, and her "increase," without any allusion to a particular estate in her, and without any terms to qualify or control the meaning of "increase," was *Held* to confer upon A, the mother, the absolute property.

CAUSE removed from the Court of Equity of Rockingham cty.

By her will, dated September 17th, 1854, Sarah Mills bequeathed as follows: "I will and bequeath to my daughter, Sarah C. Holderby, one negro woman, Anne, and her child, Edmund, and her increase, to her and increase forever; also one bed and bed-stead, cupboard, and one cow, to her and her heirs forever." By other clauses, she gives several slaves and sums of money to her other children respectively, "to him (or her) and his (or her) heirs forever." The testatrix died in October, 1854. The plaintiff, James, the eldest child of Mrs Holderby, was born before the making of the will, and since the death of the testatrix, the two others, who are also plaintiffs, have been born. The will was proved in Novem-

ber, 1854, and the executor assented to the legacies to Mrs. Holderby, and delivered the slaves and other articles to her husband, Marcus C. Holderby, and the negro woman has had another child in his possession. In 1858, Marcus C. Holderby conveyed the three negroes to the defendant Watt, as trustee, for the benefit of his creditors, by sale, and applying the proceeds to the satisfaction of their debts; and the trustee was about selling the negroes in absolute property.

The bill is filed by the three infant children against their father and the trustee; claiming that the bequest is to their mother for her life, with remainder to her children; or, if not, that it is to her and the son James as joint tenants; and praying, that a construction of the will may be made, and the rights of the plaintiffs respectively declared, and their or his share severed.

Morehead, for the plaintiffs.
T. Ruffin, Jr., and *Phillips*, for the defendants.

RUFFIN, J. The only case cited in support of the first position, is that of *Chestnut* v. *Meares*, 3 Jones' Eq. 416. But that turned on the peculiar provisions of the singular instrument, on which the question arose, and the main purposes of the instrument as declared in it, which would have been frustrated by a contrary construction. It has no application here, which is a simple, immediate, and absolute gift to the donee or donees, without the least allusion to any particular estate. In whatever the daughter gets, therefore, she must take the entire property.

It was next argued for the plaintiffs, "that increase" meant "children," and if so, then, that the birth of James, before the making of the will, brought the case within one of the resolutions of *Wild's* case, 6. Rep. 16, and he takes jointly with his mother. But "children" cannot be substituted for "increase," because the latter word means more than the former, and, like "progeny," "posterity," or "seed" takes in all descendants—excluding only collaterals. Without any other

word in that clause, or in the context, to control it, the Court cannot impose on it the restricted sense of "children." It would not serve the purpose of the argument, to strike out that word from the will, because the gift, to the daughter, would then be absolute upon the previous terms of the gift; which is, simply, the gift of a personal chattel, and carries the whole property to the legatees. If "increase" stand in the will, it would not help the plaintiffs even to interpolate "children," so as to make it read "children and increase." For, in *Roe* v. *Lowe*, 1 H. Bl. 446, it was held, that a devise of a copyhold in trust, amongst other things, "that A, then the tenant, *and his children and posterity*, which shall succeed, shall never be put forth or from the same, but always continue the possession, paying £11 rent," gave A an equitable estate tail. That made "posterity" not only a word of limitation, but one that was not controlled by being coupled with "children," which, although it may be a word or limitation, is usually, and in its natural sense, a word of purchase. "Increase" seems to be here used, as exactly synonomous with "posterity"—both taking in all lineal relations, descendants, or seed. As long ago as Lord Coke's time it was laid down, that a devise to one "forever" gives a fee simple, and to one, "*et semini suo*" gives a fee tail; and consequently, the absolute property in a personal chattel; Co. Lit. 96.

Here, the gift is expressly to the daughter, and to no one else; and to that gift are annexed words of perpetual succession "to her and increase forever." That denotes simply the quantum of interest to be taken by the daughter, and does not introduce another class of persons as purchasers with her; in other words, the testatrix used these as words of limitation. Neither of the plaintiffs has, therefore, any share of the slaves *in presenti* or *in futuro* and the bill must be dismissed with costs.

Per Curiam, Decree accordingly.

JACOB L. FULKERON, *Exr. against* CHARLES CHITTY *and others.*

The word "money," or "monies," used in a will, where the context favored such a construction, was *Held* to include bank stock, notes and bonds.

CAUSE removed from the Court of Equity of Forsyth County.

The bill is filed by Jacob L. Fulkerson to obtain a construction of certain clauses in the will of Catherine Heckendom, and for directions in the settlement of the estate under the same. The next of kin of the testatrix were Rosina Luckenbach, a sister, and Charles Chitty, Catherine Henning, Maria Spach, and Elizabeth Spach, children of a deceased sister, Elizabeth Chitty. To each of these, except the first, in her will, she gives $50,00, and she gives, in other parts of the will, about $85 00 in pecuniary legacies to about sixteen different legatees. Having premised, in the first clause of her will, after the payment of her debts, that her purpose was to dispose of the *remainder of her property* by the provisions which were to ensue. After these several pecuniary bequests, is the following clause: "Fifteenthly. I give and bequeath all the rest and residue of my monies, in equal shares, to my sister, Rosina Luckenbach, and her two daughters, Lucy Ann, wife of Simon Row, and Belinda, wife of William Repper."

The estate of the testatrix consisted of $3,844 00, of which $268 was in cash on hand, $1,000 00 in bank stock, $75 00 in articles of furniture, and the remainder in three notes on individuals. The principal question submitted by the executor was, whether the remainder of the proceeds of the bank stock, notes, cash on hand, and personal property, after paying the debts, funeral expenses, and pecuniary legacies, passed under the residuary clause above recited, to Mrs. Luckenbach and her daughters, or whether, as to these or any of them, there was an intestacy by which it passed to the next of kin. The several persons interested in these several constructions, were called upon to interplead, in order that the question might be settled between them, who all answered, insisting,

severally, upon the view of the subject most favoring their interests.

No counsel appeared for the plaintiff in this Court.
Fowle, *McLean* and *Morehead*, for the defendants.

BATTLE, J. The only question we are called upon to decide, in the present case, is, whether under the 15th clause of the will of the testatrix, the defendants, Mrs. Luckenbach and her two daughters, can take the residue of the estate, consisting of notes, bonds, bank stock, and some few articles of furniture, under the description of "all the rest and residue of my monies." That the word "money," or "monies," may, when the context favors such construction, include stock in a bank, or in the public funds, cannot admit of any doubt. In the case of *Kendall* v. *Kendall*, 4 Russ. 360; (4 Con. Ch. Rep. 706,) the master of the rolls decided that stock would pass by force of the word "money," and he said that he had so decided in a previous case, (*Legge* v. *Asgill*, 1 Turn. and Russ., 265, in the note,) which, upon an appeal, was affirmed by the Lord Chancellor ELDON. If, then, money invested in bank or other stock may pass under the term "money" or "monies," we think notes and bonds may be included also under that term. They are the ordinary securities upon which money is lent out in this State, and it is no great stretch of language for a person to speak of such securities for money as his "money." The question then arises, whether there is any thing in the will before us indicative of an intention of the testatrix to bequeath her notes, and bonds, and bank stock to her sister and neices, by the expression, "all the rest and residue of my monies." To this we answer, that there is a strong indication of such an intention apparent in the will itself, which is made absolutely certain by adverting to the condition of her property at the time of her death, which occurred shortly after her will was executed.

In the first place, she shows a clear purpose in the beginning of her will, to dispose of all her property thereby.

Secondly. She contemplated that her money which had been lent out upon the security of notes, or bonds, or invested in stock, should be collected, because she makes most of her gifts in pecuniary legacies, amounting in the whole to much more than the small amount she had on hand in cash.

Thirdly. She had provided for the children of her deceased sister, Mrs. Chitty, by pecuniary legacies also, and then, by the clause in question, she makes the provision which she intended for her living sister, Mrs. Luckenbach, and her daughters. Now, when we find that the latter will get nothing, except a few articles of furniture, of small value, unless the word "monies" can embrace the notes, bonds and bank stock, we are forced to the conclusion that she did intend to embrace them.

It is unnecessary for us to decide whether the furniture not specifically bequeathed passed by the word "monies" or not; for, supposing that it is not disposed of by the will, it forms the fund primarily liable for the payment of the funeral expenses, debts and general legacies, and to the extent of its value, would leave a greater residue of "monies" for the residuary legatees. To them, of course, it must be a matter of no consequence whether the legacy which they receive is composed, in part, of the proceeds of furniture, and in part of monies arising from the sale of the bank stock, and the collection of the notes and bonds, or whether it is derived altogether from the latter, provided that in either case it is the same in amount. A decree may be drawn for the settlement of the estate upon the principle of construction declared in this opinion.

Per Curiam, Decree accordingly.

DENNIS TYSOR *and another against* THOMAS L. LUTTERLOH *and another.*

Where a note, prepared for the purpose of being discounted at a bank, was left by the party, for whose accommodation it was made, with A, to be offered at bank, upon an understanding that A should draw the proceeds, and apply a part thereof to the discharge of a smaller note, then due to the bank, and the balance to certain debts which the principal owed him, and on the refusal of the bank to discount the note, it was further agreed between the same parties, that A should keep the note as security for the debts due him, it was *Held* that a judgment obtained in a court of law, on such note, could not be impugned for any matter that could have been pleaded to the action at law, and that it was in the first place applicable to the indemnity of the party, paying the debt in bank, and that the remainder was applicable to the claims of A against the principal.

APPEAL from an interlocutory order of the Court of Equity of Chatham, continuing an injunction.

The plaintiff, Dennis Tysor, being indebted to the Bank of Fayetteville, in the sum of $101, with Harris Tysor and G. W. Palmer, the intestate of the defendant Goldson, his sureties, and not being prepared to pay it off, made a new note for $250, payable to the defendant, W. G. Broadfoot, cashier of the bank of Fayetteville, with the same sureties, and left it with the defendant, Lutterloh, to be presented to the bank for discount. Lutterloh presented the note, but not being accepted by the bank, he retained it, and afterwards brought suit on it, in the name of Broadfoot, and recovered judgment in the Superior Court of law of Cumberland county.

The bill is filed to enjoin the collection of this judgment, alleging that, having learned that the bank would not renew a note of the size of one the plaintiffs owed, and it being inconvenient to pay the money, the one in question was prepared, partly to take up the former note, and the remainder of its proceeds was to remain in the hands of the defendant, Lutterloh, subject to the draft of the plaintiff, Dennis Tysor, and that the said defendant had no right or authority to detain the said note, or put it in suit, or use it in any way, and prayed for an injunction, which was ordered.

The defendant, Lutterloh, in his answer, gives a very different account of this transaction. He states that Dennis Tysor owed him three several notes of $50, $56,63 and $170, and much doubting his ability to pay the whole, he received from him the note in question, in order to secure a part; that concerning that, it was understood and agreed that he should advance to him, Tysor, $50 more and surrender to him his note of $50, so that there should be due him one simple contract debt of $100, and two notes, that on getting the $250 note discounted, he was to apply, out of the proceeds, the necessary amount to take up the $101 note and interest, and the remainder, first to the simple contract debt of $100, and the balance to the two notes of $56,63 and $170; that he offered the note in question for discount, but it was not accepted by the bank, and he immediately informed Dennis Tysor of the fact, urging him to make some other arrangements as to these debts; that he insisted on defendants retaining the note as security for what he owed him, which, being the best he could do to save himself, he agreed to; that having obtained a judgment, at law, upon this note, in the name of the payee, Broadfoot, he insists that he is entitled to use it for his indemnity. He denies that he promised to surrender this note, or that he ever said that it was worthless, and should never come against the parties.

On the coming in of the answers, his Honor, on a motion to dissolve the injunction, refused to do so, but ordered it to be continued until the hearing; from which the defendants appealed.

No counsel appeared for the plaintiffs in this Court.
Haughton, for the defendants.

PEARSON, C. J. We do not concur with his Honor, in the view taken by him of the question presented, upon the motion to dissolve the injunction.

Assuming that the facts bring this case within the principle of *Southerland* v. *Whitaker*, 5 Jones' Rep. 5, that defense

was available at law, and is cut off by the judgment, which is conclusive as to the existence of the debt, and we are confined to the enquiry, have the plaintiffs an *equity;* that is, is there any matter or thing connected with the transaction, which makes it against conscience for the defendants to avail themselves of the advantage which the judgment gives them at law?

The answers are fully responsive, and deny without evasion, the entire equity, in respect to the plaintiff, Dennis Tysor; so he has no ground to stand on.

With respect to the other plaintiffs, who are his sureties, without expressing a decided opinion at this time, we are inclined to think that an *equity* is confessed, in regard to a part of the judgment, to wit, an amount corresponding with the bank debt and interest; for it is admitted that the $250 note was made, for the purpose of discharging that debt, upon which they were sureties, and Dennis Tysor was only at liberty to dispose of *the excess.* That arrangement did not go into effect, and it is not alleged that they concurred in the subsequent arrangement, by which (as Lutterloh avers) he was to retain the note, as collateral security, for the sums due to him by Dennis Tysor; so that, as against them, Lutterloh (it would seem) is only entitled to use the judgment for the purpose of collecting such excess. It does not distinctly appear by whom the debt, in bank, was paid, if the sureties paid it, their equity, in respect to the amount, is clear. But if Dennis Tysor paid it, as we suppose to be the fact, his means of discharging the $250 note, was made less by that amount, and the effect of the arrangement, by which Lutterloh was allowed to retain it, was to make them liable, at one time, for *both of the notes*, which was known by Lutterloh, not to have been the intention of the parties, and for that reason, it was against conscience for him to accept the note, as obligatory on them, for the full amount.

The order continuing the injunction until the hearing, must be reversed. The injunction will be dissolved as to Dennis Tysor, and it will also be dissolved as to Harris Tysor, and

Gholson, except as to a sum equal to the bank debt and interest. The money will be paid into office, to the end that Lutterloh may produce the notes, which he holds, so that a credit may be endorsed of the balance, after deducting the $101 and interest, advanced by him, together with costs. If only a part of the judgment is made out of Dennis Tysor, the defendant will be allowed to apply that to the part of the debt, for which Dennis Tysor and Gholson are not liable, their *equity* extends no further than an exemption from liability, in respect to that part. The defendants are entitled to costs.

PER CURIAM, Decree accordingly.

FLORINDA MILLER *and another against* REUBEN L. HOLMES, *Ex'r., and others.*

Where slaves were given by will to several of the testator's children, with remainders to their children, and it was provided further that if any of the slaves given to the testator's children should die, the loss was to be made good to them by the substitution of slaves of equal value to be taken out of a stock or class intrusted to the testator's widow for that and other purposes *during her life*, *Held* that a loss by the death of a slave, happening after the death of the first taker, but during the subsistence of the stock or class provided as a recourse in such case, was to be made good to the remainderman.

CAUSE removed from the Court of Equity of Davidson County.

The questions arising in this case, arise out of several provisions in the will of Moses Holmes, one of which is as follows: "I give and bequeath to my daughter, Sarah Miller, a negro girl, named Nancy, and a boy, named Robert, now in her possession;" another of which is as follows: "9th. In the event of the death of any of the negroes willed to my children above, it is my will and wish that the loser or losers shall have another 'negro or negroes,' of equal value, from among the negroes hereinafter willed to my wife during her widowhood."

Another clause, pertaining to this question, is as follows: 10th. "To enable my beloved wife, Anna, to live comfortably during life and widowhood, and for the purpose of raising and educating, in a suitable manner, my minor children, without any expense to them, I give to her all the balance of my negroes, my household and kitchen furniture," &c., &c. A codicil is added to this will, which is also material to the questions involved. It is as follows: "It is my will and wish, should either of my children have the misfortune to lose any of the negroes willed to him or her, that it shall be made up out of the negroes named as a *balance* in the 10th clause of the foregoing will, which has been given to my wife during her widowhood, and which balance, as named in the 10th item, I now hereby make subject to such contingencies as above named. 2d. It is my further will and wish that all my lands and negroes, above willed, to my daughters—shall, after their or the death of either of them, go to their children, if they have any, and if they have none, then the land and negroes shall be equally divided among their sisters and brothers." Sarah Miller, mentioned in the above recited clause, was the wife of Michael Miller at the time the will was made. She died in the year 1854, leaving the plaintiffs, her only children, surviving her, and leaving her mother, Anna, mentioned in the 10th clause of the will, also surviving her.

The bill states that the boy, Robert, given to the mother of the plaintiffs, as above stated, died in her life-time, that she called upon the executor to make the substitution of another negro, as directed in the will, that he then refused, and still refuses, to do so; that, shortly after the death of Mrs. Miller, the mother of the plaintiffs, the girl, Nancy, also died, and that being advised, that the right for a substitution of another slave, passed by force of the said will and codicil to the plaintiffs, they demanded that he should make the same out of the slaves still in the hands of the testator's widow, Anna, but this he refused and still refuses to do.

The prayer of the bill is, that the executor may be com-

pelled to sit over and assign to the plaintiffs, out of the slaves designated, slaves of equal value with those that died.

The answers contest no fact mentioned in the above statement, but the defendants, who are the executor, the widow, and the children, being legatees and next of kin of the testator, say that Robert, the slave, mentioned in the pleadings, was very sickly, and finally died of consumption, that he was, in fact, worth little or nothing when he went into the widow, Anna's,possession. They controvert the legal positions assumed by the plaintiffs, and deny that they are entitled to the substitution prayed for.

No counsel for the plaintiffs.
Gorrell, for the defendants.

BATTLE, J. The claim of the plaintiffs is, as we think, fully sustained by a fair construction of the will of their grandfather, Moses Holmes. Whatever interest in the slaves, or in any matter concerning them, which was given to the mother, was confined to her for life, and after death, was given to her children. As to the boy, Robert, the question is too plain to admit of argument. When he died, in the life-time of the plaintiff's mother, another slave of equal value, might have been, by the terms of the will, immediately substituted in his place, and then, upon the death of their mother, such substited slave would have necessarily belonged to her children. Their right is not to be defeated by the delay of the executor to perform his duty. The case of the girl, Nancy, is somewhat more doubtful ; but a fair interpretation of the language of the testator, will, in our opinion, give the plaintiff a right to have another slave substituted for her. The testator clearly intended, that whatever interest his daughter took in the slaves which he bequeathed to them, should, at their deaths, belong to their respective children. If, then, the girl, Nancy, had died in the life-time of the plaintiff's mother, another girl would have been substituted in her place, and would have devolved upon the plaintiffs, upon the death of their mother,

as we have already decided, with respect to the boy, Robert. As Nancy survived the mother, the right to have another girl substituted in her place, passed with her to the mother's children, and upon the death of the girl, after the death of the mother, this inchoate right to have the substituted slave became perfect. To make this view more obvious, it will be observed that, in the 9th clause of the will, it is said that the event of the death of any slave given to either of the daughters, "the loser or losers shall have another negro," &c. The *loser or losers* refer, in that clause, to the daughters alone, because the absolute interest is there given to them; but in the codicil, the interest in the slaves is divided, and a life estate only is given to the daughters, respectively, while the absolute interest in remainder is given to their children, so that the mother, in any particular case, or her child or children, may be the "loser or losers," at any time, while the slaves, from whom the substituted slave is to be taken, shall remain in the hands of the testator's widow—that is, during her life or widowhood.

The plaintiffs are, therefore, entitled to a decree for two slaves of the same value with Robert and Nancy, as such value was, at the time of their respective deaths, to be taken from among those given to the widow by the 10th clause of the will. It is said, in the answer of the defendants, that the boy, Robert, was sickly, and of very little value when he was put into the possession of the plaintiffs' mother, and that he ultimately died of consumption. This is neither admitted nor proved; but, if it were, we think that from the manifest intention of the testator to provide equally for his daughters, in slaves, the boy in question must be estimated as if he were ordinarily healthy, and of the average value of a boy of his age, size and qualities.

For the purpose of ascertaining this, there must be a reference to a commissioner, and the cause will be retained for further directions upon the coming in of the report.

PER CURIAM, Decree accordingly.

WM. K. A. WILLIAMS, *Exr., and others against* JESSE J. SMITH *and wife and others.*

A bequest of slaves to be hired out to support and school the testator's three youngest children and when the youngest of such children should become of age, then to be sold, and the money divided between the three, and one other child, it was *Held* that the four legatees took, vested interests in the proceeds of the slaves, and upon the death of two of them, intestate and under age, before the youngest became of age, their interest devolved upon their next of kin.

Where slaves were given to a person for life with contingent limitations over and such slaves were sold and removed from the State, it was *Held* that those in remainder had no right to insist upon the seizure and sequestration of other property for the security of their contingent interest.

CAUSE removed from the Court of Equity of Martin County.

Aquilla Hyman bequeathed to his daughter, the defendant, Sally Ann, a negro woman, named Minerva, and a girl by the name of Piney, with a contingent limitation to her children, if she should have any, "but, should she die without a lawful heir, in that case I wish for the said negroes to revert to Adaline Hyman, Peter Hyman, Gabriel Hyman and Aquilla Hyman." After other devises and bequests in the said will contained, occurs the following: Item 5. I wish Nathan and Jerry to be hired out to support and school my three youngest children, Aquilla, Peter and Gabriel. When the youngest of the above named children becomes of age, then I wish for Nathan and Jerry to be sold, and the money equally divided between Adeline, Aquilla, Peter and Gabriel Hyman. Peter and Gabriel died under twenty-one years of age, and this bill is filed by the executor, praying the Court to advise him whether the said Peter and Gabriel took vested interests in the proceeds of the two slaves, Nathan and Jerry.

The bill further states that the female slaves, Minerva and Piney, bequeathed to Sally Ann Smith, were delivered to her and her husband, the defendant, mentioned in this bill, and that the latter of the said slaves has been sold by Smith, the husband, and has been removed to parts unknown out of the

State; that the said Jesse J. Smith is insolvent; that the wife of the said Smith has no child, and from her age and bad health, will very probably have no child or children; and that should this contingency thus happen, the limitation over will be frustrated by the removal of the negroes, and the insolvency of Smith. The executor further asked the Court to advise him whether if Smith and his wife shall be deemed by the Court entitled to a distributive share of the property of these two persons, Peter and Gabriel, it is competent for him to retain the same as security for the performance of the contingency in regard to the slave Piney. The answer of Smith and wife does not deny the material allegations contained in the bill, but objects to the legal deductions insisted on by the plaintiffs.

The cause was set down to be heard on the bill answer and exhibit, and sent to this Court.

Winston, Jr., for the plaintiffs.
Donnell and *H. A. Gilliam*, for the defendants.

BATTLE, J. We cannot perceive any reason to doubt that the testator's sons, Peter and Gabriel, took vested interests in the proceeds of the slaves, Nathan and Jerry, who were directed to be sold when the testator's youngest son should arrive at full age. There is nothing like an expression of contingency annexed to the gift, and it comes, therefore, within the ordinary rule of a legacy given *in presenti, solvendum in futuro.* Upon the deaths, respectively, of these legatees intestate, their shares devolved upon their personal representatives, to be by them distributed after the payment of debts, &c., among the next of kin of their respective intestates.

The question, then, remains, whether the share to which the defendants are entitled, in right of the feme defendant, as one of the next of kin of the intestate can be sequestered, or in any way be made to stand as a security for the slave, Piney, which they sold to a person who carried her out of the State to parts unknown—whereby the plaintiffs are likely to

lose the contingent interest which they had in her, under the limitations in the will of the testator. We are clearly of opinion that this cannot be done. The plaintiffs had an undoubted right, upon a timely application to the court of equity, to have its aid in protecting whatever interest they had in the said slave. *Brown* v. *Wilson*, 6 Ired. Eq. 558; *Braswell* v. *Morehead*, Busbee's Eq. 26. The remedy would have been a writ to sequester the slave until proper security was given that she should not be carried beyond the jurisdiction of the court. If the slave be carried off without objection, we know of no principle which would authorise a person having but a contingent interest in her to sequester other property of the owner of the life estate to make it answerable to the contingent remainderman in the event of his contingent interest ever becoming a vested one. In the present case, the defendants do not claim the proceeds of the slaves, Nathan and Jerry, from the executor under the will of the testator, but their claim is for distributive shares from the intestate brothers of the feme defendant. It is true that the estates of the brothers are derived under their father's will, but we cannot think that makes any difference. The shares which the defendants claim, have no connection with the slaves which were given to the feme defendant by her father's will; and the plaintiffs have no more right to sequester them, than they would have to take, in that way, any other property belonging to them. As, in our opinion, the plaintiffs cannot do the latter, they cannot resort to the former.

It must be declared that the interests which the testator's children took in the proceeds of the slaves, Nathan and Jerry, were vested, and upon the death of his sons, Peter and Gabriel, their shares devolved upon their respective administrators, and that the defendants are entitled to have paid to them whatever may be the share of the feme defendant as one of the next of kin of her deceased brothers.

PER CURIAM, Decree accordingly.

GARDNER JONES *against* ISAAC C. EDWARDS AND J. W. POTTER.

Where a bill, for an injunction, alleged that the notes sought to be enjoined, were given as consideration that the defendants would procure and make him a fee simple title to a tract of land, in which they then had only an estate *pur autre vie*, which they denied, and, in fact, were unable to procure and make such title, and plaintiff's allegation was corroborated by the terms of a deed, which they did make, and the defendants answered evasively, insisting upon an unequal and improbable version of the transaction, the Court ordered the injunction to be continued to the hearing.

APPEAL from the Court of Equity of Greene county, from an interlocutory order dissolving an injunction.

Stephen Coward died intestate, seized in fee of a tract of land, in the county of Greene, leaving his wife Martha surviving, also two children, Martha and Mary, infants of tender age, who died soon after the death of their father, leaving their mother, the said Martha, them surviving, to whom the said tract of land came for her life. Upon the death of these two infants, the remainder, in fee, descended to Pearcy Potter, who intermarried with the defendant, John W. Potter, and who was sister of Stephen Coward, Caroline Edwards, a niece of the said Stephen, who intermarried with the defendant, Isaac C. Edwards, John Joyner, a nephew of the said Stephen, Lydia Ormond and Susan Ormond, nieces of the said Stephen, Louisa Hart, a niece, who intermarried with William T. Hart, Jane Dunn, a niece, who intermarried with Jeptha Dunn, Elizabeth Spivey, a niece, who intermarried with Ephraim Spivey.

The plaintiff, Gardner Jones, intermarried with the widow of the said Stephen Coward, and took possession, and occupied with his wife, the premises aforesaid. On the ——— day of ———, the plaintiff and his wife, Martha, sold and conveyed to the defendants, Edwards and Potter, her life-estate in the lands, for the sum of $800, and took the note of each for $400.

The bill alleges that, within one month after the sale, by the plaintiff and his wife, of her interest to the defendants, as above stated, they (the defendants) contracted with the plain-

tiff, for the consideration of $1850, to procure the interest of all the other heirs in the remainder aforesaid, and to convey it to the plaintiff; that in pursuance of this contract, and in part execution thereof, he paid to the said Edwards and Potter the sum of $1850, in the following manner; he gave to Edwards his note, or bond, for $525, with Edward Coward as surety, and for the remainder thereof, he surrendered to him the note for $400, which he had obtained from him for his half of his wife's life-estate, and to Potter, he gave his own note for the sum of $74, with Edward Coward as surety, and a note for $435, on Elias J. Blount and Wade Butts, and for the balance, surrendered to the said Potter his own note for $400, given as above stated; and in further pursuance of this contract, they executed to him a deed, bearing date the 13th May, 1857, in which they pretended to convey to him the interest of themselves and wives, in the land in question, which was signed and sealed by themselves and wives; that at the time of the execution of this deed, it was expressly understood and agreed, that the defendants would procure a fee simple title, to be made to him by all the joint owners of the remainder. The deed, above mentioned, is referred to in the plaintiff's bill, and made a part thereof, and in it, the defendants, for themselves, their heirs, &c., covenant to, and with the plaintiff, to "warrant and forever defend the right and title of all the aforesaid tract of land, free and clear from the lawful claim, or claims, of any and all persons whatsoever."

The bill further alleges, that although by the form of the deed, a fee simple, in the whole, is conveyed, yet, as the defendants only had the interest which he sold them, and their wives declined conveying any other estate, he, in fact, has got back only what he conveyed to them, and is loser $1050.

He alleges that he has frequently called the defendants to fulfil their contract, but that they refuse to do so, denying that such a contract exists, but that if they were disposed to comply, they could not do so, because the owners of the remainder are unwilling to let them have it.

The bill alleges that the defendant, Edwards, has commenced

a suit, at law, upon the bond, for $525, and that Potter threatens to commence an action against Blount and Butts on the $435 note, and also against the plaintiff for the $74 note.

The prayer is for an injunction, to restrain the defendants from proceeding at law upon these notes; also to restrain them from passing them by endorsement to any other person, and for general relief. The injunction was issued, in vacation, as prayed for, and being executed, was returned to the next term of the Court.

The defendants, in their answers, admit that they agreed to resell to the plaintiff the estate, for the life of his wife, but they deny that they contracted to sell him the remainder in fee, or that they undertook to procure the heirs-at-law to execute deeds for the same; on the contrary, they say, in their answers, that they agreed to sell only whatsoever interest they might have acquired, by virtue of their intermarriage with their wives, and that after the execution of the deed by them, at the earnest request of the plaintiff, they permitted their wives to add their signatures and seals to the deed to the plaintiff, but that this was no part of their contract with him, and was done merely to gratify him. They admit also, the payment of the $1850, as set forth in the bill.

Upon the coming in of the answers, the defendants moved to dissolve the injunction, which was ordered by his Honor; from which the plaintiff was allowed to appeal.

No counsel appeared for the plaintiff in this Court.
J. W. Bryan, for the defendants.

Pearson, C. J. The plaintiff alleges that, for the consideration of $1850, the defendants agreed to resell to him the estate for the life of his wife, which he had sold to them for $800, and also to sell to him the entire remainder in fee; and that they undertook to procure the other tenants in common of the remainder, to execute good and sufficient deeds. He exhibits, as a part of his bill, the deed executed by the defendants, to which the signatures and seals of their wives are annexed.

The defendants admit that they agreed to resell to the plaintiff the estate for the life of his wife, but they deny, that they agreed to sell to him the remainder in fee, and undertook to procure the heirs at-law to execute deeds; on the contrary, they aver that, besides the life-estate, they contracted to sell only "*whatsover interest they might have acquired by virtue of their intermarriage*, the one with the sister, and the other with the niece, of Stephen Coward," and they say, that after the execution of the deed by them, at the earnest request of the plaintiff, they permitted their wives to add their signatures and seals to the deed, but this was no part of the bargain, and was done merely to gratify the plaintiff.

The defendants, according to their own showing, had no estate or interest in the remainder, and, yet, as they allege, the plaintiff agreed to give them $1850, for the life-estate and their supposed interest in the remainder; that is, he was to hand them back two notes of $400 each, which was the price they had, less than one month before, agreed to give for the life-estate, and, in addition, was to pay them $525 each, and it was no part of the bargain, that the wives should execute the deed!! If this be true, it proves an almost incredible degree of ignorance on the part of the plaintiff, and the defendants must either submit to a like charge of ignorance, or to a much graver one—that of knowingly taking advantage of the plaintiff's ignorance, and practicing a gross imposition upon him.

The circumstances tend to suggest the inference, that the two $400 notes were not to be paid, and that the plaintiff and his wife executed the deed, to the defendants, in pursuance of an arrangement, by which the plaintiff hoped to acquire the title in fee in his own right, and that the defendants practiced upon his eagerness to effect that object.

There is another fact, which has a most important bearing as tending to prove the allegations of the plaintiff, and in regard to which, there is such evasion in the answer, as to entitle the plaintiff to have the injunction continued until the hearing: the deed is made a part of the bill. In it, the defendants bind

themselves, their heirs, &c., to the plaintiff, his heirs, &c., "to warrant and forever defend the right and title of all the aforesaid tract of land, free and clear from the lawful claim, or claims, of any or all persons whatsoever."

The defendants give an explanation, such as it is, of the fact that the deed has the signatures and seals of the wives, but they attempt no explanation of the fact, that although, as they say, they agreed only to sell the life-estate, and their respective interests, whatever they might be, in the remainder, still they covenant to warrant the title of *all of the land in fee simple*. This is a palpable evasion.

If from ignorance, on both sides, the matter has become thus confused and entangled, it may be best to execute mutual releases, and thereby put themselves *in statu quo*.

The order, in the Court below, must be reversed, and the injunction continued until the hearing.

PER CURIAM, Decree accordingly.

C. J. HARRISON *and wife and others against* W. B. BOWIE, *Adm'r., and others.*

A charge upon the estate of a testator by his will for the maintainance of a party, is payable annally and will bear interest from the end of each year.

AT the last term of the court, it was declared that the plaintiffs, Prudence and Louisa, were entitled to maintenance until Henry McAden Richardson arrived at the age of twenty-one years, and it was referred to Thomas A. Donoho, a commissioner of the Court, to ascertain how much they had received on this account, and how much was due to them. On the coming in of the report of the commissioner, showing the balances due, with interest thereon, the defendant, F. B. Richardson, excepted to the allowance of interest. The cause was heard on the exception.

Fowle, for the plaintiffs.
Rogers and *Husted*, for the defendants.

BATTLE, J. The only exception to the report of the commissioner is one filed by the defendant, Francis B. Richardson, in which an objection is made to the allowance of interest on the sums due for the maintenance of the femes plaintiff under the provisions of the will of Henry Hooper. The exception must be overruled. The sums to which these plaintiffs were respectively entitled, ought to have been paid to them annually by the personal representative of the estate of the testator—they being a charge thereon; but as that was not done, they are clearly entitled to interest on the sums thus admitted, to be paid from the end of each year up to the time when their brother came of age. It is a general rule in this State, that interest is allowed whenever a certain sum of money is not paid at the time it becomes due.

Upon looking at the decree in the case of *Lindsay* v. *Hogg*, 6 Ired. Eq. 3, we find that interest was allowed on such sums as were not paid at the time when they should have been, towards the expenses of the plaintiff's education.

The exception being over-ruled, the report will be confirmed, and a decree entered according thereto.

PER CURIAM, Decree accordingly.

SAMUEL HANNER *against* JOHN C. DOUGLASS *and others.*

A surety who pays the debt of his principal under a judgment has an equity against the creditor to have the judgment assigned to a trustee for his reimbursement, and to pursue the bail of his principal for that purpose.

APPEAL from the Court of Equity of Guilford County.

The bill states that one Schoolfield borrowed from the Bank of Cape Fear the sum of $450, for which he gave his

negotiable note, with the defendant, Douglass, as surety, payable to the defendant, Jones, the cashier of the bank; that suit was brought on the note by the bank, in the name of Jones, and judgment recovered against the makers, and that in that action the plaintiff was the special bail of Schoolfield; that Schoolfield absconded from the State, and that the creditor proceeded against the plaintiff as the bail, and got judgment against him. The bill further states, that upon the rendering of the first judgment, Douglass furnished John H. Webb with money to pay the judgment, and he paid it accordingly to the bank, and credit was given therefor to Schoolfield and Douglass on the books of the bank, in full, of the debt, but, that at the same time, Webb, instead of merely taking a receipt for the money paid, took from Jones an assignment of the judgment to him, Webb, with the purpose of raising the money out of the plaintiff for the benefit of Douglass, who, in fact, instituted the proceeding at law against the plaintiff, and hath the management of the judgment, and intends to raise the money thereon for his own use. An injunction was prayed for, and granted, on the bill.

Jones answered, admitting that upon the receipt of the money from Webb, he executed the assignment to him, with the view of keeping up the judgment at law for the benefit of Douglass, as the surety.

The answer of Douglass admits that he procured Webb, as his friend, to take an assignment of the judgment from the cashier of the bank, for his benefit, and that he, Douglass, has the control of the original judgment, and also of that against the plaintiff, as bail, and he insists that he had a right to get such an assignment as is usually made, by which sureties are substituted to the rights of creditors.

To the answer of Douglass, the plaintiff excepted, because it did not admit or deny that the money paid to the bank belonged to Douglass, and was by him furnished to Webb; and, because it did not admit or deny that the entries on the books of the bank showed that the debt was paid.

The exceptions came on to be argued, with a motion of the

defendant to dissolve the injunction; when the Court sustained the exceptions, and ordered the defendant to answer them, and, consequently, refused to dissolve the injunction; and the defendant, Douglass, appealed.

McLean, *Fowle* and *Scott*, for the plaintiff.
Graham, for the defendants.

RUFFIN, J. The case was brought on in the Court below, in the proper manner; *Smith* v. *Thomas* 2 Dev. and Bat. Eq. 126, and the Court would concur with his Honor, if the points to which the exceptions relate were material. But it appears to the Court that they are immaterial and frivolous, and, therefore, ought to have been over-ruled. That respecting the entries in the bank books, is manifestly so; for, the debtor, being charged with the note, when the bank receives the money for it, whether it come as a payment from the debtor, or as the price from a purchaser, the account is credited by the cash, because the party is no longer the debtor to the bank. If that were not so, the books would not show the true state of the bank, but would, upon their face, claim assets not belonging to it. Upon the supposition that the entry is of a payment by Douglass, then the question upon this exception is but the same raised by the other; which is, whether a surety, who pays the debt, may take an assignment of the judgment, or other security, to a third person as a trustee for the surety, if it will afford him a better or more direct remedy than one in his own name. The first exception supposes that he cannot; since that is the only sense in which it can be material that the answer shall set forth whether the money belonged to Douglass or to Webb, upon the ground that in the former case it would be a payment of the debt, while, in the latter, it might be a purchase by Webb. It may be remarked, that it seems plain enough, upon the answer, that the money was furnished by Douglass, as it states that he procured Webb, as his friend, that is, as his trustee, to take the assignment for his benefit, and that under it, he has had

the control of all the proceedings since the assignment. That exception, therefore, ought to have been over-ruled as not being founded in fact. But, supposing the contrary, then it was untenable, because it only raises the question just mentioned, and that is sufficiently raised in the bill and answer, and on it the opinion of the Court is against the plaintiff.

It is considered a settled principle of equity, that from the relation between creditor and a surety, the former can claim the benefit of every security the latter may hold from his principal for his indemnity, and, also, that the surety has the correlative equity to all the securities obtained from the principal by the creditor. The grounds of the rule are clear and sound; but they need not be discussed at this day, since the equity has been so long established as to have grown into an adage. The only question is as to the form in which the parties are to proceed, so as to preserve the integrity of the securities after the creditor has satisfaction. It seems from some of the cases, that in England it is not deemed material whether the surety take an assignment to himself, or to another person in trust for him, or, even, whether he take an assignment at all; for, where there was no assignment, relief has been often granted to the surety, upon his bill against the creditor and principal, praying that the security held by the creditor should enure to the surety's benefit, and he be reimbursed by means of it. But the common mode there, is by taking an assignment, either to himself or another for him, according to the nature of the security, to preserve its legal operation. If, for example, it be a mortgage, the assignment may be to the party himself, while if it be a judgment to which the surety is a party, the assignment is to a trustee in order to avoid, since the statute of Anne, any difficulty from a plea of payment. But those assignments, of the one kind or the other, have always been upheld as modes securing the surety from loss. In this State the same doctrine has prevailed, with this modification: that, in order to keep the security on foot, when it is a bond or judgment, it is necessary to take an assignment to a third person. *Sher-*

wood v. *Collier*, 3 Dev. Rep. 380. But if such an assignment be taken, although the money be paid to the creditor by the surety, it has been held even at law, and much more in equity, to preserve the vitality of the security. *Hodges* v. *Armstrong*, 3 Dev. Rep. 253; *Briley* v. *Sugg*, 1 Dev. and Bat. Eq. 366; *Brown* v. *Long*, 1 Ired. Eq. 190. In the last case, it was held that an assignment of a judgment to a third person in trust for the surety, which the surety himself procured, did not amount to a payment, but kept the judgment on foot, and the decree was founded on it. These principles apply as between a surety and his principal. It is in their spirit that the statute provides, that a debt paid by a surety shall retain its original dignity against the assets of the principal. We are not aware of any instance in which the rule has been applied to sureties as between themselves; nor do we perceive any ground for applying it, save only to found the equity of contribution, independent of a contract between them.

The remaining point of enquiry in this case, is, whether this equity of substitution embraces the bail of the principal in the action of the creditor for his debt. Upon that point, the opinion of the Court is, that it does. The surety for the debt, and the bail of the principal, are not co-sureties, and there is no privity between them. Bail is more, in some respects, and in others, less bound than the surety. His contract is, that the principal shall render himself, or that he will pay the debt in his stead, and he may discharge himself by surrendering his principal. By means of his undertaking, the creditor loses the advantage of holding the person of his debtor, which is an advantage inuring to the surety likewise, of which he is deprived by the intervention of the bail, who enables the principal to abscond, or evade the process of the law, and elude the payment of the debt. It has been held, and upon very satisfactory grounds, that where a joint bond was given by two, and they were sued on it, the bail of one could not have recourse on the other, after paying the debt; *Osborne* v. *Cunningham*, 4 Dev. and Bat. Rep. 423; and in *Foley* v. *Robards*, 3 Ired. Rep. 177, that the bail, in an action against

one partner, for a partnership debt, could not recover from the copartner. Much less can a bail resort to a surety for the debt; and there is no instance of contribution between them at the suit of either.

