Annotations Include 168 N. C.

NORTH CAROLINA REPORTS

VOL. 59

CASES IN EQUITY ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

FROM DECEMBER TERM, 1860
TO JUNE TERM, 1863
BOTH INCLUSIVE

BY HAMILTON C. JONES
REPORTER
(6 JONES EQ.)

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

REPRINTED FOR THE STATE
EDWARDS & BROUGHTON PRINTING COMPANY
STATE PRINTERS
1915

CITATION OF REPORTS

Rule 62 of the Supreme Court is as follows:

Inasmuch as all volumes of Reports prior to the 63d have been reprinted by the State with the number of the Reports instead of the name of the Reporter, counsel will cite the volumes prior to 63 N. C. as follows:

1 and 2 Martin Taylor & Conf.	as	1	N. C.
1 Haywood	"	2	"
2 "	"	3	"
1 and 2 Car. Law Repository & N. C. Term	"	4	"
1 Murphey	"	5	"
2 "	"	6	"
3 "	"	7	"
1 Hawks	"	8	"
2 "	"	9	"
3 "	"	10	"
4 "	"	11	"
1 Devereux Law	"	12	"
2 " "	"	13	"
3 " "	"	14	"
4 " "	"	15	"
1 " Eq.	"	16	"
2 " "	"	17	"
1 Dev. & Bat. Law	"	18	"
2 " "	"	19	"
3 & 4 " "	"	20	"
1 Dev. & Bat. Eq.	"	21	"
2 " "	"	22	"
1 Iredell Law	"	23	"
2 " "	"	24	"
3 " "	"	25	"
4 " "	"	26	"
5 " "	"	27	"
6 " "	"	28	"
7 " "	"	29	"
8 " "	"	30	"
9 Iredell Law	as	31	N. C.
10 " "	"	32	"
11 " "	"	33	"
12 " "	"	34	"
13 " "	"	35	"
1 " Eq.	"	36	"
2 " "	"	37	"
3 " "	"	38	"
4 " "	"	39	"
5 " "	"	40	"
6 " "	"	41	"
7 " "	"	42	"
8 " "	"	43	"
Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
6 " "	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
" Eq.	"	62	"

☞In quoting from the *reprinted* Reports counsel will always cite the marginal (*i. e.*, the *original*) paging, except 1 N. C. and 20 N. C., which are repaged throughout without marginal paging.

JUDGES

OF THE

SUPREME COURT

CHIEF JUSTICE:

RICHMOND M. PEARSON.

ASSOCIATE JUSTICES:

WILLIAM H. BATTLE. MATTHIAS E. MANLY.

ATTORNEY-GENERAL:

WILLIAM A. JENKINS.

REPORTER:

HAMILTON C. JONES.

CLERK:

EDMUND B. FREEMAN.

MARSHAL:

JAMES LITCHFORD.

JUDGES OF THE SUPERIOR COURTS

JOHN M. DICK	Guilford
JOHN L. BAILEY	Orange
ROMULUS M. SAUNDERS	Wake
ROBERT R. HEATH	Chowan
JESSE G. SHEPHERD	Cumberland
JAMES W. OSBORNE	Mecklenburg
GEORGE HOWARD, JR.	Wilson
*ROBERT S. FRENCH	Robeson
**THOMAS RUFFIN, JR.	Alamance
†JOHN KERR	Caswell
‖WILLIAM M. SHIPP	Henderson
‡ROBERT B. GILLIAM	Granville

SOLICITORS

ELIAS C. HINES	1st	District	Chowan
W. J. HOUSTON	2d	District	Duplin
W. A. JENKINS.. / SION H. ROGERS	Attorney General....	3d District	Warren / Wake
THOMAS RUFFIN, JR. / THOMAS SETTLE		4th District	Alamance / Rockingham
ROBERT STRANGE	5th	District	New Hanover
WILLIAM LANDER	6th	District	Lincoln
DAVID COLEMAN.. / MARCUS ERWIN... / AUG. S. MERRIMON		7th District	Buncombe

*Elected vice Shepherd resigned 1860.
**Appointed 1861 vice Dick died. Resigned 1862.
†Appointed 1862 vice Ruffin resigned. Commission expired 1863.
‖Elected 1863 vice Bailey resigned.
‡Elected 1863 vice Kerr.

CASES REPORTED

CASES CITED

CASES IN EQUITY

ARGUED AND DETERMINED IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT RALEIGH

DECEMBER TERM, 1860

A. E. MYERS v. WILLIAM DANIELS.*

1. Where a cause was referred to arbitrators, no pleas having been entered, it was *Held*, that the reference was nothing more than a parol reference, and that the presiding judge had no power to have it stricken out.
2. Where the defendant, in his answer, admitted that a cause was referred (no pleas having been entered), and that the reference was stricken out without notice to the other party, and the cause was submitted to a jury, and a judgment obtained against him without his knowledge, the court refused to dissolve an injunction granted to restrain the collection of the same.

APPEAL from an interlocutory order, made at Spring Term, 1860, of WILKES, *Osborne, J.*

This was a bill filed by A. E. Myers to vacate and set aside a (2) judgment rendered at Fall Term, 1859, of Iredell Superior Court, and to enjoin the collection of the same. Plaintiff alleges in his bill that in 1856 he sold to the defendant a valuable horse; that shortly afterwards said defendant alleged that plaintiff had practiced a fraud upon him in the trade, and brought suit against him to Fall Term, 1857, of Iredell Superior Court; that plaintiff and defendant, before return term of said writ, agreed to refer the case to Jacob Fraley, Steptoe Bennet, Williamson Campbell and Davidson Sharpe, with leave to choose an umpire; that at Fall Term, 1857, of said Court, one of defendants's attorneys entered the reference on the docket, and shortly afterwards the referees met, and after selecting an umpire, decided the cause in favor of plaintiff Myers, and filed their award in the office of

*This cause was decided at Morganton, but was inadvertently taken away, so that the Reporter could not get it.

the Clerk of said Court, in which they used the following language: "We find all issues in favor of the defendant," the present plaintiff. Plaintiff alleges further that it was distinctly agreed between them that the cause was "taken out of Court," and the decision of said referees was to be final. Plaintiff further alleges, that when said referees decided the cause in his favor, defendant Daniels expressed himself satisfied, and he distinctly understood that the suit was at an end; that he, Myers, shortly afterwards removed to Wilkes County, where he still resides. Plaintiff further states, in his bill, that at the Spring Term, 1858, of said Court, defendant's counsel moved to set aside the award, because there was no "issues to be found," no pleas having been entered in the cause, and the award was stricken out; that at Fall Term, 1858, the reference was stricken out, on motion of the counsel of said Daniels, without any notice being given to plaintiff, Myers; that at Spring Term, 1859, a judgment by default and enquiry was entered against him, and at Fall Term, 1859, a jury was empanelled and a verdict rendered against him, in favor of Daniels, for $296, and execution was issued to collect the same. Plaintiff charges that defendant conducted these proceedings fraudulently, and that he knew nothing of the same
(3) until the Sheriff applied to him for the money due on said execution.

Defendant admits the reference as set forth in the bill; admits that the referees met, examined the witnesses, and decided the cause in favor of Myers, but he denies that he considered their decision final; he admits that the reference was stricken out without any notice being given to plaintiff, Myers, and that the award was set aside without the knowledge of Myers, and that Myers never employed counsel in the cause. On the coming in of the answer, the defendant's counsel moved to dissolve the injunction.

The defendant's counsel insisted that the Court of Equity had no jurisdiction of this cause, for the reason that the judgment by default was an office judgment, and if improperly obtained, was subject to revision at a subsequent term on motion; that the award was informal, and was properly set aside by the presiding Judge; that defendant, Daniels, was not bound to give the plaintiff, Myers, notice of the proceeding in this cause, as it was his duty to employ counsel.

Plaintiff's counsel insisted that although the judgment by default and enquiry was an office judgment, the final judgment rendered by the Court, on the finding of the jury duly empanelled, under the instructions of the Court, was a regular judgment, and could not be set aside on motion; that no award could be a rule of Court, unless the reference was made after the cause was put at issue; that our Courts can not enforce the performance of an award by execution, except in those cases

where, at common law, awards were enforced by attachments for contempt; that at common law an attachment was only allowed where the cause was referred in the *nisi prius* Courts (the pleas having been entered in the Courts of Westminster). Plaintiff's counsel insisted that the Court had no control of the reference; and that the decision of the referees was final; that the defendant's answer admitted facts showing that unfair means were resorted to, to obtain the judgment in the cause.

The Court refused to dissolve the injunction, but ordered it to be continued to the hearing; from which the defendant appealed. (4)

Barber, for the plaintiff.
Boyden, for the defendant.

MANLY, J. This is an appeal from an interlocutory order continuing an injunction until the hearing.

We have considered the bill and answer, and concur with his Honor, the Judge below, in the propriety of the interlocutory order made by him. The equity of the bill, which has not been met by the answer, rests upon *Simpson v. McBee,* 14 N. C., 521, and the principles laid down in Billings on Awards, 230, 231. Without deciding at this stage of the case upon the merits of this equity, we think there is enough not met by the answer to send the case to a final hearing, with the injunction in the meantime continued.

PER CURIAM. Affirmed.

(5)

JONATHAN WORTH, Adm'r, v. ALEXANDER GRAY and others.

1. The orders and decrees of a court of equity are not necessarily absolute, but may be moulded and shaped to meet the exigence of each particular case.
2. Where a bill was demurred to, which seemed to be deficient in equity, yet, as there were facts and circumstances incident to the matter disclosed, which would have an important bearing on the case, some of which were not set out at all, and others but vaguely, and the amount involved was large, the court, without costs and without prejudice to the defendants equity, overruled the demurrer in order that the plaintiff's bill might be amended.
3. Where a husband having a right to receive satisfaction for or release the equity of his wife, permitted a long time to elapse without bringing suit, during which time his adversary was in the open use of the property, claiming it as his own, it was *Held*, that a presumption of abandonment, release or satisfaction arose against the equity, which would be fatal, unless the delay was accounted for.
4. Whether ignorance of the claimant's right is sufficient to repel the presumption arising from the lapse of time—*Quære?*
5. Whether where a bill by way of anticipation sets forth facts to repel the presumption of satisfaction, release or abandonment, which avers that in fact there was none, the defendant pleads the statute of presumptions, it is necessary to support such plea by an answer to the plaintiff's allegations—*Quære?*

CAUSE transmitted from the Court of Equity of RANDOLPH.

The bill alleges that on 13 August, 1809, in contemplation of a marriage, then about to be solemnized between the defendant Alexander Gray and Nancy Parke, widow, articles of agreement, of three parts, were made and entered into between the said Alexander Gray and the said Nancy Parke, and one Solomon K. Goodman, therein named as trustee, the material portion of which is as follows:

"That whereas, a marriage is shortly intended to be solemnized between the said Alexander Gray and Nancy Parke, with whom the said Alexander Gray is to have and receive all such property, both real and personal, as the said Nancy is now possessed of, or may hereafter be possessed of, in consequence of any lawsuit which now is or hereafter may be brought for the recovery of any moneys or property to which she is entitled; it is, therefore, covenanted and agreed between the said parties to these presents in manner and form following: First, that the said Alexander Gray, for himself, his heirs, executors or administrators, doth covenant and agree with the said Nancy Parke and Solomon K. Goodman, their heirs and assigns, that they, the said Alexander Gray and Nancy Parke, his intended wife, in case the intended marriage be solemnized, by some good and sufficient conveyance in law, shall settle and assure all such property, whether real or personal, whereof (6) she, the said Nancy, is seized as aforesaid, to the use and behoof of her, the said Nancy, and her friend and agent, Solomon K. Goodman, for her use and benefit during her natural life, and the said Alexander Gray doth, by these presents, covenant and agree that Solomon K. Goodman, the agent or trustee aforesaid, shall have full power and authority, by the advice and counsel of the said Nancy, to prevent the said property from being sold or wasted, and doth further covenant and agree that the said Nancy Parke, his intended wife, shall have full power and authority over the said property, and may, at any time, give or convey any part of the same to her relations, and shall have full power by these presents, by will or otherwise, to dispose of the whole of the same to her friends and relations at her death: Provided, nevertheless, that if the said Nancy shall have children by the said Alexander Gray, she shall not dispose of the said property so as materially to injure them; and in case the said Alexander Gray shall first die, it is on his part, by these presents, covenanted and agreed that the said Nancy, his intended wife, shall hold by herself and the authority of her said agent all such real or personal property as she now is entitled to, and in case the said Alexander Gray should depart intestate, that the said Nancy shall, in addition to her own estate, have, hold, possess and enjoy a distributive share of him, the said Alexander Gray."