As before remarked, bail is not surety for the debt, but his liability for the money arises out of the breach of an engagement of a different kind, namely, that the principal shall render himself, so as to be amenable in his person to the creditor. Upon non-performance of that agreement, he becomes absolutely bound for the debt, upon his own independent collateral contract, and by his own default in not bringing in the body of his principal. Now, that is a new and distinct security in the hands of the creditor, and there seems to be no reason why the surety should not, upon the equity we have been considering, be entitled to the benefit of it, as much as he is to any other. Indeed, he has a peculiar interest in it, as it may be the means of saving the surety from a pursuit of his principal in a distant country, and before foreign tribunals, by compelling the bail, according to his bond, to bring the principal to the domestic *forum*, in which he was sued. These considerations lead to the conclusion, that a surety has a right to an assignment from the creditor, so that he may either make the bail liable for the debt, or compel him to produce the body of the principal; and it is gratifying to find that the position is well supported by authority. In the case of *Parsons and Cole* v. *Briddock*, 2 Vern. 608, the principal gave bail in an action against him, and his sureties being compelled, by judgment, to pay the debt, brought their bill against the creditor and the bail, to have a judgment against the bail assigned to them, in order to be reimbursed what they had paid, and Lord Cowper decreed accordingly; giving as his reason, that the bail stood in the place of the principal, and cannot be relieved, but upon payment of principal, interest and cost, and the sureties in the original bond are not contributory. Sir William Grant cites that case without disapprobation, in *Wright* v. *Morley*, 11th Ves. 12, as a strong instance of the application of the equity of a surety to all the

securities given by the debtor, and he explains the reasons for the decision more distinctly, even, than Lord Cowper did. He says, though the bail be but sureties, as between them and the principal debtor, that yet, coming in the room of the principal as to the creditor, they likewise come in the room of the principal debtor as to the surety. The surety has no direct engagement, by which the bail is bound to him, but only a claim through the medium of the creditor; and consequently, the surety has precisely the same right that the creditor had, and stands in his place.

As, then, the surety, in the case before us, had an equity against the creditor, which required him to assign to the former the obligation of the bail to be enforced for the reimbursement to the surety of the money paid by him in discharge of the debt, it is manifest that the bail has no equity, which can render that assignment ineffectual, and, therefore, the plaintiff's first exception ought to have been over-ruled and the injunction dissolved with costs.

This will be, accordingly, certified to the Court of Equity. The plaintiff must also pay the costs of the appeal.

PER CURIAM, Decree accordingly.

LYDIA McBRIDE *and others against* BENJAMIN C. WILLIAMS, *Administrator, and others.*

A limitation in a deed of marriage settlement: to the husband and wife during their joint lives, and to the survivor, and if the wife should survive, then the trustees should, at her request, convey the property to her, and if she should die without making such request, then, to such child or children, as she might leave, and if she should die without issue, then to her next of kin, was *Held* to mean, that all three of the latter contingencies depended on the event of the wife's surviving the husband; and that though she died without issue, and never called for a conveyance from the trustees, yet, as the husband survived her, the next of kin of the wife, could not come in under the deed.

CAUSE removed from the Court of Equity of Chatham county.

In contemplation of a marriage, about to take place between Dr. Charles Chalmers and Mrs. Mary Williams, a deed was made, dated 6th of May, 1830, wherein certain slaves (in number eighteen) were conveyed to the Messrs. McBride, her brothers, in trust, as follows: "That the said Charles Chalmers, and Mary Williams shall, during the term of their joint lives, or the survivor of them, hold the said negroes in possession and in the full enjoyment of their labor (and) services, to their own use and benefit, and upon trust, that if the said Mary Williams should survive the said Charles Chalmers, that the said James McBride and Archibald McBride, Jr., shall, at the request of the said Mary Williams, reconvey, and transfer to her, all the right, title, and interest, which they have, either in law or equity, to the said eighteen slaves, or such of them as may be living, and their increase, and if she should die without making such request, leaving one or more children, then in trust, that the said James McBride and Archibald McBride, Jun., shall convey and transfer all the right, title and interest, which they have in said slaves, and their increase, to such child or children. And if the said Mary should die, leaving no child or children, then in trust that the said James McBride and Archibald McBride, Jr., their heirs, executors, administrators and assigns, shall convey, transfer and set over, all the right, title, and interest, which they have, either in law or equity, to the said slaves, and their increase, to the legal representatives of the said Mary Williams, their heirs, executors and administrators, according to the true intent and meaning of these presents." The marriage, contemplated in this deed, took place shortly after its execution. The parties lived together as man and wife until July, 1857, when the said Mary died, without issue, leaving her husband her surviving. In October of the same year, (1857) Doctor Chalmers died intestate, and the defendant, Benjamin C. Williams, became his administrator, and took possession of the slaves in question, claiming to hold them as a part of the personal estate of said Charles Chalmers.

The plaintiffs allege that they are the mother and sisters of the said Mary Williams, and that as there is no issue of the marriage to claim, they, as next of kin, are entitled, under the description of legal representatives, according to the provisions of the said deed.

To this bill, the defendants demurred, generally, for the want of equity.

Joinder in demurrer; and the cause being set down for argument, was sent to this Court.

Phillips and *Haughton*, for plaintiffs.
Neil McKay, *B. F. Moore* and *Fowle*, for defendants.

PEARSON, C. J. The plaintiffs, who are the next of kin of Mrs. Chalmers, put their right, on the ground, that they are entitled, as purchasers, under the description of "her legal representatives," contained in the limitation of the deed of marriage settlement.

The Court is of opinion that the limitation, under which the plaintiffs claim, was subject to the contingency, that Mrs. Chalmers should survive her husband, and as she died first, it never took effect.

This deed differs from the marriage settlements that are usually executed, in several respects: There is no express restriction upon the husband's right *jure mariti*, in case he survives; nor any restriction upon the wife's right to dower and a distributive share of the husband's estate, in case she survived; there is no absolute provision made for the children, of the marriage, if there should be any; and there is no separate estate reserved for the maintenance of the wife. These peculiarities lead to the the conclusion, that it was the intention, if the husband survived, that he should take all; and if the wife survived, she should not be restricted to her dower and distributive share, including a part of these slaves, but should, in addition to her dower in his estate, have an absolute estate in *all these slaves*, if she *requested* the trustee to convey them to her. In default of such request, at her death, the trustees were to convey the slaves to her child

or children, and if there should be no child or children, the trustees were to convey to her legal representatives—these three limitations, i. e., to her absolutely, if she requested—if not, to her child or children, and if no child or children, to her legal representatives, being all equally subject to the contingency of her surviving her husband.

This general view is supported, and in fact, is required by the grammatical and literal construction of the words. The limitation to her, of the absolute estate, if she request it, is expressly subject to the contingency of her surviving; the limitation to the children is connected with, and made to depend on that to her by the alternative, "if she should die without making such request," and is thus made subject to the same contingency; and the limitation to her legal representatives is connected with, and made to depend on that to the children, by the alternative, "if she should die leaving no child or children," and is thus made subject to the same contingency. So, that both, in a general and a particular point of view, these three limitations are connected together, and made subject to the contingency of her surviving her husband; and the deed being silent as to what is to become of the property in the event of the husband's surviving, it is left to devolve upon him *jure mariti*.

This construction is objected to, because it leaves the issue of the marriage unprovided for, which is usually a prominent object in marriage settlements. That is true, but it results, not from the construction, but from the deed itself, which manifestly does not make the issue of the marriage a prominent object of care. There is no provision for children, except incidentally, and that is not confined to the issue of the marriage, but includes any child of Mrs. Chalmers, and is made to depend upon the contingency of her not requesting the trustees to convey to her the absolute estate; and her right to make such request, is made to depend upon her being the survivor. So that, any construction compelling a provision for the issue of the marriage, would, manifestly do violence to the terms of the deed, and our construction commends it

self as the true one, by the fact, that it harmonises with the deed, in not making the children prominent objects.

It will be declared to be the opinion of the Court, that the plaintiffs are not entitled to the slaves claimed by them, and the bill will be dismissed with costs.

PER CURIAM, Decree accordingly.

JONATHAN WORTH, *Adm'r. of* JOHN McNEIL, Jr., *and Adm'r. cum. tes. an. of* JOHN McNEIL, *Sr., against* JAMES ATKINS *and wife and others.*

Where a widow dissents from the will of her husband, she is entitled, in ascertaining her distributive share, to have advancements made to legatees under the will estimated as a part of her husband's estate, though as between themselves, there being but a partial intestacy, such advancements are not subject to be brought into hotchpot against such legatees.

Where a testator in his will provided a support for his widow and children by giving them a residence on his farm, and the issue and profits thereof, and the use of slaves, stock, &c., for a certain period—which arrangement was broken up by the widow's dissent from the will, it was *Held* that the children were entitled to compensation out of the testator's estate for the loss of these benefits.

CAUSE removed from the Court of Equity of Randolph County.

John McNeil, Sr., of Cumberland, (now Harnett,) county, died in the year 1850, having made his last will and testament, and appointed his son, John McNeil, Jr., his executor. He, having undertaken the trust, and acted therein, died intestate in 1857, and the plaintiff, Worth, became his administrator. The latter also took letters of administration *de bonis non*, with the will annexed, on the estate of John McNeil, Sr.

The bill is filed by the plaintiff, praying the advice and direction of the Court, upon several questions growing out of the will of John McNeil, Sr., the portions of which, material to these questions, are as follows:

"I give my son John my plantation, on Cape Fear River, and McKay's Creek, &c.

"I give to my son Martin, all the land on Cape Fear River, known as the Bird place, and all the land on the other side of the river, called the McAllister and Banks land, including ferry.

"I give and bequeath to Janet Ann, my daughter, the land on Cape Fear River, known as the McKinney land, on Hector's Creek.

"The land I gave unto Martin, on Cape Fear, I reserve for the support of my wife and family, and to be managed by my executor, as I have heretofore done. The plantation whereon I live, I wish carried on as before, by keeping the most suitable hands on it.

"My negroes not to be hired out or any of my lands rented.

"I desire that my wife have as many negroes to wait on her, as she may want; that is to say, as many of the women and girls as may be necessary—one boy and old George to take care of the stock.

"I give and bequeath unto John McNeil, Jr., all the piney woods land, suitable for cultivation, between, &c.

"I give and bequeath unto my two sons, John and Martin, all my piney land that is not suitable for cultivation, and direct that Isaac and one other hand be kept at the mill, when necessary, and two others to cut and haul, and that half the profits go to the use of my family.

"I give and bequeath to Daniel Shaw and Henry Atkins, of Tennessee, 640 acres, in Hardin county, of that State.

"I give unto my wife, my sons, John and Martin, and daughter, Janet Ann, all my money, consisting of cash, notes, and judgments, and that my son, Martin, be educated out of the same, with part of that and what may be spared on the farm.

"I leave to my wife and family, my stock of cattle, hogs, and sheep, household and kitchen furniture, and reserving as many of the mules, in season of hauling logs, for that purpose.

"I desire little Grace to be sold, and the money to be given to my wife, but let her be sold out of the State.

"I give and bequeath to Janet Ann, 90 acres on the waters of Neil's Creek.

"I give and bequeath to Janet Ann, $1,630 due from Kenneth Murchison, in notes.

"I give and bequeath to my son John ten head of cattle.

I do hereby nominate," &c.

Upon the death of the testator, his will was proved in common form, and John, the younger, qualified, and entered upon the charge of executing the will, but subsequently, at the instance of Mrs. Shaw, and Atkins, and wife, the probate was set aside, and a reprobate ordered, whereupon an issue was made up contesting the validity of the will, which pended for several years, during which time John McNeil, the younger, was the administrator, *pendente lite*, and being advised, as he says, that there was, no doubt, as to the establishment of the will, he proceeded, for two years, to act in conformity with its provisions, but the contest lasting longer than he expected, he proceeded to hire out the slaves, and sell the perishable property. At length the will was established by the finding of a jury, and the widow of John McNeil, Sr., dissented therefrom, and took her year's provision and dower. At the time of this dissent, the family consisted of the widow, and her two children, Martin and Janet Ann, the former about 14, and the other about 18 years of age; these were the children of a second marriage. John, the younger, lived within less than a mile of his father, their residences being in the piney woods, established mostly on account of the healthiness of the situation. Flora, a daughter of a former marriage, intermarried with James H. Atkins, many years ago, and settled in Tennessee, where they now reside. Upon the marriage of Flora, her father gave them several slaves, who have now increased much in number and value. These slaves were taken to Tennessee, and were in the possession of Atkins and wife, when the will was made, and when the testator died. One of the questions made by the administrator is, whether Atkins is entitled to hold these slaves without accounting with the estate.

Sarah, another daughter by the former marriage, became the wife of Daniel Shaw, and they also removed to Tennessee many years ago, where he died before the death of the testator. Previously to his removing, the testator gave him and his wife, by *bill of sale*, a number of slaves, which, also, have greatly increased in number and value, and another question is, whether his representative has to account for these slaves to the administrator of John McNeil, Sr.

To John McNeil, Jr., who was also born of the former marriage, were also given slaves, by deed, and as to these a similar question is made.

The bill states that on the dissent of the widow, the family arrangement, intended by the will, was broken up, and the plantations were not any longer managed for the support of herself and children.

Another question growing out of this state of things is, what is to be done with the stock, farming utensils, household furniture, &c.; and whether Martin and Janet are not entitled to some recompense for the loss of the benefits this arrangement afforded; also, how is the charge upon the products of the farm, for Martin's education, to be made up.

Another question is, by what rule is the widow to take her share, and whether the advancements to the three older children are to be taken into the account in ascertaining it. Out of what fund is her share to be paid, and whether she is entitled to a part of the accumulations to the estate since her husband's death, arising from the hire of slaves, and the interest of money.

The defendants all answered, admitting the allegations of the bill, but, severally, insisting upon the conclusions favoring their interests in the questions propounded by the plaintiffs.

B. F. Moore, for the plaintiff.
Manly, *McRae* and *E. G. Haywood*, for the defendants.

PEARSON, C. J. 1st. The effect of the widow's dissent, was

to defeat the purpose of the testator of keeping up the family establishment at the home place, and having the plantation on Cape Fear, which is devised to Martin, managed by the executor for the support of his wife and family, and the education of Martin, consequently the provisions made in reference to that purpose do not take effect, and the property, to-wit: the slaves, stock, farming utensils, household furniture, &c., fall into the undisposed of residue. Martin is entitled to the profits of the plantation; but loses the benefit of a charge upon the common fund for his education, and, in like manner, Janet loses the being supported as one of the family, but will be compensated by having the profits of her portion of the estate in severalty.

In stating the account, John McNeil, Jr., will only be charged with the profits received during the two years that he managed the farm, and Martin will be credited for the rent of his land.

2d. The widow is entitled to a *child's* part of the estate, and the amount will be ascertained in the same way as if her husband had died intestate, for, in contemplation of law, he died intestate as to her. These principles are so well settled that it is not worth while to discuss them. *Headen* v. *Headen*, 7 Ired. Eq. 179; *Husted* v. *Husted*, Busbee's Eq. 79.

It follows that she is entitled to the benefit of the slaves, and other articles of personal property, given to John McNeill, Shaw and Atkins, by the testator in his lifetime, to be valued as advancements at the time of the several gifts. The amount to which she is entitled, when thus ascertained, will be paid out of the undisposed of residue, in which will be included the one-fourth part of what the testator terms "all my *money*, consisting of cash, notes and judgments," and also Grace and her increase at their present value. In stating the account, the widow will be entitled to a ratable part of the interest which has accrued upon the "money fund," and of the hires and profits of the slaves, and will be charged with the hires of such as were put into her possession.

3d. The division among the children will be made upon a

different principle, for, as to them, there is a will, and not a case of intestacy; it follows that advancements are not to be accounted for; this applies to the slaves given to John McNeill and Shaw, for they have bills of sale; but it is otherwise in respect to the slaves given to Atkins. The gift was made in this State, and being by parol was void under our statute, and is not confirmed as an advancement, although the donor died without resuming the possession, and without making any specific disposition of the slaves in his will; still, it cannot be an advancement, because there is not a case of intestacy. The result seems hard; but, upon well settled principles of law, these slaves and their increase constitute a part of the estate of the testator, and Atkins is chargeable with their value at this time. Such cases are suggestive of a necessity for legislative interference.

PER CURIAM, Decree for account.

GEORGE WILLIAMS *and others against* HENRY W. HOUSTON *and others.*

A deed conveying slaves to a trustee, to the use of A for life, and after her death to pay over the profits to her heirs, to their exclusive use and benefit, was *Held*, by virtue of the rule in Shelly's case, to pass the full and absolute property in the use to A; the word "heirs" in this connection, not being a word of purchase.

Where a bill is filed to enforce certain rights as passing by a deed, it is not according to the course of the Court to treat it as a bill to reform the instrument, on the ground of mistake.

Where the meaning of an instrument of writing, apart from its effect according to the ordinary rules of construction, is conjectural, the Court cannot take upon itself to declare that there is a mistake arising from the ignorance of the draftsman.

CAUSE removed from the Court of Equity of Wayne county.

William Harriss intermarried with Mary Smith, and after living together many years, she filed a petition against him

for a divorce and alimony, which pended in the Superior Court of Duplin for several terms, when, at length, it was compromised by his making a deed, dated 31st of March, 1831, to Henry W. Houston, conveying a tract of land and some thirteen slaves, who, with their descendants, are the subject of this suit. The part of which deed, material to the question, in this case, is as follows: "To have and to hold the said land, as also the several negroes aforesaid, to him the said Henry W. Houston, his heirs, executors, administrators and assigns, forever, in fee simple—In trust, nevertheless, that the said Henry W. Houston, his heirs, executors, administrators or assigns, do take, collect, receive and pay over, all and every of the rentings of the said land and the hirings of the said negroes, or any or all of the profits that may, in anywise, arise, or accrue from, or out of the property aforesaid, to pay over to the said Mary Harriss, for her sole use and benefit and support during her natural life, and after, or upon, her death, to pay over in remainder to her heirs, for, and to their exclusive use and advantage and benefit, the interest, profits and emoluments accruing, or that may accrue from time to time, from the property aforesaid." Mary Harriss took the property into her possession, and kept it till her death in 1854. In the year 1844, she made a conveyance of the slaves, in question, to the defendant, Harper Williams, who now holds and claims these slaves, by virtue of such conveyance. Previously to the marriage, Mrs. Smith had made a conveyance of these same slaves to her niece, Mary Williams, who intermarried with the above named Henry W. Houston, the trustee. After Mrs. Harriss' death, Harper Williams, for a valuable consideration, in order to remove the cloud from his title, took a deed from the said Houston, for any right he might have from this last-mentioned conveyance.

The plaintiffs are the next of kin of Mary Harriss, and claim to be purchasers under the deed, from Wm. Harriss to Houston, under the description of "heirs" and the bill is filed against H. W. Houston and Harper Williams, praying that the said slaves may be surrendered to them, and that they

account for the hires and profits thereof, since the death of Mrs. Harriss.

The answer sets forth the above conveyances, and the defendants insist that, by virtue of the same, the property in question belongs to the said Harper Williams.

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

Dortch and *B. F. Moore*, for plaintiffs.
J. H. Bryan, *Stanford* and *Husted*, for defendants.

PEARSON, C. J. The equity of the plaintiffs is put on the ground, that they, being the next of kin of Mary Harriss, are entitled to the slaves as purchasers, under the limitation, in the deed of William Harriss, executed March, 1831. The deed, after conveying land and slaves to Houston in fee, declares the trust: "To receive and pay the rents, hires and profits to Mary Harriss, for her sole use and support during her natural life, and after her death, to pay over in remainder to *her heirs*, for their exclusive use, the profits accruing, or that may accrue, from time to time, from the property aforesaid."

We are of opinion, that the legal effect of the deed, was to vest the whole estate in the trust, in Mary Harriss, under the operation of the "rule in Shelly's case," and consequently, the plaintiffs have failed to make out title in themselves, as *purchasers*, and the bill must be dismissed.

"The rule" was adopted for the prevention of fraud, and the substance of it is, where an estate for life, is given to one, and by the same conveyance, the property is given to his heirs, in such a manner, that the same persons are to take the same estate as they would have taken by operation of the law, had the whole estate been given to the tenant for life, he shall take the whole estate, and such persons shall take by operation of law, and not as purchasers, notwithstanding the express intention was, that the one should take a life-estate only, and the others should take as purchasers; the principle is the

same as that by which, if one seized in fee, in England, devises to his eldest son, in fee simple, the son shall take by descent, and not under the devise; for, although the intention, that he shall take by the devise, is express, yet, such intention being in manifest fraud of the rights of third persons, shall not be carried into effect.

It is unnecessary to enter more fully into the reason of "the rule," or to refer to the numerous cases in which it has been held to extend to personal property; it is sufficient to say, it is well settled as "a law of property," and our case falls directly within its operations. It is applied in *Boyd* v. *Small*, 3 Jones' Eq. Rep. 39, a few terms ago.

Mr. Moore attempted to distinguish this case, on the ground that it was an executory, as distinguished from an executed trust, and insisted that whenever the supposed intent of the party was not effectuated by the instrument declaring the trust, it was an executory trust. His position involves an entire misapprehension of the difference between the two kinds of trusts, and, consequently, of the principles upon which a less rigid rule of construction is applied to the one than the other. An executory trust is one which is completely declared in the outset. An executory trust is one which is imperfectly declared in the outset, the creator of the trust having merely denoted his ultimate object, imposing on the trustee or on the court the duty of effectuating it in the most convenient way. Adams' Eq. 41. In the former, the creator of the trust, having done all that he intended to do, or expected to be done, in regard to the declaration of the trust, it is left to abide the ordinary rules of construction. In the latter, as the purpose merely is indicated which is to be carried into effect by some deed which is afterwards to be executed, a less stringent rule of construction is adopted. In our case the trust is completely declared by the deed of 1831, and no other deed was to be executed.

Mr. Moore further insisted, that as the deed did not declare the trust according to the intention of the parties, this Court would reform it. To this suggestion, there are two objections,

either of which is fatal. The bill is not filed for the purpose of reforming the deed, but sets up an equity in the plaintiffs as purchasers, on the ground that, being the next of kin, they answer the description of "heirs" named in the limitations in the deed; but, in the second place, there is nothing to show that the trust, owing to the mistake or ignorance of the draftsman, was not declared according to the intention of the parties; as, where a deed of settlement professes to be made in pursuance of articles previously executed, and there is a variance; or where, upon a contract of sale, in fee simple, the deed is defective by the omission of the word "heirs." For, we are left to conjecture as to the intention of the parties, except so far as we are enabled to see it from the words used, and the ordinary rules of construction; and, while it may be suggested, on the one side, that as the purpose was to compromise and settle this property on the wife, it could hardly have been the intention to limit the trust in such a way that the husband's marital rights could, under any circumstances, ever therafter attach, it may with as much plausibility be suggested, that as the wife only claimed alimony, the purpose was answered by providing a maintenance and support for her during her life, and the intention was then to let the property go back to the husband, and devolve by act of law. It is sufficient to say, in either view, it is mere conjecture, which is not sufficient to induce the court to reform a deed on the ground of accident or mistake, even upon a bill framed for that purpose.

PER CURIAM, Bill dismissed.

GARRY WILLIAMSON *and others against* DEMPSEY WILLIAMSON *and others.*

A bequest, simply of a female slave and her increase, in a will, made before the enactment of the Revised Code, passes the mother only, and not her

children, born before the will was made, or between that time and the death of the testator.

But where a slave had been put in the possession of one of the testator's children, and had increase before the will was made, and that fact is recited in the will, a bequest of such slave, and her increase, even before the Revised Code, was *Held* to be a confirmation of the previous parol gift, and to pass both the mother and her increase.

The coupling together, in a will, by the use of the conjunction "and," of a slave and her increase, mentioned as having been previously given, with one *not so mentioned*, will not have the effect of bringing both bequests within the exception to the general rule.

The state of the testator's family and property, are not considerations of weight in arriving at the construction of a will, where the language is plain, and the meaning well established.

Note.—The rule of construction, as to the increase of slaves, is altered by Revised Code, ch. 119, sec. 27.

CAUSE removed from the Court of Equity of Wilson county.

The bill was filed by the plaintiffs, as executors of Thomas Williamson, praying a construction of the following clauses of his will: "2nd. I give and bequeath to my beloved daughter, Tempy Fulgham, one negro girl, named Mary, now in her possession, and her increase, if any; also, one negro girl, named Bethany, to her and her heirs forever.

"Item 3rd. I give and bequeath to my daughter, Mourning Peele, four negroes, namely, Cherry, Merica, Charity and Washington, and their increase, if any, to her and her heirs forever.

"Item 4th. I give and bequeath to my beloved daughter, Rhoda Williamson, three negroes, namely, Ally, Arnold and Randal, and their increase.

"Item 5th. I give to my beloved daughter, Sidney Boyett, three negroes, namely, Julia, Isabel, and Daniel, and their increase, if any, to her and her heirs forever.

"Item 6th. I give and bequeath to my executors, hereinafter named, for the sole and separate use and benefit of my daughter, Mary Renfrow, the property I have heretofore put in her possession; also, I give to my executors, for the separate use and benefit of my daughter, Mary Renfrow, one tract

of land, lying in Johnson county, which I purchased of Harriss Renfrow, containing about seventy-five acres; also, I give to my executors, for the benefit of my daughter, Mary Renfrow, the sum of four hundred and sixty dollars, in money, and it is my will and desire, that my executors shall let my daughter have said money as she may need the same, for the support of herself and family; the last bequest is intended to be used by my executors, for the sole use and benefit of my daughter, Mary Renfrow, and no other;" with a general residuary clause.

The plaintiffs, Garry Williamson and Jesse Fulgham, were appointed executors and qualified.

The girl, Mary, mentioned in the second clause of the will, was put into the possession of the plaintiff, Fulgham, the husband, and his wife, the legatee, Tempy, when she was about five years old, and has remained in their possession ever since. She had one child before the making of the will, which has also remained in their possession ever since its birth. The girl, Bethany, was put in the possession of Fulgham and his wife, by the testator, after his will was executed, together with her first child, named Amos, who was born after the making of the will, and before the testator's death. The woman, Bethany, had another child before the death of the testator, both of which children, were in their possession when the testator died. Upon these facts, is predicated the prayer, by the executors, for instruction, whether they shall deliver the increase of the women, Mary and Bethany, or any of them, to the legatee; or whether the same falls into the residuum.

The female slave, Cherry, given to Mourning Peele by the 3d item of the will, was put into her possession, and that of her husband, William Peele, when about four years old, and had one child before the making of the will, and three others afterwards, before the death of the testator; the woman, Charity, had one child before the will was made, and one afterwards, before the death of the testator. The executors ask to be advised whether, under these bequests of Cherry and Charity, and their increase, their children, or any of them

pass. The legatee, Mourning Peele, died about two years before her father, leaving children who are made parties defendant. The executors ask to be advised whether the children of Mourning Peele succeed to their mother's legacies under the 3d item; also whether they came in for their mother's share of the residue.

The girl, Ally, given to Rhoda Williamson, had two children before the will was made, and the same question is asked as to them.

The slave, Julia, given to Sidney Boyett, had three children before the will was made, and two afterwards, before the testator's death, and the same inquiry and prayer for advice is made as to them.

The executors ask whether Mary Renfrow is entitled to keep possession of the land and other property given for her use, and that of her family, and whether in paying to her the pecuniary legacy, they are restricted to the interest arising from the sum given, or whether, if her necessities require, they may pass to her part of the principal.

The surviving legatees, and their husbands, and the children of Mourning Peele, were made parties, who all answered, but their answers did not vary the state of the facts above set out.

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

Strong and *Dortch*, for the plaintiffs.
Howard and *Lewis*, for the defendants.

BATTLE, J. All the questions which have been raised upon the construction of the will of Thomas Williamson, deceased, and upon which we are asked to declare an opinion, may be answered, without much difficulty, by the aid of the previous adjudications of the Court.

The first enquiry relates to the second item of the will, wherein the testator gives to his daughter, Tempy Fulgham, "one negro girl named Mary, now in her possession, and her

increase, if any, also one negro girl named Bethany, to her heirs forever." The girl, Mary, had been put into the possession of his daughter and her husband, by the testator, some years before his will was made, and had had a child before that time; but Bethany, with a child named Amos, was delivered to the daughter after the will was executed, and had another child before the testator's death. The question is, did the children pass with their mothers to Mrs. Fulgham? The general rule is clearly settled, that the bequest, simply, of a female slave and her increase, passes the mother only, and not the increase which she may have had before the will was executed, or between that time and the death of the testator. See *Love* v. *Love*, 5 Ired. Eq. Rep. 201, and many other cases. But if there be any expression in the will, showing an intention of the testator that such increase shall be included in the bequest of the mother, then the legatee shall take it. An indication of such intention may be inferred from a reference in the will to the slave as having been previously given to, or as being in the possession of, the legatee. The bequest is then a confirmation of the previous parol gifts, and carries with it the increase as an adjunct or part of such gift. *Bullock* v. *Bullock*, 2 Dev. Eq. Rep. 307; *Simpson* v. *Boswell*, 5 Ired. Rep. 49; *Woods* v. *Woods*, 2 Jones' Eq. Rep. 420. From the authority of these cases, and the principle upon which they are founded, we are satisfied that the child of the girl, Mary, who is mentioned as having been in the possession of the legatee, passed, with its mother. With respect to the other girl, Bethany, there is no gift of her increase, and the only argument in favor of her children being included in the bequest of their mother, is derived from the use of the word "also," which, it is insisted, connects with her whatever of a like kind was intended to pass with the girl, Mary. The bequest of increase is a gift of something in addition to that of the mother, and when born before the death of the testator, does not ordinarily pass with the mother. On the contrary, as we have seen, it requires an indication of the testator, manifest in his will, that such is his intention, to enable the legatee to take the

increase with the mother. The term "also" means only some other subject of gift besides what has been already mentioned, and can include only what is specified by name or description. If one subject only be named, or described, it cannot be extended to embrace two entirely distinct subjects, without the hazard of making the testator much more liberal than he intended to be. The mention of one subject without the other, when he has just before shown that he knew the difference between the two, leads more justly to the conclusion that he did not intend to embrace the latter. The children of the girl, Bethany, do not, therefore, in our opinion, pass with their mother, but fall into the residue to be sold and the proceeds divided according to the last clause of the will.

There is nothing in the third, fourth and fifth clauses of the will to take the gift of the female slaves therein mentioned, with their increase, out of the general rule, and the children born in the testator's life-time, do not belong to the respective legatees, but fall into the residue, to be disposed of as hereinbefore mentioned. The rule, referred to by the counsel, that we have a right to look to the state of the testator's family, and the condition of his property, in putting a construction upon his will, cannot be invoked when the language is plain and its meaning well established. The expression, "if any," subjoined to the word increase cannot make any difference, because it only expresses what would, if omitted, be necessarily implied; and it may apply to increase born after the testator's death, as well as those born before.

Before leaving this subject, it may not be improper to remark, that the will now before us was executed before the Revised Code went into operation, and therefore is not affected by the rule of construction prescribed in the 27th section of the 119th chapter of that code, to-wit: "that a bequest of a slave, with her increase, shall be construed to include all her children born before the testator's death, unless a contrary intention appear by the will."

Mary Renfrow takes a separate estate in the property devised and bequeathed to her in the sixth clause of the will,

and the trustees may permit her to have possession of it, and use and enjoy it with her family; and as there is no clause of restraint, she is entitled, not only to the interest, but the principal of the money given her, should her necessities require it. See *Harris* v. *Harris*, 7 Ired. Eq. Rep. 111.

There is not the slightest doubt about the last question proposed to us. The children of Mourning Peele will stand in the place of their mother, and take the share of the residue to which she would be entitled, were she living. 1 Rev. Stat. ch. 122, sec. 15. The same provisions will be found in the Rev. Code, ch. 119, sec. 28.

The parties may have a decree for the settlement of the estate upon the principles herein declared.

PER CURIAM, Decree accordingly.

THE ATTORNEY GENERAL *against* THE BANK OF CHARLOTTE.

An act of the General Assembly, incorporating a banking company, is a contract between the State and the corporation, within the first clause of the tenth section of the first article of the constitution of the United States, and the Legislature cannot pass any law impairing the obligation of such contract, or any part thereof.

Where a price is stipulated in the grant of the charter, it is the consideration or part of the consideration for which the sovereign makes the grant, and cannot be enlarged without the consent of the corporation.

To levy a tax on the bank as such, or on its franchises, is to add to the stipulated price, and therefore an act of the Legislature imposing such a tax is in violation of the constitution, and void.

The distinction, as respects the taxing power, between lands, &c., and such franchises, stated, considered and applied.

(The cases of *Gordan* v. *Appeal Tax Court*, (3 How. R;) *Attorney General* v. *Bank of Newbern*, (1 Dev. and Bat. Eq.;) *Ohio Life Insurance and Trust Company* v. *Debolt*, (16 How. R.;) *Billings* v. *Providence Bank*, (4 Pet. R.;) *Charlis' River Bridge* v. *Warren Bridge*. (11 Pet. R.,) and *Bank of Cape Fear* v. *Edwards*, (5 Ird. R.,) cited and approved. The case of *State* v. *Petway*, (2 Jones' Eq.,) also cited and approved as to the decision and the ground of it, but corrected as to an intimation contained in the opinion.)

Attorney General *v.* Bank of Charlotte.

THIS was a bill of information exhibited in the Court of Equity of Wake, to recover, to the use of the State, a forfeiture alleged to have been incurred by the Bank of Charlotte, by reason of the nonpayment of a tax, imposed by the revenue law of 1856.

A general demurrer having been put in by the defendant, it was removed into this Court for argument.

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

Badger and *Wilson*, in support of the demurrer.
Fowle, for the Attorney General, *contra*.

BATTLE, J. The bill is filed for the purpose of compelling the payment of a certain amount of taxes, claimed to be due from the defendant to the State, by virtue of the 133d section of the revenue act of 1856; (see acts of 1856, ch. 34, sec. 133d.) That section is in the following words: "The President and Cashier of the several banks in this State, except the Bank of the State of North Carolina, shall annually pay three-fourths of one per cent. into the treasury of the State, on the stock owned by individuals or corporations in the said banks, on or before the first day of October in each and every year; provided the same does not reduce the annual profits of the owners thereof below six per cent." &c. The defendant, which is one of the banks of this State, referred to in the above recited section, resists the payment of the tax thus claimed, upon the ground that it is a tax upon the capital stock or franchise of the bank, and not upon the dividends or profits of the individual stockholders thereof; that by the charter which created the bank, the franchise was purchased from the State upon an express agreement to pay a certain annual sum as a consideration therefor, and that to demand an additional sum by way of tax or otherwise, for the franchise, is an attempt by the State to violate the contract, which violation is prohibited by the constitution of the United States. The section of the charter, upon which the defendant relies as evidence of this contract is the 15th, which is as follows: "The president or

cashier of said bank, shall annually pay into the treasury of the State twelve and a-half cents on each share of said capital stock which may have been subscribed for and paid in; and the first payment of the said tax shall be made twelve months after said bank shall have commenced operation." As the capital stock was divided into shares of fifty dollars each, the tax was equal to one-fourth of one per cent. on each share. See acts of 1852, ch. 4, sec. 1 and 15.

The counsel for the plaintiff denies that the tax imposed by the act of 1856 is one upon the capital stock or franchise of the bank. On the contrary, he insists that it is clearly a tax upon the profits of the individual stockholders which one of the officers of the bank is required to retain and pay into the public treasury. But if it be a tax upon the franchise, he contends further, that as there are no restrictive words in the charter, the Legislature had the power to impose an additional tax without violating either the words or the spirit of the contract.

The questions which are thus raised by the parties, lead us to enquire, first, what is the true construction of the 133d section of the revenue act of 1856. Did the Legislature mean thereby to tax the capital stock of the banks, or only the profits of the individual stockholders of the banks? After a careful examination of the subject, we are satisfied that the intent was to tax the franchise; the tax, however, was not to be demanded absolutely, but only upon the condition that the bank should make profits of a specified amount. We are led to this conclusion, from the following considerations.

First. There is a tax upon the dividends or profits declared upon the shares of the individual stockholders in another section of the same act, as appears from the 20th section, which provides thus: "Upon every dollar more than six dollars, of net dividend or profit, not previously listed, actually due or received during the year, ending on the said first day of April, upon money invested in steam vessels of twenty tons burden or upwards, or in *stocks* of any *kind*, or in shares of any *incorporated* or *trading* company, whether in or out of

the State, and herein shall be included all *bank* dividends, bonds and *certificates* of debt, of any other State, a tax of four cents." This section of the revenue act of 1856, clearly imposes a tax upon the dividends or profits of the stock held by individuals in each and in every bank, as was decided in the case of the *State* v. *Petway*, 2 Jones' Eq. 396, upon a similar clause of the revenue acts of 1854 in relation to the president and directors of the Commercial Bank of Wilmington. A tax of this kind being thus imposed by the 20th section, we cannot readily believe that it was the intention of the Legislature to impose an additional tax upon the same thing by another section of the same act.

Secondly. Supposing the words of the 133d section to be of doubtful construction, whether the burden of the tax was intended to be imposed upon the franchise or capital stock of the banks, or upon the dividends or profits of the individual stockholders, "a strained construction is not allowable of an act, which levies money from the citizen. The amount of the levy, the subject of it, and the method of raising it, ought to be so plainly pointed out as to avoid all danger of oppression by an erroneous interpretation; and where there is a fair doubt, the citizen should have the advantage of it." *Attorney General* v. *Bank of Newbern*, 1 Dev. and Bat. Eq. 216. This rule, applied to the construction of a revenue act, does not militate against, but is entirely consistent with, another well settled rule, that "the grant of privileges and exemptions to a corporation, are strictly construed against the corporation, and and in favor of the public. Nothing passes but what is granted in clear and explicit terms. And neither the right of taxation, nor any other power of sovereignty which the community have an interest in preserving undimished, will be held to be surrendered, unless the intention to surrender, is manifested in words too plain to be mistaken." *Ohio Life Insurance and Trust Company* v. *Debolt*, 16 How. (U. S.) Rep. 435; *Billings* v. *The Providence Bank*, 4 Peters' Rep. 561; *Charles' River Bridge* v. *The Warren Bridge*, 11 Idem. 545. In the construction then, of the 133rd section of the act

which we have now under consideration, we are to presume that the Legislature intended to put an impost upon a new subject of taxation, rather than upon one which they had already taxed in a previous section.

Thirdly. We cannot otherwise account for the exception in favor of the Bank of the State of North Carolina, than by supposing that the tax was to be upon the banking franchise, instead of upon the profits of the individual stockholders. In the charter granted by the act of 1833, to the Bank of the State of North Carolina, it is declared in a clause of the 13th section, that "each share" of stock "owned by individuals shall be subject to an annual tax of twenty-five cents, and no more, which tax shall be reserved out of the profits as they accrue, by the cashier of the principal bank, and placed to the credit of the State, on or before the first day of October in every year." (See 2 Rev. Stat. at page 57.) Now, this tax thus imposed, has always been considered and acted upon by the different departments of the State as a tax upon the franchise of the bank, and the Legislature thought, and justly, that from the express words of exclusion, no additional levy could be made upon that subject; and they thought, further, that as there were no such express terms of exclusion in the charters of the other banks, or, at least, in most of them, they had a right to impose an additional tax upon the franchise or capital stock of those banks. Whether the opinion that they had such right was well founded or not, we will examine presently, and we refer to it now only to show what was their intention in the section referred to, of the act of 1856.

Lastly. We infer that it was the design of the Legislature, by the before-mentioned 133d section, to tax the franchise, rather than the profits of the individual share-holders from the manner in which it is required to be paid. By the charter of every bank in the State, it will be found, upon examination, that the tax upon the franchise is required to be paid into the public treasury, by one of the officers of the bank, while the dividends of the stockholders have been required to be listed

by the owners of the stock, and the tax thereupon has been paid to the sheriff of the county, in the usual manner. We do not say that the tax upon the profits may not be required to be collected or retained by one of the officers of the bank, and paid directly into the public treasury, but as such a requirement is unusual in relation to such a tax, and is always prescribed for a tax upon the franchise of the bank, it is a fair indication to show what kind of impost was intended in the case under consideration.

The only argument which has been, or can be urged, in opposition to this conclusion, is, that the tax refers to the profits of the share-holders, and is not to be imposed, unless those profits shall, with the tax subtracted, be equal to, or exceed *six per cent. per annum.* But it will be at once perceived, that this wants an essential element of being a tax upon profits, because its amount is not graduated by the amount of profits. If they exceed six and three-fourths *per cent.*, the same amount is to be levied, whether they be seven, ten, or twelve *per cent.* In truth, the tax is, as was contended by the counsel for the defendant, a tax upon the franchise of the bank, conditional, nevertheless, upon the making of a certain rate of profits by the share-holders.

The question which we have been considering, in regard to the nature of the tax, intended to be imposed by the 133rd section of the revenue act of 1856, was very important, because, if it were a tax upon the profits of the share-holders, it was conceded by the counsel for the defendant, to have been settled by the case of the *State* v. *Petway*, above referred to, that the State was entitled to a decree in the present case. But, as we have ascertained, that the tax was designed to be one upon the franchise of the bank, and not upon the profits of the share-holders therein, another very important question arises, whether the State has the right to demand, by way of tax or otherwise, a sum for such franchise, in addition to the annual impost of one-fourth of one per cent. on each share of stock, in the bank, owned by individuals, required by the charter to be paid into the public treasury of

the State? The counsel for the defendant, contends for the negative of this question, and after much reflection, we think that his argument is well sustained, both upon principle and authority.