That the whole of these articles are in the handwriting of General

Gray, except the signature of Mrs. Gray and the trustee, and one Harry Burrow, the subscribing witness; that Goodman was the brother-in-law of Mrs. Gray, and Burrow, the witness, her brother; that said Goodman retained the said marriage articles in his possession until he removed to the State of Tennessee about thirty years ago, when he committed them to the safe keeping of one Kennedy, who, after holding them for many years, transmitted them to Stephen Moore, who delivered them to the plaintiff, who caused them to be duly proved and registered in the county of Randolph.

That the said intended marriage was solemnized, and in 1810 a child was born of the marriage, to wit, Mary, who subsequently, at about the age of twenty, was married to the said Stephen Moore, (7) of Hillsboro; that in 1852 or 1853 she, with her husband, removed to the State of Arkansas, and there died, and at May Term, 1860, of Randolph County Court, the plaintiff, Worth, took out letters of administration on her estate.

That General Gray never made any deed or assurance as stipulated in the marriage articles, and that his wife, the said Nancy, died in 1818 or 1819, without making any will, and without ever having disposed of any of the property owned by her at her marriage; that General Gray married a second wife some five years afterwards, by whom he had several children, whose names are set out in the bill, and who are made defendants. The bill sets out the nature and quality of the property owned by the said Nancy, and which he was possessed of by virtue of his marriage, and the articles aforesaid, consisting of land and a large number of valuable slaves; that Moore and his wife sold to Gray the reversion in the land after the expiration of his life estate. The plaintiff, by his bill, insists that the effect of these articles was to limit the use and benefit of the property to the said Alexander Gray, during the joint lives of him and his wife, and after the death of the latter, then to their daughter, the said Mary, absolutely, and that at any time after the birth of the said Mary, she (the mother) might have insisted on conveyances to that effect, saving the power of a disposition to a moderate amount in favor of her friends and relations during her (the mother's) life, and that the plaintiff, as the administrator of the said Mary, is entitled to an account of all the personal estate upon that basis.

The bill sets out that the personal property aforesaid was taken into possession by the said Gray, and ever since has been treated, used and enjoyed as his own absolute property, or has been disposed of for his own benefit; that of the slaves, several were given to his children, who are made defendants, and are called on to account for the same; that within a year or two before filing the bill, the said Stephen (8) Moore called his attention to the said marriage articles; he

seemed to have forgotten them, and at first denied their existence, but when produced, he admitted their genuineness, and stated that it had always been his intention that the property of Mary's mother should be given to her (Mary) and her children; and at one time it was agreed between the said Moore and the said Gray that the matter should be referred to the arbitrament of counsel, or to compromise the same themselves; but on the next day Gray expressed a desire that the matter might be settled by a bill in equity, and refused to account in any other manner.

The prayer of the bill is for an account of the slaves and their hires and profits.

The defendants demurred; there was a joinder in demurrer, and the cause being set down for argument, was sent to this Court.

Graham, for the plaintiff.
Fowle, Morehead and *Kittrell,* for the defendants.

PEARSON, C. J. The demurrer raises two questions:

1. The construction of the marriage articles.

2. The effect of the lapse of time during which the defendant Gray has been in possession, enjoying the property as absolute owner, and the presumption of a satisfaction or abandonment of the equity.

Our opinion inclines with the defendants on both of these questions; but, as the amount involved is very large, and the Court is not, by the bill, as now framed, put in possession of all the facts and circumstances which are relevant and may have an important bearing on its decision, we will avail ourselves of the fact that the orders and decrees of this Court are not necessarily *absolute* like a judgment in a Court of Law, by may be "moulded and shaped to meet the exigence of each particular case," and order the demurrer to be overruled without allowing costs, and without prejudice to the equity or defense of the defendants (9) which may be set up by plea or answer, as they shall be advised, for the purpose of giving the plaintiff an opportunity of amending the bill by making further allegations, and the defendants an opportunity to rely on the presumption of satisfaction, release or abandonment of the equity by plea (if so advised), and of afterwards setting out all the facts and circumstances relevant to the question by averment in their answer, should the plea be overruled.

1. The plaintiff alleges that by the proper construction of the marriage articles, the legal effect is to give an estate to the wife for life in all of the estate belonging to her before the marriage, with full power to dispose of it by giving it to her relations or friends, unless there should be issue of the marriage; in which event, the intention was to vest the ulterior interest after the life estate in such child or children,

and he insists that although this intention of making a limitation over in favor of any child or children that might be born of the marriage is not expressed in the articles, it will be implied by the Court from the nature of the relation which the parties had in contemplation, which furnishes the natural and ordinary presumption that the intention is to provide as well for the issue of the marriage as for the wife, and relies on the fact that this is an executory, as distinguished from an executed trust, where greater latitude of construction is allowed in order to give effect to the apparent intention of the parties, and the Court is not bound by the use or omission of technical words.

On the part of the defendants, it is insisted that the only purpose of the parties in making the marriage articles was to give to Mrs. Gray power to dispose of the estate which she owned before the marriage by giving it to her relations and friends, with a restriction upon the power in case she should have children, and that no limitation was intended to be made, and none in fact was made, so as to vest in them an estate after her death; for, if she died first, the husband, it was presumed, would be able to provide for the children, and if he died first, they would be amply provided for out of his estate, and out of the estate which was secured to her. In aid of this construction it was urged that the subsequent acts of the parties were in conformity thereto; for, (10) after the birth of a child, and the death of his wife, General Gray treated the marriage articles as having no further force or effect, and used and disposed of the property as if absolutely his own, and Moore and wife so acted in respect to the land, by selling him the reversion after his life estate; whereas, if the articles had been in force, according to the construction contended for by the plaintiff, he was not entitled to an estate for life as tenant by the curtesy, and Mrs. Moore was entitled to the whole estate, and not simply to a reversion.

It is manifest that the condition of the parties, and the state of things at the date of the marriage, may have an important bearing upon this question of construction, and the Court should be put in possession of all the facts. Was General Gray an improvident, thriftless or dissipated man?—a man of no property and "a fortune hunter," who was not likely to be able to take care of his children? Or was he a prudent business man, with property of his own, and one who could reasonably be confided in to take care of his children, if he should have any? What was the age of Mrs. Parke at the date of her contemplated second marriage? How long had she been married to her first husband without having borne a child? Had she any destitute relatives for whom she supposed herself under an obligation to provide?

These facts have an important bearing, as tending to distinguish the case from that of two young people just starting in life, with whom the

first and uppermost idea of their marriage is to make a provision for children; whereas, in this case, judging by the face of the articles, the most prominent idea was to give the wife power, notwithstanding her marriage, to provide for "her kinfolks."

2. As Moore had power to receive and accept satisfaction for, or release his wife's equity, a presumption arises from the lapse of time during which the defendant Gray had possession and used the property as his, even according to *Cotten v. Davis,* 55 N. C., 430, unless the defendants are able to account for the delay, or to repel the pre-
(11) sumption. It was said on the argument that Moore, the husband of plaintiff's intestate, was not informed of the existence of the marriage articles, and of the estate which had vested in her by force thereof, until within less than two years before the bill was filed. This fact is not distinctly alleged in the bill, and our purpose in not disposing of the case definitely at this stage, is to give the plaintiff an opportunity to amend his bill, and aver the fact distinctly, if it is so, and present the question whether ignorance of the right will prevent the presumption.

It was also said on the argument that the admissions of General Gray, when a demand was made and his attention was called to the existence of the marriage articles, and particularly his offer to refer the matter to the arbitration of mutual friends, is sufficient to repel the presumption. These matters are not set out in the bill with the degree of certainty necessary to give to the demurrer the effect of a positive admission which would repel the presumption; and the demurrer is overruled for the purpose of removing all difficulty in this respect. The plaintiff may amend his bill and charge these matters with certainty by way of anticipating the plea of the defendants (if they are so advised) setting out the fact of the long enjoyment and possession of the property, and relying on the presumption of a release, or satisfaction, or abandonment, which the law makes therefrom.

Whether the defendants will be required to answer in support of this plea, an allegation in the bill charging that there has been no satisfaction and no release, will be an interesting question, in regard to which we intimate no opinion. The statute, and the rule of the common law, obviously give to the lapse of time a technical effect over and beyond that of a mere circumstance, as upon an enquiry in regard to an open question of fact. Whether it is consistent with the policy of this rule to require a party to make admissions as to a matter of fact which will defeat his plea, is a question we leave for future consideration.

PER CURIAM. Demurrer overruled without costs, and without prejudice.

Cited: Shinn v. Smith, 79 N. C., 313; *Mebane v. Mebane,* 80 N. C., 39; *Miller v. Justice,* 86 N. C., 30.

(12)

JOSEPH JOHNSON v. JOSHUA PETERSON.

1. A conveyance, by a woman, after a marriage engagement, and upon the eve of its solemnization, is a fraud upon the rights of the intended husband and will not be upheld, unless it appear clearly and unequivocally, that the husband had full knowledge of the transaction and freely assented to it.
2. Where a woman, being under an engagement to marry, made a week before the marriage, a voluntary secret conveyance of all her property, including slaves, to the defendant, a man of slender means, who, after the marriage took the slaves into his possession, and refused, on demand, to give them up, but claimed them as his own, under such conveyance, it was *Held*, that the husband was entitled to writs to restrain the defendant from removing the slaves out of the State, although no threat to do so was made to appear.

THIS was an appeal from an interlocutory order, made in the Court of Equity of SAMPSON, refusing to dissolve an injunction, and continuing it over to the hearing. *French, J.*

The bill sets forth that the plaintiff intermarried with Susan Peterson on 14 March, 1860; that shortly before the said marriage, and after an agreement had been entered into with the said Susan that they should marry, and only a week before that event, she secretly, and without his knowledge, and in fraud of his marital rights, conveyed to the defendant, Joshua Peterson, by three several deeds, her interest in ten slaves (naming them), and a right to live upon and enjoy a tract of land of 186 acres during the time of her, the said Susan's, marriage life, and providing in said deeds that on her becoming discovert, her right to the said property should revive; that the said deeds are expressed to be, each, on the consideration of five dollars, but that no money or other thing of value was paid for the said property; that the said Susan had, under the will of a former husband, a life estate in the said negroes and land, and that the defendant has taken possession of the said slaves and land, and on the same being demanded, refuses to give them up, and has threatened to run them out of the State; that the defendant is irresponsible in respect to financial means, having no property, except a remainder in two of these slaves after (13) the death of the said Susan. The prayer of the bill is for an injunction and sequestration to prevent defendant from running the slaves out of the State. These writs were issued in vacation, and the defendant answered at the next term. He does not deny the execution of the deeds, nor the time nor circumstances under which they were executed. He denies, however, that any fraud was intended, and says, though he paid no money, that the said Susan had promised him, before the engagement of marriage, to make him such conveyances, and that she owed him for one year's work he had done for her, and that he intended

to give her a credit for what she owed him. He denies that he ever threatened to remove the said slaves from the State, or that he intends to do so, but admits he is a man of slender means, beyond his claim in these slaves, and insists on the validity of his claim to the property under the deeds. He denies that the plaintiff was ignorant of the existence of these deeds, for that one of the family had put him on his guard by telling him in the presence of the said Susan that he would not get what he expected to get by his intermarriage with her, to which he replied that "it was not the property he wanted, but the woman." On the coming in of the answer, the defendant moved to dissolve the injunction and sequestration, which was refused by his Honor, who ordered them to be continued to the hearing; from which order, the defendant appealed.

W. A. Wright, for the plaintiff.
Person, for the defendant.

MANLY, J. The interlocutory order appealed from, continuing the injunction to the hearing, is justified by the facts of the case apparent upon the bill and answer.

The equity of the bill seems to us to be manifest. The time, manner and circumstances altogether, when and whereby the woman stripped herself of every particle of her property, was a fraud upon the rights
(14) of her intended husband. Such a conveyance after a marriage engagement, and upon the even of its solemnization, is fraudulent, and not fit to be upheld, unless the intended husband have full knowledge of and freely assent to it. Such knowledge and assent ought to be clear and unequivocal, and not inferable merely from casual remarks by an indifferent person in the hearing of the husband, and from responses of his made in a spirit of gallantry.