It is now universally conceded that a grant by the Legislature, of a charter, whereby a banking corporation is created, is a contract between the State and the corporation, which the constitution of the United States prohibits the State from violating. The well known definition of a a contract is, that it is an agreement between two or more persons, upon a sufficient consideration to do, or not to do, some particular thing. An analysis of it will show, that it consists of four essential parts, to wit, the parties, the agreement express or implied, the consideration, and the thing to be done or omitted. Of these, the consideration is as important as any other, and cannot be varied by either party without the consent of the other, and an attempt to do so by either party without such consent, would be a violation of the contract, as effectually as would be the breach of it in any other particular. The Legislature has the undoubted right to grant to a number of individuals the franchise of being a corporation, for the purpose of banking, or for any other useful purpose. If the grant be mainly for the benefit of the corporators themselves, the State may demand a price for the franchise, to be paid at once, in a round sum, or annually, during the existence of the corporation, by way of impost or tax. Where the grant of the charter is tendered by the State, and accepted by the individual persons, to whom it is offered, then, the corporation springs into existence, and at the same moment, a contract arises between it and the State, which is protected by the constitution of the United States. If the price or consideration of this contract is stated, in express terms, to be a certain sum, *and no more*, there can be no doubt that the State would be prohibited by the constitntion of the United States from demanding any thing more for the corporate franchise. Can it make any difference in principle, whether words, excluding any addition to the price, be used or not? When a person says that he

will take one thousand dollars for a tract of land, does he not necessarily mean that he will take that sum, and that he will not ask any more, and if the offer is accepted, can he demand any more? No one can hesitate as to the proper answer to be given to this question; and the purchase of a franchise, from the State, when viewed in the light of an executed contract, is precisely analogous. And, accordingly, the Supreme Court of the United States, held, in the case of *Gordon* v. *Appeal Tax Court*, cited by the defendant's counsel, that a stipulated price for the extension, by the Legislature, of a bank charter, without any words of restriction or limitation being used, did exhaust the power of taxation on the franchise during the period of the extension; 3 How. Rep. 133. We admit, that in a portion of the opinion, which we delivered in the case of the *State* v. *Petway*, there is an intimation to the contrary, but it was only an *intimation*, for the decision was put expressly upon another ground, and the decision itself has been very generally admitted, to have been right. If it had been necessary for us, in that case, to determine the question, whether the State had the right to impose a tax upon the franchise of the bank, in addition the price which had been already stipulated to be paid for it, we might, upon further reflection, have discovered that there was an essential difference between taxing land granted or an article of personal property, sold by the State to an individual, and taxing a franchise granted by the State to a corporation, created by the very act of making the grant. The land and chattel were things corporeal, having an existence before the grant or sale, and continuing to exist afterwards in the hands of the grantee or vendee and his assigns, independent of such grant or sale. Government cannot exist and be carried on without raising money from the persons and property of the country for its support, and this must be done by the means of imposts and taxes upon such persons and property. A franchise, unlike land or a personal chattel, has no existence until it is called into being by the act of the Legislature or sovereign power of the State, and in the very act of granting it to a corporation, created

for the very purpose of taking it, a contract is formed between the State and the corporation. An essential part of this contract is, as we have already shown, the consideration or price paid, or agreed to be paid, for the franchise, and that neither party is at liberty to vary without the consent of the other. And this prohibition must continue during the existence of the franchise, because the contract, including the consideration, is an essential part of it, and must be co-existent with it. But though the Legislature cannot tax the franchise of the bank, they may tax *ad libitum* the dividends or profits of the individual share-holders, and the corporate property of the bank, because these are separable from the franchise, and nothing can exempt them from taxation, unless there be a special agreement to the contrary between the bank and the State. See *Gordon* v. *The Appeal Tax Court, ubi supra*, and *Bank of Cape Fear* v. *Edwards*, 5 Ire. Rep. 510.

Our conclusion is, that the tax imposed upon banks by the revenue act of 1856, ch. 34, sec. 133, was intended to be one upon the franchise, and not upon the profits of the share-holders, and that such tax could not, under the constitution of the United States, be demanded over and above that which was agreed to be paid by the corporation for the franchise under the terms of the charter.

PER CURIAM, Bill dismissed.

SAMUEL H. HOUGH *and another against* A. H. CRESS *and others.*

Where some of several defendants answer a bill, and others demur, it is not in a state to be heard upon the bill and answer, because the demurrer has first to be disposed of, and if over-ruled, other answers have to come in, or judgments *pro confesso* taken as to the parties that had demurred.

Except as to the small allowances which the humanity of the law allows an insolvent, it is considered an inseparable incident to property, *legal* or *equitable*, that it should be liable for the debts of the owner, as it is to his alienation.

CAUSE removed from the Court of Equity of Rowan county.

Daniel Cress, by his will, directed his estate to be sold by his executors, and bequeathed a certain share of the proceeds, which turned out to be $10,000, to trustees, in trust, to be lent out at interest, or invested in stocks, and the interest to be received by the trustees, and by them annually paid to his brother, Abraham H. Cress, for his support and maintenance during his life, and if he should marry and have children, the principal should, after the death of Abraham H. Cress, be equally divided among such children as he should leave, or, if he should leave no child, then, the principal to be divided among others of the testator's brothers. The testator died in 1846, and the trustees received the fund above mentioned from the executors, and invested it, and from year to year, paid over the profits to Abraham H. Cress. In February, 1858, the plaintiff recovered a judgment, in an action of debt, against Abraham H. Cress and Calvin Cress, for $569,51, and the costs of suit, and sued out a *fieri facias* to their county, which was returned "nothing found," and in May, 1858, they filed this bill against the two defendants at law and the trustees, setting forth the foregoing facts, and alleging, that both Abraham H. and Calvin Cress, owned no visible property, and that neither was entitled to any property or effects, except the above mentioned trust fund, belonging to Abraham H. Cress; and praying for a decree for the satisfaction of a judgment thereout.

The trustees put in an answer, admitting the facts stated in the bill, and insisting, that the plaintiff was not entitled to relief, and the cause was set down to be heard on the bill and answers. The other two defendants put in a demurrer for want of equity; which was set down for argument. The cause was then transmitted to this Court.

Fleming, for the plaintiffs.
B. R. Moore, for the defendants.

RUFFIN. J. The cause cannot be heard in its present state;

because, on over-ruling the demurrer of the two of the defendants, as the Court thinks ought to be done, the cause must go back for answers from those defendants, or for want of them, that the bill may be taken as confessed. We suppose, however, that it is not material to the parties, and that the purpose of bringing up the case, was to get the opinion of the Court on the liability of the fund, at present, to the satisfaction of the plaintiff's judgment; and that question arises as distinctly on the demurrer, as it would in any subsequent stage of the case. The Court had occasion in *Harrison* v. *Battle*, 1 Dev. Eq. 537, and in *Mebane* v. *Mebane*, 4 Ire. Eq. 131, to look into the cases on the subject of the liability of equitable property for the debts of the equitable owner, and came to the conclusion that a fund given to one in trust for another, that the latter may enjoy it by having the interest, or a maintenance out of it, would be made subject in equity to his debts. The Legislature may from policy, or humanity, exempt certain parts of a debtor's estate from execution. But with those exceptions, it was considered an inseparable incident to property, legal or equitable, that it should be liable to the debts of the owner, as it is to his alienation.

It is said, however, that, as this case is situated, the Court ought not to assume jurisdiction, because, although the debtors have no legal property, the plaintiff has not exhausted his remedy at law, as he has not taken the body of the debtor in execution, whereby, he might enforce an assignment of his interest. In *Brown* v. *Long*, 2 Dev. and Bat. Eq. 138, without determining the general question, whether equity will lay hold of choses in action, or equitable interests of this kind, for the satisfaction of judgment debts, the Court held, that it would, at least, do so, when the debtor having been once discharged from the debt as an insolvent, could not be arrested on a second *ca. sa.* That was sufficient for that case, within a direct decision of Lord HARDWICKE, cited in the opinion of the Court. Indeed, we are not prepared to say, now, that relief can be given in respect to legal choses in action, which a creditor might reach through the instrumentality of a *capias ad satis-*

faciendum. Upon a judgment against a woman, and a return of *nulla bona*, equity would, of necessity, since the statute forbidding the arrest of females, apply debts due to her in satisfaction, upon the clear ground, that there is no other remedy, and that her property must be made amenable in some way.

But with respect to property purely equitable, whether that of a male or female, relief ought to be had in this Court whenever by an execution against the estate, and a return of *nulla bona*, or otherwise, it appears that there is nothing out of which satisfaction at law by execution against property can be had. It is true, the debtor, if taken in execution would be obliged to put such an interest into his schedule; and hence it might seem, that equity ought not to interfere. But that does not follow; for equity often acts when it can act more efficiently than the law, and this is the more true when the subject is equitable. As the law once stood, and in England even at this day, relief in equity might not be needful. Execution against the body was effectutal. The debtor could not be discharged upon a schedule and his oath, but continued in prison until he paid the debt, or was enlarged by an act of Parliament. It was on the debtor, then, to get the trust fund in or dispose of it for the money, so that he might satisfy his creditor; and, if the debtor were a trader, he was declared a bankrupt, and his whole property of every kind vested in the assignees, not bound by his disposition after arrest, or even by assignment in contemplation of insolvency. The pressure of actual and indefinite imprisonment might well be relied on to produce payment, if the debtor had means of any kind to make it. Hence it is not to be wondered at, that Lord HARDWICKE, in *Edgill* v. *Haywood*, 3 Atk. 352, should have placed the relief on the loss of the *ca. sa.* Our law is now in a very different state; such as renders that species of execution very inadequate, as a means of coercing payment. The debtor is not imprisoned at all, if he can give bail, and upon his oath he is discharged with an exemption from seizure of all property that he may have dishonestly concealed. After arrest, he continues to deal with

his property as owner, and may make what preferences he pleases in the application of it to other debts, so that, generally, his near friends to whom he looks for future favors in return, get it, and the arresting creditor is sure to be the last to share in it, and, in fact, seldom gets any thing. But suppose the debtor to act fairly in that respect, and to make an honest schedule, including his equitable property, held for him upon either declared or secret trusts. What follows? The sheriff, as general assignee of insolvents, has still to have recourse to the court of equity to get in the fund. Why not, then, allow the creditor to resort at once to the fund through this Court, and not compel him to the circuitous mode of a *ca. sa.*, and an assignment in insolvency? It is in the very spirit of legislative policy, which discountenances imprisonment by execution against the body, by impairing its potency. Besides, this method has the important advantage, that it constitutes a *lis pendens*, and thereby avoids subsequent assignments by the debtor, and gives a fair preference to the diligent creditor, and clears an unfortunate and failing man from all those suspicions, which naturally attach to preferences towards favored friends —sometimes voluntary, and often involuntary. If there were no other ground for the jurisdiction but this, in connection with the nature of the property, on which no lien at law can be created by execution, it would be sufficient to sustain it as furnishing a remedy more complete than the legal one. It is not the purpose of the statute passed for the ease of persons arrested on execution that they should keep off their creditors from their property, of whatever kind, but only that they should not suffer in their persons. That policy is best subserved by aiding the creditor to reach equitable property directly, and easily, and making it inure to the satisfaction of him who diligently pursues it, so as to dispense with imprisonment, when it can be avoided. In holding this doctrine, the Court proceeds on no new principle. The relief against equitable property, or a trust fund, was given in *Harrison* v. *Battle*, 1 Dev. Eq. 537, and *Mebane* v. *Mebane*, 4 Ired. Eq. 131, and in other cases, without a *ca. sa.* The demurrer must,

therefore, be over-ruled, and the cause is necessarily to be remitted to the Court of Equity for further proceedings thereon according to the course of the Court, and in conformity with the decree here.

PER CURIAM, Demurrer over-ruled.

STATE *against* THOMAS H. BRIM, *Exr.*

Where a testator or intestate had his domicil abroad, and his personal estate was there also, it was *Held* that a tax under the 99th chapter, 7th section of the Rev. Code, was not demandable off of collaterals succeeding to the same, although resident in this State.

CAUSE removed from the Court of Equity of Mecklenburg County.

Thomas Hoover, a citizen of Mississippi, died in that State in 1856, leaving a will, by which he disposed of a large amount of real and personal property lying beyond the limits of this State, much of which property was devised and bequeathed to collateral relations residing in North Carolina. The defendant, Brim, was appointed sole executor of the will, which was proved by him in the State of Mississippi, and under which he qualified and took upon himself the burden of administering the same.

The bill is filed against the executor in the name of the State of North Carolina, praying a decree for the payment of the tax due upon collaterals. Rev. Code, ch. 99. sec. 7.

To this bill there was a demurrer, and a joinder in demurrer; and the cause being set down for argument, was transmitted to this Court by consent.

K. P. Battle, for the State.
Wilson, for the defendant.

BATTLE, J. The claim of the State to the tax, specified in the present case, is so manifestly unfounded, that we have no hesitation in sustaining the demurrer and dismissing the bill. In the case of *Alvany* v. *Powell*, 2 Jones' Eq. 51, it was assumed that the tax on legacies to collateral kindred or strangers, and on distributive shares, claimed by collateral next of kin, could apply only where the testator or intestate was domiciled abroad, leaving at his death personal property in this State, or had his domicil here, owning personal estate, situate in other States or countries. In England, it seems to have been settled by the case of *Thompson* v. *The Lord Advocate*, 12 Clark and Finnelly, 1, that the domicil of the deceased determined the right of the government to the tax under a statute similar to ours, while we decided that the *situs* of the property in this State was the true foundation for the claim to the tax. It never has been contended, either in England or in this State, that if the testator or intestate had his domicil abroad, and his personal estate were there also, any tax could be demanded of the legatee or next of kin, though they might be resident in the kingdom or State. The only true foundation of the right and power of taxation, is the support of the Government by which persons and their property are protected. The Government must be maintained and supported, otherwise neither persons nor property can be protected and secured. Hence, it follows that persons and property residing or being within the limits of the Government are the only proper subjects of taxation. In raising revenue from the devolution of personal property upon collateral relations, either by will or by the statute of distributions, it is a mere matter of expediency whether the *domicil* of the decedent, or the *situs* of the property be adopted as the rule; but, if there be neither *domicil* of the testator or intestate, nor *situs* of his property within the country, no Government of which we have any knowledge has attempted to impose a tax upon the *legatee* or *next of kin* merely because of his or their residence within it. After the legacy or distributive share has been received, it then becomes a part of the property of one

of the citizens of the State, and then it may be taxed in common with any other property of the like kind. A very slight examination of the provisions of the 99th chapter of the Rev. Code will suffice to show that our Legislature did not intend to depart from the just principle of taxation of which we have spoken. The first section mentions citizens of the State and owners of property situate in the State, as being the sources from which the revenue is to be derived. In the 7th section, a tax is imposed upon legacies to collateral relations and to strangers upon distributive shares devolving upon collateral next of kin; and the three succeeding sections specifies the manner in which it is to be collected and paid into the public treasury. It is to be retained out of the estate of the decedent by the executor or administrator, and paid by him to the clerk of the Court of Pleas and Quarter Sessions of the county wherein the will was proved or administration granted. Remedies are then provided for obtaining the taxes from delinquent clerks; and a mode is pointed out for having the value of the specific articles ascertained. All this proves conclusively that there must be the domicil of the deceased, or the situs of his personal property, to give the county court jurisdiction to take probate of his will, or grant letters of administration upon the *bona notabilia*. If there be neither, as in the present case, then there are no means provided for collecting taxes, or in other words, there are no taxes imposed to be collected.

The demurrer must be sustained and the bill dismissed. As the cause is disposed of upon its merits, we have not deemed it necessary to examine critically the form of the bill, nor to decide whether, if objected to, it could be sustained in its present form. The usual course in similar cases, is to file an information in the name of the Attorney General or other proper officer for and on behalf of the State, and, as a general rule, it is best to follow ancient and approved precedents.

PER CURIAM, Demurrer sustained.

HANNAH SMITH *by her next friend against* FRANKLIN C. SMITH AND THE BANK OF WADESBOROUGH.

Although courts of equity, usually, refuse to restrain a trespass by a writ of injunction; yet, where property was bequeathed to the separate use of a feme covert, without any trustee being appointed by the will, and the property was about to be sold under an execution against the husband, for his debt, it was *Held* that the legal estate being in the husband, and, therefore, there being no one to sue for the trespass, the Court would interfere to protect the property by means of a writ of injunction.

APPEAL from the Court of Equity of Richmond county, from an interlocutory order made by SAUNDERS, J.

Upon the bill and answers, the case appears to be this: Jonathan Hailey, of Richmond county, the father of the plaintiff, by his will, dated January, 1855, bequeathed as follows: "I give to my daughter Hannah, the wife of Franklin C. Smith, my slaves, Lydia, Jim, Reuben and Hannah, to the sole and exclusive use of the said Hannah Smith, separate and apart from all control, or ownership of her said husband, and free from all liability for his debts or contracts, for and during her natural life, and at her death, to her daughter Alice, and all such children as she may have then living, share and share alike, it being my express will, that the said Franklin C. Smith shall have no interest, trust, or property, either at law or in equity, in or to the said negroes." After the death of the testator, the slaves went into the possession of the plaintiff, or her husband, by the assent of the executor, as the bill states. One of the slaves, Jim, about seventeen years of age, was rogueish and unmanageable, and the plaintiff, and her husband, concurred in thinking it was best to dispose of him, and the bill states that it was agreed between them, in October, 1855, that the husband should carry him off and exchange him for a female slave, that could serve in the house, or sell him, and invest the proceeds in such a female, to be held in the place of Jim, and that accordingly, Smith took Jim to Richmond, Virginia, and soon after brought back a negro girl by the name of Harriet, about thirteen years of age, whom, he said,

he had received in exchange for Jim, and also the sum of $125, to boot, and he delivered the said girl to the plaintiff, and she accepted her, in the place of Jim, agreeing, that he should retain the money for his time, trouble and expense in the transaction; that the plaintiff claimed Harriet, and held her as her separate property, under her father's will, up to August, 1858, when the sheriff of Richmond seized her under a *fieri facias*, on a judgment, at the instance of the Bank of Wadesborough, against Franklin C. Smith and others, and advertised her for sale as the property of Smith, the husband; and then this bill was filed by Mrs. Smith, by her next friend, who was the father's executor, against the Bank of Wadesborough and her husband, praying that the husband may be declared to hold the said Harriet in the place of Jim, in trust for her separate use, during her life, and then for her daughter Alice, and such other child, or children, as she may have, and that the said negroes may be properly settled upon a fit trustee, according to the purposes and trusts of the will; and that, in the mean while, the defendants may be restrained by injunction, from proceeding to sell the slave Harriet. Upon the bill an injunction was granted as prayed for.

The answer of Smith, admits all the material allegations of the bill, and submits that all the negroes, including Harriet, shall be conveyed to such trustees as the Court may designate, and settled upon the trusts declared in the will.

The answer of the other defendant, the Bank of Wadesborough, admits the bequest of the negroes by the will, and that Mark Hailey, the executor, assented to some of the legacies, but denies that he assented to the legacy of Jim, and states that Smith, the husband, as the defendant believes, took Jim against the assent of the executor, and without his knowledge. It admits the character imputed in the bill to the negro, Jim, but denies that the plaintiff requested her husband, or agreed with him, that he should carry Jim off and exchange him for a negro girl, or sell him, and with the proceeds purchase a girl in his place; and states that Jim was carried off against the will and decided opposition of the plaintiff. It

also denies that Jim was exchanged for Harriet, or that Harriet was purchased with the proceeds of Jim, or was ever delivered to the plaintiff by her husband, or by her accepted in place of Jim. It states that about the time Smith went off with Jim, he borrowed twelve or fourteen hundred dollars, and on his return, stated that on the trip, he purchased Harriet and another negro, and sold the latter before he got back; that Smith took a bill of sale for Harriet in his own name, as the absolute owner, and claimed her as his own property, and frequently offered to sell her, saying he could make a good title, and no claim was set up to her by the plaintiff until after the Bank got the judgment against her husband, when, after becoming insolvent, he executed to the plaintiff a bill of sale for Harriet, with the intent to defraud his creditors, and absconded. The answer admits the seizure of Harriet on the execution, and the intention to sell her under it, as the property of Smith.

Upon this answer, the counsel for the Bank of Wadesborough, moved to dissolve the injunction, which was refused, and the Bank appealed.

Kelly and *Dargan*, for plaintiff.
Banks and Osborne, for defendant.

RUFFIN, J. Although the order in the Court of Equity does not declare the grounds on which it was made, yet, in the opinion of the Court, enough appears in the pleadings, to sustain it. Equity does not usually interfere to restrain a trespass, but leaves the party to legal redress. But, both from the nature of the property, and the peculiarity of the situation in which the parties stand, the plaintiff is entitled to relief. The bequest is plainly, and expressly to the separate use of the wife, with a remainder to a child then born, and to such others as may come *in esse*. But no trustee is nominated, and, therefore, the legacy, as far, at least, as the estate of the wife is concerned, vested *jure mariti*, in the husband. But, in this Court, he stands as trustee for her, upon the clear intent, that

he should not take for his own benefit, but that she should enjoy, for her life, as if she were sole, *Parker* v. *Brooke*, 9 Ves. 583; *Steel* v. *Steel*, 1 Ire. Eq. 452. He, then having the legal title, though on trust, could not maintain an action against the sheriff for taking the slave as his property, nor against the purchaser from the sheriff. It is possible that obstacles may present themselves in the way of getting the full relief asked, (that of a settlement of all the negroes in trust for the plaintiff for life, and then for her children,) both from the nature of the limitation in remainder to the children, and from the fact, that the children are not parties. But we are not to deal with that question now, nor to anticipate the effect on the injunction of amending the bill, by bringing in the children. The controversy, at present, concerns the interest of the plaintiff alone. She has, unquestionably an estate to her separate use in the negroes, and that is purely an equitable interest that can be asserted only in this Court, and will be protected in this Court, because she has either no trustee, or none that can, in the actual condition of things, make the title available at law, so as to secure her equitable interest.

Thus far the jurisdiction has been considered, as if the controversy was touching the negroes specifically bequeathed; in which case, as the separate use of the wife, is beyond all doubt, the Court holds that she would be entitled to an injunction against the husband to restrain his alienation in breach of the trust, and to a decree securing the property to her by a proper settlement, with a fit trustee, and, therefore, that she is equally entitled to a similar relief against the creditor of the husband, endeavoring to effect a similar breach of trust, by a sale under execution, wherein the purchaser could only get (if any thing) the naked legal title of the husband, and would hold it, in the view of this Court, on the same trusts as attached to it in the hands of the husband; *Freeman* v. *Hill*, 1 Dev. and Bat. Eq. 389; *Polk* v. *Gallant*, 2 Dev. and Bat. Eq. 395. This, however, is not the case of a seizure of one of the slaves bequeathed to the separate use of the plaintiff, but of a slave which, the bill alleges, was got in exchange for

one of them by the husband, acting as the agent of the plaintiff, by an agreement between her and her husband, or purchased by him for her with the price obtained for one of the original slaves, necessarily sold for his faults, and accepted by her in his stead. It must be admitted, that on those positions, if denied by the defendants, the *onus* is on the plaintiff. She must show that she has the same equity attaching to the slave in controversy, which she had in the one her father gave her. *That*, she will not establish by merely showing that her husband sold one of hers, and afterwards bought this one; for that would not give her a specific equity to this slave, that could defeat the husband's creditor by judgment and execution. She must go further, and show affirmatively, that, in fact, she took this negro for the other, by a contract, to that effect, with her husband, or, as the bill is framed, that in truth, she made the husband, by an agreement beforehand, her agent to make the sale and purchase for her, so that this negro should take the place, as a part of her separate property, of the one sold. It results from the nature of separate property in a wife, that she and the husband may deal, in respect to it, and that he may act as her agent in making sales and purchases; which is so well established, as to need no citation of authority to sustain it. Now, in the case before the Court, there are strong circumstances, in admitted facts, tending to establish the allegations of the bill on that head, although, as a conclusion from those facts, the answer does not admit the agency of the husband in making an exchange of negroes, nor in selling the one, or investing the proceeds in the other, but formally denies them, according to the belief of the defendants, and the alleged declarations of the husband. But the answer does not profess to state any knowledge of the defendant on that point, and, therefore, cannot, with propriety, directly deny the conclusion. It is the common case of the admission of the main equity of a bill and bringing forward new matter in avoidance; and on such an answer, it is the rule of the Court not to dissolve an injunction, when the object, and only effect of it, is to secure the property until the right to it can be ad-

judged on the proofs of the parties. That Jim belonged to the plaintiff; that he was taken away by the husband for sale; that he was sold upon necessity, for his faults; that the husband was from home not longer than was requisite to sell one negro and buy another at Richmond; that he brought back the girl, and that she remained in the possession of him and his wife, with the other negroes bequeathed to her from October, 1855, to August, 1858; that he was needy and in failing circumstances, and not likely to buy and hold property on his own account, nor able to do so, all tend to sustain the right alleged in the bill, and are by no means refuted by the statement that he took the deed to himself, or spoke of the girl as his, or offered to sell her. For, if he had taken the deed to his wife, the title, at law, would have been in him, and, therefore, it is not material how that fact was, nor how he said it was. The case, therefore, is a proper one for continuing the injunction to the hearing; and so it must be certified to the Court of Equity; and the appellant must pay the costs of this Court.

PER CURIAM, Order affirmed.

ALEXANDER S. GRAY *against* JOSHUA WINKLER.

A limitation by will, before the act of 1784, to one upon the contingency of his or her arriving at a particular age, or of his or her being married, was *Held* to manifest an intention that the devisee should take an estate in fee, in case he or she did arrive at that age or married; and where such provisions were contained in a deed that had not words of inheritance, but was referred to in a will published a few days afterwards, in which the several provisions of the deed were ratified and confirmed, it was *Held* that the two instruments combined conveyed an estate in fee.

CAUSE removed from the Court of Equity of Wilkes county.

The bill was filed praying for an injunction to restrain the collection of a judgment rendered in the County Court of Wilkes, for about $1,867. The bill alleges that this judgment

was founded upon two notes given by the plaintiff to the defendant's testator, Penell, for land lying in the county of Wilkes, which the said testator covenanted to convey in fee to the plaintiff on the payment of the purchase money; that the defendant's testator had not an estate in fee in the premises, but only an estate for the life of Rebecca Wellborn, an aged female, and that a recovery for the breach of the covenant would be unavailing to him, for that the executor has not assets of the estate of Penell to compensate him in damages, in case he should recover at law for such breach. In this Court it was referred to Mr. Freeman, as a commissioner to enquire whether the defendant was able to make a good and sufficient title in fee, who reported the following facts as established before him: Hugh Montgomery, by deed dated 13th of December, 1779, conveyed the lands, of which that in question is a part, to James Kerr, David Nesbit, and John Brown. The following is a copy of this deed so far as it is material to this case. "That for and in consideration of the love and affection which the said Hugh hath for his two daughters, Rebecca and Rachel, and to the intent to make some provision for their education and maintenance, and for their support and advancement in the world, and for settling and assuring the premises hereafter mentioned, and for the sum of five shillings to him in hand, now paid by the said trustees, James Kerr, David Nesbit, and John Brown, he, the said Hugh Montgomery hath given and granted, fully and absolutely, unto the said trustees, all that tract of land of him, the said Hugh Montgomery known by the name of the Lower Moravian tract, containing 4,930 acres, situated in Wilkes county, on the Yadkin river, to have and to hold all the said plantations, lands, hereditaments, and premises hereby given or granted, or intended to be, unto the said trustees, James Kerr, David Nesbit, and John Brown, their executors, administrators, or assigns *forever;* upon the trustees hereinafter mentioned: IN TRUST that the said trustees, James Kerr, David Nesbit, and John Brown, their executors, administrators, and assigns, shall permit and suffer the said Hugh Montgomery and his assigns, to hold and

enjoy all the lands and premises hereby before given, and granted for so long a time as said Hugh Montgomery shall live, and immediately after his death, in trust to, and for Rebecca and Rachel, children of the said Hugh Montgomery, and such other child or children as she, (his wife Catharine,) may happen to have, until such time as they, or the survivor of them, respectively, shall attain their respective ages of twenty-one years, or be married, whichever that first happens; and upon the further trust, that the said trustees, or the survivor of them, his executors, or administrations shall, and do, well and truly apply and dispose of the interest and profits arising from the hereby granted lands and premises to and for the education, maintenance, clothing, and benefit of them, the said children, until they attain the respective ages of twenty-one years, or are married, and upon their and every of their attaining their respective ages of twenty-one years, or being married, then, upon this further trust, that they, the said trustees, shall and do in their discretion, deliver, distribute, and pay a just and proportionable share, and dividend of the hereby granted lands and premises, and the increase whereof, unto such children respectively, as shall attain to such age of twenty-one years or be married as aforesaid, having always especial regard to the number of children of the said Hugh Montgomery, then living, by the said Catharine; but in case neither the said Rebecca, nor Rachel, nor any other child of the said Hugh Montgomery to be hereafter born of the body of the said Catharine, shall happen to live to attain such age of twenty-one years or be married, then upon this further special trust, that the trustees, or survivor of them, &c." with a limitation over in fee to several others, one of whom was the heir of the grantor.

Three days after the execution of the foregoing instrument, to wit, on the 16th of December, 1779, the said Hugh Montgomery made and published his last will and testament, which was properly attested and probated, and was in proper form to pass both real and personal property; in which said will, among other matters, are contained the following provi-

sion, viz.: "And whereas on the 13th of this instant, December, I did give and grant, by two certain instruments in writing, called deeds of gift, a considerable part of my real and personal estate, to certain trustees, my said executors, in trust, for myself for life, with limitations over as by the said deeds will respectively more particularly appear, and at the time of the execution thereof, I did give the said trustees, full and free livery of seisin of all the premises therein given and granted, now I, the said testator, Hugh Montgomery, do hereby fully and absolutely ratify and confirm the said two deeds, of severally and all and singular the premises thereby given to the trustees therein named, upon the trusts, to the uses, and for the intents and purposes therein particularly expressed and declared, of and concerning the same, and I do hereby expressly charge and require my said executors to pay the utmost respect to the two deeds of gift severally, and to all and singular, the premises therein contained, and not to consider a single tittle of the premises thereby given and granted, as any part or parcel of my estate, real or personal, whatever, notwithstanding one part of such premises may happen to be in my custody or possession at the time of my death. And with regard to all the rest, residue, and remainder of my estate, both real and personal, of whatever nature or kind soever, or wheresoever, not hereby before specifically given, devised, bequeathed or mentioned, it is my earnest will and desire, and I do hereby will, ordain and authorize my said executors, and the survivors of them, to grant, bargain, sell and dispose of the same in fee simple or otherwise in such manner and form, and in such lots and quantities as to them may seem fit, &c." The persons above named as trustees, to wit, James Kerr, David Nesbit, and John Brown, were appointed executors to this will, and it is believed that they all accepted. John Brown was the last surviving of these executors, and he died in the year 1812 leaving a last will and testament, duly authenticated and probated to pass real and personal estate, wherein he appointed his son, John Brown, Junior, his executor, and appointed him trustee to fulfil and carry out the

trusts and purposes of the deed of trust of 13th December, 1779, and devised to him all the estates, interests, &c., necessary to perform such trusts.

Hugh Montgomery acquired the land in question by purchase from one Cossart, and being indebted for a part of the purchase money in the year 1778, he made a mortgage of the said lands to one *Michael Graff*, agent of the said Cossart, for a term of five hundred years. Montgomery died in 1779, and the unexpired portion of the term by a succession of legally executed assignments, became vested in one *Christian Lewis Benzein*, who instituted proceedings in the Court of Equity of Iredell county, to enforce the payment of the mortgage debt; to which proceeding John Brown, the surviving trustee and executor was made a party, and he, having died during the pendency thereof, his executor and devisee, John Brown, the younger, was made a party in his stead. A decree was rendered in the said Court of Equity, requiring the said John Brown, the younger, as the representative of Hugh Montgomery, to complete the payment of the remainder of the purchase money secured by the mortgage deed and after this was done, to convey the premises to Rebecca (now Mrs. Wellborn,) and Rachel, (now Mrs. Stokes,) as trustee, appointed for that purpose, in fee simple.

Benzein also died, having made his will, (duly executed to pass real and personal property,) wherein he devised and bequeathed the said unexpired term of 500 years to one John G. Cunow, and appointed the said Cunow, and Jacob Vanfleck, Samuel Stoltz, Andrew Benade, and Frederick C. Meining, his executors, who all qualified.

Cunow received from the said John Brown the remainder of the purchase money, and he, and the other executors of Benzein (made a deed in fee reciting the decree and the payment of the money for the unexpired portion of the term of 500 years) to Rebecca and Rachel, (now Mrs. Wellborn and Mrs. Stokes,). One object of the proceeding in Equity above mentioned, was to confirm to the assignees and devisees of Hugh Montgomery, the title to the lands conveyed to him by Cossart, and accord-

ingly William Lenoir and several others, claiming the premises by subsequent grants from the State, were made parties, so were Mrs. Wellborn and Mrs. Stokes with their husbands. A PART of the decree in this case was, that Lenoir and the other subsequent grantees, should surrender and reconvey the lands they were in possession of, also that the legatee, Cunow, and the executors of Benzein should convey the term (as above stated was done,) and that John Brown, the younger, being appointed trustee for that purpose in said decrees, should make a deed in fee to Mrs. Wellborne and Mrs. Stokes. In pursuance of this decree, and in his character of trustee, and as devisee and executor of John Brown, his father, he, the said John Brown, Junior, in 1829, having paid the remainder of the purchase money, by a deed properly executed for that purpose, conveyed to Rebecca Wellborn and Rachel Stokes, the *legal estate in fee simple* of all the premises mentioned in the deed and will of Hugh Montgomery, embracing the land, whereof the plaintiff complains that he cannot get a good title.

The conveyances from Mrs. Wellborn and her husband to Joshua Penell are admitted to be in due form and valid, and the contest, therefore, alone concerns the title of Mrs. Wellborn.

The Commissioner reported that "The defendent cannot make a good and sufficient title to the plaintiff for the lands mentioned in the pleadings." To which the defendent excepted upon the ground that the report was not sustained by the facts reported by him.

The cause came up for hearing upon the exception.

Boyden for the plaintiff,
Mitchell for the defendant.

PEARSON, C. J. The report of the master, and the exception filed by the counsel of the defendant, are too general to be of any assistance to the Court.

It appears by the pleadings, that the alleged defect in the

title arises from the want of words of limitation, necessary to pass a fee (the word "heirs" being omitted) in the deed, executed by Montgomery to Brown and others, dated the 13th of December, 1779.

It is conceded that this deed does not, of itself, pass an estate in fee to the *cetuis que trust*, "Rachael and Rebecca," because, however clear the intention may be, the law requires the word "heirs" to be used, in order to create a fee simple estate *by a deed.*

The law is otherwise in respect to a devise, for although, both in a deed and a devise an indefinite, limitation of land passes only a life-estate, in the latter, the technical word is not required, and a fee simple estate may be created without it, provided the intention is shown by the terms used and the dispositions made in the instrument.

We assume that the declaration of the trust, in the deed under consideration, would, if in a devise, give to "Rachel and Rebecca" a fee simple. This position is taken without reference to our act of 1784, which has no application, for Montgomery died in 1780, and is fully sustained by the cases referred to by Mr. Jarman, in his edition of "Powell on Devises," vol. 2, part 2, ch. 19, "Estates enlarged to a fee by implication" (22 Law Lib. 202). The learned writer has collated the cases with so much ability, and deduced the principles so clearly as to make it unnecessary, for our purpose, to do more than set out a few passages. He states it as settled, "that a devise of land without words of limitation, confers on the devisee an estate for life only;" but adds, "the rule has always been received with disfavor, as subversive of the intention of testators, who generally suppose that a devise in indefinite terms, includes all their interest in the property, as in case of personalty; hence, courts of law have evinced an anxiety to fasten upon any circumstances furnishing a ground for taking cases out of its operation, and hence, has arisen the several classes of cases, in which such devises have been enlarged to a fee by implication: *First*, "a condition or direction imposed on a devisee to pay a sum of mo-

ney, enlarges a devise without words of limitation, to an estate in fee simple." *Second.* "Devises without words of limitation are enlarged to a fee by implication, where lands are devised to a person, *with a limitation over in case he die under twenty-one;* or it seems, under *any other age.* In these cases, the first devisee takes a fee, on the presumption that, as the property is limited over, in the event of his dying under the prescribed age, it must be intended that the inheritance shall belong absolutely to him in the alternate event. The contrary supposition would impute to the testator a very extraordinary intention." "The rule is not confined to cases in which the limitation over is to the devisor's heirs; nor it is to be observed, to those in which it confers a fee." "In the preceding cases, the event on which the devise over was limited to arise, was the death of the first devisee under *twenty-one*, the age at which he, if living, would be competent to dispose of the land; and this circumstance has been more or less relied on in favor of the construction adopted in most of the cases. But, it seems that the rule extends to cases to which this argument does not apply, the event being death, under *another* age. Thus in *Elsmere* v. *Coleman*, 6 Price, 179, the devise was to H. H. and her assigns for life, and after her decease, to such child or children, as should be born of the body of the said H. H., as should be living at her decease, and in case she should happen to have no child or children, who should be living at her decease, or such child or children should happen to die before he, she or they should attain the age of eighteen years, or be married, then over to W. in fee, it was held that a daughter took a fee on her marriage, by the effect of the devise over."

In our case, all the strongest points are presented. The limitation over is in the event, that the taker of the first estate should die before arriving at the age of *twenty-one*, or marriage; the estate limited over is a fee, and one of the persons to whom it is limited, is *the heir of the devisor;* so, there can be no doubt that the principle would apply, if the declarations of trust had been in a devise instead of a deed, and it rests

on a clear manifestation of an intention to give the daughters a fee, provided they married, or lived to the age of twenty-one.

Three days after the execution of the deed, i. e., on the 16th of December, 1779, Montgomery executed his will; and we think it follows from the position assumed above, that the will had the effect to pass the reversion which was left in the hands of Montgomery, for the want of proper words in the deed to carry his intention into effect, so as to enlarge the estate of Rachel and Rebecca, and give them a fee by the combined effect of the two instruments. The reference to the deed which is made in the will, was for the purpose of ratifying and making good the trusts which the devisor intended to make in the deed, and in order to effect this purpose, the declaration of trust must be considered as reiterated in the will. This is clear, from the words, "I do hereby fully and absolutely ratify and confirm the two deeds of gift, and all and singular, the premises thereby given." "I do expressly charge my executors to pay the utmost respect and attention to the two deeds and all and singular the provisions therein contained, and not to consider a *singular tittle of the premises thereby given, as any part or parcel of my estate, real or personal, &c.*" The words are confused and inartificial, but the substance is: "I now intend to give effect to the estates which I intended to create by the deed," consequently, it is only necessary to determine that he intended to give Rachel and Rebecca estates in fee if they arrived at the age of twenty-one or married, which, with the assistance of Mr. Jarman, and the cases cited by him has been done.

It is unnecessary to incumber the case by a reference to the "term of five hundred years," further than to say, it merged after the assignment to Mrs. Stokes and Wellborn, as they acquired the legal estate in fee simple, by the conveyance of the assignee of the surviving trustee.

The exception is sustained; and it will be declared that the defendant can make a good title in fee simple to the land mentioned in the pleadings.

PER CURIAM, Decree accordingly.

JOHN H. TOMLINSON *against* A. F. CLAYWELL *and others.*

In a bill, for the settlement of a commercial firm between the partners, it was *Held* not to be multifariousness to pray for an account and settlement of a trust, made by them, to secure creditors, and of funds deposited with third persons, as collateral security for the firm debts.

The maker of a deed of trust, on account of his continuing liability to the creditors, and of his resulting trust, is entitled to have an account from the trustee, and in a bill, for that purpose, he is not obliged to make the secured creditors parties.

APPEAL from the Court of Equity of Iredell county, MANLY, J., presiding.

The bill was filed for the settlement of a partnership firm. The plaintiff alleged, that he and the defendant Claywell, entered into a copartnership, in the business of merchandising, under a verbal agreement, according to which, Tomlinson was to advance $2,000, and Claywell, who had had some experience in the business was to take charge of the store and give his personal attention thereto—the said Tomlinson rendering such assistance from time to time as might be needed, and the profits or losses were to be shared equally between them; that the plaintiff accordingly advanced the sum stipulated, which was laid out in a stock of goods and the business was commenced in the Spring of 1854, in the town of Jonesville, in Yadkin county; that it continued until the Fall of 1855, and not being prosperous, they conveyed to the defendant, W. H. A. Spier, all the books, book accounts and notes of the firm, and various items of property in trust, to secure the payment of the debts of the firm to certain creditors therein named, which deed bears date 2d of November, 1855; that by the terms of this deed, the trustee was to collect all the notes, accounts, &c., and sell the property conveyed, and apply the proceeds of both to the payment of the specified debts; that he accepted of this trust, and took into his possession the property mentioned in the deed; that the defendant, Spier, failed to execute the trust as undertaken; that he did not collect a large portion of the notes and accounts conveyed

to him; that he permitted the said Claywell to take into his possession and use for his own benefit a portion of the effects conveyed to him, knowing him to be insolvent; that by neglect and mismanagement he suffered the funds conveyed to him to be wasted and lost, and he prays for an account against the said trustee.