When the right to the relief sought is clear, the Court will incline favorably to ancillary writs intended to make sure that relief. Thus, in the case before us, where the bill is to declare fraudulent and void deeds for slaves and to compel a reconveyance and redelivery of them, the Court will, upon any grounds that are not light and frivolous, put the defendant under an injunction not to withdraw the property from the reach of its process. An injunction imposes no obligation on him that he was not already bound in conscience to fulfill. It only adds a legal penalty to a moral obligation.

Although the principal allegation in the bill of a purpose to remove the slaves beyond the jurisdiction of our Courts is denied by the defendant, yet he admits he sets up claim to them under the deeds in question, and does not deny that he is a man of little or no means beyond the slaves in controversy. This, we think, is sufficient, when added to

the clear equity of the plaintiff's bill, and the consequent unconscientiousness of the defense, to cause the Court to leave the defendant under the injunction.

It should be certified to the Court below that there is no error in the interlocutory order appealed from, and that they do, therefore, proceed.

PER CURIAM. Affirmed.

(15)

HECTOR McLEAN v. NEILL McPHAUL and others.

A distributive share in the hands of an administrator, due the wife of a nonresident debtor, can not be subjected to the payment of the husband's debts in this State, by means of an attachment, in equity, under the statute, Rev. Code, ch. 7, s. 20.

CAUSE removed from the Court of Equity of ROBESON.

The bill sets out that Catherine McLean died intestate, in the county of Robeson, some time in the year 1858, seized and possessed of a considerable estate, and left, among other next of kin, a sister, Margaret, who had intermarried with the defendant Neill McPhaul. As one of the next of kin of her sister Catherine, Margaret McPhaul was entitled to a distributive share of her estate. Letters of administration upon the estate of Catharine McLean were granted to one Morrison, who is made a party defendant in this suit. The bill further states that Neill McPhaul, the defendant, is a nonresident of the State, and is indebted to the plaintiff in the sum of one hundred and forty-five dollars, due upon a former judgment, and it prays that the distributive share of the estate of Catharine McLean to which defendant is entitled in right of his wife, and which is still in the hands of the administrator, Morrison, may be decreed in satisfaction of this debt.

Defendant demurred for the want of equity, and the cause being set down for argument upon the bill and demurrer, was sent to this Court by consent.

M. B. Smith, for the plaintiff.
Leitch, for the defendants.

PEARSON, C. J. The question is, can the creditors of a nonresident reach a distributive share in the hands of an administrator, which is due to the wife of the debtor, by means of an "attachment in equity" under the statute, Rev. Code, ch. 7, sec. 20?

We are of opinion that the case is not embraced by the statute, for this very satisfactory reason: The distributive share, while (16) in the hands of the administrator, does not belong to the husband.

It is true, by the *juris mariti,* he may reduce it into possession during the coverture, and if he does so, it belongs to him, or he may assign it, and if the assignee reduces it into possession during the coverture, it will belong to him, but until it is reduced into possession, it belongs to the wife, and if the husband dies before that is done, either by himself or his assignee, the interest of the wife is absolute. This is settled; *Arrington v. Yarboro,* 54 N. C., 73, where the subject is fully entered into and disposed of.

The fact that a legacy in the hands of an executor, or a distributive share in the hands of an administrator, which is due to the wife, belongs to her and not to the husband, is the ground of the well established doctrine, *i. e.,* equity will not interfere, at the instance of a creditor of the husband, in order to subject the fund to the satisfaction of the debt, either by compelling the husband to reduce it into possession or assign it for the benefit of his creditors, and thus enable them to reduce it into possession. If the husband chooses to do so, the Courts of Equity, in this State, will not interfere to prevent him and require a settlement on the wife. But neither in North Carolina nor in England, nor anywhere else that we are informed of, do Courts of Equity interfere actively to the prejudice of the wife, and subject her interest without the consent and coöperation of the husband, to the payment of his debts, because it would be doing injustice to the wife to deprive her of the chance to have the absolute ownership if she survives, and of the right to have the interest devolve upon her personal representative if she dies first, whereby it would be first applicable to the satisfaction of *her own* creditors, before it passes to the husband and becomes liable to his creditors. In *Allen v. Allen,* 41 N. C., 293, and *Barnes v. Pearson, Ibid.,* 482, the general doctrine is assumed, and those cases are made exceptions on the ground that where the husband makes an assignment and an interest vests in the assignee, the Courts are then called on to aid
(17) the assignee in like manner as they would aid the husband, to reduce the interest into possession, whereby the wife ceases to be the owner of the fund.

On the same general principle, it is held at law that a legacy of the wife can not be taken under an attachment by the creditor of the husband; *Arrington v. Screws,* 31 N. C., 42.

In short, there is neither authority nor principle to support the position on which the bill is based.

PER CURIAM. Demurrer sustained.

SMITHERMAN & SPENCER v. HIRAM ALLEN and others.

Where a debtor conveyed all his property with an intent to defraud his creditors, and then left the State, it was *Held*, that a creditor could not maintain a suit in equity to have his debt satisfied out of the property, under the statute, Rev. Code, ch. 7, s. 20, his remedy being at law.

CAUSE removed from the Court of Equity of MONTGOMERY.

Hiram Allen, one of the defendants in this case, was indebted to the plaintiffs in the sum of $175, due by note and account; and the said Allen, in the month of September, 1859, was seized of a tract of land in the county of Montgomery, and was also possessed of a valuable chattel property. Some time during that month, the defendant Hiram conveyed all his property to his brother, David Allen, and his brother-in-law, Martin Hunsucker, who are the other defendants in this suit, and then left the State.

The bill charges that this conveyance was intended to defraud creditors, and that there was a combination among the defendants for that purpose.

The prayer is for a discovery of the matters relating to this transaction, and that the payment of plaintiffs' debt may be (18) decreed, according to the statute, Revised Code, ch. 7, sec. 20, against the defendants, and for general relief. The defendants demurred to the bill, for the reason that the plaintiffs had a remedy by an attachment at law, and also for that the plaintiffs had not reduced their debt to a judgment. The cause being set for argument upon bill and demurrer, was transferred to this Court.

Mason and *Jackson,* for the plaintiffs.
McCorkle, for the defendants.

PEARSON, C. J. A debtor conveys all of his property with an intent to defraud his creditors, and then leaves the State. The question made by the pleading is, can a creditor maintain a bill to have his debt satisfied by what may be called "an attachment in equity," under the provisions of the statute, Rev. Code, ch. 7, sec. 20? We are of opinion that the case does not come within the provisions of the statute.

It is said the grantee holds the property upon a secret trust for the debtor, and the statute applies to any estate or effects in the hands of a "trustee" holding for the use of the debtor. It is clear that the debtor himself could not enforce such a trust, for the conveyance, although void by the statute of Elizabeth as to creditors, is good between the parties, and neither a Court of Law nor a Court of Equity will interfere at the instance of the debtor; in other words, the confidence reposed by him in the grantee is not recognized by the Courts *as a trust* fit to be

enforced, and as the proceeding under the statute rests on the footing of enforcing a trust, it follows that a trust like that under consideration does not fall within the meaning.

It is settled that such a trust does not come within the meaning of the act of 1812, and can not be sold under an execution at law; *Page v. Goodman,* 43 N. C., 16.

So, it is settled such a trust can not be sold on the petition of an administrator, under the act of 1846; *Rhem v. Tull,* 35 N. C., 57,
(19) and it is said the creditors may reach the property, not on the ground of a trust, but on the ground of *fraud,* which proves that the word "trustee," used in the statute under consideration does not embrace a case of this kind.

It was next insisted that the case is that of an absconding debtor, having "an estate in the hands of a third person, which can not be attached at law, or levied on under execution." Why may not this property and estate be attached at law? The conveyance is void as to creditors, so they may treat the property as if it still belonged to the debtor, and, in fact, it is his property for the satisfaction of debts.

This disposes of our case. *Gentry v. Harper,* 55 N. C., 177, referred to on the argument, is distinguishable from this, but may serve to illustrate the principle. There, the interest of the debtor could not be reached at law by a creditor, who *had obtained a* judgment, and it was subjected in equity, not on the ground of a trust, but on the broad ground "that it was against conscience for debtors to attempt, in any way, to withdraw property from the payment of their debts, and where a Court of Law can not reach it, a Court of Equity will."

In exercising this jurisdiction, the Courts of Equity require that the question of debt or no debt, being a legal one, should be settled by a judgment at law. To meet this, the statute under consideration was passed. It may be that a fraud like that in *Gentry v. Harper* is not provided for by it. But our case is expressly excluded, on the ground that the fraud is one which does not stand in the way of creditors, and they may have an attachment at law, and do not need the interference of a Court of Equity.

PER CURIAM. Demurrer sustained and bill dismissed.

Cited: Greer v. Cagle, 84 N. C., 389.

(20)

GEORGE B. DOUGLAS, Guardian, v. A. H. CALDWELL, Guardian.

Where it appeared that the property, in this State, of a ward residing in another State, consisted of good bonds, at interest, in the hands of his guardian here, a part of which arose from the sale of land, and the ward was nearly of age, and there was no special necessity made to appear for making a transfer of the property, the court of equity, in the exercise of its discretion, refused to order a transfer of the estate to the hands of a guardian appointed in such other State.

CAUSE removed from the Court of Equity of ROWAN.

This was a petition by a guardian in another State to obtain the property of his ward in the hands of a guardian here.

The petition is filed by George B. Douglas, the father of the ward, George C. Douglas, alleging that in April, 1858, he was duly appointed by the Court of Ordinary of Dougherty County, in the State of Georgia, guardian of the person and property of his said son, and gave bond with two good sureties, according to the requirements of the law as it is in that State. An exemplified copy of such appointment, with the bond taken, is filed, and depositions are taken establishing the validity of the bond as to form and as to the solvency and pecuniary ability of the sureties. The petition states that in 1858, the ward was about 14 years old, and that it is his purpose, and that of the petitioner, his father, to remain permanently in the State of Georgia. The petition sets out, further, that as guardian of the person of his son, he has been allowed for the support and maintenance of his son, since the year 1855, by the Court of Equity of Rowan, the annual sum of $300, which, in the year before the petition was filed, to wit, in 1858, was increased to $400. The answer of the defendant is filed, and discloses the fact that the estate of his ward is between 25,000 and 30,000 dollars; that he has not yet fully settled with the former guardian, but he thinks there will be about that amount; that in January, 1859, by a decree of the Court of Equity of the county of Rowan, N. C., the negroes of his ward were sold at public auction, and bonds, bearing interest from date, well secured by sureties, were taken by a commission appointed by (21) said Court, and that when the answer was filed, the credit had not expired. The answer also sets out that about twenty-five hundred dollars of the fund arose upon land, which was sold by a decree of the Court of Equity of Rowan, which also is invested in bonds with good security, bearing interest.

The evidence taken in the cause clearly established the facts set out in the pleadings. The cause being set down for hearing on the bill, answer, exhibits and proofs, was sent to this Court by consent.

Fowle, for the plaintiff.
Wilson, for the defendant.

MANLY, J. There are several reasons which induce us to deny the object of the petition:

The minority of the ward is now of short duration. The fund is safely invested in interest bearing stocks of medium value, and with respect to a portion of it, at least, it can not be changed without loss at this time. The unavoidable losses and hazards of collecting and re-investing so large an amount makes such a measure inexpedient in any stage of a minor's wardship. There ought to be some object of primary importance in view to justify it, so near the close. No such object is suggested. The transmission to the guardian of the ward's person of such amounts as, from time to time, may be deemed proper and necessary for his maintenance and education, at this important period of his life, is matter of little inconvenience. Beyond this, we can conceive of no reason for the removal of the fund at this time, and against it stands the risks and incidental losses which must necessarily attend the transfer.

The petition sets forth that a portion of the fund belonging to the ward consists of moneys and securities for moneys arising from the sale of land. This, in connection with the provision in the Rev. Code, ch. 54, sec. 33, suggests another reason, which has some weight in in-
(22) fluencing the discretion of the Court: The Code provides that when personalty is substituted for realty by a sale of a minor's property, the substituted personalty shall be enjoyed, alienated and devised, and shall descend, as by law the property sold would have done had it not been sold, until it shall be restored by the owner to its original character. Considering this part of the fund, therefore, as real estate, subject to descend upon the heirs-at-law of the present owner, a further reason for retaining it within the jurisdiction of the Court until the ward is of age is apparent. Upon the whole case, we are of opinion that it is unadvisable, at the present time, to make a decree for the removal of the estate.

The petition should be dismissed, but without costs.

PER CURIAM. Petition dismissed.

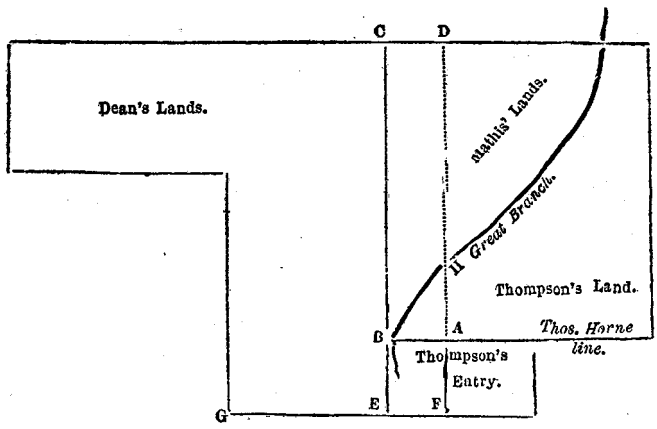
ALFRED THOMPSON and others v. JOHN DEANS.

Where a dispute existed between the owners of contiguous lands as to their dividing lines, and it was agreed in writing to submit the matters to arbitration and to *stand to and abide by such lines* as should be *made and laid down by the referees*, and the arbitrators made an award designating dividing lines between the parties, which the recusant party failed to show were erroneous, it was *Held*, a proper case for the court to decree a specific performance.

CAUSE removed from the Court of Equity of NASH.

THOMPSON *v.* DEANS.

This was a bill to compel a specific performance of an award. John Mathis, Alfred Thompson, one of the plaintiffs, and the defendant, owned contiguous lands, and a disagreement having arisen among the three as to the dividing lines between them, they entered into a penal obligation, dated 19 April, 1851, conditioned as follows: "Whereas, there is a dispute between the said John Deans, Alfred Thompson and John Mathis in regard to the dividing lines of their lands (23) and the said parties have referred the said dispute to Exum L. Curl, Jesse Beal and A. B. Baines, to make lines and settle the said dispute; now, therefore, if the above bounden John Deans, Alfred Thompson and John Mathis, their heirs, executors and assigns, shall stand to and abide by the said lines, as they shall be made and laid down by the said referees, and let each peaceably enjoy the same as allotted to him by the said referees, then the above obligation to be void, otherwise to remain in full force and effect." Signed and sealed by the parties mentioned. The arbitrators met on the day the submission bond was signed, and having all the parties present, went upon the premises and surveyed such lines of the several tracts as at all concerned the controversy, and examined such deeds and living witnesses as were produced. The matters in controversy may be illustrated by the following diagram:



The defendant had insisted that the true boundary of his land was as represented by the letters G, F, D, whereas, the plaintiffs said it was G, E, C, so that the land in dispute is that embraced in (24) the area E, F, D, C, of which the spaces A, B, H, and E, F, A, B, were claimed by Thompson, and the rest of it by Mathis.

After examining into the matter, the arbitrators made up and delivered to the parties the following award: "Know all men by these presents, that we, the undersigned referees, having been called on by

John Deans, Alfred Thompson and John Mathis to settle a dispute in regard to the lines of land between them, and having met on said lands on 19 April, 1851, do agree to the following boundaries, viz., beginning at a lightwood pine (G), Dean's corner in A. Thompson's line, then east 130 poles to a stake, Dean's corner in Thompson's line (F), then north to the original Thomas Horne line (A), then along the said line west to a stake on the west side of the Great Branch, Thompson's corner in Dean's line (B), thence north a line of marked trees to a stake, Dean's corner in Mathis' line (C)."

By which award it will be seen that Deans obtained of Thompson the area E, F, A, B, which is about seven acres, and Thompson and Mathis obtained of the land claimed by Deans the space B, A, D, C, about forty acres. It appears from the testimony that on the delivery of this award, each party took possession according to the lines fixed upon by the arbitrators, and in that manner continued to hold until some time after the death of John Mathis, when the defendant entered upon the territory embraced in the figure B, A, D, C, and still holds the same in his possession. Also, that he continues in possession of the land E, F, A, B, surrendered to him by the award. The suit was brought by Thompson, who offered to make title to the part taken from his claim, and by the children and heirs-at-law of Mathis, and the prayer is for a specific performance of the award by making deeds, etc., and for an injunction. The defendant, in his answer, insists that there is a palpable mistake in the award of the arbitrators, and that it would be hard and unconscionable for the plaintiffs to have a specific
(25) execution of it. The proofs taken in the case are voluminous and contradictory, but it seems that the arbitrators based their judgment chiefly on the fact that the lines adopted by them were old marked lines, corresponding in date with the deeds of the parties, and there were no marks on the lines rejected by them. The cause was heard upon bill, answer, proofs and exhibits.

B. F. Moore and *Dortch,* for the plaintiffs.
Miller, Fowle and *Rogers,* for the defendant.

MANLY, J. The bill is to enforce an award by compelling a specific execution. The submission appears to be by agreement *in pais,* and by reference to it, it is found the arbitrators are authorized to make lines and settle the dispute then existing between the parties in regard to their dividing lines; and they bind themselves to abide by such lines as shall be made and laid down by such referees, and to allow each other peaceably to enjoy the same as allotted. The referees laid down a line of division, and the parties thereupon adjusted their respective possessions in conformity with the same.

After two or three years acquiescence by all concerned, the defendant, Deans, took possession again of a parcel of the land which he had abandoned under the award, and this bill is brought to compel him to abide by the lines established, and to allow each peaceably to enjoy the part allotted to him.

We do not perceive why this object may not be accomplished by the bill. By the submission, the parties contract to do what the arbitrators might direct. When the latter, therefore, made their decision, the submission and award, together, amounted to an agreement; and as this agreement is plainly executory in its nature, it is, in substance, the case of an executory agreement under a penalty. The enforcement of such an agreement, specifically, is a familiar subject of equity jurisdiction. In Russell on Arbitrators, 525, it is said, a bill will lie to enforce a specific performance of an award whenever the matter directed by it is such that it would be enforced by the Court as an agreement or contract—especially when the award be to do anything in respect (26) to lands. This is confirmatory of our view.

The award, it will be seen, does not specially require the parties to release or convey to each other, but this, we think, follows from the making of the line by the arbitrators, taken in connection with the terms of the submission. The parties agree to end all disputes by abiding by the line to be made, and allowing each other to enjoy quietly in conformity with the line. It is a private submission, and we think it clear, by the terms of it, that the arbitrament is conclusive as to the rights of the parties to the land in controversy between them; and, as the award does not convey the title, it would seem to be manifestly intended that their rights should be made effectual by conveyances, and that thus all dispute might be ended. In *Carter v. Sams,* 20 N. C., 321, the arbitrators agreed that defendant should pay all costs, and they assessed plaintiff's damages to $100. It was held that the award was entitled to a liberal construction, and that it should be intended that the defendant was to pay the $100 to the plaintiff. The cases are similar. In neither can the declared rights of the parties be made effectual, except by a construction according to a reasonable intendment.

This is what is called "certainty to a common intent," in the definitions given of the degrees of certainty required in law proceedings; and this degree is all that is required in an award; according to what is said in *Carter v. Sams,* above referred to.

The only other enquiry which arises upon the pleadings and proofs in the cause, is whether the award be such as the Court will enforce specifically. The parties recite in their submission bond that a dispute existed between them as to the division lines of their lands, and they refer it to the arbitrators to make lines. Upon examination of the

proofs in connection with the terms of this submission, the propriety of the plenary power given the arbitrators is apparent. The boundaries are left in great doubt, after the voluminous proofs now on file
(27) are all considered; so far, therefore, from it being hard, unconscientious or fraudulent, the arbitrament, at the time and upon the terms agreed on, was a measure of wisdom for all parties. There is nothing brought forward in the proofs which, regarding the award as of no higher obligation than a contract, would prevent a Court of Equity from ordering its specific execution.

A decree may be drawn directing the parties to execute deeds of release to each other for the parcels of land awarded to each by the division lines established by the arbitrators.

PER CURIAM. Decree accordingly.

Cited: Crawford v. Orr, 84 N. C., 251; *Metcalf v. Guthrie,* 94 N. C., 450; *Pass v. Critcher,* 112 N. C., 407.

JOHN C. ALSTON and others v. JOHN LEA.

Where a husband devised and bequeathed as follows: "I give and bequeath to my beloved wife, D. A., after the payment of my just debts, all my property, real, personal, and perishable, to be hers in fee simple, so that she can have the right to give it to our six children as she may think best," it was *Held,* that under the terms of the will the testator's widow had the power to sell, at her discretion, any one part of the property for the payment of the debts of the testator, so as to release another part from such debts; and BATTLE, J., was strongly inclined to the opinion that she took an absolute interest in all the property.

CAUSE removed from the Court of Equity of HALIFAX.

The only question in this cause arises on the construction of the will of John Alston, the material portion of which are as follows:

"Item 1st. It is my will and desire that all my just debts are to be paid, and for the purpose of paying said debts, I wish negro fellow Cudge, negro boy Mack, and negro girl Milly, to be sold, and, if necessary, to sell my other property, personal or real. I wish the land
(28) on the east side of the road, and also my right and interest in the negroes held by John Crawley, be sold."

"Item 2d. I give and bequeath to my beloved wife, Dolly Alston, after the payment of my just debts, all my property, real, personal and perishable, to be hers in fee simple, so that she can have the right of giving it to our six children, Ann M. Arrington, Mariam B. Allen, Frances A. Alston, John Alston, Gid. Alston and Thomas M. C. Alston, as she may think best."

The bill alleges that Mrs. Alston, being in possession of the tract of land set out in the pleadings, sold and conveyed the same to the defendant for the sum of $...., and that by the will under which she claimed, she was appointed a trustee, and was seized of the land in question for the use and benefit of her children, the plaintiffs, and that the defendant was aware of these provisions of the will. The prayer is, that the defendant convey to the plaintiff the land in question, and account for the rents and profits thereof.

To this bill the defendant demurred, for the cause that by their own showing Dolly Alston was not a trustee for the benefit of the plaintiffs, and that he is, therefore, no trustee himself, and is not bound to answer, etc. He also answered the bill circumstantially, and says that after the fund provided for the payment of the debts of John Alston was exhausted, there was a further indebtment by the estate of about $1,000, with interest, to the executor of Stirling Johnston, and an execution in the hands of the Sheriff of Halifax for that amount, which was about to be levied on the slaves belonging to the estate, and it was to pay this debt, and protect the negro property from execution, that the sale in question was made to this defendant, and the money paid by him was applied entirely to the satisfaction of this debt; that he gave $1,024, which he thinks was a fair price for it; and believed then, and still believes, that he got a good title for it. The cause was set down for hearing on the bill, answer and demurrer, and sent to this Court by consent.

B. F. Moore and *Batchelor,* for the plaintiff.
Conigland, for the defendant. (29)

BATTLE, J. The only question presented by the pleadings which it is necessary for us to consider, is whether Mrs. Dolly Alston took such an interest in the estate of her husband, John Alston, by virtue of his will, as enabled her to convey to the defendant a good title to the tract of land now in controversy.

In the first clause of his will, the testator directs that his debts shall be paid, and for that purpose he specifies three slaves which he wishes to be sold; and if it should be found necessary to sell more property, he points out a certain tract of land and his "right and interest" in certain negroes, then held by other persons. In the second clause, he devises and bequeaths as follows:

"I give and bequeath to my beloved wife, Dolly Alston, after paying my just debts, all of my property, real, personal and perishable, to be hers in fee simple, so that she can have the right of giving it to our six children (Ann Maria Arrington, Mariam B. Allen, Frances A. Alston, John Alston, Gid. Alston and Thomas M. C. Alston), as she may think

best." The plaintiffs contend that under a proper construction of this clause, the testator's widow took all his estate after the payment of his debts, as trustee for his children, and the trust conferred upon her no power to sell the land, and that consequently the defendant, having purchased with a notice of the trust, became himself a trustee for the testator's children. The counsel for the defendant objects to this construction, and insists that the widow took an absolute estate for her own use in the property given her by the will, or if she took in trust for her and the testator's children, she took it coupled with an implied power to sell any part of it, at her discretion, and to apply the proceeds in any manner she might think best for the children.