The bill alleges further, that previously to the execution of this deed of trust, viz.: in August, 1855, all the goods of the firm were sold by the partners to Gentry, Fulton & Gentry, of Ashe county, for about sixteen hundred and fifty dollars for which three several notes were taken, payable to the firm; that shortly thereafter these notes were deposited by the firm with the defendant, Benham, to indemnify him, the said Benham, and the defendant Spier, against certain debts whereon they were sureties for the firm, which debts were also provided for in the deed of trust; that these notes of Gentry, Fulton & Gentry were not conveyed in this deed of trust, but by an agreement with his partner, Claywell, were to be the property of the plaintiff for cash advances he had made to the firm; that sometime in the Winter of 1856, the plaintiff took up the notes of the Ashe firm deposited with Benham, and in lieu thereof put into his hands a note on N. D. Tomlin for about $400,, and one on F. M. Sanders for $105, which were the individual property of the plaintiff and that he also transferred to the defendants, Benham and Spier, $334 in cash, then deposited in the bank at Salem; that Benham and Spier drew this money from the bank and applied it to their private uses; that they collected also the notes on Tomlin and Saunders and applied the proceeds to their private uses; that while the notes of the Ashe firm were in the possession of Benham, he collected $90, which he has not accounted for.

The plaintiff further alleges that in consequence of the failure of Spier to pay off the debts secured in the deed of trust, he has been obliged to pay out of the proceeds of the notes on Gentry, Fulton & Gentry, the sum of $600 towards debts secured in the said deed, and that one Lazenbury, a

surety of the firm, has been obliged to pay another debt, secured in the said deed, of about $400.

The prayer of the bill is for an account and settlement of the firm, also of the trust fund in the hands of the trustee, and of the effects deposited with Benham and Spier as collateral security, and for these purposes Benham and Spier were made parties defendant.

The defendants demurrer to the bill for multifariousness and also because it appears from the face of the bill that one H. B. Lazenbury was interested in the matters set forth therein, who was not made a party. The cause was set down for argument on the demurrer, and his honor ordered and decreed that the demurrer be overruled, from which the defendants appealed.

Clement, for plaintiff,
Boyden, for defendants.

PEARSON, C. J. The main purpose of the bill is to have an account and settlement of the firm of "Tomlinson & Claywell." In order to effect this, it was absolutely necessary to have an account of the debts, &c., which had been conveyed by the firm in trust for the payment of certain of its creditors, because, until it was known how much had been realized of this trust fund, or what application had been made of the sums collected, the condition of the firm could not be ascertained, and of course, the business could not be closed. The same considerations are appropriate to the notes taken for the stock on hand, which were placed in the hands of the defendant, Benham, as collateral security to him and for the the greater part of which, other notes and cash were afterwards substituted. A settlement of the firm necessarily involved all of these transactions, so that it is not true, that the bill covers several distinct and independent subjects of controversy and the demurrer cannot be sustained on the ground of "multifariousness." The maker of a deed of trust for the payment of debts, in consequence of his continuing liability

to the creditors for whom the deed is collateral security, and of his resulting trust, is entitled to an account from the trustees, and may sustain a bill without making the secured creditors parties; he may join them if he chooses, but the trustee has no right to object, if the relation is treated as one of special personal confidence between him and the trustor, to which the duty of rendering an account is necessarily incident.

The trustor has a right to be informed, what amount of the fund has been realized, which of the debts have been paid, and what other disposition has been made of the amounts collected and reduced to cash. To a bill, charging gross neglect on the part of a trustee in respect to making collections, waste of the fund by permitting an insolvent party to apply a portion of it to his own use, and fraud, in applying other portions to the individual use of the trustee, by reason of which negligence, waste, and fraudulent misapplication of the fund, the trustor has been forced to advance a large portion of his individual funds, and one of his sureties upon a debt secured by the trust, has also been forced to pay a large sum, a demurrer on the ground that the creditors named in the deed and particularly the surety who has paid off one of the debts, are not made parties, looks bad, because it admits the alledged negligence, waste, and fraud; on this account, we are glad upon an examination of the authorities to find, that the demurrer cannot be sustained, *Patton* v. *Bencini*, 6 Ired. Eq. 204, Mitford Plead. 175, 1 Daniel Ch. Prac. 304 and the cases there cited.

Besides the fact, that the maker of the deed has a resulting trust and is liable for the debts secured, there is between him and the trustee, a particular relation, which entitles him, whenever there is a mismanagement of the fund, to arrest it at once, without stopping to ascertain which of the creditors may, or may not be satisfied; putting the relation on the ground of agency, and leaving the rights of the creditors to be cared for and protected in a subsequent stage of the proceeding, on the same principle that one member of a firm, if his partner is

wasting and misapplying the effects, may file a bill for an account and settlement, and for the appointment of a receiver in order to close the business, without making the creditors parties, but leaving them to come in under an interlocutory order in the cause, to have satisfaction of their debts out of the fund. There is no error.

PER CURIAM, Interlocutory order affirmed.

M. N. HART *against* JAMES COFFEE *and others.*

To a bill for relief against a surety, the principal is an indispensable party, and if he be dead, his personal representative must be brought in, or some good reason shown for its not being done.

CAUSE removed from the Court of Equity of Mecklenburg co.

The plaintiff, in his bill, alleges that, as guardian of certain infants, he took from one Cyrus Williamson a bond, on which there is a balance due of $100, to which one Augustus Alexander was surety; that the said Alexander died in 1849, leaving a will, in which Cyrus Williamson aforesaid, was appointed executor; that said executor paid and delivered to the defendants, as legatees of Alexander, all the remainder of his estate after paying the debts; that Williamson died insolvent, after having thus closed his duties as executor. The plaintiff then became administrator, with the will annexed, of Augustus Alexander, but was able to get nothing wherewith to satisfy the debt due to him, as guardian, and this bill is filed to compel the defendants, as legatees of said Alexander, to contribute out of the funds, paid over to them, their proportion of the debt due as aforesaid.

The will of Augustus Alexander is referred to, in the bill, from which it appears that the several legacies, in respect of which, it is sought to charge the defendants, were left to them

in unequal proportions, they being described as grand-children, &c., but the proportions are not set forth. Williamson's representative is not made a party, nor is any allusion made to him in the bill.

The defendants demurred.

The cause being set down for argument on the demurrer, was sent to this Court by consent.

Osborne and *Wilson*, for plaintiff.
Boyden and *Lourie*, for defendants.

RUFFIN, J. The object of the bill is to follow the assets of Augustus Alexander, deceased, in the hands of his legatees, to whom the executor, Cyrus Williamson, delivered them before paying a debt to the plaintiff, on a bond given to him by the said Williamson, as principal, and the testator as his surety. But the statements of the bill are so meagre and indefinite as to render it difficult, if not impracticable to raise the equity, on which the relief is asked; as, for example, the amount of the bond is not given, nor any thing to identify it or put it in issue, except only the obligors or obligee; and the mode of charging the defendants, and the proportions are also omitted, although most of the legacies are not to persons *nominatim*, but in classes, as the testator's grand-children, or the children of certain of the testator's children.

But, without considering those matters further, and supposing the equity to be well founded, there is a radical defect as to a party, which is fatal to the bill. It does not bring Williamson, the principal debtor, or his representative, before the Court, nor assign any reason for not doing so. To a bill for relief against a surety, the principal is an indispensable party, as the decree must be against him as the person primarily liable, and the surety is entitled to his assistance in impeaching the bond or showing its satisfaction, and also for the purpose of concluding him in any future proceeding, by the surety, for reimbursement. The bill, on that head, merely states that Williamson became insolvent after assenting to the legacies,

and is dead. But it does not state when or where he died, nor whether he died testate or intestate, nor that he has no personal representative. The demurrer must, for that cause, be sustained, and the bill dismissed with costs, but without prejudice.

PER CURIAM, Bill dismissed.

TODD R. CALDWELL *and others against* THE JUSTICES OF THE COUNTY OF BURKE.

A statute authorising the people of a county to take stock in a railroad, and to raise the funds to pay for it by themselves, or otherwise, is not forbidden by the constitution.

Under the charter of the Western North Carolina Railroad Company, passed in 1855, and the amendment at the next session, it was *Held* (PEARSON, C. J., *dissentiente*) that the justices of any of the county courts of the counties along the line of the road, are authorised to determine on an amount to be subscribed by such county to the stock of such company, and to submit the same for the approval of the voters of such county, notwithstanding a former proposition to subscribe may have been submitted to them and rejected.

Held further, that such subscriptions may be made *toties quoties*, as the emergencies of the undertaking require.

APPEAL from an interlocutory order of the Court of Equity of Burke county continuing an injunction; BAILEY, J., presiding.

The facts of the case and the statutes referred to, are sufficiently stated in the opinion of the Court.

Badger, *Graham*, *B. F. Moore* and *T. R. Caldwell*, for the plaintiffs.

Avery and *Bragg*, for the defendants.

RUFFIN, J. Though the Court entertains but little doubt upon the question, yet, in the view taken of other points in the case, it becomes unnecessary to determine, whether relief

by injunction in this Court is the proper mode of redress for those citizens of a county, who allege grievances from proceedings of this kind; and, therefore, nothing more will be said on it.

It was, we think too, properly admitted at the bar, that a statute, authorising the people of a county, or town, to take stock in a rail-road, and to raise the funds to pay for it by taxing themselves or otherwise, is not forbidden by the constitution. From time immemorial, the counties, parishes, towns, and territorial sub-divisions of the country, have been allowed in England, and, indeed, required to lay rates on themselves for local purposes. It is most convenient, that the local establishments and police should be sustained in that manner; and, indeed, to the interest taken in them by the inhabitants of the particular districts, and the information upon the law and public matters generally, thereby diffused through the body of the people, has been attributed by profound thinkers much of that spirit of liberty and capacity for self-government, through representatives, which has been so conspicuous in the mother country, and so eminently distinguishes the people of America. From the foundation of our government, colonial and republican, the sums necessary for local purposes have been raised by the people or authorities at home. Court-houses, prisons, bridges, poor-houses and the like, are thus built and kept up, and the expenses of maintaining the poor, and of prosecutions, and jurors, are thus defrayed, and of late, a portion of the common school fund, and a provision for the indigent insane, are thus raised, while the highways are altogether constructed and repaired by the local labor, distributed under the orders of the county magistrates. When, therefore, the constitution vests the legislative power in the General Assembly, it must be understood to mean that power as it had been exercised by our forefathers before and after their migration to this continent. In accordance with these views, is the case of *Taylor* v. *The Commissioners of New Berne*, 2 Jones' Eq. 141; so that the question may be said to be settled here.

The question remains, nevertheless, whether the proceedings to which the plaintiffs object in this case, are sustained by the acts under which they took place; and that depends upon their construction.

The charter of the Western North Carolina Rail Road Company was passed the 15th of February, 1855, and incorporated a company, with a capital of six millions of dollars, if the requisite stock should be taken, to build a road from Salisbury to some point on the French Broad river, beyond the Blue Ridge. By the act, the road is laid off into three sections—the first beginning at Salisbury and running west, and it is required that one section shall be built before the others shall be begun, and that subscriptions of stock shall be made for the several sections separately; that for the first section to be limited to $300,000, or, in a certain event, to $400,000; and the act engages that for all stock thus subscribed, on which a deposit of five per cent. shall be made, a subscription shall be made on behalf of the State to double the amount. Upon the completion of the first section, then, operations may be begun on the second, and to that end, books of subscription are to be again opened, and upon a certain amount being obtained, measured by the estimates of the cost of that section, there is the same engagement for a subscription on the part of the State; and so on for the residue of the route. Then, in the close of the act, 1855, C. 228, Pr. L. Sec. 47, there is a provision in these words: "That any county, through which the road passes, may subscribe for any such amount of the capital stock in said company, as a majority of the voters of said county may approve; for which purpose, the court of pleas and quarter sessions of said counties, are hereby authorised to hold an election at the usual time and places of voting for members of the General Assembly." Subscriptions were opened under the charter, and the sum required for the first section was subscribed, and the corresponding subscription made by the State, and the work was commenced. In 1856, Priv. A. ch. 68, an act was passed to amend the charter, the provisions of which, material to this case, are: that the directors might

open books for further subscriptions for $200,000, or $300,000, in their discretion, as an addition to the stock before subscribed for the first section, which is extended to Morganton and no further, with a like stipulation, that upon five per cent. being paid on the subscription by solvent persons, or by counties, a subscription should be made on behalf of the State to double the amount. By the third section, the directors might also, in their discretion, open books for subscription for stock to an amount sufficient to meet one-third of the (estimated) cost of constructing a second section of the road, beginning at Morganton, and extending within ten miles of the Swanannoa tunnel, with a proviso, that the State would not be bound to take stock for this section, until the first section to Morganton should be completed. Then follows the fourth section, in these words: "That before any proposition for subscription by counties shall be submitted to the people for their approval, provided in the charter, the county court of the county proposing to subscribe, (a majority of the acting justices being present) shall determine on the amount of stock to be subscribed by said county, and the manner in which the question shall be submitted to the people, the time when the vote shall be had thereon, and the person, by whom the subscription on behalf of said county, shall be made, and the court shall have power to make all such orders, rules, and regulations, for the issue and sale of the county bonds, necessary to insure the payment for the stock subscribed, and to lay such tax, from time to time, as may be necessary to pay the interest on said bonds, and ultimately liquidate the principal of the same."

Under those acts the proceedings were had, which it is the object of this suit to restrain the defendants, the justices of Burke, from completing. Two objections are mainly urged on the part of the plaintiffs.

One is, that the county court did not, prior to ordering a vote of the people to be taken, directly "determine" on the amount of stock to be taken, and, therefore, that every thing, founded on the order, falls. The Court is inclined to the opinion, that such a determination must be considered as having

been substantially made; because, the record states that a majority of the justices were present, and a majority of those present voted in favor of a proposition, that the county should subscribe for stock to the amount of $50,000, and after directing a popular vote on the proposition, there was a further order, that if a majority of the votes should be for subscription, "the chairman of the county court shall make such subscrip- which shall be binding upon the county." But the want of *formality in those proceedings*, if any, is fully supplied by the entries at the succeeding term, *nunc pro tunc.*

Another, and the material objection is, that there had before been a determination of the justices to subscribe for one thousand shares, or $100,000, which had been submitted to the people and lost by a large majority, and that the court and the people were thereby concluded, and could not afterwards make a subscription at all.

It may be as well to remark, in the first place, that there is no difficulty in holding, notwithstanding the answer urges a return of the first election was not made, and that such a return is the only admissible evidence of the result of that election, that, for the purposes of this cause, it is to be taken, that the vote was adverse to the proposition to subscribe $100,000 towards the stock. If it had not been, there can no doubt that each of the defendants would have taken steps to compel a return, instead of proceeding to a second proposition for a smaller subscription. A return was indispensable to authorise a subscription on that vote; for without it, a subscription could not be made more than upon an adverse one. But it does not follow from the want of a return, that there was no decision, any more than that it was a favorable one; for, in either of those events, it is certain, it would have been made to appear in an official form. It is taken for granted, therefore, that a majority of the people voted against the first proposition; and the case must depend upon the enquiry, whether, after rejecting one proposition to subscribe, another can be adopted. After consultation and much deliberation, the

Court is opinion, that it can, and the reasons for it will now be stated.

The work which the charter designed to call into existence is an extensive, costly, and important one. It was deemed by the Legislature of such consequence to the State, as to induce that body to pledge the public faith to supply two-thirds of the capital estimated to be needed for its execution—the large sum of $4,000,000—provided the residue could be raised by the subscriptions of individuals and counties. It is apparent, there were apprehensions as to obtaining those subscriptions; for they are to be accepted by piece-meal, and for sections of the road, and books are to be opened from time to time and for considerable periods. In such cases, persons who reside contiguous to the projected road, are looked to as the probable subscribers; because, as investments for dividends merely, stocks in railways have not proved profitable among us; and hence, commonly, subscriptions come from those who indirectly receive advantages in the conveniences of trade, travel, and the appreciation of property, which may make a moderate outlay of capital prudent. But a supply from those sources was not reliable, or at all events, was not relied on,—for, the act takes the further step, unusual until recently, of authorizing the counties along the road to take stock. It cannot be imagined that, that was intended as a favorable financial measure for those counties; at any rate, not directly so; or that it was expected it would be so at an early period, though it might become so ultimately. On the contrary, it seems obvious, that the State was calling on those counties for aid in constructing the work—one of cherished policy to her, and of peculiar interest to those counties. They might well be supposed willing to contribute at one time, or at many times, as needful, pecuniary assistance towards the construction of so great a highway; which, in conjunction with similar works, was to connect the Atlantic coast of North Carolina with her western border, and, in the language of the act, effect a communication with the valley of the Mississippi. These considerations, which are found within the acts and in known public facts,

elucidate the provisions of the statutes, and aid in their construction. They leave no doubt that the Legislature was prepared to receive gladly any advances from the counties which they should voluntarily tender; and we are prepared to expect, in any enactment on the subject, the use of such terms as would confer on the counties the powers, which the State thus apparently wishes them to exercise. Accordingly the charter uses the broadest terms, conferring the fullest powers: "Any county may subscribe for any amount" of stock, such as a majority of the voters may approve. The authority is without restriction as to sums, or the periods of subscription, while other provisions show that no restriction was intended. For example, the act directs subscriptions from time to time, until the requisite capital shall be made up; and the county subscriptions are not limited to this or that time, or this or that section of the road, more than in the amount. There is but a single restriction; which is, that only such counties as lie on the road can subscribe. In all other respects the ability of the people, according to their own judgment, is to govern. The law does not force them to subscribe, but allows them to take what stock they will. Why then, may not a county make a subscription whenever it chooses and as often as it chooses? The power may, indeed, be most usefully exercised at different periods, according to emergencies. It may not feel able at one time to subscribe at all, or not more than a particular sum and become quite able to subscribe more at another. It may hang back in the hope, that individuals will take the stock, or that other means may be found for carrying out the work; and when disappointed in those expectations, the people may be willing to make a further subscription in order to get the early benefit of the road and put into activity the capital before invested. There may, in fine, be various considerations to induce the citizens of the county to make a subscription which they before declined, or to make additional subscriptions, when those previously made, are found insufficient to effect the end proposed. A court is not to take notice of the danger of errors of judgment in the people on those points

(which may, by the by, be as well on one side as the other,) nor to question the prudence of submitting them to the discretion of the county. That is a question of policy, and falls within the functions of the Legislature; our province is, simply, to ascertain the intention of the Legislature—the meaning of the law, as passed; and upon that, it is apparent, that the purposes of the Legislature required a grant of very full power, and it is certain, that the words do grant the fullest power. Why should it not be so, if the Legislature, in its wisdom, chooses to grant such a power? It works no wrong to any one; for after all, it is but a power to the people of a county to tax themselves from time to time, if they see it to be to their interest. So much for the provisions in the original charter.

They, however, were found defective in some respects; particularly in not prescribing a mode of presenting the question in a precise form, and for certain sums, for the decision of the people, and also in the delay in taking the vote bi-ennially—at the time of voting for members of the Legislature, and in not ensuring due deliberation before a decision. To supply those defects, and for other reasons, an amendment of the charter was passed at the next session. But the amendments do not conflict with the policy, or the provisions of the charter in the point we have been discussing. They merely provide the requisite machinery for submitting the questions definitely to the public judgment at suitable times, and for having that judgment authenticated to the justices, who are to carry it out. They supply also a wholesome guard to rash popular impulses by not allowing the people to go beyond an amount prescribed by the magistrates of the county. There is nothing in the act to limit the number, or the amount of county subscriptions, before allowed, except in requiring the concurring judgment of the court and the people of the county in making them. But there are in it other provisions which tend to establish the correctness of the construction already given to the charter upon this subject. The amendment authorizes an addition on to the west to the

first section, carrying it to Morganton, and new subscriptions for that, and also permits a beginning of the second section, lying beyond Morganton, and a separate subscription for that. Now, can it be said, that subscriptions by a county which that very act authorizes or recognizes, cannot be made for both these sections; and, if so, that the question, as to each, may not be taken separately and at different times? Besides, a county might have made a subscription under the original; and yet in the amended charter, which still authorizes county subscriptions, there is no provision, that a county, which had subscribed, should not subscribe again. It seems impossible to deny the right of such subscription, when the Legislature expresses no negative, but very plainly invites subscriptions from any quarter in which they may be had. It follows, that the court and people of the county may subscribe when, and in such amounts, as to them may seem best; and therefore, that they may at one time decline, and at another time make a subscription.

Some criticism was made at the bar on the language of the statute's being in the singular number in speaking of any "proposition" to subscribe and of holding an "election," as denoting that only a single proceeding was contemplated, and it was thence inferred, that a decision by the justices or the people adverse to any proposition was once for all, and conclusive. But grammatical inaccuracy cannot control a construction upon the general intent of the act, found in numerous provisions in it. Indeed, the language is well enough in the singular number, as it applies naturally to the making and deciding any particular proposition for a certain subscription, at a certain time; for on that, there is a conclusive determination as to its being then adopted or rejected. But even if the county cannot subscribe *toties quoties*, it cannot be yielded, that it is not competent to make a subscription after the rejection of a previous one. Let the question be considered in reference to the action of the justices and the people respectively. The former do not act on such occasions judicially, so as to make a decision, at a particular time, a conclusive adjudica-

tion, as if it were *inter partes*. They act as the authorised organs of the county on a local matter, as they do about the building of a bridge or the laying out a road. No one will question their power after a refusal to do either of those things, to make an order, upon reconsideration for those purposes. For the same reason, they may thus act on this matter. It is true, if they make an order for a subscription, and submit it to the people who adopt it, that cannot be retracted. The thing is done and cannot be recalled. But it is quite a different thing, that by declining at a particular time to act, their whole power over the subject, though conferred in general terms, and for the purposes supposed to be beneficial, is exhausted. The same reasons which induced the grant of the power in the beginning, require its continuance until it be revoked by the Legislature. Surely, the justices may deliberate as to the amount proper to be subscribed, and after considering and deciding against one sum, they may fix on an another, and, if they may, the people may also. The two bodies act separately, and must unite in an affirmative measure, to give effect to it. But after disagreeing for a time, there is nothing to prevent them, like the two houses of the Legislature, from finally concurring and when they do concur affirmatively in the act which they are empowered to do, it ought to be valid.

The order refusing to dissolve the injunction is, therefore, deemed erroneous, and is reversed with costs; which will be certified to the Court of Equity.

PEARSON, C. J., *dissentiente*. I concur in opinion on the question, as to the jurisdiction of the Court of Equity, and also as to the power of the Legislature to authorise county subscriptions. But I do not concur upon the question of construction; my opinion is that *only one act* was contemplated; that is, the county court of a county proposing to subscribe, (a majority of the acting justices being present) having passed upon the question of subscription, and fixed the amount (which action, on the part of the county court, was necessary,

as a preliminary measure, in order to present a question for the decision of the voters of the county); that voting "was *the act*" which was to determine it.

My mind has been brought to this conclusion, by a consideration of the wording of the two statutes, of the nature c the proceeding and of the subject-matter. There can be no middle ground; either a vote of the people, once taken, must be decisive, or else, (a majority of the justices being in favor of a county subscription) *any amount*, may be subscribed, to any and every section of the road, and at any, and all times, whenever a majority of the votes polled may chance to be in its favor! Had this been the meaning, it seems to me different words would have been used; and the whole authority to subscribe would have been at once conferred on the court, (a majority of the justices being present) without putting the people to the trouble of going to the polls at such a time, and as often as the magistrates, in their good pleasure, should direct a question to be submitted; or some provision would have been made, that a voting should not be of effect, unless a majority of the votes of the county went to the polls.

As the two other Judges have come to a different conclusion, the question is, of course, settled; and being one of construction merely, confined to these two statutes, I should have deemed it unnecessary to file an opinion, except for the purpose of stating that on the question of the *power of the Legislature*, there is no difference of opinion.

PER CURIAM, Interlocutory order reversed.

JOEL H. JENKINS *and others against* JOSEPHUS W. HALL *and others.*
JOSEPHUS W. HALL *and others against* JOEL H. JENKINS *and others.*

A bequest to a woman and her children, she having no children at the time, gives her an absolute estate in the property.

Where a testator in one clause of his will limits a use in property on event of survivorship between his daughters at the death of his widow, but in a subsequent clause gives the use of the property to the survivor upon the death of the other without leaving a child or children, it appearing from the context that he wished to make the bulk of his estate unalienable as long as possible, it was *Held* that the latter disposition should prevail over the former, and that the contingency was open until the death of one of the daughters without leaving a child.

THESE Causes were removed by consent from the court of equity of Rowan.

Thomas L. Cowan, of the town of Salisbury, died in February, 1856, having made and published his last will and testament. He left surviving him his widow and two daughters, Charlotte, the wife of the plaintiff, Joel H. Jenkins, and Mary, the wife of the defendant, Hall. On the 29th of December, 1857, Mrs. Cowan died, leaving her two daughters surviving, one of whom, Mrs. Jenkins, had children, to wit, Elizabeth, Ella, Sally, Charlotte, Thomas L., John H., who are made parties defendant with their mother; the other daughter, Mary, never had a child. The bill was filed in the first instance, praying that an account may be taken of several mercantile firms of which the testator had been a partner; in each of which, the plaintiff, J. H. Jenkins, was also a partner, and of the last of which, the plaintiff's Jenkins and Roberts, are the surviving partners; and praying for directions as to the manner in which they should discharge their trust, as executors, in the several particulars set out. The bill sets forth that the plaintiffs, Jenkins and Roberts, had the bulk of the assets in their hands, but that they were at a loss to know to whom they should make a payment of Mrs. Hall's share, as the trustee mentioned in the will, P. B. Chambers, had declined to act; also, they prayed to have a construction put upon the following clauses of the will:

"ITEM 2. I give and bequeath to my beloved wife, Elizabeth, my whole right and title to the following negroes, Jack, &c., (naming eleven,) I also give her during her natural life, only, five other negroes, (describing them, and including in the same clause bank stock, money, furniture, &c.,) to be *bona fide* hers and at her disposal during her natural life, and then to be equally divided between my two daughters, Charlotte and Mary, and *their children* then living, or any they may have afterwards. She may in the meantime, if she thinks proper give off to one or both, such parts of it as suits their convenience, taking and keeping a correct account of the same, to be brought in upon a final settlement of that part of my estate."

* * * * * * * * * * *

ITEM 4. "I give and bequeath to Pinckney B. Chambers, agent and trustee for my daughter Mary's sole use and benefit, and to her children forever, my negro woman Harriet, and all the children that she now has, and all that she may hereafter have. I do not now recollect the names, nor the number, but includes all that she ever had or may hereafter have together with their increase."

ITEM 5. "I give to Pinckney B. Chambers, as agent and trustee of my daughter Charlotte C. Jenkins, for her sole use and benefit, her choice of all the balance not above named, as nearly the same in number and valuation as can be arrived at, and as much as can possibly be in one family. If this cannot be equitably in one family, it must be made up out of one or more of other families."

* * * * * * * * * * *

ITEM 19. "At the death of my wife, I wish the entire or rather the whole of my estate to be divided between my two children, Charlotte and Mary, both real and personal, as equitably as it can be done, and as nearly as can be done, and in strict accordance with my direction as is contained in this my will. And should either of them be dead before that time, it is to go to their children."

ITEM 20. "It is my will that if either of my children Char-

lotte or Mary, should die without children, that then, the whole of the estate of the deceased one, both real and personal, shall go to the surviving one during her life, and then to her children."

ITEM 21.—I hereby nominate and appoint my friend, Pinckney B. Chambers, as agent or trustee for my children, Charlotte and Mary, to whom I convey the title of all of my property for their use and benefit; both lands, lots, houses, negroes or money, &c., the title to be vested in him, so that none of it can be disposed of in any manner whatever either by the wives or the husbands, without the consent and free will of the trustee, to be given in writing, and assigning at the same time satisfactory reasons therefor. * * * And at the same time, I allow my children and their husbands, together with my grand children, to have, to possess, to use and enjoy all the profits, benefits, services and emoluments growing out of any of it, as if it was their own, and free from any incumbrance whatever."

ITEM 22. "I give and bequeath to my daughter Mary, a special legacy of five hundred dollars, to be paid to her personally, and to be hers forever, under the control of no other person whatever, either in money or property as she may prefer, and to be paid at some future time, when it is most convenient to my executors.

ITEM 23. "All the balance of my estate, of whatever it may consist, either in lands or money, in Mississippi or in this State, either in accounts, notes, money, or any other property, which I may have forgotten, and whatever may be due me from the several mercantile firms with which I have been connected, I allow, and so order, that they may all be put into my estate and settled equally between my two daughters, Charlotte and Mary, if then living; if not, to their children respectively, that is, after the death of my wife."

The principle question discussed by the parties was, whether the contingency of the death of one sister without issue, the other surviving, was limited and restricted to the event of Mrs. Cowan's death, and it was contended by Hall and wife, that as neither of the sisters was dead when their moth-

er died, the estate of each one then vested subject to no contingency. Jenkins and wife and their children, maintained that it was the manifest intention of the testator to keep the contingency open until the death of one or the other of the sisters, no matter whether that happened before or after the death of their mother.

The bill of Jenkins and Roberts, &c., prayed for an ascertainment of the assets for which they were accountable, and from all other sources, and of the sums which the parties were severally entitled to, or bound to pay.

The obbject of the other bill is the same.

Wilson, *Jones* and *Winston*, *Sr.*, for Jenkins, &c.
Boyden, *B. F. Moore*, and *Osborne*, for Hall, &c.

BATTLE, J. The bills, in these two suits, are filed for the same purpose, which is to obtain a construction of the will of Thomas L. Cowan, deceased, and then to have a settlement of his estate.

The will is very inartificially drawn, and if the writer had any very definite idea as to the manner in which his large estate, consisting of almost every kind of property, which is to be usually found in the southern portion of our union, was to be limited and settled, it is difficult to discover it. He certainly failed in one important object, which he seems to have had in view, which was to prevent any disagreement or dispute among the members of his family about the division of his property, and especially to interdict any litigation about it. He had not been many months in his grave before such difficulties arose upon the construction of his will as to compel his widow to dissent from it; and to bring about among his children a litigation, which the pleadings show to be very far from amicable. He may possibly be quite as unfortunate in having his wishes carried out in the limitations of his estate to his daughters and their families, by the inability of those who are called upon to expound his will, to ascertain [illegible]al intention. We can only promise, that after a [illegible]ful

examination of the will in all its parts, and comparing one clause with another, we will put such a construction upon it, as a fair interpretation of its language will bear, when considered in connection with the rules established for our guidance by former adjudications. In performing this duty, it will not be necessary for us to notice every expression, or even, clause in the will; for, amidst the immense verbiage in which he has thought proper to express his ideas, it is not very difficult to discover, that with one or two exceptions, he intends the same disposition for the whole of his property of every kind. There are some immediate gifts, in trust, for the sole and separate use of his daughters, but all the residue of what he several times calls "his estate," was to be kept together during the life of his wife, and then, at her death, to be divided between his daughters, and vested in a trustee for them and their families, according to the limitations expressed in the 20th and 21st clauses of his will.

In the 4th item, which we will consider first, he gives to a trustee certain slaves therein mentioned, for the sole and separate use of his daughter, Mrs. Mary Hall, "and to her children forever." Mrs. Hall has never had any children, and this limitation gives her an absolute estate in the use of the slaves, according to the rule laid down in *Wild's* case 6 Rep. 17, and recognised by this Court in *Moore* v. *Leach*, 5 Jones' Rep. 88. In the 5th clause, certain slaves are given in trust for the sole and separate use of the testator's other daughter, Mrs. Charlotte Jenkins, without saying, "and to her children." She, therefore, took an absolute estate in the use of the slaves, there being no words to restrain it, though she had children at the time when the will was made and at the death of the testator. The slaves mentioned in the two clauses of the will just referred to, are, in our opinion, separated, from the residue of "the estate," because the gifts of them are immediate, whereas, the disposition of the residue was expressly reserved to be made at the death of the testator's widow. They were not intended, therefore, to be embraced in that residue, and hence, the general expressions contained in the 21st and

23rd clauses of the will do not apply to them. The legacy of five hundred dollars, given to Mrs. Hall in the 22d clause, is for similar reasons, to be excluded from the operation of the same clauses, and as such, is an absolute gift.

The 19th clause of the will is in the following words: "At the death of my wife, I wish the entire, or rather the whole of my estate, to be divided between my two children, Charlotte and Mary, both real and personal, as equitably as it can be done, and as nearly as it can be done, and in strict compliance with my directions, as is contained in this my will. And should either of them be dead before that time, it is to go to their children." If this clause stood alone, it would make a disposition of the whole of the testator's property, (except what he had given for the use of his daughters by the 4th and 5th clauses, and to his daughter Mary, by the 22nd clause) which would be clear and explicit, and about which there could be no doubt. The daughters would have taken the whole absolutely upon the death of their mother, to be equally divided between them. If either had died in the life-time of the widow, leaving children, such children would have stood in their mother's place, but as that event did not happen with regard to either, there would have been nothing to prevent a division between the daughters, in which each would have taken her share absolutely. But the 20th and 21st clauses impose restrictions and limitations upon the shares which each daughter is to take in the division, which raises the most important question in the cause, but one which we do not consider difficult to decide, because the principle, upon which it depends, has been recently fully considered and settled by this Court. The limitations in these two clauses extend, as we think, to all the property, of every kind, that the testator owned, which was reserved to be divided at the death of his wife. The 23d clause is not more extensive in its words and meaning than the 20th and 21st, and seems to have been inserted out of abundant caution to prevent the possibillity of anything being left undisposed of by the will. These limitations too being annexed to the trusts which the

testator declares in relation to his whole estate, with the exception hereinbefore referred to, must supercede any which he may have vaguely expressed as to particular kinds of his property, as, for instance, his furniture and books, which he directs to be equally divided after the death of his wife between his two daughters, Charlotte and Mary, "and their children then living, or any they may have afterwards." The clause which immediately follows the 19th, to wit, the 20th, declares as follows: "It is my will, that if either of my children, Charlotte or Mary, should die without children, that then the whole of the estate of the deceased one, both real and personal, shall go to the surviving one during her life and then to her children." By the 21st clause, the title of the whole of the property is vested in a trustee for his daughters, the testator declaring that he allowed his children and their husbands, together with his grand-children, "to have, to possess, to use and enjoy all the profits, benefits, services and emoluments growing out of any of it, as if it were their own, and free from any incumbrance whatever." The question arising upon the construction of these two clauses is, whether the estate, in the shares, which the daughters are to take upon the division, vested in them absolutely either at the death of the testator, or at the death of his wife, as neither of them was then dead without children, or is the contingency still subsisting, making the estate conditional, upon the event of a death without children at a future time. If the 20th clause stood alone, we should have no hesitation in saying upon the authority of the case of *Hilliard* v. *Kearney*, Busb. Eq. 221, where the subject is fully discussed, that the estate became absolute at the death of Mrs. Cowan, the period when the division was directed to be made. But in that case, it is admitted, that there is an exception to the rule, where the use, only, of the property is given, and not the property itself; see 2 Jarman on Wills, 668, 688. In the present case, there can be no doubt that the testator intended his daughters should have only the use and profits of the property given them, because such intention is clearly and strongly expressed by the 21st clause; and besides,

it appears from every part of his will that he wished to tie up his property and make it inalienable as long as he could. The effect of the 21st clause, then, is that each of the daughters takes an equitable estate in fee in the real estate, and an absolute equitable estate in all the other property, subject to an executory devise in the event of her dying without leaving any child or children, over to her sister for life, with remainder to her children.

The parties may have a decree for taking all necessary accounts, preparatory to a final settlement of the estate of the testator upon the principles herein declared. It may also be referred to a commissioner to ascertain and report a suitable trustee for each of the testator's daughters; and the cause will be retained for further directions upon the coming in of the reports.

PER CURIAM, Decree accordingly.

APPENDIX.

DEATH OF CHIEF JUSTICE NASH.

The Chief Justice having died since the last term of the Court, the following proceedings were had:

"IN THE SUPREME COURT,
Monday, Jan. 3, 1859.

On the opening of the Court, the Attorney General rose and said:

May it please your Honors:

I beg leave to announce to the Court that a meeting of the members of the Bar, in attendance on the Supreme Court, was held this morning in the Court room, for the purpose of giving expression to the sense of the loss which the country has sustained, by the death of the late lamented and venerable Chief Justice Nash,

In obedience to the wishes of the meeting, it becomes my duty to present to the Court, the preamble and resolutions, which were unanimously adopted. In presenting these resolutions, I shall not enter into any extended observations in regard to the character of the deceased, either public or private. He needs no eulogy. For nearly forty years he has been in the public service, and in whatever position he has been placed, he has performed the duties devolving upon him, with credit to himself and satisfaction to the public. A man of unsullied private character, he possessed in an eminent degree, those rare and inestimable qualities both of mind and heart, which must command the respect and esteem of all good men. Whilst we feel a deep and sincere sorrow, at being separated from such a man, yet we are, to some extent,

consoled by the reflection, that he has left behind him an example, that will be a beacon light, a polar star to guide succeeding generations in the paths of duty and virtue. Believing, as I do, that each member of the Court will heartily concur in the sentiments expressed in the following resolutions, I beg leave to read them to the Court.

The Attorney General then presented and read the following:

At a meeting of the Bar and officers of the Supreme Court of North Carolina, held at the Court room, in the Capitol, on the 3d day of January, 1859.

On motion of Mr. Badger, Hon. William A. Graham was called to the chair, and Edmund B. Freeman appointed secretary.

On motion, the chairman appointed P. H. Winston, senior, W. N. H. Smith, R. S. Donnell, John Pool, John H. Bryan, William A Jenkins and Hamilton C. Jones, a committee to consider and report resolutions expressive of the feelings of this meeting of the death of the late Chief Justice Nash.

Mr. Winston from the Committee, reported the following preamble and resolutions:

Frederick Nash, late Chief Justice of the Supreme Court of North Carolina, having died since the last term, the members of the bar, and officers of the Court, desire to express their sense of the loss which the country has sustained, in the death of a magistrate so worthy of the high office, whose duties he performed with perfect integrity, and eminent usefulness and dignity; and also to give some outward evidence of sincere sorrow for their separation from a man, whose ardent, yet cheerful piety, at once gave strength and consistency to all his private virtues, and to his manners a pervading and attractive gentleness; which, joined to the more imposing qualities exhibited by him in his public employments, gained for him universal affection, esteem and admiration; therefore, *Resolved*,

1. That the members of this meeting will wear the usual badge of mourning during the present term of the Court.

2. That a copy of these resolutions be sent to the family of the deceased by the chairman of this meeting.

3. That the Attorney General be desired to present the pro-

ceedings of this meeting to the Judges of the Supreme Court, with a request that they be entered on the records of the Court.

The preamble and resolutions were seconded by Mr. Badger in a feeling and eloquent address, and after a few impressive remarks from the chairman, were unanimously adopted.

The meeting then adjourned.

W. A. GRAHAM, Chm'n.

E. B. FREEMAN, Sec'y.

Whereupon, Chief Justice Pearson, on behalf of the Court, replied:

Gentlemen of the Bar:

The members of the Court are deeply impressed by the sad event to which your proceedings refer, and join in the sentiments to which you have given expression.

To very extensive legal learning, ripe scholarship, and an elegant and easy style, Judge Nash united a high sense of moral and religious duty, which gave to him a weight of character, that was calculated to command the confidence of the public for the decisions of any tribunal of which he was a member. His distinguishing characteristics were firmness and integrity.

His urbanity and uniform attention to all the courtesies of social life, endeared him to his associates; and in his death, we feel that we have lost not only our Chief Justice, but a friend. He had lived the term allotted for human existence—three-score years and ten—he had filled the measure of his usefulness and honor. We were in some degree prepared, and whilst his demise suggest the most solemn considerations, the feeling of regret should not be as unmitigated, as when one is suddenly cut off in the prime of life.

The Court directs the proceedings of the Bar to be entered on the minutes.

Court adjourned until to-morrow morning, 10 o'clock.

E. B. FREEMAN, Cl'k.

*** The Hon. THOMAS RUFFIN, of Alamance, was appointed by the General Assembly to fill the vacancy occasioned by the death of Judge NASH.

Judge PEARSON was appointed by the Court, Chief Justice.

ROBERT R. HEATH, of Edenton, and JESSE G. SHEPHERD, of Fayetteville, were appointed by the General Assembly, Judges of the Superior Courts, (having first received the appointment *ad interim*, by the Governor,) in the places of Judges PERSON and ELLIS, resigned.

CASES IN EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT RALEIGH.

JUNE TERM, 1859.

HENRY WILSON *against* RICHARD A. WESTON, *Adm'r.*

A deed which has a proviso for "the privilege of redeeming the property conveyed", imports *prima facie* that it is intended as a *security*, and not a *sale.*

In a question, whether an interest conveyed in slaves, was intended as a security, or a conditional sale, the facts that the bargainor was illiterate—needy—and, in the power of the bargainee, also, that the price was grossly inadequate, and was not paid, but only promised to be paid, added to the fact that the instrument included a much larger interest than the bargainor had, are very decisive evidences that a security was intended.

CAUSE removed from the Court of Equity of Bertie.

The case, as stated in the pleadings, and established by the proofs, appears to be this: In 1844, Lewis Wilson bequeathed certain slaves to his wife for her life, and ordered that at her death, they should be sold by his executors, and the money equally divided between three of his children, of

whom the plaintiff was one. Mrs. Wilson died in the latter part of the year 1851, at the age of seventy years, and her health had been feeble for three or four years before. Early in the year, 1852, the executors sold the negroes, then consisting of three in number for a little over over $1200, and taking into consideration the age and infirmities of the tenant for life, one-third of the remainder in the slaves, or their proceeds was worth two hundred and fifty dollars in October, 1850. The original defendant was a constable in 1850, and had executions against the property of the plaintiff, amounting to $35, which he was unable at that time to raise; and it was agreed by them that Weston should pay the debts, and Wilson should repay the amount within six months, and that the plaintiff should convey or assign his interest in the three negroes to Weston as a security for the money to be advanced, according to the allegations in the bill, or, as stated in the answer, by way of conditional sale, under which the title or right should be absolute in Weston if the plaintiff should not repay the money within the time limited. Weston then prepared a deed which purports to be a conveyance from Wilson to Weston, of the three slaves by name, in possession, with general warranty, in consideration of $35, with a proviso "that said Wilson shall have the privilege of redeeming the above named slaves, by paying to the said Weston, the said sum of $35, on or before the expiration of six months from this 19th of October, 1850." On the day of the sale, by the executors, the plaintiff tendered to Weston the sum of $35, and the interest thereon from October 19, 1850, and the latter refused to receive it, because it had not been paid within the six months, and claimed one-third part of the proceeds of the slaves as the assignee of the interest of the plaintiff. On the same day, Weston paid to the creditors, in the executions against Wilson, their debts, and in February, 1852, he had the deed proved and registered, and it appears to have been executed by the plaintiff by making his mark.

The bill was filed in March, 1852, and prays that the deed of October, 1850, may be declared to be a security, only for

the sums due on the executions, and that on payment thereof, the defendant may be compelled to reconvey, or assign to the plaintiff.

Winston, Jr., for the plaintiff.
No counsel appeared for the defendant in this Court.

RUFFIN, J. There may be in some cases much difficulty in distinguishing between a mortgage and a conditional sale; but there are very decisive evidences of the true character of this transaction. The deed of itself imports *prima facie* a security, and not a sale—by "the proviso for the privilege of redeeming" the negroes, which between these parties is equivalent to a technical condition on which an equity of redemption, proper, would arise as denoting the intent of the parties. The inference from these terms is fortified strongly by the circumstances. It is impossible to believe, that the bargain was for the interest expressed in the deed. It purports to be a conveyance, out and out, of the three slaves specifically, without taking any notice of the existing life-estate of the mother, or the interest of the other two children in the fund after her death. No money was advanced by Weston, but he only agreed with Wilson orally, that he would satisfy the executions, which, however, he never did until after the life-estate fell in. The plaintiff was illiterate, and needy, and in the power of the other party, and the disparity between the alleged price, and the value of the true interest of the plaintiff, was very great, while that between the price and the value of the negroes, as conveyed, was enormous. The agreement could not have been for a sale of any kind, but only as a security; and the plaintiff is entitled to a declaration to that effect, and a decree accordingly.

As the original defendant denied the plaintiff's right to redeem altogether, the plaintiff is entitled to his costs up to the hearing. In taking the account, those costs must be set against the debt and interest; and, should there remain a bal-

ance of costs, the present defendent must pay it out of the assets of his intestate.

PER CURIAM, Decree accordingly.

E. P. TABB & COMPANY *against* JOHN WILLIAMS AND WIFE AND ANOTHER.

A bill was brought to subject equitable property to the payment of a judgment at law, in which it was alleged that the defendant, in that judgment, was insolvent, that he had no property that could be reached by an execution at law, and that executions, on other judgments against him, had been returned *nulla bona*, to which the defendant demurred; it was *Held* not necessary to show that an execution had issued on the judgment at law, and been returned *nulla bona*.

A *lis pendens* constitutes a lien on equitable property, in a case where it can be properly sought in this Court, and it is not necessary to restrain the holder of such property from paying it to the *cestui que trust*, (he being a party,) for the Court will make all proper orders for the protection of the fund.

CAUSE removed from the Court of Equity of Bertie.

The plaintiffs alleged in their bill, that the defendant, John Williams, became indebted to them in the sum of about $258, and that at November Term, 1858, of Bertie County Court, they obtained judgment for the amount; that shortly before the rendition of their judgment, the defendant had, by absolute conveyances, by deeds of trust, and executions in the hands of officers, been stripped of every species of property that could be reached by execution, and that several *fi. fas.* issuing on other judgments, had been returned by the officers holding them, *nulla bona*, and that he held himself out as largely insolvent; that by a certain deed of trust and marriage settlement, dated 2nd of January, 1855, executed by the said Williams and his intended wife, Rachel, (then Rachel Thompson) to the defendant Beasley, as trustee, the incomes of

certain lands, slaves and other personal property, therein described and set forth, was secured to the said Williams, which he fraudulently endeavors to conceal, and to hinder the plaintiffs from having satisfaction therefrom. The prayer of the bill is for a discovery, and that the plaintiffs may have satisfaction out of the fund above mentioned.

The defendant Williams demurred generally. The defendant Beasley demurred specially, because, that the bill does not pray for an injunction to restrain him from paying over the income to the said Williams.

The cause was set down for argument on the demurrers and sent to this Court.

Winston, Jr., for the plaintiffs.
Garrett, for the defendants.

BATTLE, J. In the case of *Hough* v. *Cress*, decided at the last term of this Court, (ante 295,) it was said, that "with respect to property, purely equitable, whether that of a male or female, relief ought to be had in this Court, whether by an execution against the estate, and a return of *nulla bona, or otherwise*, it appears that there is nothing out of which satisfaction, at law, by execution against property, can be had." Here, it is stated explicitly in the bill, that no satisfaction of the debt of the plaintiffs could be obtained by an execution at law, because the defendant, Williams, was entirely insolvent for a large amount, and that many executions against him, in other cases, had been returned *nulla bona*. These statements are admitted by the demurrer to be true, and if so, the plaintiffs' claim to the relief, which they seek, is clear and undoubted. As against this relief, the special cause set forth in the demurrer of the defendant Beasley, the trustee, furnishes no substantial objection. The suit constitutes a *lis pendens*, which certainly prevents an assignment by the debtor as against his creditor, and would, we think, protect the trustee against the demands of the debtor or his assignee. Hence, there is no necessity for a formal injunction; as the

Court would, whenever called upon in a proper case, make the necessary orders for protecting the fund in the hands of the trustee, so as to have it ready for any decree, which might be made in favor of the creditor.

The demurrers must be overruled with costs, and the cause remanded to the Court below, in order that the defendants may put in answers.

PER CURIAM, Decree accordingly.

FRANKLIN W. DIXON *and others, against* JOHN H. COWARD *and wife.*

Under the Revised Code, chap. 38, sec. 2, an estate, *pur autre vie*, given to a child by an intestate father, is subject to be brought into *hotchpot* as an advancement in the division of other lands.

One half an estate in land given by an intestate by deed to his daughter and her husband, is subject to be brought into *hotchpot.*

CAUSE removed from the Court of Equity of Greene County.

Windsor Dixon died intestate in 1857, seized in fee of a tract of land in Greene, containing 888 acres, and leaving a widow and also six children, and the child of a deceased daughter surviving him, who are his heirs at law. All the children were the issue of a second marriage, except the defendant, Mary E., who is the wife of the defendant, John H. Coward. The bill is filed against Coward and wife, by the other children and the grand-children, and prays for a partition of the said descended land, subject to the right of dower of the widow; and to that end, after alleging that actual partition could not be made without injury to the parties, it prays for a sale, and that the purchase money should be divided between the heirs, in the proportions in which they were entitled. And, as to those proportions, the bill states that, Windsor Dixon was entitled to, and seized of an estate for his life, as tenant by the curtesy, in a tract of land of which his former

wife, the mother of the defendant, Mary E. was, in her life-time seized in fee simple, and that by way of advancement, he conveyed his life-estate in that tract to his daughter, Mary E., upon whom the reversion had descended upon the death of her mother.

The answer submits to a sale of the first mentioned tract of land as prayed for, but it claims one equal seventh part of that land or its proceeds, because it denies that the conveyance from Windsor Dixon was by way of advancement, and says it was upon a purchase by the husband, Coward, in consideration of a balance of money which the father owed his daughter as her guardian.

Upon the issue of fact thus formed, the evidence establishes that the defendants intermarried in 1847, and that at the end of the year, the father let the defendant into possession of the land, and they continued in possession the three following years; in July, 1850, Mr. Dixon and Mr. Coward came to a settlement, and the latter gave to the former a receipt for $300, expressed to be in full payment for the balance due from Dixon, as the former guardian of his daughter, and expressed, further, to have been paid "in rent of land," and on the same day Mr. Dixon executed a conveyance of his life-estate in the land to the two defendants, Mr. and Mrs. Coward, in consideration of natural love and affection and of one dollar. The annual value of the land at the time Coward was let into possession, is shown to be sufficient to make the rent for three years, at least equal to the balance due him in right of his wife.

A decree was made by consent for the sale of the first mentioned tract; there was a sale of it for $12,000, and an order to distribute the proceeds. The cause was brought on to be heard on the question of advancement, and adjourned to this Court.

J. W. Bryan, for the plaintiff.

No counsel appeared for the defendant in this Court.

RUFFIN, J. Under the statute of descents of 1808, only lands settled in fee simple, were advancements to be taken into account in the partition of other lands descended. But the Revised Code, chap. 38, sec. 2, which went into operation the 1st of January, 1856, which was prior to the death of the *propositus*, uses the terms "any real or personal estate," which includes every thing settled or given to a child. Those terms are very broad in themselves, but they must be taken in the most extensive sense, when it is considered that all the previous statutes are repealed, and that this act complicates realty and personalty together in this respect, by making an excessive advancement in one kind of estate, a charge on the child's share of the other kind. It seems, *a fortiori*, that it must be so in reference to the share of the things of the kind of that advanced. For every thing must partake of the one nature or the other, and it is the apparent purpose of the act to make the child account for every thing received in the division, or distribution of the estates. That may lead to serious inconveniences in several respects, and particularly, in some instances where there have been advancements in personalty, by delaying the ascertainment of the rights of the children in the realty, until administration of the personal estate is closed, and the several shares in it, ascertained. But no such obstacle is presented here, as no advancement of either kind is alleged on either side, except that to the defendants, of the father's estate, as tenant by the curtesy. As to that, the statute now in force, is express and conclusive.

The question remains, whether that is to be brought into *hotchpot*, since the conveyance was not to the daughter, but to her and her husband; and next, which interest is to be taken into the estimate, and at what time. If the point were open, there might be grave doubts whether a conveyance of land to husband and wife is an advancement to be accounted for by her in the partition of lands descended from the father. At common law, it was not so as between coparceners. That consequence attached only to the peculiar gifts in frank-marriage, and not to an express estate tail special; for although a

gift in frank-marriage, was a gift in special tail, yet it had this peculiarity, that the reversion in fee, was in the feme, and not in the donor's heirs generally, and upon a dissolution of the marriage by divorce, the estate and enjoyment was in the feme, and not in the husband, as Lord COKE says. On the the other hand, gifts in frank-marriage were to be brought into *hotchpot* at the full improved value of the land given.— Those analogies would seem to lead to different conclusions from those adopted by the courts of this State on those points; the latter of which, however, are the guides to our law. In *Jones* v. *Speight*, 2 Murph. 89, it was held that lands conveyed to the husband were not to be brought into *hotchpot* in the division between the wife and her brothers and sisters, but that lands conveyed to the husband and wife were, in respect to a moiety of them, to be brought in, upon the ground, no doubt, that the chances of the husband and wife to get the estate, as the longer liver, were equal. There is no sound ground on which this case can be distinguished from that, on this point; and *Toomer* v. *Toomer*, 2 Hay. Rep. 368; (1 Murph. 93,) decided that lands advanced are to be valued as of the time of the advancement, and such has been the uniform rule since. It follows that half the value of the father's life-estate, at the time he made the deed to the defendants, is to be taken into account against the defendant, Mrs. Coward, as an advancement, and estimated with the proceeds of the other land, in ascertaining the shares of the several heirs of the whole real estate.

It must be referred to the clerk to inquire into the value of the life-estate at that time, and upon that basis compute the shares, when the price of the sold land shall be brought into Court

PER CURIAM, Decree accordingly.

NOAH MERCER AND WIFE *and others against* MARTHA BYRD.

Although it is the practice to allow affidavits in support of the allegations of the bill to be read, on applications to dissolve a special injunction or sequestration, and it is error to refuse them, yet, where upon an appeal the affidavits refused below were read, and with their aid, no case was made for such an injunction, it was *Held* that an order below, dissolving it, should not be reversed.

To induce a court of equity to interfere with a tenant for life, in the enjoyment of his property, by an injunction or sequestration, it is necessary for the remainderman to allege and prove facts and circumstances, showing reasonable ground to apprehend that such tenant will commit a fraud and defeat the ulterior estate, by destroying the property or removing it to parts unknown.

(*Swindall* v. *Bradley*, 3 Jones' Eq. 354, cited and approved.)

APPEAL from an order of the Court of Equity of Robeson county, dissolving an injunction and sequestration, HEATH, Judge, presiding.

William Byrd, by his will, bequeathed the slaves in question, and other property, to his widow, the defendant, during her natural life or widowhood, but provided, that if she died, or married, before their youngest child came to the age of twenty-one, that the said property and the increase should be equally divided among the plaintiffs, their children.

The bill alleges, that the defendant, who was in possession of the slaves bequeathed, threatened that she would sell them to some person, who would carry them beyond the limits of the State, and had endeavored, and was then endeavoring to do so, and had repeatedly declared that the plaintiffs should never have any benefit of the said slaves.

The prayer of the bill is, that the property, in question, may be secured so as to be forthcoming on a certain day, named in the bill, when they allege they are entitled to have a division, and to take possession thereof.

The answer of Mrs. Byrd denies the allegations pointedly and without evasion; she says of Ell, one of the slaves mentioned in the pleadings, that finding her unruly, and being

unable to manage her, she had been compelled to hire her out, and that she took the advice of a lawyer whether she had a right to sell her or her interest in her, and invest the proceeds in another negro, to be held for the benefit of her children, mentioned in the will, and that being advised that she could not sell and convey the absolute title to the said slave, she refused to make a conveyance of any interest whatever.

There were four affidavits filed by the plaintiffs, two or them made by plaintiffs in the suit, reasserting some of the allegations in the bill; one other was that of one *Ivey*, who deposed that "he heard Mrs. Martha Byrd say, that they had as well let her alone, and let her sell or hire the negroes, for they were there in her way, she feeding them there, and they doing but little good or none." The fourth was that of *Riley Kinland*, who stated that "he heard Mrs. Byrd say that she intended to do as she pleased with the property, when speaking of the negroes she got from her husband's estate, let her children do what they would; that the negroes were her own and she meant to do as she pleased with them." He says that "the property is not well taken care of, and it is continually less and less valuable by reason of neglect and bad management." On the hearing of a motion to dissolve, these affidavits were excluded by his Honor, who ordered the injunction and sequestration to be dissolved, from which the plaintiffs appealed.

On the hearing in this Court, the affidavits were read.

Kelley, for the plaintiffs.
Leitch, for the defendant.

PEARSON, C. J. As this is a *special* injunction and sequestration, the plaintiffs ought to have been allowed to read affidavits in support of their bill; *Swindall* v. *Bradley*, 3 Jones' Eq. 354.

The effect of the error, however, is cured, because at the hearing in this Court, the plaintiffs were allowed to read all

the affidavits, and thus the matter was presented upon its merits.

To induce a court of equity to disturb a tenant for life in the enjoyment of the property, by having it sequestered, so as to compel security to be given for its forthcoming at the instance of the remainderman, it is necessary for him to allege and prove facts and circumstances, showing reasonable ground to apprehend that the tenant for life intends to commit a fraud, and defeat the ulterior estate by destroying the property, or removing it to parts unknown; *Swindall* v. *Bradley supra*, and the cases there cited.

The allegation of the plaintiffs is: "The defendant has threatened that she will sell the slaves to some person, who will convey them beyond the limits of this State, and has endeavored, and is now endeavoring to do so, and has repeatedly declared that your orators and oratrixes, shall never have any benefit of the said slaves." This allegation is denied by the defendant positively, and without any sort of evasion. In regard to the negro woman Ell, she says, "finding her unruly, and being unable to manage her, she has been compelled to hire her out, and took the advice of a lawyer, whether she had a right to sell the slave or her interest in her, and invest the proceeds in another negro, to be held for the benefit of her children, mentioned in the bill, and being advised that she could not sell and convey the absolute title to said slave, has refused, and still refuses, to convey any interest whatever." The affidavits read by the plaintiffs do not support their allegation.

It seems, from the averments in the bill, that the plaintiffs suppose they have a right to have slaves devided at the time, when the youngest daughter arrives at the age of twenty-one, although the defendant may then be living and unmarried. This is an entire misapprehension, and it was natural for the defendant to take offense at so unfounded a pretension on the part of her sons-in-law, evincing as it does, an *itching palm* and a *hot haste* to interfere with the slaves before her estate terminates, or their right attaches. Such conduct fur-

nishes a satisfactory explanation of the contents of the affidavits.

The decretal, order discharging the sequestration, is affirmed.

PER CURIAM, Decretal order affirmed.

MARTHA E. SIKES *against* SAMUEL A. TRUITT *and others.*

Where there is a demurrer to the whole of a bill, if it appears that the plaintiff is entitled to any relief, the demurrer must be overruled.

A defect in a guardian bond, arising from the mistake or ignorance of the clerk, will be aided in this Court, as against sureties. (*Armistead* v. *Bozman*, 1 Ired. Eq. 117, cited and approved.)

APPEAL from the Court of Equity, of Tyrrel County.

The plaintiff is an infant, and the defendant Truitt was once her guardian, and on his resignation, the defendant Sikes was appointed, and he was afterwards removed, and another appointed. The bill is against Truitt, Sikes, and the persons who were the sureties in the respective bonds of the guardians, or the representatives of such of them as are dead. It states that Truitt received a considerable estate as the plaintiff's guardian, and held money, bonds and other securities therefor: that Sikes was largely indebted to Truitt, and in failing circumstances, and that, with the view of saving his own debts, Truitt gave up the guardianship, and procured Sikes to be appointed upon an agreement between them, that Truitt might retain the effects of the plaintiff as his own, and in the place thereof, deliver over to Sikes the notes of Sikes to Truitt, founded on their private dealings; and that, accordingly, upon the appointment of Sikes, he and Truitt came to a settlement of Truitt's account as guardian, and by way of pretended discharge of the balance due the plaintiff, Truitt passed to Sikes the latter's own notes, or debts, and Sikes executed to Truitt a release or receipt in full; that Truitt was fully

informed, at the time, of the embarrassment and insolvency of Sikes, who shortly afterwards, executed a general assignment of his estate to some of his creditors, and that the sureties to the guardian bond given by Sikes, were also insufficient, and shortly became insolvent.

The bill further states that Frederick Patrick, and Ashbel Liverman, were offered and accepted by the Court as the sureties of Truitt, and executed the bond with him in the sum of $5000, and exhibits a copy of it in this form:

"Know all men by these presents, that we, Samuel A. Truitt, Frederick Patrick, and Ashbel Liverman, are held and firmly bound to the State of North Carolina, in the sum, &c., to be paid to his Excellency, the Governor, his successors, &c., to the which payment, &c.," with the usual conditions of guardian bonds.

The bill states that this bond was executed in the form it bears, by reason that the clerk of the County Court used forms which had been printed while guardian bonds were payable to the Governor, and, after the act passed, which requires them to be made payable to the State, the clerk usually struck out the name of the Governor, and inserted the State; and that through ignorance, inadvertence, or mistake of the clerk, that was omitted in this instance, but that it was the purpose of the Court to require a bond according to the law, and the intention of the obligors to give, and their belief that they were giving a proper and sufficient guardian bond, and that all the parties were mistaken with respect to the form of the bond that was executed.

The prayer of the bill is for an account of the plaintiff's estate which came, or ought to have come, to the hands of the several guardians, and that Truitt may be held liable to the plaintiff, notwithstanding any such colorable or fraudulent settlement between him and Sikes, or any release or acquittance founded thereon, and that the bond given by Truitt, Patrick, and Liverman, may be set up and enforced in the Court, and that the several sureties on the bonds of the guardians may be held

liable to the plaintiff for the defaults of their respective principals, and for general relief.

The defendants put in a joint demurrer, which was over-ruled, and they appealed to this Court.

Winston, Jr., for the plaintiff.
Hines and *E. W. Jones*, for the defendants.

RUFFIN, J. The demurrer is to the whole bill, and consequently it must be over-ruled, if the plaintiff is entitled to any relief. It is clear that she is. Against Sikes, it is the common bill of a ward, calling a guardian to account. It is the same with respect to Truitt, with the addition that it supposes him to rely on a discharge founded on a settlement between him and Sikes as the subsequent guardian, and impeaches that settlement and discharge, upon the ground, that Sikes was insolvent, and that payment was made to him in his own debts, which he owed to Truitt on their private dealings, upon an arrangement between them, with a view to save Truitt from loss, and throw it on the plaintiff. The bad faith of such a transaction, would certainly leave Truitt still liable for the debt he owed his ward. Each of these is a sufficient ground to sustain the bill against those defendants. The bill states as another ground for relief: a supposed legal defect in the first guardian bond, and it was against that position alone, the argument for the defendant was directed. For the reasons already given, that point need not be considered, since the demurrer is necessarily over-ruled, as being too broad. But the Court thinks it would be improper to leave it in doubt; for, however the law was, before the case of *Armistead* v. *Bozman*, 1 Ired. Eq. 117, the principle was there settled that a defect in a guardian bond, arising from the mistake, or ignorance of the clerk, will be aided in this Court, as against the sureties. However much opinions may have differed at the time, on that position, and I own I was among those who were not satisfied with it, the certainty of the law, as depending

upon judicial decisions, is of too much importance to allow its authority to be questioned at this day.

There is no error in the decretal order of the Court of Equity, and it must stand.

PER CURIAM, Order below affirmed.

HENRIETTA SWAIN *and others against* WM. A. SPRUILL, *Executor.*

Where one gave, by will, to his wife for life, all his land and plantations, with the stock of every kind upon them, with slaves and a white family to be supported, and added, that all the rest of my chattel-property, of every description, after taking out the chattel-property left out to A, was to go to her, it was *Held* that there was a strong implication that he intended to include the crops and provisions on hand, at his death, as a gift to his wife.

Where a testator expressly gives, specifically, for life, with a limitation over, things which *ipso usu consumuntur*, the Court has no power to control the disposition of the testator, by denying that use to the first taker, which has been bestowed by the will, although it may impair the value, or extinguish the thing itself, to the loss of the ulterior taker.

CAUSE removed from the Court of Equity of Washington.

Dempsey Spruill died in 1842, having made his will on 11th day of October, 1840, and a codicil on the 4th of May, 1842. By the will, he gave to his son Dunning, two negroes, then in the possession of his son, and a small sum of money, "in full of my estate as to his part, to him and his heirs." The will, then, has the following clauses: "I lend to my wife, Mary, the house and plantation where I live, together with all the lands I own, (consisting of several designated parcels,) together with all my working tools, horses, mules, cattle, hogs, sheep, and house-hold and kitchen furniture, of every description, during her life. I lend to my wife, Mary, all my negroes, to her disposal, also, those negroes that are lent out to my children, to her disposal, to take or let them keep them, to be at disposal her life-time, or she has a right to lend any

one of the children as she may think proper, or to take them away at her pleasure. I further give to my wife, all my money and notes that are in the house, to the use of my wife, Mary; also, my constable's receipts to her use. Now, my will is, that all my negroes, at the death of my wife, shall come in together, of every description, to be equally divided among my lawful heirs, except my son Dunning. I give to my daughter, Anne Caroline, one bed and furniture, the first choice, and two cows and calves, also two ewes and lambs, and one hundred and fifty dollars in money, to her, and her heirs forever. I give to my daughter, Henrietta Dunston, forever, all of her own property, now in my possession, and also, three cows and calves, of the stock that will be in possession of my wife at her death, and three ewes and lambs. Now, my will is, that all of my household and kitchen furniture, horses, cattle, sheep, and all the rest of my chattel property, of every description, after taking out the chattel property I have given away to my two daughters, Anne Caroline and Henrietta Dunston, be equally divided between my lawful heirs after the death of my wife, excepting my son Dunning, who is not to come in as an heir, as I have given to him his legacy before." The will, then, contains numerous devises to the testator's children, and the children of his deceased children—all to take effect after the death of his wife. By the codicil, he again declares, that all the gifts, in his will, to his children and grand-children, are to be considered subject to the life-estate of his wife, except that of $150 to his daughter, Anne Caroline, and that is to be paid to her without interest, at the discretion of her mother, and is to be over and above her share of his estate, on the division, directed by his will. The testator appointed his wife and his son, William A. Spruill, executors, and they proved the will and took out letters testamentary in May, 1842.

Mrs. Spruill took all the estate into her possession, and paid all the testator's debts, and, with the assent of Wm. A. Spruill, she had the use of all the personal property, as legatee, during her life. She died in January, 1858, having made a will, and

appointed her son, William A. Spruill, her executor also. After her death, the son, William A., took possession of all the personal estates belonging to each of his parents. The testator's slaves were divided, and all the stocks of every kind, and the furniture and other things, which had belonged to his father, and remained specifically at the death of his mother, were sold by him for the purpose of division, according to his father's will.

In September, 1858, the bill was filed by the testator's surviving children and grand-children, mentioned in the will, and the personal representatives of those who had, in the mean time died, against William A. Spruill, as the surviving executor of his father and the executor of his mother. It states that, besides the slaves, the personal estate, which came to the hands of Mrs. Spruill, consisted of a large stock of horses, mules, cattle, sheep and hogs, a considerable quanti y of corn, cotton, pork, bacon, wheat, peas, and other provisions on hand, a large and valuable collection of farming, plantation, black-smith's, and other tools and utensils, a large number of beds, tables, chairs, crockery and other articles of household and kitchen furniture; a large amount of money, bonds, accounts and other choses in action; all taken together, to the value of $4000. The bill then alleges, that the plaintiffs are advised, that it was the duty of the executors of Dempsey Spruill, to sell all the personal estate, except the slaves, and have the money secured at interest for the benefit of Mrs. S. for her life, and the capital left for the plaintiffs, who are entitled in remainder, or at least, that it was her duty to preserve all the articles given to her for life, so that they might come specifically to the remaindermen, and also to supply others in the place of those that were consumed, or were worn out, or died; but that instead of so doing, she reduced the quantity, quality and value thereof, all the time, while she augmented her own estate in proportion.

The bill further alleges, that after the death of Mrs. Spruill the defendant took the slaves into possession and worked them on his own farm. The prayer is for an account, and that the

defendant and the estate of his mother, may be held chargeable for the money and debts left by the testator, and for the crops, and provisions left by him, and also for the full value of the original stocks of cattle, horses, mules, hogs and sheep, the household and kitchen furniture, and all the tools and other utensils before mentioned.

The answer states, that Mrs. Spruill took possession of all the chattel property of the testator, and used it according to the ordinary course of husbandry and house-keeping. But it denies that she wasted any part of it, and avers that the only loss it sustained was that incident to the ordinary use of such articles, or from natural decay during her life. It further states that some of the negroes were kept for a short time on the plantation to take care of the property until it could be sold, after the death of Mrs. S., and some of them worked on the defendant's plantation for about ten days; that they were then hired out (because some of the owners were infants) until an order of court could be obtained for a division, which was soon made; that during the same period some of the plaintiffs retained slaves, which had been put into their possession by their mother. And the defendant submits that an account shall be taken of the services of the slaves, after his mother's death, the several parties being willing to be charged reasonably for such as he had.

The cause was removed, by consent, to be heard in this Court on the pleadings and the will; and on the hearing, the parties asked for a construction of the will in the first instance, before sending it to the master for an account.

Winston, Jr., for the plaintiffs.
Henry A. Gilliam, for the defendant.

RUFFIN, J. The money and debts due to the testator, are given to his wife absolutely; and the plaintiffs have no interest therein. As to them, then, the bill must be dismissed.

There is no express gift in the will, of the provisions or crops on hand, *eo nomine*. But they are otherwise sufficient-

ly given specifically. Such a gift might certainly be expected to accompany the universal devise of all the land and plantations, with the stocks of every kind on them, and the slaves, as needful, if not indispensable to keeping house and carrying on the plantations and supporting the slaves. But other parts of the will leave no doubt on that point. After giving the stocks, working tools, furniture, &c., to his wife for life, and legacies to two of his daughters, the testator adds emphatically, "now, my will is, that all my household and kitchen furniture, horses, cattle, sheep, *and all the rest of my chattel-property of every description*, after taking out the chattel-property I have given to my two daughters, A. C. and H. D., shall be equally divided between my lawful heirs after the death of my wife," which would, under the circumstances, raise a strong implication of a gift of all the chattel-property, as he calls it, to the wife for life. If, however, that were not sufficient, every thing that is wanting is supplied in the codicil, which declares that all the gifts in the will, to the children, are to be subject to a life-estate in his wife. The crops and provisions, therefore, stand as gifts to the wife for life, like the stocks and furniture, and tools.

The gifts are all specific, and the question is, what interest the tenant for life and the remaindermen take in the things. It is perfectly clear that, here, the testator expected and intended that his wife, with a large family of children, and some slaves, should enjoy the things themselves. But we do not take that to be conclusive as to the rule of law, founded on the terms of the gifts in his will, excepting only, that there is generally, in such dispositions, something in the will, or the circumstances of the family, to denote that to be the pervading intention and expectation of testators, thus giving a clew to the proper construction. We think, however, after some reflection, that where a testator expressly gives, specifically, for life, with a limitation over, things which *ipso usu consumuntur*, the Court has no power to control the disposition of the testator by denying that use to the first taker, which has been bestowed by the will, although it may impair the value,

or extinguish the existence of the thing itself, to the loss of the ulterior taker. It must be taken that the testator had considered the chances of benefit to those in remainder, after the prior benefit bestowed by him on the first taker, and that he only meant to limit over those chances. It seems to be entirely unwarrantable to sell the things in the first instance, giving the interest to the tenant for life, and securing the capital for those to take afterwards, as is the rule when such things are given in a residuary clause; for that would amount to this, that neither the first nor the last taker should have them as given; that is, specifically. No other rule, therefore, can be devised, but that the tenant for life is entitled to the possession and enjoyment of the things according to the ordinary use of them in the country. It is admitted that this gives the advantage to the tenant for life, as she may thus get the whole and the remaindermen nothing. But that results from the will of the owner, and there is no power to restrain him in that respect. Indeed, it is generally apparent, that the chief benefit is meant for the first taker, who is commonly the widow, for whose comfort and the maintenance of the family, such provisions are usually made. If the tenant for life, instead of using the things, and thereby consuming them, wantonly destroy them or sell them, undoubtedly, she would be responsible for the value of them, or the price, but not otherwise. Nothing of that kind exists here, but the only question is, whether her estate is liable for the value of those things, which did not remain specifically at her death, but were consumed in the enjoyment of them. For such as were consumed the Court holds that she is no more responsible, than she would be for the impaired value, by age or decay, of those which were on hand at her death. The remaindermen must take all together in the state in which she left them without her fault. It follows that she is not bound to replace, with others, such as died, or were worn out. With respect to the profits of the slaves, between the death of Mrs. Spruill, and the division, the parties are liable to account, whether received by them respectively in the form of hire or labor.

These declarations will probably enable the parties to settle without sending the case before the master, which we suppose to have been the purpose of bringing on the case in its present form. The defendant will be entitled to his costs, and may retain them out of the fund in his hands, if sufficient.

PER CURIAM, Decree accordingly.

CHARLES MANLY AND R. M. SAUNDERS *against* THE CITY OF RALEIGH.

The General Assembly has power to extend the limits of an incorporated town without the consent, and against the wishes of the citizens who live on, or own land comprising the part to be annexed.

It is within the constitutional power of the Legislature to provide that an act, extending the limits of a town, shall depend for its validity on the acceptance of the Mayor and Commissioners of such town.

CAUSE removed from the Court of Equity of Wake County.

By an ordinance of a Convention of the people of North Carolina, dated 21st of July, 1788, and an act of the General Assembly, dated 30th of September, 1792, the seat of Government was permanently established on a tract of land adjoining the tract whereon Joel Lane lived, at Wake County Court House, and four hundred acres of land embraced in that tract, was laid off and erected into a city, named the "city of Raleigh." By an act of the General Assembly dated 7th of February, 1795, said city was constituted a municipal corporation by the name of the "Commissioners of the city of Raleigh," and the corporate powers and authorities thereof were vested by the said act, and others passed in amendment thereof, in an "Intendant or Mayor and seven Commissioners," to be elected annually by the resident citizens, who were empowered to lay taxes and collect the same by distress or sale of property, and to do many other official

acts therein prescribed, and up to the 3rd of February, 1857, the said corporation existed within the limit of said tract of 400 acres, and exercised its rights, powers and authority by and through the officers aforesaid. On that day, 3rd February, 1857, an act was passed and duly ratified, entitled "an act to revise and consolidate the charter of the city of Raleigh;" in the 86th section of which is enacted that "the present corporate limits of the city of Raleigh shall be extended one quarter of a mile in all directions around the said city, North, South, East and West; and that the boundary line shall run parallel with the old boundary, until the lines shall intersect at each corner." The act then proceeds to divide the newly added territory among the three wards of the city, and to provide for the election of nine commissions instead of seven.—It also changes the name of the presiding officer from Intendant to Mayor, and the title of the corporation to "The city of Raleigh."

The 79th section of the same act provides "that this act shall be accepted within one month from and after the ratification thereof, else it shall be of no effect," and then provides that the acceptance shall be made by the then existing commissioners, recorded in their minutes, signed by the commissioners, and proclaimed by the mayor through two news-papers. The ratification and acceptance were duly made by the seven commissioners, then in office, and proclaimed by the mayor.

The plaintiffs, in their bill, complain that they are, with many others, owners of the territory proposed to be added; that they, and those under whom they hold, had long enjoyed these tracts, without any apprehension that they should be brought within the corporate limits of Raleigh against their will, and they deny the authority of the Legislature to pass an act to compel them to submit to the burdens which had accumulated in the shape of a debt, and to the onerous taxes incident to the corporate government—they deny also its constitutional power to pass any act to amend the charter of Raleigh, without submitting it to the vote of the citizens for

acceptance; and further, they insist that the Legislature could not constitutionally pass a law, which was to be dependent, for its efficacy, on the will of other persons. The prayer is for an injunction against the municipal corporation of Raleigh, to enjoin them from proceeding to levy town taxes on them and others similarly situated, and otherwise to abstain from enforcing the said act of assembly.

The several acts of incorporation of the city of Raleigh, and the proceedings of the board of commissioners accepting the amendment to the charter, are filed as exhibits.

The answer of the defendant goes into the justice and reasonbleness of the law, and insists upon its validity. The cause was set down for hearing on the bill, answer and exhibits, and sent to this Court.

Graham, for the plaintiffs.
B. F. Moore, for the defendant.

PEARSON, C. J. 1. Has the General Assembly power to extend the limits of an incorporated town, without the consent, and against the wish of the citizens who live on, or own the land comprising the part to be annexed?

"All legislative power is vested in the General Assembly." The Constitution of the United States, the Declaration of rights, and the Constitution of the State, impose the only restrictions to which this otherwise unlimited power is subject; frequency of elections being relied on to prevent its abuse, or mitigate the effect of abuse, by the repeal of an unwise enactment.

Counties and towns are instruments used for the good government and management of the whole State. To establish a county, or incorporate a town, is a legislative act, consequently, the General Assembly may exercise this power, whenever, and in such manner, as in in its opinion, the public good will be thereby promoted; unless the time, manner, or other circumstance of the act violates some provision of the Constitution.

Counties and towns are usually made upon the petition of

the citizens, especially interested, or a majority of them; but there is no ground to support the position, that the consent of this particular portion of the community, is a circumstance necessary to give validity to the exercise of the power of the General Assembly. Ours would be a strange sort of government, if the Legislature could not make a new county without the consent of the people there residing being first had and obtained, or if, when in the opinion of the Legislature, the population of a particular locality has become so dense that it cannot be well-governed by the ordinary county regulations, and requires the special "rules and by-laws" of an incorporated town, to secure its good order and management, such locality cannot be incorporated into a town, or annexed to one already incorporated, without the consent of the inhabitants; and by a logical deduction, without the consent of every single individual. For, there being no social connection, each person must answer for himself, and is not bound by the acts of the others; so that the objection of *one man*, takes from the Legislature the power of doing what is necessary to promote the general welfare, unless he is specially excepted, and thus allowed to enjoy the benefits, without being subjected to the burthens of the incorporation.

The position assumes that such legislative acts involve a *contract* between the General Assembly on the one part, and the citizen, or citizens of the locality on the other part. Herein lies the fallacy. There is no contract in respect to it. This is settled by *Mills* v. *Williams*, 11 Ired. 558, where it is decided that the General Assembly has power to abolish a county, although a majority of the inhabitants are opposed to the passage of the repealing act. The subject is there fully discussed. An extract will serve our turn:

"The purpose, in making all corporations, is the accomplishment of some *public good*." Some corporations are created by the *mere will* of the Legislature, there being no other party interested or concerned. To this body, a portion of the power of the Legislature is delegated, to be exereised for the

public good, and subject at all times to be modified, changed or annulled.

"Other corporations are the result of contract. The Legislature is not the only party interested; for, although it has a public purpose to accomplish, it chooses to do it by the instrumentality of a *second party*. These two parties make a *contract*. The Legislature, for and in consideration of certain labor and outlay of money, confers on the party of the second part, the privilege of being a corporation, with certain powers and capacities. The expectation of benefit to the public, is the moving consideration on one side; that of expected remuneration for the outlay, is the consideration on the other. It is *a contract*, and therefore, cannot be modified, changed or annulled, without the consent of both parties. So, corporations are either such as are independent of all contract, or such as are the fruit and direct result of a contract.

"The division of the State into counties, is an instance of the former. There is no contract—no *second party*, but the sovereign, for the better government and management of the whole, chooses to make the division, in the same way that a farmer divides his plantation off into fields, and makes cross fences, when he chooses. The sovereign has the same right to change the limits of counties and make them smaller or larger, by putting two into one, or one into two, as the farmer has, to change his fields; because it is an affair of his own, and there is no second party having a direct interest." So, the incorporation of towns is an instance of the former. There is no contract—no *second party*, and the General Assembly has power to incorporate a town, or to extend, or contract the limits of one already incorporated, whenever in its opinion, public policy requires it to be done. It is a legislative act, in which no *second party* has a *direct* interest.

2. Is the act void because of the provision, that it shall be of no effect unless accepted by the Mayor and Commissioners within one month after the ratification thereof? It is insisted by the plaintiffs that by the true meaning and spirit of the Constitution, the Legislature is required to pass all statutes

upon its own responsibility, and its own judgment as to the expediency; that it has no power to delegate its authority, or make a statute depend upon the opinion or wishes, of any man, or set of men, and that, in this instance, the interest of the persons without whose acceptance the act is not to take effect, is opposed to that of the plaintiffs; so that they are put at the mercy of persons interested against them, and are aggrieved in their rights and estates by a statute, in respect to the expediency of which, and its necessity for the public good, there has been no absolute and unconditional expression of opinion by the law-making power, as is required by the Constitution. This position receives some countenance from a doctrine of the late Chief Justice NASH, in *Hill* v. *Bonner*, Busb. 257. That was a proceeding under the act to divide the county of Surry, which was made to depend upon a vote of the people. At a subsequent session, an act was passed confirming the first act, so the point was not presented; but the learned Judge intimates an opinion, that the original act was unconstitutional, and protests against that mode of legislation, "because it alters the fundamental principles of the government, by converting it from a *representative* republican government, into a pure democracy." And it is supported by *Busto* v. *Himrod*, 4 Selden, 483. The action involved the constitutionality of an act of the Legislature of New York, (1849,) "to establish free schools throughout the State," which was made to depend on a vote of the people of the State. At a subsequent session, (1851,) it was re-enacted in the usual mode, which greatly diminished the practical importance of the question; it was, however, elaborately discussed, and the Court decided that the first act was unconstitutional. The argument upon that side of the question is strongly stated in the opinions delivered by two members of the Court. RUGGLES, C. J. says: "It is not denied that a valid statute may be passed, to take effect upon the happening of some future event, certain or uncertain. The event, or change of circumstances, on which a law may be made to take effect, must be such, as, in the judgment of the Legislature, affects the question of the expe-

diency of the law—an event on which the expediency of the law, in the judgment of the law-makers depends. On this question of expediency, the Legislature must exercise its own judgment definitively and finally. When a law is made to take effect upon the happening of such an event, the Legislature, in effect declares the law inexpedient, if the event should not happen; but expedient if it should happen. They appeal to no other man, or men, to judge for them in relation to its present or future expediency. But in the present case, no such event or change of circumstances, affecting the expediency of the law was expected to happen. The wisdom or expediency of the free school act, abstractly considered, did not depend on the vote of the people. The Legislature has no power to make a statute dependent on such a contingency, because it would be confiding to others that legislative discretion which they are bound to exercise themselves, and which they cannot delegate. They are no more authorised to refer such a question to the whole people, than to an individual. The people are sovereign, but this sovereignty must be exercised in the mode which they have pointed out in the Constitution."—WILLARD, J. says: "If this mode of legislation is permitted, and becomes general, it will soon bring to a close the whole system of representative government, which has been so justly our pride. The Legislature will become an irresponsible cabal, too timid to assume the responsibility of law-makers, and with just wisdom enough to devise subtle schemes of imposture to mislead the people."