There is no class of cases, arising from the construction of wills, in which there has been a greater fluctuation of decision than in that
(30) which involves the enquiry whether a trust has been imposed upon a devisee or legatee in favor of other persons. Technical language not being necessary to create a trust, any words of recommendation, request, entreaty, wish or expectation, addressed to a devisee or legatee, have been held to make him a trustee for the person or persons in whose favor the expressions were used; provided, the testator pointed out with sufficient clearness and certainty both the subject matter and the object or objects of the intended trust. This was, of course, supposed to be in accordance with the testator's intention, and in the earlier cases a very slight indication of such intention seems to have been deemed sufficient. Thus, in *Massey v. Sherman,* Amb., 530, where a testator devised copyholds to his wife, not doubting that she would dispose of the same to and amongst his children as she should please; this was held to be a trust for the children, as the wife should appoint. Many other cases of a similar kind came before the Courts from time to time, and were decided in the same way, the leaning in each case seeming to be very decidedly in favor of a trust. At last, however, the Courts began to doubt whether they had not gone too far in investing with the efficacy of a trust loose expressions of the kinds above referred to, which, very probably, were never intended to have such an operation. Under the influence of this change of judicial interpretation, *Meredith v. Heneage,* 1 Sim., 542, was disposed of in the House of Lords. There the testator, after having given his real and personal estate, in the fullest terms, to his wife, declared that he had given his whole estate to her unfettered and unlimited, in full confidence and the firmest persuasion that in her future disposition and distribution thereof, she would distinguish the heirs of his late father by devising and bequeathing the whole of his said estate, together and entire, to such of his father's heirs as she might think best deserved her preference. It was *held* by the House of Lords, confirming a decree in the Exchequer, that the

wife was absolutely entitled for her own benefit—Lord Eldon, considering that the testator intended to impose a moral but not (31) a legal obligation on his wife, for which he, as well as Lord Redesdale, relied much on the words "unfettered and unlimited." In this country, the Supreme Court of Pennsylvania has, in a recent case, where the whole subject is much discussed and considered, been governed by the same spirit of liberal interpretation. In that case, *in the matter of Pennock's Estate,* 20 Penn., 268, the testator, after directing the payment of his debts, provided as follows: "I will and bequeath to my wife the use, benefit and profits of all my real estate during her natural life; and all my personal estate of every description, including ground rents, bank stock, bonds, notes, book debts, goods and chattels, absolutely; having full confidence that she will leave the surplus to be divided, at her decease, justly amongst my children," and it was *held* that, by the will, the *absolute* ownership of the *personal* property was given to the widow, with an expression of mere expectation that she would use and dispose of it discreetly as a mother, and that no trust was created in relation to it. The case was ably and elaborately argued by counsel on both sides, and in the opinion of the Court, as delivered by *Lowrie, J.,* the doctrine of both the Roman and the English law on the subject is reviewed with great ability; so that the decision is justly entitled to more than ordinary respect and consideration. In the course of the opinion, the learned Judge says: "It can not be denied that there is a considerable discrepancy in the English decisions on this subject, and nothing less can reasonably be expected. An artificial rule, like the one insisted on here, that is founded on no great principle of policy, and that sets aside, while it professes to seek, the will of the testator, must continually be contested, and must be frequently invaded. And no one can read the English decisions on this subject without suspecting that all important wills wherein similar words are found, became the subjects of most expensive contests, and gave rise to those family quarrels which are the worst and most bitter and distressing of all sorts of litigation. We may well desire that such a rule may never constitute a part of our law. It rejects the plain, common sense of expres- (32) sions, and it is not in human nature to submit without a contest."

In accordance with the spirit of this decision, we find that, not only among the later English cases, but among those of several of the States of this Union, "a strong disposition has been indicated in modern times not to extend this doctrine of recommendatory trust; but, as far as the authorities will allow, to give the words of wills their natural and ordinary sense, unless it is clear that they were designed to be used in a peremptory sense. See 2 Sto. Eq. Jur., sec. 1069; *Sale v. Moore;* 1 Sim., 34; *Lawless v. Shaw,* 1 Lloyd and Goolds, 154; *Ford v. Fowler,*

3 Bea., 156; *Knight v. Knight, Ibid.,* 148; *Hart v. Hart,* 2 Desaus., 83; *Van Dyck v. Van Buren,* 1 Caines, 84; *Ball v. Vardy,* 2 Ves. (Sumner's Ed.), 270, note b." 1 Jarm. on Wills (Perkins' Ed.), 339, note 1.

Tested by the principle of these modern adjudications, there is strong ground for contending that the testator's widow, in the case now before us, took an absolute interest in all his estate under his will. Such seems to be the plain import of the words, for he gives it to her *"to be hers,"* in the strongest language which he could employ, and he gives it to her, not for their children, so that they may have a direct interest in it, but "so that *she can have the right"* of giving it to them "as she may think best." His intention appears to have been to substitute her in the place of himself, and to place her as he had been, under the moral, but not legal, obligation to provide for children who were as much hers as his. And considering that he was much in debt, of which he shows by the first clause of his will that he was aware, and that some of his children were grown up and married, we need not be surprised that he was anxious to provide for his "beloved wife," and to leave her children dependent upon her, rather than her upon them.

This construction is not at all opposed by the decision of this Court in *Little v. Bennett,* 58 N. C., 156, referred to and relied on by the counsel for the plaintiffs. There the devise and bequest by the
(33) testator to his widow was expressly "to raise and educate my children, and to dispose of the same among all my children as their circumstances may seem to require." The intention to create a trust for the children was too direct and obvious for the Court to hesitate a moment in giving effect to it.

But we need not, and do not, decide this question, because we are clearly of opinion that if the testator's widow, in the case now under consideration, did take all his property, real and personal, in trust for their children, she took it with a power, necessarily implied from the terms of the will, to sell either the land or the personal chattels, at her discretion, and to give the proceeds to the children, or to reinvest for their benefit. The tract of land which she did sell to the defendant was sold, as is clearly proved by the testimony, to save the slaves, forming a part of the estate, from being taken under execution for the payment of the testator's debts. The land may be, therefore, regarded as having been converted into slaves for the benefit of the children, and this, we are satisfied, was within the scope of her discretionary power over the estate.

This view of the question is strongly corroborated by the adjudication of the Court of Appeals in Virginia, in *Steele v. Livesay,* 11 Grat., 454, to which our attention was called by the counsel for the defendant. In that case the testator said that, "having implicit confidence in my be-

loved wife, and knowing that she will distribute to each of my children in as full and fair a manner as I could, I hereby invest my said beloved wife with the right and title of all my property, both real and personal, to dispose of to each of my children in any way she may think proper and right." By a subsequent clause of the will it was provided that if the widow should die without making a will, the children should have an equal distribution of the testator's estate. After a full argument, it was decided by the Court that the widow had an unlimited discretion as to the time and manner of distributing the property among the testator's children. She might distribute it, or any part of it, in her lifetime, or at her death by any instrument proper for (34) the purpose, or she might distribute to either child such kind of property as she might choose to give him or her. It was held further, that the widow might sell or convey the whole, or any part of the property, and distribute the proceeds of sale. And that having a discretion as to the time and manner of distribution, a purchaser of land from her was not bound to see to the application of the purchase money.

The course of argument which led the Court, in that case, to the conclusion that the will of the testator conferred upon his widow an implied power of sale, will lead to the same result in our case. Here the legal title of the testator's whole estate of every kind is unquestionably vested in his widow, and the property is declared to be hers for the very purpose that she may have "the right of giving" it to the children "as she may think best." The intention of the testator to give his wife an ample discretionary power over his estate, to be exercised for the benefit of his children, is too clearly manifested to be disregarded. The bill must be

PER CURIAM. Dismissed with costs.

Cited: Cook v. Ellington, post, 373; *Young v. Young,* 68 N. C., 315; *Carter v. Strickland,* 165 N. C., 72.

JOSEPH C. WHITLEY and others, Ex's., v. CHRISTOPHER FOY, Adm'r., and others.

Where an agent deposited money in bank as an ordinary deposit, stating at the time that it was the money of his principal, but desired the officer to place the money to his own credit on the books of the bank, alleging that he might have occasion to use it for the benefit of his principal, and the agent died shortly afterwards insolvent, it was *Held*, that the principal was entitled to the fund, and might follow the same in a court of equity.

CAUSE removed from the Court of Equity of CRAVEN. (35)

Edward S. Jones, the testator of the plaintiffs, resided in the

State of Alabama, but owned a plantation and slaves in the county of Onslow, in the State of North Carolina, upon which he was engaged in planting cotton. The intestate of the defendant Foy, one John Oliver, was the overseer for the said Jones upon this plantation, and was in the habit of disposing of the crops as his agent. In the spring of 1858, Oliver went to New Bern and sold the crop of the preceding year, and received the money therefor, which amounted to the sum of $1,000. This money the said Oliver deposited at the Branch of the Bank of the State at New Bern. When he made this deposit, he stated that it was the money of Edward S. Jones, but that he wanted it placed to his own credit on the books of the bank, as he might have occasion to use it for the benefit of his principal, as he lived in Alabama. Shortly afterwards, Oliver died, when the plaintiffs' testator, Jones, made a demand on the officers of the bank for the money, which they refused to pay. It was admitted by the plaintiffs' counsel in this case that the deposit was not a special one, but that the money was mingled with the other moneys of the bank.

The bill is filed to obtain a decree for the payment of the fund to the plaintiffs as the executors of the said Jones, who has since died; the claim is resisted by the defendants, the administrators of John Oliver, who claim the fund as assets of the estate of their intestate. The Bank of the State is also made a party defendant.

The cause being set for hearing upon the bill, answer, exhibits and proofs, was transferred to this Court by consent.

J. W. Bryan, for the plaintiffs.
Hubbard, for the defendants.

BATTLE, J. The claim of the plaintiffs to the funds in controversy is clearly sustained both by reason and authority. This contest being between the personal representatives of a principal and agent for
(36) an amount of money which the agent had received for the principal, which he always admitted to belong to the principal, the latter certainly has the right to claim what is conceded to be his own, so long as he can identify it. This proposition is too plain to be denied, but the counsel for the defendant Foy, the administrator of the agent, insists that the money can not be identified, because it was deposited in bank as an ordinary, and not a special deposit, to the credit of the agent, and that it thereby became the money of the agent, and he at the same time became the debtor of the principal for the amount. That can not be, because it was deposited expressly as the money of the principal and not of the agent, and was placed by the latter to his own credit solely for the purpose of enabling him to pay it with more convenience to his principal, apply it to his use.

Such being the state of the case, the rule applicable to it is, that "a principal in all cases where he can trace his property, whether it be in the hands of the agent, or of his representatives or assignees, is entitled to reclaim it, unless it has been transferred *bona fide* to a purchaser of it or his assignee for value without notice. In such cases, it is wholly immaterial whether the property be in its original state, or has been converted into money, securities, negotiable instruments or other property, if it be distinguishable and separable from the other property or assets, and has an earmark or other appropriate identity; *Taylor v. Plummer,* 3 Maul. and Sel., 562; *Veil v. Mitchell,* 4 Washington C. C., 105; *Jackson v. Perkins,* 3 Mason, 232; *Scott v. Surman,* Willes, 400; *Whitcomb v. Jacot,* 1 Saulk., 166; *Jackson v. Clark,* 1 Young and Jer., 216." The above extract is from *Overseers v. Bank,* 2 Grat., 544, in which it was held that the plaintiffs were entitled to money deposited to his own credit by their agent, he having soon after died insolvent. The same principle, which is that of following a fund in equity, is clearly settled by several decisions in our State. See *Black v. Ray,* 21 N. C., 433; *Bateman v. Latham,* 56 N. C., 35, and *Wood v. Reeves,* 58 N. C., 271. (37)

The plaintiffs are entitled to a decree for the amount claimed.

PER CURIAM. Decree accordingly.