This decision, and the reasoning offered in support of it, fail to satisfy us that the Legislature has *not the power* to pass a law dependent upon a vote of the people, or the acceptance of a corporation. It is certain the Legislature has power to pass a law to ascertain these facts, and may, afterwards, make a law in conformity thereto; so, in its practical result, it makes no difference which act precedes the other. In the instance of the division of the county of Surry, and also, that of the free schools in New York, subsequent acts were passed confirming the first, and in regard to the latter, no question as to the pow-

er of the Legislature could be raised. It is not denied that a valid statute may be passed to take effect upon the happening of an uncertain future event, upon which the Legislature, in effect, declares the expediency of the law depends, and when it is provided that a law shall not take effect, unless a majority of the people vote for it, or it is accepted by a corporation, the provision is, in effect, a declaration that in the opinion of the Legislature, the law is not expedient, unless it be so voted for, or accepted. It seems to us, the Court in New York, fell into error by not discriminating between a *want* of power and an *abuse* of power. All legislative power is vested in the General Assembly, restricted only by the Constitution. There is no prohibition in the Constitution against this mode of legislation, consequently, although it may be an abuse of power, greatly to be deprecated, as tending to subvert the principles of our representative form of government, still the power has been granted, and it is not the province of one branch of the government to correct the supposed abuses of another. The Judiciary can only interfere when the Legislature acts without power, i. e. in violation of the Constitution. In respect to the delegation of its power, supposed to be involved in an act of the General Assembly, making a law depend upon a vote of the people, or the acceptance of a corporation, or the action of the justices of the peace, or any other set of men, *Thompson* v *Floyd*, 2 Jones', 313, is a direct authority in support of our conclusion. It is there decided that a statute giving the justices of a county power to abolish jury trials in the county courts, if at any time thereafter, a majority of the justices may deem it expedient, is not a violation of the Constitution. The subject is there fully discussed, and such delegation of power is shewn to have been of frequent occurrence, ever since the organization of the government.

It will be declared to be the opinion of the Court, that the plaintiff's have no equity, and the bill will be dismissed with costs.

PER CURIAM, Decree accordingly.

HENRY B. WILLIAMS *against* JAMES A. SADLER.

It is the ordinary course of the Court of Equity to restrain the *execution*, but allow the plaintiff to proceed to a judgment at law; and it is only upon an averment in the bill, that the plaintiff in Equity believes the answer will afford discovery material to his defense at law, that an injunction to *stay the trial*, ought to be granted.

A party cannot, while pressing his rights in a court of law, and resisting his adversary's legal rights before that tribunal, carry the matter into a court of equity, upon the ground, that the matters are too complicated for a court law, and thus have the matters before both tribunals at once.

APPEAL from an interlocutory order of the Court of Equity of Mecklenburg county, continuing an injunction to the hearing, made by BAILEY, J., at the last Spring Term.

The case is sufficiently set out in the opinion of the Court.

Guion, for the plaintiff.
Boyden and *Osborne*, for the defendant.

PEARSON, C. J. In March, 1853, the parties enter into a covenant; Sadler to convey to Williams a lot in the town of Charlotte, at the price of $3250; Williams to erect a hotel on the lot; Sadler to rent the hotel for five years, at ten per cent per annum on the cost. At the expiration of the second year, the lease was surrendered, and Sadler sold the furniture to Williams at the price of $2300. The parties differing as to the amount of the rent, agree to leave that matter to arbitration, and by an award, it is fixed at $2336,86, for the two years. Sadler brings an action for the price of the furniture, and judgment is rendered for $1447,10 balance, after deducting set-offs; he is also prosecuting an action for the price of the lot. Williams, on his part, is prosecuting an action at law, against Sadler for the amount of the rent, which he alleges is about $5000. In bar of this suit, Sadler relies on the award. Thereupon, Williams files this bill, the object of which is to bring the whole matter into a court of equity, on the ground, that it is so complicated, that a court of common law cannot do complete justice, and

on the further allegation, that the plaintiff is entitled to many equitable set-offs, which were not allowed in the action for the price of the furniture; that the award is void, because the plaintiff had no notice, and that Sadler is insolvent. The prayer is for an account of all the several matters, and for a conveyance of the lot; and as ancillary to the relief sought, the plaintiff asks for an injunction against an execution on the judgment, that the proceedings in the action for the price of the lot be stayed, and that Sadler be restrained from relying on the award, as a bar to the plaintiff's action for the rent.

The answer avers that on the trial of the action for the price of the furniture, Williams was allowed all of the set-offs which he claims, as well equitable as legal; that the defendant tendered a deed for the lot, which he is still willing to deliver; that the plaintiff had due notice of the time of making the award, and handed to the arbitrators his estimates of the costs of the hotel, which were duly considered by them in connection with a like statement handed in by the defendant; that the balance, $1447 10, the price of the furniture fixed by the judgment is justly due, and also, a large balance on the price of the lot, after deducting the amount of the award; so the plaintiff is indebted to the defendant; and, he further denies the allegation of his insolvency, and avers that he owns another lot of the value of $1000.

A motion to dissolve the injunction that had issued, according to the prayer of the bill was, *pro forma*, refused, and the injunction continued over until the hearing, from which order the defendant appealed.

There is error. The decretal order must be reversed, and the injunction dissolved.

In respect to the execution of the judgment at law: The equity growing out of the alleged right to set-offs, is fully denied, and without any evasion, the defendant swears, that all of the equitable set-offs which are specified in the bill, were allowed on the trial at law, and the award of the plaintiff's claim, thereby reduced from $2300, the price of the furniture, to $1447 10.

In respect to the action, for the price of the lot, the injunction staying the trial at law, was improvidently granted. It is the ordinary course to restrain the *execution*, but allow the plaintiff to proceed to judgment at law; and it is only upon an averment in the bill, that the plaintiff in equity, believes the answer will afford discovery material to his defense at law, that an injunction *to stay the trial*, ought to be granted; Adams' Eq. 195. In this case the plaintiff was bound by his covenant to give a note for the price of the lot; which he has failed to do; and now seeks to prevent the defendant from getting a judgment at law. As a preliminary to coming into this Court, it was necessary for him to confess judgment for the price of the lot. The defendant had at least a right to go that far. In respect to the award, according to the plaintiff's own showing it was void, and did not stand in the way of his action for the rent; so he has adequate relief at law; and if he did not wish to proceed with his action, and encounter the award in a court of law, all he had to do, was to take a nonsuit and file a bill. In short, this proceeding on the part of the plaintiff was misconceived. If the several matters had been so complicated, that a court of common law could not do complete justice, and the plaintiff desired to have an account, taken under the direction of this Court, and to have a title for the lot, he ought, in order to get a footing here, to have confessed a judgment for the price of the lot, so as to put an end to that action, and to have stopped his own action by a nonsuit, and then, being out of that court, he could have come into this, to get title and for an adjustment of the whole matter, and by way of being rid of the award, he could set out the matter of impeachment, which if sustained, would leave the question as to the cost of the building, &c., open for adjustment by a reference. But he is not at liberty, according to the course of this Court, to have two actions pending at law, and produce a multiplicity of suits, by coming into this Court in respect to the same matters of controversy.

This opinion will be certified.

PER CURIAM, Decree accordingly.

MILES A. H. McKEIL *against* CATHARINE CUTLAR'S *Administrator* AND ANOTHER.

Where the owner of a life interest in a slave, found it expedient to sell him, that he might escape the consequences of a capital charge, by being carried out of the State, it was *Held* that the owner of the remainder was entitled to a share of the money received.

A mere agent, who assisted the owner of a life interest in a slave, in selling him, that he might be run off to avoid a criminal charge, and who received no part of the price for which he was sold, was *Held* not to be liable to the remainderman.

CAUSE removed from the Court of Equity of Beaufort.

Catharine Cutlar, under the will of her husband, John Cutlar, was the owner, for her life, of a slave, by the name of Caswell, with a remainder over to one Bryan Cutlar, and for several years she was in the enjoyment of the use and benefit of the said slave. In 1851, a charge of homicide was preferred against the slave, and either at the instance of the said Catharine, or of the slave's own motion, or both, he eluded a caption and was secreted. While thus concealed, she employed the defendant, Caleb Cutlar, to assist her in selling him, so that he might not fall into the hands of the law. The said Caleb, at the request of Mrs. Cutlar, secured the services of one Henry Hodges, who effected a sale of the negro to one Hill, a trader, at the price of $500, and she took the money. The sale was of the entire property in the slave, and the purpose and understanding of the parties was, that Caswell should be carried beyond the limits of the State, secretly, in order to avoid the risk of a prosecution. The suit is carried on by the plaintiff, as administrator of Bryan Cutlar, against N. W. North, the administrator of Catharine Cutlar, who died after the first bill was filed, and against Caleb Cutlar, for the proportional share of Bryan Cutlar in the $500, which was received by Mrs. Cutlar; and it is sought to subject the defendant, Caleb Cutlar, for aiding and assisting the other defendant in selling and removing the slave. The defendants answered and depositions were taken, from which this state

of facts is made out. The cause being set down for hearing, was sent to this Court.

Donnell and *Warren*, for the plaintiff.
No counsel appeared for the defendants in this Court.

PEARSON, C. J. We are satisfied that Catharine Cutlar sold the slave "out and out," with the intention that he should be run off, and taken to parts unknown; and that she received $500, as the price. Having only a life-estate, it was against conscience for her to sell the absolute interest, except upon the footing, that as the charge of a criminal offence, which was made against the slave, rendered it expedient for the remainderman, as well as for herself, to sell him, she would do so, and hold the price for their mutual benefit, in the place of the slave. This is a clear equity, which the plaintiff has a right to enforce, against the personal representative of Mrs. Cutlar, to the extent of the assets; as to which there will be a reference. If the assets are sufficient, the plaintiff will take a decree for the $500, with interest from the death of Mrs. Cutlar, she being entitled to the interest during her life, in lieu of her life-estate; *Cheshire* v. *Cheshire*, 2 Ire. Eq. 573; *Haughton* v. *Benbury*, 2 Jones' Eq. 337. The defendant, Caleb Cutlar, acted merely as the agent of Mrs. Cutlar in effecting the sale, and did not receive any part of the price. We see no ground, on which the plaintiff can raise an equity against him; for this Court does not act, on the idea of giving damages for a *tort*, but on that of making compensation, by requiring a party to hold a fund, which he has acquired against conscience, in trust for the party, whose property was used for the purpose of acquiring it—a *substitution* of the one for the other. This defendant may have subjected himself to an indictment as accessory after the fact, and to a special action on the case; but the bill must be dismissed as to him.

PER CURIAM, Decree accordingly.

E. R. STANLY *against* S. S. BIDDLE.

A prior entry of vacant land, not acted on, but abandoned, (under a misapprehension of its efficacy) although known to a subsequent enterer, who complies with the law and gets a grant from the State, can, in no degree, help out a still later entry and grant; for such abandoned entry becomes null and void after the time prescribed for its effectuation has expired.

There is no policy of the State which requires that an entry shall have lapsed before another can be made.

CAUSE removed from the Court of Equity of Craven county.

On the pleadings, it appears that on the 31st of May, 1855, the plaintiff made an entry, in Craven county, of 1000 acres of land, situated on the south side of Neuse River, and on both sides of the line of the Atlantic and North Carolina railroad, between the lands of Samuel S. Biddle and George West; that he then took out a warrant and soon after had the survey made, and that it was duly returned into the office of the Secretary of State, and on the 15th of December, 1856, he paid into the treasury the purchase-money of 1000 acres, and on the 24th of December, 1856, a grant was issued to him. On the 26th of October, 1855, the defendant made two entries of 1000 acres each, which covered the land entered by the plaintiff, or a part of it, and had surveys immediately made and returned, ascertaining the quantity of one tract to be 698 acres, and of the other 675 acres, and on the 30th of November, 1855, he paid the purchase-money into the treasury and got grants. At the time of the defendant's surveys and entries, he knew of the previous entry of the plaintiff, and the survey made under it, and although he was not informed of the particular lines of the plaintiff's survey, he was aware that his own entries covered a considerable part of the land included in the plaintiff's survey. Upon this state of facts, the bill (which was filed in April, 1857,) prays that the entry of the plaintiff may be declared the preferable one, and the defendant held to be a trustee for him, and decreed to convey to him accordingly.

The answer, however, states the further facts, that the de-

fendant owning a plantation, which the vacant land adjoined, was desirous of acquiring the title to it, and that on the 28th of October, 1854, he made three entries for 640 acres each, which would include the land granted to the plaintiff, and took out warrants thereon, and presented them to one Marshall, the county surveyor, with the request that he would make the surveys without delay; that Marshall professing to have engagements, which put it out of his power to make the surveys shortly, authorised one Heath to make them, and engaged to sign the plats when brought to him; that Heath accordingly made them, but when presented to Marshall he declined signing them, upon the ground, that they included more than 640 acres each by his computation, (though in that he was mistaken) and he advised the defendant to make new entries of one thousand acres, and promised to make Heath's surveys fit them—expressing the opinion, that he would still thereby have a preference over the plaintiff's entry, which had then been made; and that under that advice and direction, the defendant abandoned his first entries, and made his subsequent entries, and got his grants thereon; and that the plaintiff, at the time he made his entry, was fully informed of those previous entries and surveys of the defendant. The answer then insists on the benefit of the defendant's first entries in support of the legal title derived through his grants.

Green for the plaintiff.
Haughton, *Donnell* and *J. W. Bryan*, for the defendant.

RUFFIN, J. The Court does not find it necessary to advert to the testimony taken by the parties, since it does not vary the case admitted in the answer, and upon that and the exhibits, the plaintiff is entitled to a decree.

As between the entries on which the grants emanated, there is no doubt that of the plaintiff's is to be preferred. It is prior in time, and by the subsequent payment of the purchase-money, in due time, it gave the plaintiff a complete equity, against the State, and also against those claiming under her

by subsequent entry---at all events, if they have notice of the prior entry before they pay their money and get a grant; which is this case; *Plemmons* v. *Fore*, 2 Ire. Eq. 312. If, therefore, the defendant had made no entry before that on which his grant issued, it would be a clear case for the relief the plaintiff seeks. And the Court is of opinion, that the defendant's previous entries can have no effect, as they were not acted on, but abandoned, and had lapsed before the bill filed. If any agency of the plaintiff's, in the causes or inducements to the defendant to suffer them to lapse, could affect the question, this case is clear of it, as there is no proof or allegation, of any such agency, but only that the plaintiff knew of the existence of those entries, when he made his own. But that is immaterial, because, in the first place, the answer admits, that the defendant had abandoned them, and that for reasons not affecting the plaintiff, and, in the next place, because, whether he had then abandoned them or not, he subsequently allowed them to lapse, whereby they became null and void. The law does not forbid a person from entering land previously entered by another. For it is the object of the law to effect sales of the public domain, and, therefore, entries may be made *ad libitum*, subject, of course, to the engagement of the State to make a grant to the first enterer, provided he pays the price before, or at, the day limited by law. But no policy of the State, requires that an entry shall have lapsed before another person can enter the same land; but quite the contrary; Rev. Stat. chap. 42, sec. 11; and the subsequent enterer is entitled to a grant, if the first enterer fail to pay his money within the time limited. The entry of the plaintiff was, therefore, liable to be defeated, or lost by the prior entries of the defendant, if the latter should go on to perfect his title under them; but, on the other hand, the plaintiff's entry gave him a right to get a grant, if he took the proper steps to get one, in case the defendant failed to entitle himself to a grant upon his previous entries. Notice, then, to the plaintiff of such prior entries, raises no equity against him, since he also knew, that such entry would be

effectual or not, as it might, or might not, be acted on in due time. He made his entry at that risk; and having run the risk, there is no ground on which the defendant can deprive him of the advantage derived from the defendant's default in not perfecting his title on those entries. It is somewhat surprising, that, after the controversy arose between the last entries of the defendant and that of the plaintiff, the former had not proceeded on his first entries by new surveys on his warrants and the payment of the purchase-money, as he had the right to do up to the 31st December, 1856, and thereby defeat the claim of the plaintiff. But he did not; so that at the time the bill was filed, those entries were gone by lapse; consequently, the defendant had lost all benefit by them, and had no equity thereon against the State, nor, of course, against a purchaser from the State. For it is perfectly clear upon the Statute, sections 13, 14, 15, that one entry cannot be connected with another, so as to affect the operation of the grant, either at law or in equity; since each entry is to be dated and numbered, and the warrant numbered, and to contain the copy of the entry with the number and date, and returned with the survey to the secretary's office, and a copy of the survey thereon, annexed to the grant; so that the right to a grant stands on its own entry exclusively. If it were not so, there would be inextricable confusion in the titles to the public land. The defendant can derive no benefit, therefore, from his first entries, as he did not act on them in getting his title, and finally allowed them to lapse, and thereby left the land subject to the entry, made subsequent thereto, but prior to the entry on which his grant issued, and on which the plaintiff having complied with the law, got his grant.

The answer states likewise, that the land is swamp and vested in the Literary Board. But that cannot affect the equity between these parties, because we suppose that is a question between them and the Literary Board. But, if that be otherwise, there is no satisfactory proof, that the land is of that character. The plaintiff is, therefore, entitled to the declarations and decree he asks. But as it does not appear how

far the grants to the parties interfere with each other, there must be an enquiry and survey, to ascertain that fact. For, the defendant's grant is not to be declared void in this proceeding; but on the contrary, the plaintiff, assuming it to be valid at law, seeks to hold the defendant to be a trustee for him, which is true only as to such part of the plaintiff's land as may be covered by the grants to the defendant. Decree for the plaintiff accordingly, with costs against the defendant.

PER CURIAM, Decree accordingly.

EVERETT P. ROBERTSON *against* JOHN M. FLEMING *and others.*

(Construction of a will, depending on its peculiar phraseology.)

It is well settled that not only a vested interest, but a contingent remainder, or contingent executory bequest, or a future contingent trust, where the person is certain, is transmissible by descent in the case of realty, and devolves upon the personal representative in the case of personalty.

CAUSE removed from the County of Wake.

Everett Pearce, in the year 1807, bequeathed as follows:—

"I lend to my beloved daughter, Patience Stevens, wife of Jacob Stevens, during the natural life of the said Patience, Jacob, or either of them, eight negroes, viz: Jerry, &c., (naming seven others) * * (then devising some land); and should my said wife, Rachel, die before the death of the said Jacob Stevens or Patience, that then, and in that case, I lend to the said Jacob and Patience, or the survivor of them, during the natural life of them, or either of them, the whole of the aforesaid property.

Item. I give and bequeath unto the heirs lawfully begotten, at present, or hereafter, of my daughter Patience, all and singular, the aforesaid lands; but, as aforesaid, to be by them possessed, from and immediately after the death of those to whom the same are lent as aforesaid; to them and their heirs

forever; and the whole of the aforesaid negroes and their increase, to be by them possessed as aforesaid, and also, the whole of my estate not disposed of otherwise by this will, to be by them possessed as aforesaid."

By a previous clause of the will, the testator had loaned to his wife, Rachel, during her natural life, the following slaves, viz: Sam, &c., (naming seven others.)

Patience Stevens had a number of children by her husband, the said Jacob, among whom was a daughter by the name of Joanna, who intermarried with Temple Robertson, in the year 1830, and died in 1831, having had one child, the plaintiff, Everett P. Robertson.

Temple Robertson took out letters of administration on the estate of his wife in 1838.

Rachel, the widow of the testator, Everett Pearce, died in 1825, leaving Jacob and Patience surviving her; Jacob died in 1830, and Patience in 1842.

A share of the slaves which had come into the hands of Jacob and Patience Stevens, after their deaths, came to the hands of Temple Robertson, as being the part coming to Joanna.

The plaintiff's bill alleges that by the will there is a limitation over to him, and that these slaves came to defendant's hands as the trustee for the plaintiff; that the said Temple frequently acknowledged the rights of the plaintiff to all the said slaves, and delivered several of them (naming them) to him; that the said Temple married a second time, and issue was born of this marriage, to wit: the defendants, Charles and John; that the said Temple Robertson died in 1856, and the defendant Fleming, having administered on the estate, took possession in that character of all the slaves not theretofore delivered to plaintiff, by his father. The plaintiff claims that he is solely entitled to the slaves which came to the hands of his father through his wife, Joanna, and complains that the widow, the the defendant, Nancy, and her two children, Charles and John, are insisting on a share in the same, and that the said Fleming refuses to acknowledge the plaintiffs sole claim, but alleges

that he holds the said slaves as a part of the estate of his intestate, and means to dispose of the same, as such, according to the statute of distributions. The prayer is that the administrator deliver over the slaves not delivered to him, and account for their hires.

There was a demurrer, in which plaintiff joined, and the cause sent up by consent.

Miller, *Rogers* and *Lewis*, for the plaintiff.
Moore, *Busbee*, and *K. P. Battle*, for the defendants.

PEARSON, C. J. It may be, there is some force in the suggestion, that the words "begotten at *present* or *hereafter*," exclude the idea, that "heirs" was used in its technical sense, for "*nemo est hæres viventis:*" and fix its meaning, so as to vest an interest in the children of Patience, subject to a life-estate of Patience and Jacob Stevens in one set of the negroes, and to the life-estate of Rachel Pearce, and a contingent life-estate of said Patience and Jacob in the other set. But it is not necessary to decide the question; for, in neither view of it, is the plaintiff entitled to the slaves in controversy, or any part of them, in the manner set forth in the bill, and consequently the *demurrer* must be sustained, and the bill dismissed.

If the word "heirs" is taken as a word of limitation, so as to vest the absolute estate in Patience Stevens, under the rule in Shelley's case, the claim of the plaintiff is admitted to be unfounded, for the title would then have passed presently to Jacob, the husband, *jure mariti*, as to one set of the slaves; as to the other set, it would have passed, on the death of Rachel in 1825, to him in the same way. If the word "heirs" is taken as a word of purchase, it would include any child of Patience, so as to give a vested interest, subject to the life-estate; consequently, the share of Joanna, who was a child of Patience, born in the life-time of Rachel, at her death devolved upon her personal representative; and there is no ground upon which the plaintiff, who is the child of Joanna, can claim that share. It is well settled that not only a vested in-

terest, such as that given to the children of Patience Stevens, but a contingent remainder, or contingent executory bequest, or a future contingent trust, *where the person is certain*, is *transmissible* by descent, in case of realty, and devolves upon the personal representative in case of personalty. In this case, at the birth of each child of Patience Stevens, a share vested in it, and was not divested by death. *Sanderlin* v. *Deford*, 2 Jones' 74.

PER CURIAM, Dismissed.

ROBERT FAIRBAIRN *against* GEORGE F. FISHER.

The poverty of an executor, which existed at the testator's death, without mal-administration, or loss, or danger of loss, from misconduct or negligence, will not authorise a Court of Equity to put him under a bond to perform the trust, or, as an alternative, give up the office.

A misunderstanding between two executors, added to the fact that one is a man of limited means, it not appearing that any detriment had happened to the estate from their disagreement, is no reason why the business should be taken out of their hands, and committed to a receiver.

It would be improper for a Court of Equity to take part of the estate from one executor and give it to a receiver for him to co-operate with the other executor. A receiver must be of the whole estate.

APPEAL from an interlocutory order of the Court of Equity of Craven County.

The bill was filed to recover from the executors of Thomas Fairbairn, all the residue of his estate, after paying some pecuniary legacies, which is given to the plaintiff by the will of the said Thomas, and, as incident thereto, to take the property out of the hands of the executors, and put it into those of a receiver. The allegations on which the latter application is based, are :

1st. That they are both using the means of the estate for their own purposes.

2nd. That an angry hostility has arisen between the two executors, which has resulted, and is likely to result, in detriment to the estate.

3rd. That the defendant, Fisher, hath not property at all adequate to make good to the estate any amount which he may squander and misapply.

To show the injury resulting from this dissention of the executors, the bill alleges that the defendant, Fisher, without any pretext or authority in law, seized and caused to be imprisoned, a negro man belonging to the estate, named Daniel, and proceeded to advertise him for sale, whereupon, his co-executor, Williams, filed a bill in the Court of Equity for an injunction to restrain the sale; that by this controversy, the estate was run to costs, and that when it was ended, the estate was subjected to considerable loss, and the plaintiff insists that, as this arose from the dissention of the executors, it affords a ground for taking the administration out of their hands, and he protests that the estate ought not to bear the burden of he expense of this proceeding, but that it should fall upon the executors who caused it; or on one of them.

With the bill, went out the following order of the Judge of the Court of Equity:

"Upon the complainants entering into bond, with surety, satisfactory to the master, in the penal sum of $500, with the usual conditions for injunctions and prosecution bonds, the said clerk and master in Equity, for the county of Craven, will issue writs to restrain the defendants, Williams and Fisher, respectively, from any further execution of their testator's will, until they respectively file bonds with surety, in the master's office, each in the penal sum of $12.000, with conditions for the performance of any and every decree which may be rendered against them, or either of them—either in the progress, or at the final hearing of the cause. In case the said executors neglect, or refuse for twenty days to file such bonds, it is further ordered, that Fred. C. Roberts, the master, be a receiver of said estate, and that he be charged with the collection and custody of the same, until the further order of the Court of

Equity for Craven: And to this end, it is ordered, the said executor or executors, failing or refusing to file the bonds aforesaid, shall, forthwith (at the expiration of said twenty days,) make surrender, under oath, to said receiver, of the funds, effects and evidences of debt of every description, belonging to their testator's estate, accompanied by an account."

Both the defendants answered, but as only the case of the defendant, Fisher, is brought up by the appeal, it is necessary to notice his answer alone. He answers and admits that he is not in affluent circumstances, but says he is in good credit as a merchant, and is solvent; that he is in a better condition now than he was when appointed executor; that the office was conferred on him by the testator from the confidence which he reposed in his integrity, and that he has not abused that confidence: that he has not used the money of the estate for his private purposes, except a sum about equal to what his commissions will probably be; that he has kept a full account of his administration, and that all the money received by him, has been deposited in the bank of the State, at Newbern, and that he has been prevented from settling with the plaintiff, because, that he is a stranger, residing in a distant nation of Europe, and has not furnished him with sufficient evidence that he is the individual to whom the legacy is given, and that he has not furnished him with the proper bond to secure him against loss in paying the legacy to him. He answers as to the dissention between him and his co-executor, that it is true an ill feeling has grown up between them, but that it is not his fault, and he believes that it has grown out of a distrust created in the mind of his co-executor by interested and and designing persons.

He answers as to the slave, Daniel, that he had been runaway for twelve months; that when the defendant got possession of him, he thought it was the surest, and, probably, the only means of securing the value of him to the estate, to sell him; that the slave was turbulent, and regarded as dangerous in the community, and that the citizens of Newbern objected to his remaining there on account of his dangerous

character; that this slave was insolent towards him, and threatened that unless he was permitted to select his owner, he would runaway again; that these were the reasons why he was proceeding to sell him, when he was restrained from doing so by the act of his co-executor, in getting an injunction. He says further, on this point, that the plaintiff sanctioned his course—took the negro out of jail, dismissed the proceedings in Equity, instituted by his, defendant's, associate, and that this defendant and the plaintiff sold the slave to a trader at a fair price, and they both joined in a bill of sale to the purchaser. He denies that any detriment has happened to the estate from the disagreement between himself and his co-executor.

On motion, to dissolve the injunction, and to set aside the order requiring the defendants to enter into bonds, and to have the said bonds delivered to the defendants for cancellation, it was decreed, among other things, that the bond of the defendant, Williams, should be delivered to him; but that, that of the defendant, Fisher, should be retained; from which defendant Fisher appealed. Other orders were also made in the cause, from which there was no appeal.

McRae and *Hubbard*, for the plaintiff.
Haughton and *B. F. Moore*, for the defendant.

RUFFIN, J. As the defendant appealed only from that part of the order which refused his motion to deliver up the bond which he had been required to give, and ordered it to be retained, the Court does not consider any other question that might be made on other parts of the order. On that, the Court is of opioion, there is error. The effect of the order is, to lay the executor under bonds for his administration of the estate, and the performance of the decrees in the cause, as the alternative of having the estate taken out of his hands, and put into those of a receiver. We think this is not a case for the appointment of a receiver. There does not appear to be any change, for the worse at least, in the property or credit of the executor, since the death of the testator, or even the making of his will. The mere poverty of the executor, does not

authorise the Court, against the will of the testator, to remove him by placing a receiver in his place. There must be, in addition, some mal-administration, or some danger of loss from the misconduct or negligence of the executor, for which he will not be able to answer by reason of his insolvency. That seems to be the well-settled rule. Now, the affidavit of the plaintiff, to his bill, is the only evidence to any of those points, and the bill is framed, mostly, upon the information of others, and not upon the personal knowledge of the plaintiff. But, both with respect to the general charge, as to the meanness of the defendant's circumstances, and the few particular allegagations of negligence or mismanagement, the answer of this defendant is full and precise in the negative. It is clear, that, with regard to the slave, whom the defendant imprisoned for the purpose of selling, and was only restrained from selling, before much expense had been incurred, by the acts of his co-executor, his conduct was that of an honest and careful executor. He did just what he ought to have done. He denies directly, and positively, having appropriated any of the assets to his own affairs, or to have used, in any way, any portion of them, except small sums within the amount of the usual commissions allowed by law to an executor. Even to that extent, the Court does not approve of an executor's applying the funds for his own benefit. But it is certainly not such a *devastavit* as authorises an inference, that the estate is in jeopardy, or will not be faithfully administered, and duly accounted for. The answer, indeed, states that most of the funds of the estate, which had been collected, were in deposit in one of the banks in Newbern, where the parties are now residing; so that, if it were not true, it might easily have been shown by reference to the bank, and the affidavit of one of its officers. The only pretext for a receiver, as far as the case appears in these proceedings, is the misunderstanding between the two executors. But that is not sufficient of itself, or in connection with the limited circumstances of the defendant, Fisher. It does not appear by the fault of which of them it has arisen. But if it did, it would be a novel proceeding, not to appoint a receiver

for the estate, but only for the part of it in the hands of one executor, leaving the other to administer the other part in the name of himself and his co-executor, as has been done here by the consent of the plaintiff, by discharging Williams from the bond, which he gave, by way of superseding the order for a receiver. Considering the bill and answer as affidavits, the Court does not consider any thing in the past course of Fisher, or any hazard to the estate to be justly apprehended for the future, for which a receiver ought to have been appointed, or he put under bond in place of appointing a receiver. Indeed, the very fact that he has been able to give a satisfactory bond, in the heavy penalty of $12.000, to perform the decree, furnishes the strongest evidence that the plaintiff's apprehensions of his insolvency or suspicions of his integrity, were unfounded.

So much of the decree, as was appealed from, must, therefore, be reversed, and the bond given by the appellant, cancelled or surrendered up to him; which will be certified to the Court of Equity. The appellant is entitled to costs in this Court.

PER CURIAM, Order below reversed.

JOSEPH H. WYNNE, *by his Guardian, &c., against* THOMAS BENBURY, *and others.*

The payment of a debt to a guardian before it is due, is not sufficient in itself to establish an unfair purpose.

Where one, owing a bond to a guardian in failing circumstances, not yet due, held a note on such guardian, which he gave to an attorney to collect, with explicit instructions not to make an exchange of notes, but to collect the note given him, and with the proceeds to take up the bond due the guardian, and such attorney received a bank check from the guardian, and, believing the money to be in bank, and that the check was as good as money, returned the note to the guardian, and took up the bond in his hands, it it was *Held*, that, if done *bona fide*, this did not afford the ward a ground for pursuing his former debtor.

CAUSE removed from the Court of Equity of Chowan.

Samuel S. Simmons was appointed the guardian of the plaintiff, Joseph H. Wynne, and as such, received from the commissioner of the Court of Equity for the sale of land, three bonds, payable to himself as guardian, by John A. Benbury and Thomas Benbury, one for $3025, due 1st of January, 1856, another, for the same sum due 1st January, 1857, and a third for that sum, due on 1st day of January, 1858, each of which said bonds was executed on, and bore date the 1st of January, 1855. On the commissioner's reporting to the Court of Equity that these bonds were undoubtedly good, title was ordered by the Court, to be made, and the bonds delivered to the guardian, having been made payable to him in anticipation of such an order. Simmons failed, and made a general assignment of his effects on the 21st of February, 1856, and the sureties to his guardian bond also failed, and all three became, and are still hopelessly insolvent. The bonds of the Messrs. Benbury were taken up by them from Simmons, before either of them became due, and it was alledged that this anticipation was made in fraud of the rights of Simmons' ward, the plaintiff, Wynne. The first two were taken up with cash and business paper, then ,and before, due to Thomas Benbury, and by him endorsed to Simmons, and remained good until paid to him. As to the third note, it is alleged by the plaintiff, that that was taken up with a note which Simmons owed Thomas Benbury, upon dealings in the year, 1855, when it was known to both these obligors that the guardian was insolvent, and to save his otherwise desperate claim on Simmons. The prayer of the bill is to compel the Messrs. Benburry to pay the three bonds which Simmons held as guardian, and which were anticipated by them.

The defendants, in their answer, deny plaintiff's allegations as to their motives, and explain the transaction in this way: That the defendant, Thomas Benbury, in July, 1855, sold to Simmons his crop of wheat at the price of $3800, which was understood, and intended to be a cash sale, but in the act of delivering the wheat, he found that Simmons did not have the

money, but offered to give him up the guardian note held by him on the said Thomas and his son John A.; this was positively refused on the part of the said Thomas; that it was then proposed by Simmons, if he would let him take the wheat which he was in immediate readiness to ship on board of a steamboat, on which they were then aboard, that he would, in a few days, secure the price, by delivering his note with Charles L. Pettigrew as his surety; but failing to do this, he sent his account against Simmons to his son John A., who lived in the neighborhood of Simmons; that the best he could do with it, was to take Simmons' note for the price of the wheat; which being done, Simmons observed he supposed suit would be immediately brought, to which the defendant, John A. replied, that he did not mean to do so, but intended to send the note to another State, and enforce its collection by levying attachments on his vessels and cargoes lying in the ports of that State; that a gentleman of the bar, at Plymouth, who was the general attorney of Simmons, interceded and persuaded him not to take that course, for it would greatly harrass him, and told him if he would leave the note with him, he could, and would collect it from the maker; this, after some hesitation, he agreed to do, and left it with him under the explicit understanding that the guardian note was not to be taken in payment of any part of it. This was pressed upon the attorney, and he distinctly promised that the collection should be only made in money; that it was agreed, however, that when collected, the attorney might apply as much of it as was necessary to pay off the guardian note to Simmons; that afterwards, he received the said guardian note from the attorney, who wrote to him that Simmons had paid him money enough to take up this note, and had agreed to confess judgment for the balance, about $800, at the January term of Tyrrel county court; this was done, and the remainder of the money made under this judgment. The defendants aver that they believe the whole sum could have been made by suit, if it had not been settled with the attorney; it turned out that the note was not paid in actual cash, but in a check on a bank

in Washington, drawn by Simmons in favor of one of the defendants, which the attorney testified he took upon Simmons' assurance that he had the money in the bank, and which he had no reason to doubt. The letter of the gentleman of the bar, alluded to, is dated 1st January, 1856, and contains as follows:

"I enclose you your note which I took up from Simmons. The note which I hold is credited with $3206 50, and the balance will be shortly paid. The settlement was all right. He made the payment out and out, and I afterwards took up the note."

This letter is filed as an exhibit. The deposition of the same gentleman is fully recited in the opinion of the Court.

The defendants, Messrs. Benbury, aver that their part of this transaction was not colorable, but *bona fide*, and they believe the same of the course taken by the attorney. No answer was filed by Simmons.

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

Moore, *Hines* and *E. W. Jones*, for the plaintiff.
Winston, *Jr.*, for the defendants.

RUFFIN, J. The payment of the two bonds which fell due the 1st of January, 1856 and 1857, and were payable to, and held by Simmons, as the guardian of the plaintiff, having been been made in cash, or the notes, or bonds of other solvent persons, endorsed by the defendant, Thomas Benbury, there is no ground to impeach it, unless it be that the payment was in anticipation. That is not sufficient, of itself, to have that effect. It may often be to the interest of a ward to receive payment of a debt before it is due. The ward may require the use of the money, or it may be a means of securing the money, or a better investment may be in contemplation. Therefore, in such a case, something more, and much more, must be shown than mere pre-payment to establish an unfair pur-

pose—*mala fides*—in making it; and here there is nothing of the kind shown.

In respect to the third bond, which fell due in 1858, the case goes farther towards charging the Messrs. Benbury, in alleging the payment to have been made to Simmons in a note which he had given to Thomas Benbury for a crop of wheat in July, 1855, for $3800, and that it was made in that manner, because Simmons was then in failing circumstances, and that was suspected by Benbury, which led him to adopt that plan, as the means of saving his debt. If that case were established, it would undoubtedly entitle the plaintiff to relief on this part of the case. But it is prositively denied in the answer, and not sustained by proof; on the contrary, the evidence is the other way. It turned out that Simmons was, in October, and as far back as July, 1855, in embarrassed circumstances, and that may have been, and probably was, suspected by Benbury, before it was generally. But Simmons had a very large property, and continued in good credit up to the middle of February, 1856, when he made a general assignment. Benbury, then, could have collected his debt by attaching Simmons' ships and cargoes in the ports of other States, or even by suits in the courts of this State, for it appears that for the balance of seven or eight hundred dollars, due on the note of Simmons, judgment was obtained in January, 1856, so as to give it a priority over the assignment, and the money was collected. But no great stress, perhaps, ought to be laid on these circumstances, since the Court would still hold Benbury liable, if he passed Simmons' note in payment of his own, because he suspectsd him at the time, and with the view to save himself from expense and risk, and throw them on the ward of Simmons. Although Benbury might have thought that he could save his debt, and although he might have, in fact, saved it by diligence and means in his power, yet, as he could not suppose that any such diligence or means, would have been used on behalf of the infant, he would have been justly chargeable with a concurrence in the misapplication by Simmons of the money of his ward, if, in

truth, he made the payment of his bond in that of Simmons' under such circumstances. The transaction would have been *mala fide*, and with the view to a payment, not in money, nor what was certainly money's worth, but in doubtful paper of the guardian and trustee of the infant. The question, then, comes to this, whether the payment was intended to be in the note of Simmons, or was it in fact, in that note under the guise of being in money or the check? On that point, the answer is as precise in its denials and in its statements, as it could be framed in exculpation of the defendants, and is essentially sustained by the only proof taken. The answer states that Simmons proposed, instead of giving his own note for the price of the wheat, to pass the bond of the Messrs. Benbury in payment; that the proposition was distinctly and instantly rejected, and he was told that the two transactions would not be connected, and that the other party meant to secure and enforce payment for the wheat by attaching his vessels abroad, and that Simmons urged that such a course should not be adopted, and promised to make payment in a few days, proposing to Benbury, to that end, to leave the note with a gentleman of the bar, in Plymouth, who was the general attorney of Simmons who might receive the money; that accordingly, in September, 1855, the note was thus left, but with positive instructions not to take in payment the bond held by Simmons, which fell due in January, 1858, or any thing but money, and that the gentleman afterwards informed Benbury that, in October, Simmons had paid a part of his debt in money, with which he subsequently discharged the bond of Messrs. Benbury, *pro tanto*. Certainly, in all that, no unfairness of purpose can be imputed to these defendants. But, it is urged, on the other side, that Messrs. Benbury are bound by the acts of their agent, and that he did not receive payment in money, but in a check drawn by Simmons, on a bank in which he had no funds, and afterwards, exchanged with Simmons the check for the bond of the other defendants, which was a mere color.— It might well be questioned whether the acts of that gentleman, who was rather the attorney of Simmons, than of Messrs.

Benbury, would affect the latter, when, in direct opposition to their positive instructions. But, be that as it may, and, supposing him to be the attorney of both parties, the Court does not find in the acts of that gentleman any thing to impose a liability on Messrs. Benbury. His testimony has been taken, and he affirms the truth of the answer in all its details. He states that John A. Benbury was prevailed on by him, not to harrass Simmons by attachments in other States, and was informed by him that he thought he could collect the money for him; that Mr. Benbury instructed him positively not to connect the two debts together, and to receive nothing in payment but money; that he applied to Simmons for payment, who proposed to exchange notes, and he rejected the application, and informed him of his instructions. That Simmons then said that he had not the money in hand, but had it to his credit in a bank at Washington, and would get it and pay it over in a few days; that he then asked Simmons whether he had the amount in bank, subject to his check, and the latter stated that he had, and that he, the witness, had no reason to doubt it, and that, thereupon, he took the check in payment as money, and delivered up to Simmons his note; that being otherwise occupied, he did not find it convenient to present the check for ten or fifteen days, and that then, meeting with Simmons, he informed him that he was authorised by Messrs. Benbury to take up their bond, and inquired of him whether he would as soon have his own check as the money, and he replied the check was money to him, as he could draw other checks on the same fund, and, thereupon, the business was closed, by returning to Simmons the check, and receiving from him the bond of the other party. Upon this statement, it is manifest that every thing depends upon the integrity of the closing transaction. As far as the personal acts of Messrs. Benbury go, there is no opening for an imputation against them. Nor does there seem to be any in reference to those of the gentleman who acted between the parties. His instructions were to receive money in payment.—But, in the transaction of business, payment is every day re-

ceived in checks on banks, and they are considered, to that purpose as much money as the notes of the bank on which the check is drawn—that is upon the supposition that the payment of the check is expected on presentment. The witness says, Simmons assured him the funds were in bank to meet the check, and says, further, that he believed it, and had no reason to doubt it. That he acted in good faith in that respect, may further be inferred, from his holding the check instead of presenting it immediately. If the bank had been in the same place, the delay in the presentment might have been suspicious; but the parties resided in Plymouth, and the check was on a bank in Washington, and it may well be that it was held upon the confidence that no man of business, who had any regard for his character or credit, would draw a check without funds—fortified by the positive assurance of Simmons that the funds were in bank. In such a case, the Court is not at liberty to infer a secret, colorable purpose in opposition to the direct and positive statement of a respectable witness, especially, when he is the only person who can have personal knowledge of the motives of the parties, and the purpose of the transaction. It may be true, and probably is, that Simmons did not have the money in bank. But the other side was not bound to see that he had. It is sufficient if they believed he had, and acted *bona fide*. That they did, is a presumption authorised, first, by the usual course of business, and next, by the assertions of Simmons on the subject, and the credit which the witness says he gave to his assertion.

It must be declared, therefore, that the payment of the last bond, by Messrs. Benbury, was believed and intended by them to be an actual payment in money in good faith, and, therefore, that they are not responsible over again for the bond.—Bill dismissed with costs.

Per Curiam, Decree accordingly.

SETH DAVIS, *Adm'r, against* THOMAS L. HALL, *Executor.*

It is usual to plead a decree in bar to a second suit for the same thing; but where the bill itself sets forth the substance of the pleadings in the former suit, and the decree given in it, and prays a discovery of facts contrary to the declaration then made, and a decree inconsistent with that decree, so that there is no need of a plea for the purpose of identifying the parties, and the subject matter of the second suit as being the same with that of the former, the objection may be taken by demurrer.

CAUSE removed from the Court of Equity of Craven County.

The bill professes to state the pleadings, proceedings and decree in a suit brought in the Court of Equity, by the present defendant, Hall, as executor of Alexander Carter, against the present plaintiff, as administrator of James P. Davis, which was tried in this Court, as reported in 3 Jones' Eq. 413. It sets forth a declaration in the decree, that the funds with which the slaves were purchased by his intestate, belonged to Carter, and were held by the intestate as Carter's agent, and that his executor, therefore, had an equity to follow the funds, and to have the slaves that were purchased; and then a decree thereon that the defendant in that suit should deliver the slaves to Hall, and convey them to him as the executor of Carter. It further states that the slaves were accordingly delivered and conveyed; and that, afterwards, upon certain proceedings by the legatees of Carter against Hall, a receiver of the estate of Carter, has been appointed, and has the slaves in possession.

The bill then states that the ground of the decree was, that Carter was the entire owner of the debts for which the intestate took the negroes, and, therefore, that the intestate held the whole of them in trust for Carter. But it alleges further, that, in fact, Carter was not thus the owner, but that when he employed the intestate Davis, as his agent to collect the debts, it was known that they were doubtful, and that the collection would be difficult, and for that reason it was agreed between Carter and Davis, that the latter should have one half of all the debts collected by him by way of compensation for his

services; so that, in truth, but one half of the fund belonged to Carter, and the other half belonged to the intestate, Davis, and by consequence, the intestate of the present plaintiff held but one half of the slaves in trust for Carter or his executor, and ought to have been allowed to keep the other half of them as the estate of the plaintiff's intestate. The bill further states, that the original slaves were a woman and two children, and that they have increased to the number of ten or more, and that their maintenance was troublesome and expensive, and ought to be reasonably compensated.

The bill is filed against Hall, the executor, and the other persons who claim the slaves under Carter's will, and the prayer is, that the negroes may now be divided, so as to have a moiety allotted to the plaintiff, and for an account of the profits and expenses of the slaves and a decree for the payment of any balance that may be found due thereon to the plaintiff.

The defendant demurred both as to the discovery and the relief.

J. W. Bryan, for the plaintiff.
Donnell and *Green*, for the defendant.

Ruffin, J. This is not a bill of review; not alleging any error of law or fact in the decree. Nor does the bill allege any fraud in obtaining the decree, nor otherwise impeach it except in the single particular, that, the allegation in the former bill, that the fund with which the slaves were purchased belonged entirely to Carter, and the consequence deduced therefrom, that, in the view of this Court, Carter was entitled to all the slaves. The bill states, that the present plaintiff put in his answer in the former suit, but it does not profess to set forth either the tenor or substance of the answer in reference to a denial or admission of Carter's claim to the money or the slaves, nor whether it set up the agreement, now alleged, in respect to an equal division of the funds collected, nor whether the slaves were wholly or in part the intestate's. No rea-

son, indeed, is given, why the question now made was not presented in the former suit, nor any allegation that it was not made and proofs taken on it. The point was plainly in issue in that cause, whether the answer made it directly or not; for it was involved in the allegation of Carter's ownership of the fund, and evidence that a part of the fund belonged to Davis, would have answered Carter's claim *pro tanto*. As that is the case, the decree then made, and standing unreversed, concludes the rights of the parties to that cause, and those claiming under them, as to all the matters found or decreed in that cause. For litigation would be interminable, if after a decree in a cause founded on the allegations and proofs in that cause the party could, upon an original bill, obtain a decree on the same matter in opposition to the first decree, simply upon the ground, that the titles of the parties were different from what they were before declared—at the same time, not imputing any undue practices in obtaining the decree. The Court cannot be thus called on to pronounce opposing decrees upon the very same subject matter. Upon this point, the Court entertains no doubt. There has been some hesitation upon the question, whether a demurrer was the proper mode of raising the point, as it is usual to plead a decree in bar to a second suit for the same thing. But here, the bill itself sets forth the substance of the pleadings in the first suit and the decree given in it, and prays a discovery of facts contrary to the declaration then made, and a decree inconsistent with that decree. So, there is no need of a plea for the purpose of identifying the parties and the subject-matter of this suit as the same as those in the former. There is nothing left, then, but the naked question of law, whether the same parties can litigate the same matter over and over again; and that question arises as well on the demurrer as it would have done on a plea. Demurrer sustained and bill dismissed.

Per Curiam, Decree accordingly.

Z. R. HINTON *against* F. ODENHEIMER *and others.*

There is no principle, on which, after the satisfaction of a judgment for a partnership debt, by one of the partners sued, equity ought to extend or preserve the vitality of the legal security, under the guise of an assignment, so as to charge the bail of the other partner.

The bail of an absconding partner is under no obligation to surrender his principal for the benefit of another partner.

It would seem that the bail of one partner, would have no power to arrest his principal after the debt had been in fact paid by another partner.

APPEAL from an interlocutory order of the Court of Equity of Wayne county, dissolving an injunction.

Odenheimer and one Minzesheimer were copartners in trade, and became indebted to Waldheimer & Grossmayer, and were sued, and judgment obtained in Wayne. The plaintiff was the special bail of Minzesheimer, who absonded and went to New York. Odenheimer paid the debt and costs, but satisfaction was not entered, and instead of that, he obtained from the creditors an assignment of the judgment to Thomas Hollowell in trust for Odenheimer, with a view to charge Hinton, as the bail of Minzesheimer; and he afterwards prosecuted the bail to judgment in the name of the plaintiffs at law. Pending the *scire facias*, Odenheimer gave Hinton notice, that Minzesheimer was resident in the State of New York, and required him to surrender him—alleging that Minzesheimer was largely indebted to him on their partnership dealings, and, therefore, he wished him brought back, that he might settle with him here, instead of being forced into litigation with him in New York.

The bill was filed by Hinton against the plaintiffs at law, Odenheimer and Hollowell, praying for relief and an injunction against the judgment against him; and the injunction was awarded. But on the coming in of Odenheimer's answer, setting out Minzesheimer's indebtedness to the firm and his absconding, so as to throw the debts of the firm on this defendant, the injunction was dissolved; and the plaintiff appealed.

Howard, for the plaintiff.
Dortch, *Strong* and *K. P. Battle*, for the defendants.

RUFFIN, J. The Court is not aware of any principle, on which, after the satisfaction of a judgment for a partnership debt by one of the partners sued, equity ought to extend or preserve the vitality of the legal security, under the guise of an assignment, so as to charge the bail of the other partner. It has been called a strong instance of the application of the principle of substitution to give a surety this right against the bail of the principal; and we think that carries the principle as far as authority or reason will sustain us. But partners are not entitled to the equity accorded to sureties. They are not sureties—one for the other; but each is a principal debtor, and the joint effects the primary fund for the payment of their joint debts. When that fails, then, each is liable out of his separate property by force of his legal contract, and, as a principal debtor. There is nothing in the relation of a creditor of a firm towards the different members of it, which charges the creditor with the duty of protecting one of the members against the other, by preserving or assigning all the securities he may have. The partners all stand alike to the creditor; being all principal debtors, and equally liable for the debt primarily in equity, as well as at law. It is sufficient for the creditor to abstain from concurring in the fraud of one partner on another; and he is under no obligation to see that the one does not get an advantage over the other, or to aid the one against the dishonesty of the other. In fact, when the debt is paid, the creditor has nothing more to do with it, and the payment becomes, merely, an item of account in the books of the firm, which concerns the partners alone. There is no reason, therefore, why payment of the firm debt by the partners, or one of them, should be considered in equity anything but payment simply; or why a judgment, for it, should be kept on foot, to enable one of the partners to charge the other; much less to charge the bail of the other. As to the idea, that Odenheimer has an interest, that his partner should

be brought back to this State, which can be done only through the bail, there are several answers: In the first place, the bail is under no obligation to him to perform that service. His contract is with the creditor alone, and for the creditor's benefit, and the creditor is not charged with any duty to the respective partners, as we have seen, which would entitle either of them to call for an assignment. In the next place, after the payment of a judgment in fact, by the principal debtor, or one of them, the authority of the bail of another party to the judgment, also a principal, to arrest his principal for the purpose of a surrender, would at least, apparently, be gone at law.

Upon the whole, the Court is of opinion, clearly, that the doctrine of subrogation cannot be applied between partners and joint principals, so as, after payment to the creditor, to affect the bail of one of them for the benefit of the other. It is against conscience to enforce the judgment for that purpose. The interlocutory order was, therefore, erroneous, and the injunction ought to have been continued; which will be certified to the Court of Equity.

PER CURIAM, Decree accordingly.

THOMAS N. JAMES *against* ROBERT F. MORRIS.

A was the owner of a judgment against one, who, it was supposed had fraudulently conveyed his land, and it was agreed between him and B that the latter should have the control of the execution and try the validity of the debtor's conveyance, and that he should have half of what could be collected; B bought in the land for a nominal sum—recovered it in an action of ejectment, and sold it for several times the amount of A's debt; *Held* that A was entitled to half the amount of his debt out of the proceeds of this sale; and no more.

CAUSE removed from the Court of Equity of Orange county.

The plaintiff held a note on one William Copley for $240,

on which a judgment was obtained in the County Court of Orange, and the defendant, professing to be insolvent, the execution thereon was returned *nulla bona*. About the time the note was given, William Copley made a deed of trust of his land to secure his brother Anderson Copley, in a debt for its apparent value; which the defendant told the plaintiff, and others, he believed to be fraudulent; whereupon, it was agreed between him and the plaintiff, that he should have control of the execution, and if he could make the debt out of the land, he should have half of it. Accordingly, he (defendant) took the matter in hand—had the execution levied on the land, and it advertised; but, being obliged to be absent from the State on the day of sale, he procured one J. B. Leathers to attend in his place. He instructed Leathers to run the land up to the amount of the debt, and if it went for less, to buy it for him. Copley's trustee attended and forbade the sale, in consequence whereof, it was cried off to Leathers at $10. The defendant took a sheriff's deed and brought an action thereon. After a protracted contest in an action of ejectment, the defendant recovered the land and sold it to one John Leathers for $700. The plaintiff demanded to share equally in this sum, or at least, to the amount of half the debt; and the bill is brought to enforce that demand.

The defendant insists that he is only entitled to one half of the ten dollars, for which the land was sold to Leathers. The facts appear substantially from the defendant's answer and the deposition of J. B. Leathers.

Miller, for the plaintiff.
Phillips, for the defendant.

BATTLE, J. The plaintiff does not profess to set forth in his bill, all the terms of the contract between himself and the defendant, relative to the collection of the claim, which he, the plaintiff, had against William Copley. He merely states, in general terms, that the defendant undertook to collect it for him "upon shares." The defendant alleges that the agreement

was made after the plaintiff had obtained a judgment against Wm. Copley, who had conveyed his land to his brother, Anderson Copley, as was supposed, in fraud of his creditors, and that the contract was, that he should have an execution, issued on the plaintiff's judgment, levied upon the land, and would make it bring enough to pay the judgment if he could—the plaintiff agreeing to give him, half the purchase-money. The only witness examined in the cause, John B. Leathers, proves that the agreement between the parties was, that the defendant was to save the debt if he could, by having the plaintiff's execution levied upon the land above mentioned, and the plaintiff was, upon its being saved, to give him one half of it. At the sale of the land, the witness, as the agent of the defendant, who was necessarily absent, was instructed to make it bring the amount of the plaintiff's debt, or to buy it for him, the defendant.

We think that the fair construction of the contract between the parties, as evidenced by what was said and done was, that if the defendant could make the amount of the plaintiff's debt out of the land in question, he was to have half of it. He did make it by means of his purchase, and subsequent sale of the land, and we think that he is bound in equity and good conscience to pay the plaintiff one half of it. It is ridiculous to suppose that the parties meant to divide a mere nominal sum, while the defendant was to take and keep for his own use whatever he conld make from the purchase of the land in question. It has been, indeed, strongly insisted that the plaintiff is entitled to one half of the amount for which he sold the land, after deducting the expenses of the litigation by which he recovered it. The argument is, that he was agent for the plaintiff, dealing with his funds, and, therefore, accountable to him for whatever was made out of them, after retaining the stipulated compensation of fifty *per cent* on the amount. If the premises were correct, the conclusion would be legitimate; *Hall* v. *Davis*, 3 Jones' Eq. Rep. 413. But we do not think that a fair construction of the contract between the parties, invests the defendant with the character of agent for the plain-

tiff, to manage his funds. The defendant was, at his own costs, to make an attempt to save the plaintiff's debt against William Copley. It is truly, that in doing so, he was to have the control of the plaintiff's judgment against Copley, but the plaintiff was not to be responsible for any of the expenses or costs in the management of the business. All these were to be borne by the defendant alone, and if he should suceeed in saving the plaintiff's debt, he was to have one half of it as a compensation for his trouble, risk and expense. Had the litigation, which was necessary to recover the land after the defendant had bought it at the execution sale, proved adverse, there is no pretence that the plaintiff could have been compelled to pay any part of it. As it proved successful, we think the defendant is entitled to the land or its proceeds, and that the extent of the plaintiff's claim against the defendant is for one half of his debt with interest, and for that, as well as for his costs, the plaintiff may have a decree.

Per Curiam, Decree accordingly.

CASES IN EQUITY,

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH CAROLINA,

AT MORGANTON.

AUGUST TERM, 1859.

JOHN HARRIS *and others, against* JOHN ROSS *and others.*

Where one legatee can resort to two funds, and another to but one of them, the former shall not be allowed to resort, in the first instance, to that which is the sole reliance of the latter legatee.

A charge upon land by will, for the maintenance of one who is deaf, lame and helpless, to begin immediately, and to continue during the life of such beneficiary, is to be preferred to legacies of an ordinary character charged on the residue of the estate after the expiration of a life interest therein.

There is no reason, generally, why land devised to several, burthened with a charge for the maintenance of a person, shall not be sold for a division;—but this must be done *cum onere.* Where, however, the maintenance of such person can be had on the land itself, but, probably, cannot be secured by a sale, a Court of Equity will only order it, experimentally, to ascertain how the fact is.

CAUSE removed from the Court of Equity of McDowell County.

Lewis Harris made his will in July, 1845, containing the following provisions:

"I give to my wife all my lands with all my stock of every kind, and all my farming tools, and household and kitchen furniture, to be fully possessed by her during her life, or widowhood. My daughter, Sarah, to have her maintenance off the land, during her natural life. I give to my two sons, Giles and John, three hundred dollars each; to be raised out of my estate at the death of my wife. I give to my grand-son, Joab Harris, sixty-five dollars, when he arrives at the age of twenty-one years. The balance of my estate, after the payment of my debts, to be equally divided between all my children." He appointed his son John Harris and John Ross, executors; and the testator died shortly afterwards and both of the executors proved the will, and left the effects in the enjoyment of the widow, who lived on the land, and kept her daughter, Sarah, with her. She, Sarah, was almost entirely deaf, had but one hand, and being considerably advanced in years, was, therefore, unable to perform any labor, or earn any thing towards her maintenance. The widow died in March, 1856, and at her death, administration of her estate was granted to her son Giles, who took possession of her effects; and at the same time, Ross, as executor of the testator, took possession of such of the personal things originally belonging to the testator, as were left by the widow. Giles Harris had lived with his mother and sister on the land, and worked it so as to maintain them; and after the widow's death, he and Sarah continued in the possession of the place, as before, for the purpose of maintaining Sarah.

The bill is filed by John Harris and Joab Harris, and the other children of the testator, against Giles, Sarah, and John Ross, and seeks an account of the personal estate of the testator and intestate widow, and that the latter may be equally divided among all the children, who are her next of kin, and that the former may be applied to the satisfaction of the several pecuniary legacies to John, Giles, and Joab, if sufficient for that purpose, and praying for a sale of the land, which the bill alleges to be of the value of $2.500, and that out of the proceeds, a sufficient sum shall be set apart, in the first in-

stance, and invested so as to yield interest annually to an amount adequate to the comfortable maintenance of Sarah, and out of the residue, the legacies to the two sons and grandson, or any balance of them, satisfied, and the surplus divided among all the children, under the residuary clause.

The answers of Ross and Giles Harris, set out accounts of the personal estates of the testator and Mrs. Harris; and that of the latter and Sarah, state, that she is decrepid, and so infirm, as to be wholly unable to provide for herself, and was the peculiar object of the care of her parents—that the purpose of her father, in charging her maintenance on his land, was to provide her with a home, and secure, certainly, the means of her subsistence by an income, issuing out of the land; that the profits of the land which is cultivated for her, by her brother Giles, is barely sufficient to afford her a scanty subsistence, and would not do that, if she were not saved the expense of hiring a house, by living in that on the land; that the whole value of the land does not exceed $1.000, and that it would not sell for that sum; and that the interest thereon, would not support her in her present condition, much less, would it be adequate, hereafter, as she is old, and her infirmities increase yearly, so that each succeeding year will probably add to the expense of her maintenance; and, therefore, she insists that the land ought not to be sold, as she is willing to take it as it is, in satisfaction of the charge of her maintenance.

To facilitate the hearing, the parties consented to have certain inquiries made by the master, and he reported the nett balance of the testator's personal estate to be $148.47, in the the hands of the executor, Ross, and of Mrs. Harris' estate to be $72.52, in the hands of the defendant, Giles Harris. He further reports, that it will require the sum of $80 a year to maintain Sarah, comfortably, and that the land would not sell for more than $1000, and that the interest thereon would not support her; but, that the use of the land and houses, if unsold, would afford her much more comfort, as a home.

Neither party excepted to the report, but the plaintiffs in-

sist that the master is mistaken in finding the value of the land, and say that they will make it bring much more.

Gaither, for the plaintiff.
Avery, for the defendant.

RUFFIN, J. Of course, the small sum in the hands of Giles Harris, as administrator of his mother, is subject to distribution amongst her next of kin, and there is no reason why it should not be made immediately.

The personal estate of the testator, Harris, in the hands of Ross, cannot, until after the sale of the land. It is, indeed, applicable to the legacies to the two sons, and the grandson, but it may not be in equal proportions. For the latter legacy is payable out of the personal estate only, while the other two are charged upon the whole estate, including the land.—Neither is to be defeated, if there are funds for their satisfaction, and, as it is ascertained that the personalty is not sufficient, and that, if divided, *pro rata*, the grandson will lose the the larger part of what is given to him, the application must be deferred until it shall appear what the land will raise, clear of Sarah's incumbrance, as it may bring enough to allow a payment in full to the grandson out of the personal estate, and then leave a sum, with the residue of the personal estate, sufficient to pay the $300 to each of the sons. In the meanwhile, the parties may require Ross to bring the money into court, and have it invested at interest, until it shall be seen how it ought to be applied. This is upon the common doctrine that testators intend the payment of all their legacies, if there be funds, and that where one legatee can resort to two funds, he shall not resort to the one, in the first instance, to which alone the other can look, so as to exhaust it, and defeat the latter.

With respect to the principal question, arising out of the provision for the daughter, Sarah, it may be observed that it is assumed in the pleadings on both sides, that it is the preferable charge; and the Court considers that to be correct. That charge, attached to the land immediately upon the death of

the testator, and came into enjoyment as against the mother, the tenant for life; she held subject to it, and the will continues it, during the daughter's life; consequently, it continues to exist in the same state against those who take after the mother. But it is nothing more than a charge. No estate in the land vested in her, nor any right to the possession against the heirs at law. It is clear, that the testator did not intend any thing of that kind; because he directs the $600 for his sons to be raised out of *his estate at the death of his wife*, and, therefore, he must have contemplated that a sale might then be necessary, notwithstanding the daughter might be living. All the perplexity in the case, arises, therefore, out of a doubt, whether a sale will insure a proper maintenance for the daughter and leave any thing for the heirs, or the two sons. If it will not, as the master finds, it is manifest, that a sale can do no good to any one; and, therefore, as the land is all she has to look to, and she is willing to occupy it for her charge, there ought not, in that case, to be a sale, but she ought to be left in the enjoyment, unless the residuary devisees prefer having it sold, and securing to her an annual sum for maintenance.—That is not likely to take place, as she, and the defendant, Giles, are two of the devisees, and they are both opposed to the sale, at present. But, the other parties insist that the land will bring a sum sufficient to secure the sister's maintenance, —discharge the pecuniary legacies, and leave a surplus; and they further insist, that the only way to determine that, is by a sale. The Court, therefore, though inclined to concur with the master, as to the arrangement, best for the family, is obliged to have regard to the rights of the legatee, John Harris, and of those entitled to the residue, so as to give them the opportunity of, at least, an experimental sale, whereby it can be seen whether it will duly secure the maintenance of Sarah, and at the same time, yield anything for the other parties. It must, therefore, be declared, that Sarah is now entitled to the sum of $80 annually, for her maintenance, and also, that she is entitled to have such further sum allowed her annually, as from time to time, from her increasing age and infirmities may

be proper, with liberty to her to apply therefor. The sale will, therefore, be made on these terms: That the purchaser shall give bond and good security to pay into Court, on a certain day, annually, the sum of $80, for the use of Sarah during her life, and that the same shall also be a charge on the land, and that for the principal sum, which, at six per centum, will yield interest to the amount of $80, namely, the sum of $1333.33⅓, the purchaser shall give bond and good security, payable upon the death of Sarah, and as a further security, that the title of the land be retained until the further order of the Court: and that for the residue of the price, over and above the sum of $1333.33⅓, the purchaser give bond and good security, payable at one and two years with interest from the first day of the next term of this Court, subject, when collected, to the future order of the Court, so that it may be applied, if need be, to enlarging the allowance to Sarah, or to the other purposes of the will as may be right. Unless the land should, therefore, bring at least $1650, it would not, in the opinion of the Court, yield an adequate security for the daughter's maintenance, and the sale ought not to be confirmed, but, she left in the occupation according to her offer; and, therefore, the master will not let a purchaser into possession at a less price than that sum, until he shall have reported the sale to the Court, and the further order of the Court thereon.

PER CURIAM, Decree accordingly.

WILLIAM BREWER *and others against* JAMES CHURCH.

Where the sons-in-law and an only son of a very aged man, without the participation of the wives of the former, and without the knowledge of the father, entered into a written agreement that they would divide all the property of the father equally among them, it was *Held* that on the father's afterwards surrendering the personal property to the sons-in-law, and conveying the land to the son, a specific performance of the agreement against the son, would not be decreed.

CAUSE removed from the Court of Equity of Watauga county.

Philip Church, a very aged man, in the year 1854, was living with his daughter Lucy, who intermarried with one Nathaniel Church. While residing there, five of his sons-in-law, Samuel Grier, Joshua Grier, William Brewer, Benjamin Hartly and G. S. Lind, with his son, James Church, met together, and in his absence entered into an instrument of writing as follows: "Whereas, the estate, now belonging to Philip Church, senior; we, the undersigned heirs of the aforesaid Philip Church, being present, do by his consent, take down an inventory of all the property now claimed by the aforesaid Philip Church, for which, we, the undersigned heirs, do agree to *have*, or make sale of, and divide the proceeds thereof, as we, the undersigned heirs, may hereafter agree on. This indenture, made and agreed on between us, to which we assign our names. This is the amount of property now belonging to the aforesaid Philip Church, to wit: two negro men, one brown mare, one yoke steers and cart, six head of cattle, twenty head of hogs, nine head of sheep, together with about eleven or twelve hundred dollars in notes and accounts, with $20 cash on hand, together with all his lands. We, the undersigned heirs, being present for this cause and intent, the day and date above. Witness our hands and seals.

(Signed,) JAMES CHURCH,
his
WM. X BREWER,
mark
JOSHUA GRIER,
his
SAMUEL X GRIER,
mark
BRYAN HARTLY,
G. S. LIND."

The said Philip was not present when this paper was signed by these parties, and has not, in any way, recognised the same. The bill alleges that, subsequently to the execution of this instrument, the defendant, James, took from his father, the said

Philip, a deed for the above land, and sets up claim thereto, as his sole right and property, which, they say, was obtained by fraud and imposition. They allege that several other children of Philip Church, whose names are given in the bill, but who are not made parties thereto, have been advanced in full proportion to what they, plaintiffs and defendants, would receive under this arrangement; that finding James Church determined to hold on to what he could get under the deed, from his father, they took into their possession, and have divided among themselves the personal property mentioned in the instrument of writing above set out. The plaintiffs pray a specific performance of the contract above set out, and for a sale of the land mentioned therein, and an account of the rents and profits during the time it has been occupied by the defendant.

The defendant answered, admitting the execution of the instrument set out in the plaintiffs' bill, but says it was never intended between the parties to be enforced; that his father, Philip, who is is still alive, but very old, fell under the control of a son-in-law, one Nathaniel Church, who was wasting his property, and this agreement was entered into as a means of getting it out of his hands; that it was so far successful, that he gave up most of the personal property to the plaintiffs in full satisfaction of their shares of his estate, and that the deed to him was made with a like intention; that his father often expressed an intention to give him three hundred dollars more than his sisters, and that the value of this land is not more in amount than that sum; that, moreover, he has taken the old man to his house and has maintained him for the last twelve months, and expects to do so for the remainder of his life; that the deed was the voluntary act of his father, and that there was no fraud or imposition in this transaction. He submits that a specific execution of the instrument, insisted on, would be harsh, unequal and unjust, both towards his father and himself.

There were replication, commissions and proofs taken in the cause, and being set down for hearing, was sent to this Court.

Folk, for the plaintiffs.
Gaither, for the defendant.

BATTLE, J. Had the agreement, mentioned in the pleadings, been executed by all the children of Philip Church, senior, or by all of them who had any further claims upon his bounty, and had provided for an equal division of his property among them with his consent, a very interesting question would have been presented, whether the Court of Equity would not have sustained it against any one of them, who should subsequently have obtained a conveyance from the father, inconsistent with it. It seems to be settled, that if two expectant devisees, or legatees, agree to divide equally, whatever devises or legacies they may take under the will of a particular devisor or testator, the agreement of one shall be regarded as a valuable consideration for that of the other, and the contract will be enforced in equity. Can the case, first supposed, be distinguished in principle from the second? If so, can it, nevertheless, be sustained upon the ground of being a fair family arrangement? These are interesting enquiries, into which we will not enter, as we think the facts of the present case do not fairly present them. The instrument, by which the agreement of the parties is testified, purports to be executed by the "heirs" of Philip Church, and provides for making an inventory and for a division of his property, real and personal, or of the proceeds thereof arising from the sale, the division to be made, "as we, the undersigned may hereafter agree on." The persons who signed the instrument, and who are, therefore, "the undersigned," are the defendant, who is a son, and some of the husbands of the daughters of Philip Church; and the instrument concludes, "we, the undersigned heirs, being present for this cause and intent, the day and date above written." It is manifest, upon the slightest inspection, that the instrument is open to the criticism of being very vague and indefinite as to when, how, and in what proportions the property, or its proceeds, were to be divided between "the undersigned." But waiving any objec-

tion of that kind, there is no mutuality in the contract, so far, at least, as it relates to the land; about which alone, the bill seeks relief. The undersigned husbands have a very limited interest in the land, compared to that of their wives, who are not parties to the instrument at all. Not being parties, the femes are not bound by the agreement made by their husbands, touching their real estate, and hence, there cannot be any mutuality between the defendant and the other parties to the arrangement. He could not obtain from them an equal division of the lands by virtue of their contract, and on that account, a court of equity ought not to enforce a specific performance against him, but ought to leave them to whatever remedy the law would give them for the breach of the contract by him.

The bill must be dismissed with costs.

PER CURIAM, Bill dismissed.

JOHN A. FLEMING *and others against* A. B. CHUNN.

Where, by articles of agreement, A is to make title to, and B pay the purchase-money for land, on a certain day, and B fails to pay the money at the time specified, but it is afterwards recovered in an action at law, A in the meantime occupying the premises at intervals, it was *Held* that he was liable for a fair rent for such occupation.

This rent is recoverable in equity, for the reason that it could not be recovered at law, for want of the legal title.

Rent due for the occupation of an equitable estate in land, in the life time of the *cestui que trust*, goes to his personal representative, that accruing on such occupation after his death, goes to his heirs.

CAUSE removed from the Court of Equity of Buncombe County.

Upon the pleadings, the case is this: On the 12th of April, 1848, Chunn, the defendant, and one Samuel Fleming entered into written articles for the sale by the former to the latter,

in fee, of certain lots in Asheville, on which were situated a store and dwelling house, then occupied by the defendant, at the price of $5.100, payable on the 10th of July following, or at any time thereafter, upon the delivery of possession by the defendant. On the 8th of July, 1848, the defendant gave Fleming notice that he should be ready on the 10th of July, to deliver the possession and convey the premises upon the receipt of the purchase money, and requested him to make the payment, and receive the conveyance accordingly. Fleming did not comply, and the defendant brought an action at law against him for the purchase money. Pending the suit, Fleming died intestate, and it was revived against his administrator, and judgment recovered thereon for the purchase money, and interest thereon from July 10th, 1848, which was paid.—Very soon afterwards, the defendant executed a deed in fee to the present plaintiffs for the premises—they being the children and heirs-at-law of Fleming; and they entered into the premises. The bill alleges, that until he made the deed, the defendant used, and occupied the premises, and that $400 per annum, is a reasonable rent, during that period, and the prayer is for an account and payment of such rent. The answer admits the occupation and enjoyment of the premises by the defendant for part of the time mentioned in the bill, but denies it for the residue of the time, and states that the defendant, having no use for them, both the store and dwelling house were shut up and not occupied by any one, for considerable periods. It insists, also, that the defendant was not bound to give possession until the purchase money was paid, and had the right to the immediate enjoyment of the premises, without liability for rent or profits.

Shipp, for the plaintiffs.
N. W. Woodfin, for the the defendant.

Ruffin, J. As the defendant recovered at law, the purchase money, with interest on it from the 10th of July, 1848, (when, upon payment of the price, Fleming, was by the terms

of the contract entitled to the possession,) the property and the profits of it, are to be regarded in equity, as belonging to Fleming, for that time. The profits of the premises came in the place of the interest which constitutes the profits on the price. But the defendant is not liable for rent except for those periods, during which he had the enjoyment. A vendor, who retains the possession and the title, as a security, not merely for the payment, but for the punctual payment, of the purchase money, is not precisely like a mortgagee, who turns the mortgagor out of the premises yielding, or that might yield profits, and enters himself. Such a mortgagee may be justly chargeable with the profits made by him, and also, with such as he might, and, therefore, ought to have made; for he is at liberty to occupy or let the premises, and, unless he means to do so, and apply the profits to the mortgage debt, he ought not to eject the mortgagor. But, a vendor, in a case like this, is under no obligation, and has no authority, but by the direction or request of the vendee, to let the houses, to the possession of which the vendee may entitle himself at any moment, by the payment of the price. Therefore, the defendant, in this case, is liable only for a fair rent for such parts of the premises as he may from time to time have occupied and enjoyed; and, he is liable for that upon the principle, that he has derived benefit to that extent out of the equitable estate of his vendee.

But the plaintiffs are not entitled to the whole of that rent; because, that which accrued in Fleming's lifetime, formed part of his personal estate, and went to his administrator.—But they are entitled to that for the term between their father's death, and the conveyance and surrender of the premises to them; and they are entitled to receive it here, because they could not recover it at law, for the want of the legal title at that period. There must, therefore, be a reference to the clerk to enquire for what period the defendant occupied the premises, or any, or what part thereof, or let the same, and to fix a reasonable rent for the same, and, after making the defendant all just allowances for taxes, repairs, and other proper

outlays, report the sum which the defendant ought to pay the plaintiffs for the rent or profits of the premises by him made or received.

PER CURIAM, Decree accordingly.

JESSE MULLINS *against* DAVID C. McCANDLESS *and another.*

One, from whom the equitable right of the plaintiff has been obtained by compromise, but against whom there is no claim and no prayer for relief, need not be made a party to a bill against the agent who effected the compromise alleging a fraudulent dealing with the proceeds of the compromise.

Where one, in a confidential relation, uses the influence and advantages of his position, to make an unequal contract with his dependent or inferior, Equity will relieve against such contract.

(*Polk* v. *Gallant*, 2 Dev. and Bat. Eq. 395; *Thompson* v. *McDonald*, Ibid. 463; *Thorpe* v. *Ricks*, 1 Dev. and Bat. Eq. 613; *Buffalow* v. *Buffalow*, 2 Dev. and Bat. Eq. 241; *Deaton* v. *Monroe*, 4 Jones' Eq. 39, cited and approved.)

CAUSE removed from the Court of Equity of Watauga county.

The plaintiff alleges in his bill, that he was the owner of a negro woman, named Silvey, and her four children, William, John, Matilda, and Anderson, also of a tract of land, adjoining the defendant, Horton, on which he lived, containing about 75 acres; that he was old, feeble in mind, unacquainted with business, and helpless, and had no family but his wife, who was also old and infirm; that on the 22nd day of January 1852, he yielded to the repeated solicitations of his nephew, one Larkin Hodges, to convey to him all the said negroes, and took from him a bond, conditioned to support himself and his wife during their lives; that at the same time, it was distinctly understood and agreed, that the said Larkin should remove to plaintiff's home, and that the slaves were not to be removed from that place; that said Larkin did remove to plaintiff's land, and for several years did comply,

indifferently well, with his contract, but afterwards became totally regardless of it; that among other departures from his agreement, in the year 1857, he conveyed the two slaves, William and John, to his two sons, William and Edward, without the knowledge of plaintiff, who took them away from plaintiff against his will, and sold them to a trader, who carried them to the county of Rutherford; that in his perplexity and distress at such faithless conduct, the defendants, McCandless and Horton, approached the plaintiff and tendered him their sympathy and assistance; that the former of these, was the sheriff of the county, in which he lived, and the other had filled that office, and was his near neighbor; that they were men of character and had always been friendly, so that he readily accepted their proffered services; he gave them a power of attorney to act in the business, and they followed the slaves, John and William, to where they had been sold, in the county of Rutherford, and there had the two sons of his nephew Larkin, arrested on a writ, returnable to the Superior Court of Watauga, and the same process served on Larkin Hodges and one other person, whom they said was in confederacy with the others; that on returning, the defendants told plaintiff what had been done, and told him that the other slaves, Silvey, Matilda and Anderson, were not safe in his possession, for that the Hodges intended to get them from him by force or fraud, and run them out of the country; that he was greatly alarmed and distressed at this information, without funds or money, and in his great need, adopted the suggestion of the defendants, that he should convey the slaves to them, and put them into their possession; that a bond was accordingly executed, the condition of which was, "that whereas, the said Jesse Mullins, has this day conveyed to the said Horton and McCandless three negro slaves, a woman and two children, which he is legally possessed of as he claims, and as there is other claims on the same; now, if the said Horton and McCandless shall deliver to the said Jesse Mullins, his heirs, executors and assigns, the above negroes, after they have established a good and lawful title to them, then this

obligation to be void, otherwise to remain in full force;" that a few days after this, the defendants made a compromise with Larkin Hodges, in which, as plaintiff's agents, they agreed that he, Hodges, might retain the slaves, William and John, as his right, but was to surrender all right and title to the other slaves, and the plaintiff, on his part, was to relinquish all interest in the bond taken for the support of himself and wife, and the plaintiff was to dismiss the suit brought against said Larkin and others for the abduction of the slaves; that in fulfilment of this compromise, the slaves, Silvey and her two children, were conveyed to the *defendants*, not as agents, but individually, and the bond, held on Hodges, was surrendered to him, and plaintiff released, by deed, all claims to the slaves, William and John; that abusing the confidence which plaintiff so implicitly had in these defendants, by pretending that he was still in great danger, they persuaded plaintiff to acquiesce, for the present, in the conveyance made by Hodges on the compromise, and to let the title to the negroes, Silvey and children, remain in them, and furthermore, they persuaded him to convey to them the tract of land, on which he lived, in fee, which was worth ———, and to take back a life-estate for his own life, and at the same time, they deceitfully prevailed on the plaintiff to take their bond to support himself and his aged wife for their lives; that even this was done also under a promise and assurance that plaintiff should not again be disturbed in the possession of Silvey and her children, but immediately on the completion of this hard arrangement, to show how selfish and interested had been the interference of the defendants, they forthwith took exclusive possession of Matilda, the elder child of Silvey, and asserted the absolute right and dominion over all these slaves under the deed made them by Larkin Hodges; he alleges that the taking this conveyance to themselves, when acting as his agents, was a fraud upon his rights, and was designed and intended to accomplish the deceitful scheme, whereby they have got all he is worth for a very small consideration, and by their pretended kindness, leave him worse off than he was in the

hands of the Hodges, by the value of the land. The prayer of the bill is for an injunction to restrain the defendants from taking Silvey and Anderson from the possession of the plaintiff, and from selling Matilda or removing her out of the county; that the conveyance to them from Larkin Hodges, may be declared to be void and surrendered for cancellation, and for general relief. The defendants demurred, and the cause being set down for argument, was sent to this Court.

Gaither and *Edney*, for the plaintiff.
Folk and *Lenoir*, for the defendants.

BATTLE, J. The demurrer is founded mainly on the objection that Larkin Hodges, is not made a party to the suit.—With respect to him the bill charges that the defendants, as the duly authorised agents of the plaintiff, compromised the matters in dispute between him and the said Hodges, and fraudulently took from the latter a conveyance for the slaves, now in controversy, to themselves instead of the plaintiff, as they ought to have done. The bill sets up no claim against Hodges, and prays for no relief against him. He is then, according to the allegation of the bill, an assignor, all of whose interest has been transferred to the defendants, and this is admitted by the demurrers. In such a case it is settled, that the assignor is not a necessary party to a bill, seeking relief against the assignee alone; *Polk* v. *Gallant*, 2 Dev. and Bat. Eq. 395; *Thompson* v. *McDonald*, ib. 463. See also *Thorpe* v. *Ricks*, 1 Dev. and Bat. Eq. 613.

The more general ground of demurrer for want of equity in the bill, is equally untenable. The allegations are, that the plaintiff was old, illiterate, unacquainted with business, feeble-minded, and friendless; that he had just been grossly deceived by his nephew, and was likely to be greatly injured by him; that the defendants, one of whom was the sheriff of the county, and the other had been so, came to him, professed to be his friends, and proposed to become his attorneys in fact, with no purpose of gain to themselves, but solely with the

view to recover his slaves, which the sons of his nephew had wrongfully carried off, and to assert his rights against that nephew; that under these circumstances, the defendants, by the fraudulent means set forth in the bill, obtained the conveyances for his land and slaves, against which it is the object of the bill to obtain relief. The facts thus related, are admitted by the demurrer to be true, and it would be a reproach to any court, professing to be governed by the principles of equity and good conscience, not to give the relief prayed. This Court, at least, will not hesitate to do so; and, in doing so, it is only carrying out the principles established by former adjudications. See *Buffalow* v. *Buffalow*, 2 Dev. and Bat. Eq. Rep. 241, and *Deaton* v. *Monroe*, 4 Jones' Eq. 89, and the cases therein cited.

The demurrer is overruled with costs, and this will be certified to the Court below, to the end that the defendant may be ordered to answer the bill.

PER CURIAM, Demurrer overruled.

DAVID JUSTICE *against* JOSEPH CARROLL *and others*.

Where the interest of one, holding a bond for title to land, was sold at execution sale, and the obligee induced one to purchase it, who afterwards sold it to another at an advance on his bid, and this last sold it to the original vendor, (all parties believing the sale to be valid) it was *Held*, that neither the obligee in the title-bond, nor his assignee, who was the person that bid off the interest at sheriffs sale, could call on the obligor for a specific performance, he having parted with the legal title to one who paid a full price, and had no notice of an adverse equity.

CAUSE removed from the Court of Equity of Cleaveland County.

Joseph Carroll, being the owner of a lot in the town of Shelby, sold it to Lewis Justice, and executed to him a title-bond for the same, dated 2nd of February, 1852. Some four

years thereafter, Lewis Justice assigned his interest in such title-bond to the plaintiff, David Justice, as he alleges in his bill, for a valuable consideration, and the suit is instituted by the latter, as assignee, to compel Carroll to the specific performance of his contract, by making a title to the lot in question. The bill alleges that most of the purchase money was paid to Carroll, but that the plaintiff was able and ready to pay the remainder, and had offered do so, but that the defendant Carroll, had refused. The bill states, that "before the purchase money had been paid therefor, several justices' executions were levied on the said lot, as the property of the said Lewis Justice, duly returned to the County Court of the said county, orders of sale duly and regularly obtained, and writs of *venditioni exponas*, issued, under which the interest of the said Lewis was sold, when your orator became the purchaser. At the time, he supposed he would, by the said sale, acquire a good title thereto, and, on the payment of the purchase money due upon the preceding contract, be entitled to call for, and enforce a conveyance of said land, from the defendant, Carroll, to himself, but being informed otherwise, and, inasmuch as he had been induced to make the purchase at the instance and request of the said Lewis Justice, in pursuance of which he had advanced money for his benefit, he, the defendant, Lewis, agreed by parol, to assign to your orator all the interest which he had in, and to the said premises, and in pursuance of this contract, he did, on the 12th of June, 1856, assign and deliver to your orator the bond which he so held on Joseph Carroll."