Cited: Barnard v. Hawks, 111 N. C., 339; *Edwards v. Culbertson, Ibid.,* 344.

TEREST CARMAN v. STEPHEN PAGE.

1. Where both parties to a trade for the sale of slaves had full time for deliberation, and the deeds were executed without secrecy, and attested by a respectable witness, and there was no evidence of mental incapacity, and no sufficient proof of a gross inadequacy of price, it was *Held,* that the transaction should be sustained.
2. Gross inadequacy of price is not sufficient, in itself, to set aside a deed, although it is a strong circumstance, tending with others, to make out a case of fraud or imposition.

CAUSE removed from the Court of Equity of CARTERET.

The bill seeks to have a conveyance of certain land and slaves set aside, on the ground of fraud practiced in procuring it. It alleges that the plaintiff was joint owner with her sister, one Mary Heath, of a remainder in a valuable lot of slaves, dependent upon a life estate in one Edmund Heath, which slaves, it alleges, were worth ten or twelve thousand dollars. The bill further alleges that in the summer of 1857, defendant applied to plaintiff to purchase her interest in said slaves, having several times before importuned her to sell them to him, and

informed her that he was the owner of the interest that had before belonged to Mary Heath, and offered $1,000 for plaintiff's interest, which offer was declined; that some days after this conversation, defendant again called and informed her that he had been informed by a gentleman of the bar that there was some doubt about the title to the remainder in these slaves, after the death of Edmund Heath,
(38) and proposed that they should compromise with the children of Edmund Heath, who were, as he alleged, the claimants of the slaves, and would bring suit for them when the life estate determined; that some time after this last interview, the plaintiff was taken sick, and that while prostrated by disease, she yielded to entreaties of the defendant, and signed the deed in question, which was not even read to her, and of the contents of which she was entirely ignorant, and that the price mentioned in said deed was only $1,100.

The answer denies that the defendant importuned the plaintiff, but alleges that plaintiff, on several occasions, sent for him and offered to sell her interest in the slaves at the price of $1,500, and that on the occasion when the deed was made, he called on her by her request; that the terms of the sale were proposed by the plaintiff herself, and were, that defendant should pay her one hundred dollars down, and the balance in one, two, three, four and five years, with good security, without interest, and that this was a fair price, as Edmund Heath, though a man in advanced life, being between seventy and eighty years of age, was, nevertheless, of robust constitution, and had promise of a long life.

Elizabeth Pearce deposed that she was acquainted with the plaintiff in 1857; that just before the execution of the deed in question, plaintiff sent for her, and desired her to see the defendant and request him to call and see her, that she might sell him her interest in the slaves; that she informed defendant of plaintiff's request, and was at plaintiff's house when defendant called; that the former offered the property for the price of $1,500, which the latter refused to give, but offered her $1,000; but that they did not conclude a bargain. Witness further testified that the plaintiff afterwards sent for her again, which she did; that she was present at this interview, and that the plaintiff still asked $1,500, which defendant still refused to give; that the plaintiff then offered to take $1,100, payable as alleged in the answer, and that these terms were accepted by the defendant; that he then informed the
(39) plaintiff that he would have the notes and the bill of sale drawn, and thereupon left the house; that he afterwards returned with one O'Leary, that Mrs. Carman was sitting on the bed; that O'Leary took a seat near her and read the bill of sale to her, and afterwards read the notes; that the $100 was then paid, and O'Leary left, and that Mrs. Carman seemed satisfied, and that her mind, at these interviews, was

as good as she ever saw it; that she afterwards had many conversations with her, and that she always seemed perfectly satisfied with the whole transaction.

A number of witnesses testified that they considered the plaintiff a woman of sound mind, capable of transacting ordinary business, and also that $1,000 was a fair price for the remainder in the property dependent on the life estate of Edmund Heath.

James A. Perry, a son-in-law of the plaintiff, testified that he had managed her business for her some years, and that her mind was weak, and that she was easily influenced.

Dr. O. W. Hughes testified that the plaintiff sent for him in 1857, in regard to these negroes, and asked him $1,200 for them; and gave as a reason for desiring to sell them, that she was on bad terms with her son-in-law, and wanted to realize means to live on.

Daniel O'Leary testified that he drew the bill of sale and the notes at the request of the defendant, and went with him to the house of Mrs. Carman, and read them over to her twice or three times, and that she remarked that they were according to the contract. This witness attested the bill of sale.

The cause being set for hearing upon the bill, answer, exhibits and proofs, was transferred to this Court by consent.

J. W. Bryan, for the plaintiff.
McRae, for the defendant.

PEARSON, C. J. The allegations of the bill are not sustained by the proof. It is not proved that the plaintiff was of unsound mind at the time of the dealing mentioned in the pleadings. There is no proof that any fraud or artifice was resorted to for the purpose (40) of inducing her to sell. Both parties had full time for deliberation, and the deeds were executed without secrecy, and attested by a respectable witness. So, the plaintiff has no ground to stand upon, except the allegation of gross inadequacy of the price, which is not sufficient to set aside a deed, although it is a strong circumstance, tending with other to make out a case of fraud or imposition.

The price in this case does not appear to have been *grossly* inadequate. The plaintiff offered several times to sell at $1,500, and the difference between that sum and $1,100 can hardly be treated as enough to make out the imputation of fraud. Upon the whole, we are satisfied that the plaintiff had made up her mind that "a bird in the hand was worth two in the bush," and having some fear that the title might be drawn into question, and having no particular wish to retain property of which she could not have the enjoyment, except as a fund to bestow upon her nephews and nieces, who were the parties by whom she apprehended

her title might be disputed, was willing to sell at a "low figure." And the defendant did no more than to avail himself of what he considered a chance "for a speculation." Such dealings, though not encouraged by the Courts, are not forbidden by law.

The plaintiff having failed to established any equity, the bill will be

PER CURIAM. Dismissed.

(41)

DAVID SWINDALL, by his next friend, WILLIAM J. McNEILL, *v.* WILLIAM BRADLEY.

Where the owner of a life interest in slaves, a demoralized and needy man, who had made a sale of all his property, enquired of a person whether he could be subjected, criminally, if he removed a slave out of the State, and intimated to another, after a suit was brought, that if he could get the slaves in his possession, the remainderman should never receive any benefit from them, it was *Held*, a proper case for a writ of sequestration.

APPEAL from an order made by *French, J.*, at the Fall Term, 1860, of the Court of Equity of BLADEN.

The cause having been set for hearing, was heard below upon the bill, answer and proofs filed by both parties, and it was ordered that the sequestration which had theretofore issued, should be dissolved, from which order the plaintiff appealed to this Court.

The facts of the case upon which the decision is mainly founded are sufficiently stated in the opinion of the Court.

Leitch, for the plaintiff.
Fowle and *C. G. Wright,* for the defendant.

MANLY, J. Any doubt as to the merits of this case, as it was presented by the bill and answer alone, has been entirely dissipated by the proofs subsequently taken. The case is a strong one for the interposition of a Court of Equity to protect the minor, who is entitled in remainder.

It seems that complainant is a son by a former husband of Mary Bradley, wife of the defendant; that defendant has separated himself from his wife, and has another woman living with him; that he has sold all the property acquired by his marriage, except the slaves in question, and has no property besides; that he consulted with H. H. Robinson some time before the suit, whether he (defendant) would incur any *criminal* responsibility if he sold them, and that he has intimated since the suit was instituted against him, in indirect but intelligible
(42) terms, that if he could again get possession of them, he would put them beyond the reach of the claimant.

These leading facts now developed in the case convince us that the danger to the property in the hands of the defendant would be imminent, and that it is highly expedient and necessary the person in remainder should be protected by the writs heretofore granted in the cause.

The testimony from one witness (Robinson) is, alone, conclusive of the case. From his testimony, it appears the defendant deliberately meditated a conversion of the slaves out and out, to his own use, and was making the plan turn in his mind, upon the point whether it involved any *criminal* responsibility. A person who could entertain such thoughts requires, in the opinion of this Court, other restraints than those of a moral nature.

This is especially so when such a person is found under demoralizing and necessitous circumstances.

Therefore, the decree of the Court below dissolving the sequestration in the cause should be reversed, and a decree in conformity with this opinion to continue the sequestration.

PER CURIAM. Decree accordingly.

AARON ELLIOTT and others v. JOSEPH H. POOL and another.

Where the trustee of an insolvent debtor, under a deed of trust which left out certain creditors, bought property at his own trust sale at less than its value, but without any actual fraud, in a suit by the unsecured creditors to compel a resale of the property for their benefit, it was *Held*, that such trustee was entitled to have *bona fide* debts due him from the trustor satisfied out of the increased price obtained by a resale of the property before the unsecured creditors could come in.

THIS was a petition to rehear a decree of the Court, passed at December Term, 1856. The facts upon which that decree was based are set out in 56 N. C., 17, and they, with the further facts upon which the decision at this term is founded, are sufficiently set (43) forth in the following opinion of the Court.

B. F. Moore, for the plaintiff.
Fowle, for the defendant.

BATTLE, J. When this cause was heard, and an account ordered, at December Term, 1856, the question presented in the petition to rehear was either not argued by the counsel, or if argued, was overlooked by the Court. It certainly was not decided, as appears from the opinion in *Elliott v. Pool,* 56 N. C., 17. It is, therefore, a proper subject for consideration upon the petition to rehear the former decree. The question thus presented is an important and interesting one, and we are

gratified that, in the investigation of the principles upon which it is to be decided, we have been materially aided by the able arguments which have been submitted to us by the counsel on both sides. In proceeding to state the process of reasoning by which we have been led to the conclusion to which we have come, it will aid us to advert to the facts upon which the question is raised. They are briefly as follows: One Jesse L. Pool, being greatly in debt, and, as it afterwards appeared, insolvent, on 30 January, 1841, executed a deed in trust to the defendant Joseph H. Pool, conveying to him a large real and personal estate, consisting of land, slaves and other personal property, being, in fact, all he owned, in trust that he should, when he might deem proper, advertise and sell the same, either for cash or upon a credit, and apply the proceeds to the payment, in the first place, of certain debts recited in the deed, due and owing to the said trustee, or for which he was surety, and in the second place to the payment of a debt due to one John Pool, and then, should there be a residue of property after discharging these liabilities, it was to be conveyed by the trustee to the grantor, Jesse L. Pool. In the year following, Jesse L. Pool died, and shortly thereafter, to wit,
(44) on 1 and 3 December, 1842, the defendant Joseph H. Pool, after due advertisement, sold *all* the property conveyed to him in the deed of trust, and, by his agent, became the purchaser of a valuable tract of land and several of the slaves. The whole amount of sales was sufficient to pay and discharge all the debts mentioned in the first class, and a part of the debt due to John Pool, leaving a part of that debt unpaid. This appears from exhibits filed with the answer of Joseph H. Pool, which contain statements of the accounts of the sale, and the amounts of the several debts secured by the deed of trust. The defendant Joseph H. Pool, being afterwards advised that he could not legally become a purchaser at his own sale, and that the heirs-at-law and personal representative of Jesse L. Pool could, at their discretion, have his purchases declared void, and call for a reconveyance or a resale of the property, procured a friend to take out letters of administration on the estate of the said Jesse L. Pool, and then filed a bill in the Court of Equity against the heirs and administrator of the deceased, calling upon them to elect either to repay him the amount of his bids and take a reconveyance of the property, or to permit him to have his purchases confirmed by a decree of the Court. On this bill such proceedings were had that decree was made confirming the purchases made by the trustee, and perpetually enjoining the heirs and administrator of the grantor in trust, respectively, from setting up a title to the property. The present bill was filed by the plaintiffs, as creditors of Jesse L. Pool, not secured by the deed in trust, charging fraud on the defendant Joseph H. Pool, and seeking to hold him accountable for the full value of the land and

slaves, which he purchased at his own trust sale, and which value was alleged to be much greater than that at which the property was purchased. After an answer was filed to the original bill in 1848, the defendant Joseph H. Pool instituted suits at law against the administrator of Jesse L. Pool for certain debts which he alleged to be due him, and which were not included in the deed in trust. In these suits, the defendant pleaded a want of assets, which was admitted by the plaintiff, and judgments *quando* were taken for the amounts claimed. After this, the defendant obtained leave to file a supplemental answer, in which he claimed that if he should be held to be accountable to the plaintiffs for the increased value of the land and slaves purchased by him, as has been before mentioned, he should be allowed as credits the amount of the debts due him by Jesse L. Pool, and for which he had obtained the judgments above referred to. The right of the plaintiffs to the account was established by the decree made at the hearing of the cause, and the question whether the defendant Joseph H. Pool is entitled to the credits which he claims, either upon the ground of retainer or as an equitable set-off, is the one now presented to us upon the petition to rehear. (45)