The bill further alleges, that subsequently to the plaintiff's purchase at execution sale, the defendant, Joseph Carroll, sold the premises to the defendant Dellinger, who has entered into the possession thereof, and refused to recognise the equity of the plaintiff, although both he and Carroll had full knowledge of the same at the time they contracted in relation to the said lot.

The answer of John Dellinger states, that in 1853, he contracted for the lot in question with Carroll, and, the same be-

ing vacant, he entered thereon, and commenced building and making other improvements; that, on the 19th of January, 1854, Carroll conveyed it to him by deed, he having paid a full price for the same; that he continued to improve the lot until he had expended some seven hundred dollars thereon, without having the slightest knowledge that either of the Justices had any equitable claim thereto. He alleges that these improvements proceeded under the eyes of both David and Lewis Justice, and they neither of them gave him any notice of their claim, until the land became suddenly enhanced in value, by the prospect of a rail-road's being made near to it; immediately after which time, this suit was brought.

Joseph Carroll, in his answer, says that at the execution sale spoken of in the bill, David Justice bid off the lot in question, and shortly thereafter, assigned his bid to one Benjamin Justice, who took possession of the bond which he, Carroll, had given, and the sheriff's receipt which David Justice had taken on the sale made under the executions; that shortly after this, he bought Benjamin Justice's interest in the lot, and paid him a large advance on his outlay; that he took no written memorial of this sale, but took up from the said Benjamin the title bond, which he had given to Lewis Justice for the lot; that after this, he sold and conveyed the property to Dellinger, who went on to improve it, as stated in his answer.

The proofs establish, that David Justice sold the interest which he acquired by the purchase at the sheriff's sale, to Benjamin Justice, for a profit of two dollars.

Shipp and *Bynum*, for the plaintiff.
Lander, for the defendants.

Pearson, C. J. Where the purchase money of land is not paid in full, and the title remains in the vendor as a security, it is settled that the vendee, or his assignee, has not such an equitable estate as is liable to be sold under an execution by force of the statute, because it is a *mixed* trust, and the vendor holds the legal estate in trust to secure himself, and then,

in trust for the vendee, so that the purchaser at execution sale could not have the legal estate consistently with the right of the vendor to hold it as a security. If, therefore, Lewis Justice had been passive in respect to the execution sale, his equity to have a title upon the payment of the balance of the purchase money, would not have been affected by it, and the plaintiff, as his assignee would have been entitled to the relief which the bill seeks to enforce.

But, he was not passive in respect to it; on the contrary, in order to show how it happened that after the plaintiff had assigned his bid at the sheriff's sale to Benjamin Justice, Lewis Justice was induced to assign his interest in the land to the plaintiff, he alleges in his bill, that "inasmuch as he had been induced to make the purchase at the *instance* and *request of the said Lewis Justice*, in pursuance of which he advanced money for his benefit, he, the defendant Lewis agreed by parol to assign to your orator, all the interest which he had in the premises, and, in pursuance thereof, afterwards assigned the bonds for title," &c.

So, the question is, can the plaintiff, who stands in the shoes of Lewis Justice, on any principle of "*justice*" and fair dealing, call for a specific performance of the original contract, made by the defendant Carroll? We have this case: Lewis Justice induces the plaintiff to buy his interest in the land which was exposed to sale under an execution, the plaintiff, for valuable consideration, assigns his bid to Benjamin Justice, who sells to Carroll, the original owner, and he sells to Dellinger for a full price, and executes to him a deed, all the parties being then under the impression that the sale by the sheriff to the plaintiff, and the transfer of his bid to Benjamin Justice, and the assignment by him to Carroll had extinguished the equity of Lewis Justice, and put it in the power of Carroll to make a title discharged from all equities growing out of the prior dealings in respect to the land. But it is discovered that the interest of Lewis Justice was not liable to execution sale, and, thereupon, he assigns his interest to the plaintiff.

Now, although, according to the moral perception of *David* Justice, the plaintiff, he may supose that he is at liberty to call for a specific performance of the original contract, and to compel Dellinger, who is an innocent purchaser, at a fair price, to convey the title to him, yet, it is manifest, from the bare statement, that *common* justice and good conscience, alike forbid, either Lewis Justice, whose debts were paid, by reason of his inducing David Justice to become the purchaser at execution sale, or David Justice, who transferred his bid at an advance of two dollars to Benjamin Justice, to take advantage of the fact that the interest of Lewis was not the subject of sale, under execution. The request of Lewis, that David should buy his interest, and the fact, that by reason thereof, his debts, to the amount of the value of the interest to which he was entitled in the land, were discharged, makes it iniquitous that he or David, who got clear of his bid at a small advance, should, afterwards, combine and confederate in order to deprive a *bona fide* purchaser of the title. So, according to the plaintiff's own showing, he has no standing-place in a Court of Equity.

PER CURIAM, The bill dismissed with costs.

THOMAS F. ELLIOTT *and others, against* SAMUEL POSTEN *and Wife.*

The increase of a female slave, born after the making of a will, made in 1850, and before the death of the testator, does not pass under a bequest of the mother.

A wagon was held to pass under the terms, "all my farming utensils."

Property not disposed of by a will, always forms the primary fund for the payment of debts and funeral expenses.

CAUSE removed from the Court of Equity of Cleaveland county.

The plaintiffs are the brothers and sisters, nephews and nieces of James P. Doggett, and filed this bill against his widow, who is the almost universal legatee, and executrix of

the said James. She has, since the death of Doggett, intermarried with the defendant, Posten.

It is alleged that a negro child was born of a certain female slave, Mahala, given by the will to Mrs. Posten, after the making of the will, and before the death of the testator, and that a certain wagon and a buggy were left out of the will; that there is no residuary clause in said will, and, therefore, that this property goes to the next of kin, by the statute of distributions. They allege, in their bill, that this property has been sold by the defendants, and has been bought in by themselves, or for their benefit, at an undervalue, and that the same is now in their possession. The prayer is for a resale of the property mentioned, and for an account and settlement.

The defendants admit the birth of the child, mentioned in the bill, before the death of the testator, and that the buggy was left out of the will. They say, however, that in the will of Mr. Doggett, is the following clause, "I give and bequeath to my wife, Anne Jane Doggett, all my household and kitchen furniture, also, all my farming utensils and ox-cart and oxen," and that the wagon in question passed to her as part of the farming utensils. They state, in their answer, that the defendant, Mrs. Posten, supposing she was entitled to all the property, paid the debts of her former husband's estate out of her own means, but they insist that if this property, or any part of it, is not disposed of by the will, that it is the primary fund for the payment of debts, and that they are entitled to reimbursement out of it, for the funds advanced towards the testator's debts. Replication, commission and proofs. The cause being set for hearing, was transmitted.

Shipp, for the plaintiff.
Lander and *Avery*, for the defendant.

BATTLE, J. There is nothing in the will of James P. Doggett, which was executed in the year, 1850, to take the child of the woman, Mahala, which was born after that time, and before the death of the testator, out of the general rule, and

make it pass under the will. The child is, therefore, undisposed of, and belongs to the next of kin. The same is the case with respect to the buggy; but, we think the wagon was bequeathed to the widow under the general description of all the testator's "farming utensils." The word "utensil," according to Webster, is derived from the latin verb "*utor*," and signifies "an instrument; that which is used; particularly an instrument or vessel used in a kitchen or in domestic or farming business." A wagon "is an instrument" generally used in farming business, and in some parts of the country almost as necessary as a plough or a hoe. In 1 Roper on legacies 211, we find it stated that the word "utensil" will embrace every thing that is "necessary for household purposes or applicable to the trade or mystery to which the term has reference." The argument that the extent of the term is narrowed in the will, now before us, by the insertion of the word "ox-cart," will prove too much, as it would exclude "oxen" from the import of the term "stock of cattle." The word "ox-cart and oxen," were evidently added out of abundant caution.—The plaintiffs, as the next of kin of the testator, have a right to treat the sale and purchase of the negro child, in question, by the executrix and her husband, as a nullity, and to have it resold for the purposes of a partition among them. The defendants are entitled to a reasonable compensation for their expense and trouble in keeping and taking care of it. The defendants must account for the buggy at a fair price, according to its value at the time of the testator's death. The debts, including the funeral expenses of the testator, are a charge upon the negro child and buggy, as personal chattels undisposed of by the will, as such property always forms the primary fund for the payment of debts, in the absence of a special provision in the will to the contrary. There may be a decree for a sale and an account, upon the principles declared in this opinion.

PER CURIAM, Decree accordingly.

SAMUEL CABE *and others against* SAMUEL B. DIXON *and others.*

Where, on a contract to lease a mine for twelve months, in order that search might be made for minerals, it was agreed that the lessor should make a good title to one half of the minerals discovered, and the lessees permitted other persons (claiming a right) to make explorations and discoveries, which added greatly to the value of the property, without offering to assist, it not appearing that they were ready or able to do the necessary work, it was *Held* that they were not entitled to a specific performance.

CAUSE removed from the Court of Equity of Macon county.

Samuel B. Dixon, was seized in fee of a small tract of land in Macon county, of about 56 acres, which, about the 1st of January, 1851, he contracted to sell to his brother, George W. Dixon, at $50, about $20 of which, was paid down, and the remainder secured by bonds, at one, two and three years in equal instalments, and took a bond from him in the penalty of $110, to make him, the said George W. Dixon, a title to the same as soon as the last note was paid. While this contract was in force, the said George W. Dixon executed to the plaintiffs the following contract in writing:

"North Carolina, Macon County.

"Be it known to all whom it may concern, that I, George W. Dixon, of Macon county, North Carolina, this day lease unto John Cabe of Fannin county, Georgia, and Samuel Cabe and Leander F. Cabe and L. D. Cabe, of Macon county, North Carolina, my lot of land, I purchased of S. B. Dixon in the 13th District, for the term of twelve months, from this date, for the purpose of mining and searching for copper or any other valuable mineral: Therefore, should the said Cabes discover, or cause to be discovered, any copper or other valuable minerals on said lot, in said time, then, I agree, and hereby bind myself, to make, or cause to be made unto the said Cabes, their heirs or assigns, good and lawful titles to one half of said mineral or minerals, together with the undisturbed right of way, wood and water, for mining purposes.

June 7th, 1854. Signed, GEO. W. DIXON."

One fifth of the interest, thus conveyed, the parties sold to Aaron Matthews, and a memorandum thereof is endorsed on this paper, and he thus becomes, with the Messrs. Cabes, a party plaintiff.

The bill alleges that in pursuance of said contract of lease, plaintiffs "prepared to develop all the mines on the said land, and went for that purpose, but that the defendant, George W. Dixon, and the other defendants, their confederates, refused to let them enter upon said land for that purpose or any other;" that they destroyed the written obligation which Samuel B. Dixon had given to George W. Dixon, and that the former then proceeded, and did lease the premises to the defendants, Saunderson, Ledford, Curtis, Cook, Trusty and Forrester, who gave to the said George W. Dixon a written obligation, in the penalty of $10,000, to hold one half of said land in trust for him in fee; that this was all done with a full knowledge, on the part of these defendants, of the plaintiffs' equitable rights. The plaintiffs allege that they again and again requested to be let into possession, and as further inducement, offered to pay to S. B. Dixon all the remainder of the purchase-money due him from G. W. Dixon, which turned out to be $37,62, which was refused, and the plaintiffs were fraudulently and forcibly prevented from testing the mine, while "they, (the defendants,) interfering thus improperly, have, at little cost, *at the very point at which they* (plaintiffs) *intended to commence work*, discovered a valuable and rich copper vein." The prayer is for a specific performance and an account.

All the defendants answered. George W. Dixon says that he supposes he did execute a paper, like that set out in plaintiffs' bill, but that he was very drunk when it was done, and was made so by the contrivances of the plaintiffs, Leander, Lorenzo and Samuel Cabe, and, therefore, thinks plaintiffs ought not to have the relief sought. He further says, that in the fall before, he had given Forrester and Trusty a lease on it, and the exclusive right to work, in searching and operating for metals thereon; that one-fourth of the minerals discovered, was to be their compensation for such services, and the said

George was to bear an equal share of the expense after the mine was opened, and an exhibit is filed of that purport, dated 21st of November, 1853; that Forrester and Trusty, in the month of September, 1854, commenced working the mine, and, associating the defendant Cook with them, they, in October following, made discoveries of copper to some extent; that in December, the mine, under their operations, proved to be *very promising;* that during the progress of these explorations, between September and December, finding the expense very heavy, and the associates being poor, they took into their company the other defendants, Sanderson and Ledford, who contributed materially to the means and participated in the efforts to develop the mine. Various sub-divisions and modifications of the interests of the parties took place, and the other defendants, Grady and Curtis, were also admitted on certain terms, all of which shares, interests and modifications of the association, are set forth in the answers and by exhibits, but are not essential in the view taken of the case by the Court. It appears from the proofs filed, that during the progress of the work, the plaintiffs, or some of them, were often present; that they made frequent enquiries as to the extent of discoveries made, and were informed, without reserve, of the results, but made no offer, and asserted no right to participate in the expense or profits of the enterprise until after the property had become of very great value, (one 48th part having, at one time, sold for $500, and the other interests being considered of proportionate value.)

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

Shipp and *Merriman*, for the plaintiffs.
N. W. Woodfin, *J. W. Woodfin* and *Dickson*, for def'ts.

PEARSON, C. J. The equity of the plaintiffs is not made out, because there is no proof that they "discovered or caused to be discovered any copper or other valuable mineral" on the land mentioned in the pleadings, which was the consider-

ation of the agreement, which the bill seeks to have specifically performed; nor is there any proof that they were prepared, or able, or offered to do the work necessary to test the mine; on the contrary, according to the proof, they stood by and allowed the defendants to be at the expense and labor of testing the mine, and now seek, without having paid any consideration, or having made any outlay of money, or labor, to deprive the defendants of a title which they have paid for by labor and money.

PER CURIAM, Bill dismissed.

WILLIAM PARKER *and others, against* THOMAS PARKER *and others.*

"Increase" annexed to the gift of a female slave, in a will, does not, *per se*, pass the issue born before the the testator's death; and the Court cannot *reject* a word which makes a phrase insensible, and *substitute* another which makes it sensible, in order to make such increase pass, unless something in the will itself justifies such rejection and substitution.

CAUSE removed from the Court of Equity of Rutherford county.

William Parker made his will in March, 1844, and gave all his property, real and personal, to his widow, Polly, during her natural life, and then, after giving land and slaves specifically, to several of his children, after the death of their mother, he gives to an idiot son, James, "three negroes, Jack, Jim, and Till, and Till's increase of this my will, to him and his heirs forever"; and he afterwards adds, "Now, my will is, that my sons, Thomas and Elijah, be constituted guardians for my son James, as long as he lives, and, if they, Thomas and Elijah, do live longer than my son, James, the said Thomas and Elijah, are to divide my son James' estate between them, share and share alike." The testator died in 1854, and the executors, Thomas and Elijah, proved the will, and the estate of the testator was held by Mrs. Parker until her death, which happened in April, 1858. Between the making of the will,

and the death of the testator, the woman, Till, had issue several children, and upon the death of Mrs. Parker, the sons, Thomas and Elijah, took possession of the three slaves, given in the will to James, and also, the issue of Till, claiming them for their idiotic brother. The bill is filed by some of the testator's next of kin, against Thomas, Elijah and James, and some others of the next of kin, alleging that the issue of Till, before the death of the testator, did not go with Till to James, Elijah and Thomas, but, there being no residuary clause in the will, were undisposed of, and subject to distribution and division, between all the next of kin, and to that end, prays for a sale of the slaves. The answers submit the construction to the Court, contending that it was understood by the whole family, that Till's children were intended as a part of the provision for James, after he should leave the protection and care of his mother.

Gaither, for the plaintiffs.
Avery, *Shipp*, and *Hoke*, for the defendants.

RUFFIN, J. There have been so many cases holding, that "increase" annexed to the gift of a female slave does not *per se*, pass her issue, before the testator's death, as to make the doctrine familiar to the whole profession. But the Court has readily looked to any thing in the will tending to show that "increase" was used in a more enlarged sense, and allowed it to control the meaning, if it could control it. We should be quite willing to do so here, if we could; for a Judge may personally suppose that the testator meant the largest gift to his son James. But that is conjecture, merely, formed on collateral circumstances, and not on any thing the testator has said in his will, either directly, as declaring his intention, or indirectly, as declaring a fact from which the intention might be inferred. There is, indeed, in this will, a peculiarity, as it gives "Till's increase of this my will," and the Court considered much, whether any thing could be made of that mode of expression. It cannot, we believe. If the word, instead of

being *of*, had been *after*, it would have been clear enough; and the Court would be quite willing to read the will thus, if any reason could be given for it. One word may be substituted for another, to effectuate an apparent intent. But one word cannot be thus substituted, in order, first, to create an intent, and then to execute it. The increase "of my will," is insensible, and must remain so, unless it be supposed that *after* was left out, and *of* put in by mistake. But, as was just said, no good reason can be assigned for that supposition, except barely, that *after* would make sense; and that is not sufficient to show that such was the sense meant by the testator.

The Court, therefore, concludes, though with some reluctance, that the issue of Till, in the testator's time, are, after the death of the widow, subject to distribution amongst those entitled under the statute of distributions; and, for the purpose of distribution, there may be a decree for a sale by the executors, on the usual credit and an account. The fund must pay the costs.

PER CURIAM, Decree accordingly.

JOSEPH THOMPSON, *Executor, against* JOHN MITCHELL *and wife and others.*

A limitation by will of slaves and other property to one, for her support during her life, "and what remains at her death, to be sold and equally divided among the heirs of her body," vests the proceeds of the property sold, by the rule in Shelley's case, in her children, and the descendants of such of them as may have died, as purchasers.

CAUSE removed from the Court of Equity of Alexander county.

This bill is filed by the executor of Thomas Lackey, seeking the advice of the Court upon certain bequests in his will. That portion of the will necessary to a proper understanding of the question, is as follows: "3rd. I will and bequeath to my

beloved wife, Margaret Lackey, as much of my plantation, with the improvements, as will support her her life-time. Also her own negroes that came by her, and her own beast, and so much household and kitchen furniture as will be necessary for her, with as much of my stock of cattle, hogs and sheep; and, at her decease, what remains, to be sold and equally divided among the lawful heirs of her body."

One of the questions raised by the executor is, whether the words "what remains, to be sold, &c.," applies to the slaves as well as the other property mentioned in that connection.

Margaret Lackey, the widow and legatee above mentioned, made a will, in which she bequeathed all her property to three of her daughters, Amy Thompson, Elizabeth Hines and Margaret Mitchell, and the husbands of these legatees insist that by virtue of the recited clause, in the will of Thomas Lackey, his wife, Margaret, took an absolute estate in the negroes and other property, and upon the sale, after her death, the whole proceeds passed to them.

There are other children of Mrs. Lackey, and the children of several, whose parents died in her life-time, but after the death of Thomas Lackey. These others, the surviving children of Mrs. Lackey, insist that the construction contended for by the three daughters, Mrs. Thompson, Hines and Mitchell, is wrong, and that only an estate for life vested in Mrs. Lackey, under the will of her husband, with a limitation over to all her children that may be alive at her death.

The children of the deceased children of Margaret Lackey, insist upon the latter construction of the will, with this difference, that they claim to participate in the division as representing their deceased parents.

The executor feeling that it would not be safe for him to assume either of the above constructions, of the said will, to be correct, and to act upon it as such, calls upon the said several parties to interplead, and let the matter be settled, for his protection, by a decree of this Court.

The answers of the defendants reiterate the several views as attributed to them by the plaintiff.

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

Boyden, for the plaintiff.
Mitchell, for the defendants.

PEARSON, C. J. The clause of the will submitted to us for construction, is entire and unbroken, and we can see no ground upon which the words, "what remains, to be sold, &c.," can be so detached as to be referable alone to the stock of cattle, hogs and sheep, and not be extended to the negroes and other property, given in the clause by words making a continuous sentence; it follows, that the negroes vested in Margaret Lackey, subject to the legal effect of the direction, "what remains, (at her death) to be sold and equally divided among the heirs of her body."

We are of opinion, that the words "heirs of her body," as here used, are words of purchase, and not words of limitation, according to the rule in Shelley's case; because, by reason of the direction, "what remains, to be *sold* and equally divided," the persons indicated as heirs of her body, do not take the same estate in *like manner*, as they would have taken, had she taken the absolute estate. It follows, that she took an estate for life, with a limitation over to the heirs of her body as purchasers. Taken in this sense, heirs of her body, means her issue, that is, her children and the descendants of such of them as may have died, who would represent and stand in place of their deceased parent. It must be declared to be the opinion of this Court, that under the limitation over, the children of Margaret Lackey, living at the death of the testator, Thomas Lackey, took a vested interest under the limitation over as purchasers, which, upon the death of any of them, devolved upon their personal representatives.

As none of her children died before the death of the testator, leaving issue, it is not necessary to enter upon that question.

PER CURIAM, Decree accordingly.

MAXFIELD DOUTHETT *and wife and others, against* PHILIP S. BODENHAMER.

A limitation over of slaves by will "to a daughter and to her children, (should she have any) forever; but should she die without children," then to another daughter," &c., is a valid contingent interest, and a Court of Equity, on a proper case being made, will protect it by writ of sequestration, against a fraudulent removal, or sale of the property.

CAUSE removed from the Court of Equity of Henderson County.

Thomas Brummet, of Greenville District, South Carolina, by a will, properly executed for that purpose, bequeathed, (among other things) as follows: "Third. I will and bequeath to my daughter Letta, the following negroes, to wit: Ann and Eliza, also, Juliet and her two children, Green and Thomas, together with the increase of said negroes, unto my daughter Letta, and to her children, (should she have any) forever; but should she die without children, then, and in that case, the above named negroes willed to Letta, revert back to my daughter, Quintina Douthet, during her life, and at her death, to her children forever." * *

Fourthly. And, for the support and maintenance of my wife, I wish my three negroes, Joe, Adam and Jim, to remain in the hands of my daughter Letta, with whom I desire my wife to live, and the proceeds arising from the labor of said three negroes, Joe, Adam and Jim, to be set apart for the use and benefit of my wife, so long as she lives; and at her death, I will Joe, Adam and Jim, to my daughter Letta, and at her death to her children, if she have any, but should Letta die without children, then I desire that the above named negroes, Joe, Adam and Jim, shall revert back to my daughter, Quintina Douthet, and at her death, to her children forever."

Letta, named in the foregoing bequests, and mother, lived together for several years in the State of South Carolina, when the former intermarried with the defendant, Philip S. Bodenhamer, who took possession of the slaves above named, and

afterwards, Mrs. Brummett, the widow, having died, the defendant removed to the county of Henderson, in this State.

The bill alleges that the defendant's wife has not had children, and that there is not much probability of that event; but that Quintina, who is the wife of the plaintiff, Maxfield Douthett, has now living, several children, who are made parties plaintiff with their parents, to this bill. The bill further charges, that the defendant removed two of the slaves to Georgia, and tried to sell them to persons, who were by agreement with him, to carry them to Texas, and that he secretly removed the rest of the said slaves from South Carolina, and has endeavored to sell them in absolute right; and plaintiffs aver that there is great danger of their contingency being defeated by the unlawful conduct of the defendant, Bodenhamer. The prayer is for a sequestration to secure the slaves from being carried off, or sold so as to defeat plaintiffs' rights.

The defendant answered, denying that he had tried to sell *all* the sales in a distant State, but admitted that he had endeavered to sell some of them in the State of Georgia, with a view of their being carried beyond the jurisdiction of any court which could protect the interest of the plaintiffs. He stated that the proceeds of the slaves sold, had been invested in a tract of land which he held subject to the proper construction of the will. He further answered, denying the assertion that there was no probability of his wife's having a child or children, but said he hoped and believed she would, but, whether so or not, he insisted that plaintiffs' limitation over, was too remote to be valid in law. The cause being set for hearing on the bill and answer, was sent to this Court.

Roberts, for the plaintiff.

N. W. Woodfin, *J. W. Woodfin* and *Merriman*, for the defendant.

PEARSON, C. J. The question made as to the construction of the will of Thomas Brummett, admits of no doubt whatever. The plaintiffs have an interest contingent, and depending

upon the death of the wife of the defendant, without having a child, and however "the chances" may be, they have such an interest as will be protected by this Court.

It will be declared to be the opinion of this Court, that the limitation over to the plaintiffs in the will of Thomas Brummett is not too remote, and entitles the plaintiffs as executory legatees to have the property secured. A decree will be entered according to this declaration, and the agreement of the parties, in respect to the price of two slaves invested in land, to be held according to the limitations of the will.

PER CURIAM, Decree accordingly.

JOHN S. DAVIS, *Adm'r and others, against* ALFRED O. MILLER.

A widow may properly join with the administrator of her husband and his heirs-at-law in a petition for the sale of his land to pay debts, and having done so, and they having procured an order of sale, she is a proper party with the others, in a bill to effectuate such order by removing a cloud from the title produced by the fraudulent claim of another; and a bill of this character is not multifarious on account of her joinder in it.

APPEAL from an order sustaining a demurrer made by MANLY, J., at the last Court of Equity of Watauga County.

The bill alleges that the plaintiff, John S. Davis, became the administrator of Cyrus A. Allen; that the plantiffs, William W. Allen, Martha Campbell, James L. Allen, Harvy W. Allen, and Cyrus A. Allen, Junior, are his children and heirs-at-law, and the plaintiff, Clarissa, his widow; that it appearing by sale of the personal assets, that they were insufficient to pay the debts, they joined in a petition to the County Court of Mecklenburg, where was the domicil of the decedent, and obtained an order from the said Court, that the administrator should sell a tract of land lying in the county of Watauga, of which the said decedent was seized at the time of his death, and which was particularly described in the plaintiffs' petition; that before the land could be sold under the order aforesaid, the defendant, A. O Miller, procured it to be sold by the sheriff under an execution, issuing from the County Court of Watauga, against the decedent, C. A. Allen, in his life time; that the defendant attended at the sheriff's sale, and by pretending at one time, and to some of the persons present, that the said C. A. Allen had no title to the land offered for sale, and at another time, and to other persons, that he was bidding

for the benefit of the wife and children of the decedent, he succeeded in bidding off the land at a price far below its value; that he has taken a deed from the sheriff for the land, and now repudiates the trust upon which he avowed he was bidding at the sale, and insists that he purchased the same *bona fide*, and for his own benefit. The prayer is that the defendant may be compelled to bring into Court the sheriff's deed, to be cancelled, and for other and further relief.

The defendant demurred to the bill, and the same being set down to be argued, the demurrer was ordered to be sustained and bill dismissed; from which order, plaintiffs appealed.

Lenoir, for the plaintiffs.
Folk, for the defendant.

BATTLE, J. The case stated in the present bill varies in several important particulars from that which was presented by the pleadings in relation to the same subject matter in *Allen* v. *Miller*, (ante 146,) and in which we sustained a demurrer for multifariousness. There, the bill was filed by the widow, and the children and heirs-at-law of C. A. Allen, deceased, against the present defendant, Alfred O. Miller, for the purpose of converting him into a trustee on account of fraud, and also, against the present plaintiff, John S. Davis, as administrator of C. A. Allen, praying for an account and settlement of the estate of his intestate. The plaintiffs also claimed to be creditors of the estate, and sought to have their debts ascertained and paid, and the widow prayed to have her dower assigned out of the land alleged to have been fraudulently purchased by the defendant Miller. The bill was manifestly multifarious, and we so declared it to be, for the reasons set forth in our opinion. The present bill is filed by the administrator of C. A. Allen, together with the widow and heirs-at-law of the deceased, against Alfred O. Miller, and the plaintiffs, state that the personal assets of the deceased having been exhausted in the payment of his debts, and there being other debts due from his estate still remaining unpaid, it became

necessary to sell his lands for the purpose of discharging them, and with that view a petition was filed by the administor, heirs-at-law, and widow of the deceased, in the County Court of the county where administration on his estate was granted; and an order was obtained for selling all his lands, and thereby converting them into assets for the payment of the debts as prescribed by law. The plaintiffs then charge the defendant with fraud in procuring title to the tract of land in question, and pray to have the sheriff's deed brought into Court and cancelled, and for such other relief as may enable them to have the said tract of land sold for the purpose of paying the remaining debts of the deceased. To this bill, the defendant demurred for multifariousness, and his counsel relies on the authority of the former case. The demurrer cannot be sustained. We have already said that the present differs from the former case in several important particulars.—The difference is manifest from the summary which we have given of the allegations of the two bills. In the present, all the parties plaintiff joined in the petition for the sale of the land, and they have a connected interest in it, and there is no repugnancy in their respective rights. They are all interested in having the cloud of the defendant's title removed, so that the land may be sold for the benefit of the decedent's estate. The administrator and the heirs were certainly necessary parties, both in the petition to the County Court and the present bill. The widow need not have joined in the petition for the sale of the land, but it was not improper for her to do so; and if she wished to waive her claim for a specific assignment of dower in the land, she was a necessary party in order to bind her, and to prevent her from setting up a claim for it afterwards. Being then a proper party to the petition, it was necessary to make her a party to the present suit, the object of which is to render the proceedings in the petition in relation to the land in question, effectual. There is, therefore, no multifariousness in the bill, and the demurrer must be overruled. The order of the Court sustaining the demurrer must be reversed, and this opinion must be certified to the end that

the demurrer may be overruled, and the defendant be ordered to answer.

PER CURIAM, Decree accordingly.

J. R. PATTERSON *against* R. C. MILLER.

Relief by an injunction, (except in some few cases, to restrain the commission of torts,) is ancillary to some primary equity, and it is improvident to issue that writ, where no such primary equity is alleged.

Where, therefore, it was simply alleged in a bill, that the plaintiff had been informed of a superior title to the land, for which the note in question was given, and that a suit was pending between other parties, from which it appeared that such title might be the better, and that if so, it was doubtful whether the defendant was in circumstances to make redress in a suit on the general covenants of seizin and quiet enjoyment contained in his deed, *and no ulterior proceeding* is suggested as being contemplated, and not even a reference of the title asked, it was *Held* that it was not proper to allow an injunction.

APPEAL from an interlocutory order of the Court of Equity of Watauga county, refusing to dissolve an injunction.

The bill alleges that, in the month of June, 1855, the plaintiff bought a tract of land, lying in Watauga county, containing about two hundred acres, from the defendant, and that the same had been granted to one Dobson, through whom the defendant claims title; that the plaintiff gave three several notes for the purchase-money, payable at different dates, and that the defendant made him (plaintiff) a deed in fee for the premises, with full covenants of seizin and warranty of title; that the plaintiff went into possession and made valuable improvements on the land; that the said notes having become

due, the defendant brought suit thereon, and having obtained judgments in a court of law, has taken out execution, and by force thereof has collected one of these judgments, and threatens to enforce the collection of the others, which it is the object of this bill to restrain by an injunction. The plaintiff alleges that he has lately been informed, that one John E. Brown is claiming title to the land, conveyed by the defendant, under a grant to one Cathcart, prior in date to that to Dobson, and has brought several actions of ejectment, which are now pending in the Superior Court of Watauga county, for the purpose of establishing his title to the land in controversy, and to a large extent of adjoining lands; and for the purpose of establishing the boundary lines of the grant to Cathcart; that surveys have lately been made by orders made in these suits, which have been so run as to include the land conveyed by defendant to the plaintiff, and that "if the boundary of the Cathcart grant, as run in said surveys, is its true boundary, as in the present state of the controversy it seems to be, then the title, which the defendant has conveyed, is wholly worthless," and the said notes were executed under a total mistake of facts, both on his part and on that of the defendant, and are without consideration; that the defendant is embarrassed with heavy debts, so as to render it very doubtful, whether the plaintiff could, in the event of the land being taken by such superior title, obtain any redress by suit at law on the covenants. The prayer is simply for an injunction and for general relief.

The defendant answered, but as the opinion of this Court proceeds upon the plaintiff's bill alone, it is not deemed requisite to state the contents of such answer.

On the coming in of the answer, the defendant moved to dissolve the injunction, which was refused by his Honor, and the defendant appealed.

Lenoir, for the plaintiff.

Folk, for the defendant.

PEARSON, C. J. The relief by injunction does not *per se* constitute an equity; except when it is to prevent torts; as, to stay waste, destructive trespass, and the like; but is ancillary to some primary equity which the bill seeks to enforce; in aid of which, the writ of injunction restrains proceedings in the courts of common law, until such primary equity can be established; as, to stay execution on a judgment at law, until an opposing equity can be set up. It follows that to entitle a plaintiff to this ancillary relief, the bill must contain matter sufficient to make out some primary equity, in aid of which the injunction is asked for. This really seems a very plain proposition; and yet, although it has been announced time and again by this Court, it is frequently not attended to on the circuit.

The present is an instance of it. The bill does not contain matter sufficient to make out any primary equity, in aid of which the injunction is asked for, but the object is to stay execution on a judgment at law, as an independent equity; without reference to any primary equity, or to any further proceeding in this Court.

By reason of this fatal defect of the bill, the injunction was improvidently granted, and the decretal order must be reversed, and the injunction be dissolved irrespective of any matter set out in the answer.

The bill alleges that in pursuance of a contract the defendant executed to the plaintiff a deed in fee simple for a tract of land, "with full covenants for seizin and warranty," under which he took possession, and has made improvements; in consideration whereof, the plaintiff executed to the defendant three bonds for the purchase-money; upon which, judgments at law have been taken, and one of them has been satisfied. It further alleges, that there is ground to apprehend that the title of the defendant is defective by reason of a grant to one Cathcart, which it is supposed covers the land, and is older than the grant under which the defendant claims, and that the defendant "is embarrassed with heavy debts, so as to render it doubtful whether your orator could obtain redress in an

action at law on the covenants, in the event of his losing the land." The prayer is, that the defendant be enjoined from collecting the two judgments, which are unsatisfied, "until the further order of this Court; and for such other and further relief as the nature of the case may require."

What primary equity does the bill seek to establish? It lays the foundation for none. There is no averment of an offer to rescind the contract and reconvey, because of the defect in the title, or of a willingness on the part of the plaintiff to do so, and without it, the prayer for general relief is unmeaning. No further proceeding seems to be comtemplated in this Court except the injunction; no other order is asked for; there is not even an intimation that the plaintiff wishes a reference in respect to the title, or a suggestion of what action is to be taken in regard to it, supposing the plaintiff is entitled to have such an order after the contract has been executed by his accepting a conveyance, and relying on the covenants of seizin and warranty. Nor is there an averment, that the plaintiff has instituted a suit at law, or intends to do so, upon the covenant of seizin, so as to try, in the courts of common law, the validity of the defendant's title. In short, without laying the foundation for any further action in this Court; and without proposing to proceed in any other court, the plaintiff, being in possession under a deed with full covenants, desires to hold the land *without paying for it!* and to enjoin the collection of the purchase-money, for an indefinite time, or until those claiming under one Cathcart, who are not parties to this proceeding, and over whom the Court has no control, may see proper to institute an action of ejectment! It is not according to the course of this Court, to allow litigation to be commenced and left in a condition, indefinite, unfinished, and dependant upon the action of strangers. This opinion will be certified.

PER CURIAM, Decree accordingly.

L. FERRER *and others against* E. S. BARRETT *and others.*

A surety, upon the principle of *quia timet*, may file a bill against a counter-surety, to enforce his (surety's) exoneration, though he may not have paid the debt.

In a bill by a surety against a principal and counter-sureties, it was *Held* that the creditor and co-surety were properly made parties plaintiff.

It was *Held*, further, that the insolvency of the surety was no obstacle to his filing the bill to enforce his exoneration.

THE bill states, that Jacob A. Ramsour, was the surety of Barrett upon several notes and bonds, and becoming uneasy, he applied to Barrett for a counter security and indemnity, and that, thereupon, Barrett, Briggs, Henderson and Hoyle, executed their penal bond to Ramsour in the sum of $20.000, on the 5th of September, 1857, with a condition, that "if Barrett shall well and truly pay and discharge each and every of the bills, bonds, and notes, in or by which said Ramsour is bound as surety for the said Barrett, and discharge and save harmless the said Ramsour from any all liability for the said debts, bills, bonds and notes, then the above obligation to be void; otherwise, to remain in full force." That the whole amount for Ramsour was bound, as surety for Barrett, did not exceed $10.000. That among the debts for which he was thus bound, was one to Lorenzo Ferrer, upon a bond for the sum of $509.80, dated January 17th, 1856, and due one day after date, and executed by Barrett, as principal, and by Ramsour

and one G. Mosteller, as sureties. That Barrett failed to pay the debt to Ferrer, and the latter put it in suit, at law, and recovered judgment against the three obligors, in April, 1858; but that they had then all become insolvent, and neither of them was able to pay any part of it. The bill is filed by Ferrer, Ramsour, and Mosteller, against Barrett, Briggs, Henderson, and Hoyle, and prays that Barrett may be decreed to exonerate Ramsour and Mosteller from their liability on the debt to Ferrer, by paying the same, and the costs; and in default thereof, that the other defendants be decreed to pay it.

The defendants put in a demurrer for the want of equity, which was set down for argument, and the cause transferred to this Court.

Avery, for the plaintiffs.
Guion, for the defendants.

RUFFIN, J. The demurrer rests on the position that Ramsour could not maintain an action against Barrett on their original relation of principal and surety, until damnified by the payment of the debt, and, by consequence, that he could not have an action against the parties on the bond given to him as a counter-security. The first part of the proposition is true in reference to an action at law; but it is not true with respect to relief in this Court. It is the established doctrine in equity, that a party, after the debt has become due, may, upon the principle of *quia timet*, file his bill against the principal and the creditor, to compel the former to make, and the latter to accept payment; because those parties have no right, against his will, to keep him bound for a longer time than agreed for, so as to enlarge his risk of loss. Now, as between Ramsour and Barrett, that is substantially the nature of this bill; and it can make no difference that a co-surety, Mosteller, and the creditor, Ferrer, are also, plaintiffs; for, as regards the latter, it is only signifying his readiness to accept payment without compulsion, at the suit of the surety, and, as regards the former, asserting his interest in the question,

and sanctioning the discharge of the debt to his own exoneration also. In that point of view, the insolvency of the two sureties makes no difference. It might, perhaps, in the case of a certified bankrupt, because the creditor could prove his debt under the commission, and the surety and his property are wholly discharged; but that does not apply to an insolvent in our law, that is, one merely unable to pay his debts, and not discharged upon his oath, because his person is still liable. Moreover, if so discharged, his subsequent acquisitions may be taken for the debt, and that is a danger from which he is entitled to protection. If the money were to go into the hands of the insolvent, it would be an insurmountable objection to a recovery at Law, or in Equity, as there is no security that he would apply it properly; and, unless he did, the principal would still be liable to the creditor. But, the object of all such suits is that the payment shall be made to the creditor in satisfaction of the debt, and in exoneration of all the parties. If the bill, then, be taken as that of Ramsour, it will lie against Barrett, and, likewise, as the Court thinks, against the other parties to the bond, intended as a counter-security. Supposing that he could maintain an action at law, by reason of that part of the condition which obliges Barrett to pay every debt for which Ramsour was surety, yet, for the reasons already mentioned, his insolvency would raise very serious obstacles in respect to the amount of the recovery. At all events, the relief here is more beneficial to all parties, as the money goes directly to the proper hand, and immediately discharges every person previously bound for it. That is the real nature, in the view of this Court, of the agreement for counter security. It is that Ramsour should be entirely exonerated from all liabilities to the extent of the penalty of the obligation, and, in that sense, he has a right to call for its execution here, provided, that in executing it, the defendants be exonerated from the debts, as well as he.

But the bill may likewise be looked on as the bill of the creditor and co-surety, Ferrer and Mosteller; for they have well recognised equities to participate in the benefit of any

security for the debt, provided by the principal, though it be in the form of a counter security for one surety alone. If the principal had created a mortgage of the property, there could be no doubt of it, and no distinction is seen between that and a counter-security-bond to the surety. He is bound to communicate the benefit of it to all the other parties, and, if he will not, those parties may compel him and the other debtor to do so by their bill against them upon the common principle of subrogation; of which, an example, much stronger than this, is to be found in a recent decision of this Court: *Brinson* v. *Thomas*, 2 Jones' Eq. 414. That case is in point, both as to the doctrine of a substitution of a counter-security, and, as to the parties.

It is objected, however, that the bill is but for a single debt, which may expose the defendants to the expense and vexation of many suits, when one would do. It would, doubtless, have been most proper for Ramsour to have filed a bill against the defendants and all the creditors and his co-sureties, so as to settle the whole matter in one suit. But at present, the question does not arise, because it is not seen upon the pleadings that there is any unsatisfied debt but that which is the subject of this suit. Therefore, the Court refrains, and ought to refrain, from giving any opinion upon the point suggested, until the facts be properly put on the record by plea and answer. The demurrer is overruled with costs, and the usual certificate will be sent to the Court of Equity.

PER CURIAM, Decree accordingly.

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