The doctrine of equitable set-off was established as one of the principles of the Court of Chancery prior to the enactment of any statute authorizing sets-off in a Court of Law. Judge Story, in delivering an opinion in *Greene v. Darling,* 5 Mason., 201, in the Circuit Court of the United States, held in Rhode Island, made an elaborate review of all the English cases on the subject, from which he drew the conclusion "that Courts of Equity will set off distinct debts where there has been a *mutual credit,* upon the principles of natural justice, to avoid circuity of suits, following the doctrine of compensation of the civil law to a limited extent. That law went further than ours, deeming the debts, *suo jure,* set off or extinguished *pro tanto;* whereas, our law gives the party an election to set-off, if he chooses to exercise it; but if he does not, the debt is left in full force, to be recovered in an ordinary suit." The learned Judge then proceeds to say, "Since the statute of set-off of mutual debts and credits, Courts of Equity have generally followed the course adopted in the construction of the statutes by Courts of Law, and have applied the doctrine to equitable debts; they have rarely, if ever, broken in upon the decisions at law, unless some other equity intervened which justified them in granting relief beyond the rules of law, such as has been already alluded to. The *American* Courts have generally adopted the same principles as far as the statutes of set-off of the respective States have enabled them to act." In North Carolina we have had a statute of set-off ever since 1756 (see Rev. Code of 1820, ch. 57, sec. 7; Rev. Stat., ch. 31, sec. 80), which is embodied (46)

in the Revised Code, ch. 31, sec. 77, as follows: "In cases where there shall be mutual debts subsisting between the plaintiff and defendant; or where either party may sue or be sued as executor or administrator, and there are mutual debts subsisting between the testator or intestate and either party, one debt may be set against the other, either by being pleaded in bar, or given in evidence on the general issue, on notice given of the particular sum intended to be set-off; and on what account the same is due, notwithstanding such debts shall be of a different nature; but if either debt arose by reason of a penalty, the sum intended to be set-off shall be pleaded in bar, setting forth what is pustly due on either side." It is manifest from the enactment that we allow sets-off to be made at law, where the debts are mutual, without regard to the enquiry whether they be founded on mutual credit, that is, one contracted on the faith and credit of the other, and our Court of Equity will be found to have acted on the same principle with regard to equitable sets-off. See *Iredell v. Langston,* 16 N. C., 392; *Sellars v. Bryan,* 17 N. C., 352; *Bunting v. Ricks,* 22 N. C., 130.

In the case before us, it is contended by the counsel for the defendant Joseph H. Pool, that by the application of this principle, he had a right to set-off the debts due him from the estate of Jesse L. Pool, against the claim preferred against him by the plaintiffs. The counsel insists that he would have had a right to do so as against Jesse L. Pool himself, or against his heirs and personal representative, and, consequently, against the plaintiffs, who, according to the opinion heretofore filed in the case, have "to work out their equity" through the representatives of the deceased debtor. The counsel for the plaintiffs argues, in opposition to this alleged right of set-off, contending that Joseph H.
(47) Pool was bound as trustee by the express words of the deed under which he acted, to sell the property conveyed to him, and after satisfying the debts secured by the deed, to reconvey the residue to the grantor in trust; that his purchase at his own sale did not divest the property, so purchased, out of his hands as trustee, and that consequently he is still bound to convey or account for it, or its value, to the plaintiffs, who stand in the place of the representatives of the deceased debtor. It would be difficult to answer this argument, or to impair its strength, if the sale of all the property conveyed in the deed of trust had been unnecessary, or if the sale had been conducted in an illegal manner, so as to have infected the defendant Joseph H. Pool's purchases with actual fraud; but such does not appear upon the proofs to have been the case. It seems from the account of the sales, and the statement of the amount of the debts secured by the deed in trust, which are filed as exhibits, that a sale of all the property was necessary, and the proofs do not satisfy us that there was any actual fraud in the manner in which

it was conducted. The decree heretofore filed in the cause does not put this defendant's liability to the plaintiffs on that ground, but upon the broad ground of policy, which forbids a trustee to purchase at his own sale. That policy has established "the rule that, however fair the transaction, the *cestui que trust* is at liberty to set aside the sale and take back the property. If a trustee were permitted to buy in an *honest case,* he might buy in a case *having that appearance, but which, from the infirmity of human testimony, might be grossly otherwise.*" Such is clearly the rule in the English Courts of Equity, and the reason upon which it is founded; and we believe it will be found that our Courts of Equity have adopted the same rule, and for the same reason. See Lewin on Trusts, 87 Law Lib., 394 (m. p. 460). According to this rule, then, the purchase by a trustee at his own sale is not absolutely void, but only voidable at the election of the *cestui que trust.* The latter may, if he think that it is his interest to do so, let the purchase stand, and compel the trustee to pay the price, or he may have the sale set aside and the property resold. The rule is manifestly well (48) adapted to accomplish the purpose which it has in view, which is to prohibit trustees from attempting to make a profit out of the property which they are entrusted to sell, for if they, by purchasing it, make a bad bargain, they may be held to it. There can not be a doubt, then, that if, in the present case, Jesse L. Pool, the grantor in the deed of trust, were alive, he could, in a Court of Equity, have the purchases of the land and slaves made by the trustee set aside and the property resold, and hold the trustee responsible for the price obtained upon such resale. But could he recover from him the amount of the advanced price without being liable to have any *bona fide* debt which he owed the trustee set-off against his demand? We think not. The claim of each against the other would be mutual, and in equity the real debt due from one to the other would be the excess of one of the claims over the other. When the *cestui que trust* came to seek the enforcement of an equity by the Court, he would be met by the maxim "that he who seeks equity must do equity." The original considerations upon which these debts are founded are not set forth in the supplemental answer, but from the transcripts of the record of the judgments obtained thereon, it would seem that they were moneys paid by the trustee as surety for his *cestui que trust,* and if so, it would be a hard rule which would enable the *cestui que trust* to recover the full value of the property purchased by the trustee at his own sale, without repaying to him money which he had been compelled to pay as the surety of his *cestui que trust.* In *Iredell v. Langston, supra,* HENDERSON, C. J., said: "I doubt whether a creditor can call the funds out of the hands of the trustee without paying all the debts of the *cestui que trust* to the trustee." He was not speaking, of

course, of a creditor whose debt was secured by a deed in trust; and if there be a doubt whether any other creditor could call the funds out of the hands of the trustee without paying the debts of the
(49) *cestui que trust* to him, surely the *cestui que trust* himself could not.

If the proposition, then, be established that the defendant Joseph H. Pool would have had a right to set-off his debts against the demand of Jesse L. Pool himself, we think it plain that the Court of Equity, acting in analogy to the express words of the statute, as to a set-off at law, must have allowed the defendant's debts to have been set-off against the demand of the *cestui que trust* in a suit by his representatives. It has already been shown that the plaintiffs stand in the place of these representatives, and, of course, have no greater equity than they would have. The defendant can not, however, have the same right of set-off in his representative capacity, as executor or administrator of some other person. This is settled in *Sellars v. Bryan,* 17 N. C., 358, upon the ground of a want of mutuality in the debts.

It will be ordered, then, that the defendant Joseph H. Pool shall be allowed a credit for all *bona fide* debts due to him in his own right, which he can prove against the estate of Jesse L. Pool. In making this proof, the judgments which he may have obtained against the administrator of the said Jesse L. Pool shall not be evidence for him, because the administrator was not interested in contesting the existence or legality of the alleged debts, and the plaintiffs, as creditors, were not parties to the suits.

PER CURIAM. Decree accordingly.

Cited: *March v. Thomas,* 63 N. C., 88; *Scott v. Battle,* 85 N. C., 195.

---

(50)

LETITIA BROWN, Adm'r of M. L. BROWN, Dec'd, v. THOMAS W. HAYNES.

1. Where a partner, whose duty it is to keep the books, seeks to make a charge in his own favor, which is not supported by a proper entry in the books, he must account for that fact, and can only support the charge by clear proof; every presumption being against him.
2. Where one entered into a copartnership with his son-in-law, and it was agreed that the father-in-law should furnish a house for a shop, tools, etc., and a house for the defendant to live in, and that he "should be at no expense," it was *Held,* that these words must be intended to mean expense for things connected with the business, and not family expenses.
3. One partner can not, without the express concurrence of his co-partner, make a note of the firm payable to himself and charge the firm therewith.

4. Where A, who was the active partner, and the bookkeeper of a firm, sought to charge it with the value of a slave which it was alleged belonged to the firm, and had been appropriated by B, his co-partner, to his individual use, it was *Held*, that in the absence of any charge upon the books of the firm, the mere allegation of it in his answer, supported by vague and improbable testimony that such slave belonged to the firm, was not sufficient.

5. Where A, who was the active partner of a firm, and its bookkeeper, set up a claim against the firm for money which the answer alleged was due the partners jointly, for services rendered independently of the co-partnership, but which were appropriated by B to his own use exclusively, it was *Held*, that this could not be made a charge upon the firm in the absence of proof that the money had been appropriated to the purposes of the firm, there being no entry on the books to show the fact.

6. The office of an exception is to call the attention of the court to some specific matter or item in an account in respect to which error is alleged; if it does not answer this purpose, the court will not notice it.

CAUSE removed from the Court of Equity of ROWAN, and brought up upon exceptions to the report of the Master.

The bill is filed against the defendant as surviving partner of the firm of Brown & Haynes, and prays for an account and settlement of the firm business, and the plaintiff is the administratrix of M. L. Brown, the deceased partner.

About 1851, the defendant and plaintiff's intestate entered into a co-partnership for the purpose of carrying on, in the town of Salisbury, the business of tanning, shoemaking and harness making. There were no written terms of co-partnership, but the defendant, in his answer avers that by the terms of the parol agreement, "the capital was furnished by the plaintiff's intestate without interest, and the tan yard and a house for the defendant to live in, were to be furnished without rent, and also the shoe shop without rent; and his mules to grind the bark, and old Jesse, the tanner, without charge." "And in consideration of this capital, etc., the defendant was to give his personal (51) attention to the business of the copartnership, and they were to share equally in the profits and losses of the said firm." The partnership continued up to 1857, when Brown died.

In his answer, the defendant seeks to have an allowance for four notes; one for $960.79, dated 15 February, 1855, which, he avers, "was given on the settlement of the estates of Henry W. Brown and Michael Brown, one-half of this sum belonged to this defendant, and the other half to plaintiff's intestate"; another for $525, dated 8 August, 1853; "this was given for a negro boy, Burton, the property of the firm, taken by the intestate"; another for $600, dated 2 November, 1854, "for money of the firm received by plaintiff's intestate"; and one other for $1,152, dated 6 May, 1853, "given for money of the firm received by plaintiff's intestate."

These notes, amounting in the aggregate to the sum of $4,344.46, were

all in the handwriting of the defendant, both the bodies and the signatures, the name of the firm having been signed to them by defendant, who, it is admitted, was the active partner, and kept the books, made the entries, hired the hands and paid them, and, in fact, was the general manager of the business.

Defendant introduced in evidence the deposition of one W. H. Haynes, his father, who deposed that in a conversation had with plaintiff's intestate, a short time after the firm was organized, that intestate said to him that he "was to furnish everything," and "that T. W. Haynes was to be at no expense." The witness Haynes further deposed that plaintiff's intestate told him that he had administered on the estate of Henry Brown, and that T. W. Haynes had administered on the estate of Michael Brown; that Haynes was to attend to the business of both estates, and that the commissions were to be equally divided; that Brown afterwards told him that the estates were settled; that the commissions on both amounted to between $900 and $1,000; that he had used the entire sum himself, but that he was responsible to T. W.
(52) Haynes for one-half of it. He further deposed that he sold a boy, Burton, to the firm, and that he was paid for out of the firm funds; that plaintiff's intestate afterwards took this boy to his plantation, and told him, witness, that he was to account for him to the firm; witness did not recollect how much he received for Burton; that he sold the firm another boy at the same time, and though he got between $700 and $800 for both.

The defendant, who was a son-in-law of plaintiff's intestate, as was shown, was a man of slender means, and had been, for several years previous to the organizing of the co-partnership, engaged in clerking, and Michael Brown, his employer, deposed that when he left him, he was indebted to him (Brown) to the amount of $70, which was paid by his father, W. H. Haynes. The father of the defendant also stated, upon his cross-examination, that during the continuance of the co-partnership, he had let his son have money at different times, that the largest sum he recollected letting him have was $400; and that of this money so supplied, $400 was borrowed by the firm to purchase hides with, half of which had been paid back by the firm—the rest was a gift to his son.

This witness lived, during the existence of the firm, in the county of Iredell, some twenty miles from Salisbury.

The answer also avers that there was a note on Moses Rymer and Frederick Mowery, payable to M. Brown, for the sum of $600; that this note, though made payable to Brown, was the property of the firm, and was taken for firm debts, and the defendant seeks to have it accounted for as such in the settlement.

There was no further evidence of these various transactions, and no entries on the books of the firm in relation thereto, nor was any mention made therein of any such matters.

Upon the coming in of the Master's report, defendant filed the following exceptions:

1. Defendant excepts to the whole report, for the reason that the testimony does not sustain the report.

2. Defendant excepts to the report for the reason that the commissioner has charged for Jesse's services at one hundred and fifty dollars per annum for five years, making $750, when the witness (53) W. H. Haynes proved that there was to be no charge for Jesse.

3. Defendant excepts to the report for the reason that W. H. Haynes proved that T. W. Haynes was to be at no expense, but that the family expenses were to be borne by Brown, but that the Master had allowed only the rent of the dwelling house and other buildings connected with the business, and for the services of two negro women, whereas, he should have allowed for the whole expense of the family.

4. Defendant excepts to the report for the reason that the commissioner refused to allow as a charge against the firm in favor of defendant four notes amounting to the sum of $4,344.46.

5. Defendant excepts because commissioner refused to charge the plaintiff with the value of the negro boy Burton.

6. Defendant further excepts because the commissioner failed to allow his one-half of the commissions received upon the estates of Henry and Michael Brown.

7. Defendant excepts because the commissioner refused to allow for any money advanced to the firm, when he should have allowed at least the sum of $500; that W. H. Haynes proved two hundred dollars advanced by him and applied in the purchase of hides.

8. Defendant excepts to the report of the commissioner for the reason that he has not allowed the note of Rymer & Mowery, principals, and B. B. Roberts, S. R. Harrison and J. J. Summerell, sureties, for $600, with a credit of $75, which note, though payable to M. L. Brown individually, was indirectly firm property, and placed by this defendant as firm property in the hands of L. Blackmer, and for which this defendant holds his receipt.

Upon the coming in of the report and the filing of the exceptions, the cause was set down for argument, and transmitted by consent to this Court.

Fleming and *James E. Kerr,* for the plaintiff.
Boyden and *B. R. Moore,* for the defendant.

PEARSON, C. J. Before entering upon the exceptions, two (54) general remarks will serve to give "color and complexion" to this

whole case. "Defendant admits that he was the active partner, *kept the books, made all the entries,* and received and disbursed the funds, hired hands and paid them, and did all the other business of the firm."

It follows that if the proper entries are not made, so as to show *on the books* the condition of the business, it was the fault of the defendant, and he will not be allowed to take advantage of his own wrong. The defendant makes a charge against the firm amounting to more than four thousand dollars; it is not supported by any entry on the books, and instead thereof, the defendant relies "on four notes" purporting to have been executed by the firm to himself, with different dates, and for the several sums, amounting in all to the sum total claimed, and professes in his answer to give the transactions constituting the consideration. These notes are in his handwriting and the name of the firm signed by him. There is no proof that they were ever exhibited to the deceased partner, or were ever seen by any one in his lifetime. These circumstances detract much from the credit which might otherwise be due to the answer, and reflect unfavorably upon the testimony of the defendant's father, which is relied on in support of several of his charges.

1. The first exception is overruled because of its generality. The object of an exception is to call the attention of the Court to some specific matter or item in the account, in respect to which error is alleged. If an exception does not answer this purpose, the Court will not notice it.

2. The second exception is overruled. Neither W. H. Haynes, nor any other witness, proves that no charge was to be made for the hire of Jesse, and the allegation of the answer is not only unsupported, but is opposed by the weight of the evidence. The tan yard tools and fixtures, shoe shop, house and lot, which it is admitted the partner Brown was to furnish free of rent, in compensation for the services of the defendant, was worth an annual rent of some five hundred dollars. (55) Two hundred and fifty dollars was a fair allowance for the services of the defendant, who was a young man, and had no experience in the business, and was to be also allowed one-half the profits.

3. The third exception is overruled. The witness W. H. Haynes, who is the father of the defendant, deposes that Brown, whose daughter his son had recently married, told him that he was to furnish everything, and that the defendant was to attend to the business, and "was to be at no expense." The proper construction of this is, that Brown was to furnish the tan yard, shoe shop, houses, tools and stock on hand, that is, *everything connected with the business.* It would be a strained construction to make the words include provisions for the use of defendant and his family, and also *their clothes* and furniture, and other necessaries for housekeeping! Had this been the understanding, the books

would have contained many entries in respect to such articles, whereas, there is no entry of the kind, and the defendant does not, in his answer, allege that the "victuals and clothes" of himself and wife were to be furnished by Brown. He says that Brown was to furnish, without charge, the tan yard, tools, etc., his mules to grind the bark, and old Jesse, the tanner, and the shoe shop, dwelling house and lots, "these were all to be furnished without charge." So, the *probata construed* (as contended for) goes beyond the *allegata!*

4. The fourth exception is overruled. This applies to the four notes, amounting to $4,344.46, which are referred to above. The idea that a partner, without the express occurrence of his co-partner, can make a note of the firm payable to himself, and charge the firm with it, is too monstrous to be entertained for a moment! The only motive that can prompt one to manufacture secret evidence of this kind must be that he prefers to keep the evidence in his pocket, rather than put it on the books, where it would be subject to the inspection of his co-partner. In our case, the proof is, that the defendant did not have the means to enable him to advance such large sums for the use of the firm; indeed, it would seem that he was barely able to support himself (56) and his wife.

5. The fifth exception is overruled. The answer seeks to charge the firm with a note for $525, dated 8 August, 1853, and sets forth "this note was given for a negro boy, Burton, the property of the firm, taken by the intestate." This is one of the four notes embraced in the fourth exception, and the defendant failing in his attempt to have the note allowed, seeks to set up a charge against the firm for the value of the slave, on the ground that the slave was purchased and paid for by the firm, and afterwards appropriated by the intestate to his individual use. If such was the case, the intestate ought to have been required, when he took the slave, to give his note *to the firm,* or been charged with the amount on the books, and it was a strange notion on the part of the defendant that he could make it the foundation of a note by the firm to himself for the value of the slave. This circumstance, together with the absence of any entry on the books in respect to it, puts suspicion on the transaction. It is proved that the slave went into the possession of Brown, and was claimed by him as his individual property. For the purpose of showing that he was bought and paid for by the firm, the defendant relies on the testimony of his fathehr, who says: "I sold the firm a boy, Burton; he was paid for out of the firm funds; afterwards, Mr. Brown took the boy to his plantation, and told me he was to account for him to the firm. I don't recollect what I got for Burton; I sold them another negro at the same time; I think it was between $700 and $800 that I got for both boys." No explanation is given how this

witness happened to know the fact that the price of this boy was "paid for out of the firm funds." Witness says, "I don't recollect when I sold him, nor do I recollect *where* Thos. Haynes lived at the time." It may be his son told him so; it was in character with the fact that he should, thereupon, make a note payable to himself for the full value of the boy, and put the name of the firm to it. But, however this may be, as it was the business of the defendant to keep the books, and to
(57) have charged Brown with the value of the boy, if, in truth, he had been the property of the firm, in the absence of any entry on the books, we can not, upon loose testimony like this, declare that the defendant has supported the charge; and strongly incline to the opinion that, as it was not a part of the business of the firm to trade in negroes, as no bill of sale is produced by the defendant, who ought to have taken one, and no entry was made on the books in respect to it, connected with the fact that the defendant manufactured the note above referred to, that defendant bought the boy as the *agent* of Brown, and not as a member *of the firm;* at all events, there is no sufficient proof that the slave was paid for out of the funds of the firm.

6. The sixth exception is overruled. The answer seeks to charge the firm with a note of $960.79, dated 15 February, 1855, and sets forth: "This was given on the settlement of Henry W. Brown and Michael S. Brown's estates, one-half of this sum belonged to this defendant, and the other half to M. L. Brown." This is also one of the four notes embraced in the fourth exception, and the defendant failing in his attempt to have the note allowed, seeks to set up a charge against the firm for the amount on the ground that the firm had received the commissions due on settlement of the estates of Henry and Michael Brown. If such was the fact, the books of the firm ought to show it, but there is no entry on the books, and no proof of the allegation, and the firm does not seem to have been in any way connected with these two estates, except by the strange notion of the defendant that he could make it the foundation of a note by the firm to himself, as he did in respect to the slave Burton.

7. The seventh exception is overruled. It appears by the proofs that the defendant had been acting as a clerk in a store for a year or two before he married, and entered into business with his father-in-law; he had no funds when he left the store, and was actually in debt to his employer some seventy dollars. So, he was not able to make advances for the firm, and does not allege in his answer that he did so.
(58) The evidence of his father, on which this exception is based, is another instance where the *probata* reaches beyond the *allegata.* W. H. Haynes deposes: "I let him (my son) have money at different times; the largest amount I recollect of letting him have at any one time was $400." In answer to a question on cross-examination, "Did you

make a gift of the money to your son which you said you let him have; if not, did you lend it to your son or to the firm, and was it ever paid back to you?" The witness says: "Not the whole of it; $400 was borrowed by the firm to purchase hides with, and one-half of it has been paid back by the firm; the balance of the money was a gift." This witness lived some twenty miles distant, in another county, and had no opportunity of knowing the business of the firm, except what was communicated to him by his son. So, the most charitable construction of his testimony is, that *his son told him* that the money was borrowed by the firm. The books furnish no evidence of the fact that this $400 went to the use of the firm, and in the absence of that proof, this evidence is not sufficient to support the charge against the firm.

8. The eighth exception is overruled. This is another item embraced by one of these "four unfortunate notes." It is enough to say that the note of Rymer and others for $600 is, on its face, payable to M. L. Brown, individually, and there is no evidence that it ever did become the property of the firm.

In passing on all the exceptions, we have been governed by a well established rule in the law applicable to co-partners, *i. e.*, where a partner, whose duty it is to keep the books, seeks to make a charge in his own favor, which is not supported by a proper entry on the books, he must account for that fact, and can only support the charge by clear proof; for every presumption is made against him, inasmuch as between partners their books have the verity of a record. If the defendant, by the application of this rule, has lost any one claim which is a just one, it is his misfortune, and the result of his own neglect in not making the proper entry. The matter was not helped by his attempt to manufacture evidence in order to supply the omission, and he was cer- (59) tainly ill advised in urging charges upon insufficient proof.

There will be a reference in order to show the balance after bringing into the account the sum of $2,021.49, which was omitted, and the report will be in all things confirmed.

PER CURIAM. Decree accordingly.

JOHN G. FLEMING, Ex'r., v. JEFFRY MURPH.

1. Where, in a suit for an account, plaintiff obtained leave to examine defendant upon oath, before the master, and he was interrogated as to the items of plaintiff's account, it was *Held*, that defendant's answers were evidence for himself, only so far as they were responsive to the questions, and that he could not, in this way, prove his charges against plaintiff.
2. Where the plaintiff, in a suit, failed to file a replication to the answer, and the parties proceeded to take proofs in the cause, this was *Held*, a waiver by the defendant of a replication, and the court allowed an amendment under s. 17, ch. 33, Rev. Code.

CAUSE removed from the Court of Equity of ROWAN.

The bill is filed against the defendant as a partner of the plaintiff's intestate in a saw mill, and prays for an account and discovery of the matters pertaining to the co-partnership.

Upon the coming in of the answer, the cause was referred to the Master to state an account, and leave was given to examine the defendant upon oath.

Upon his examination before the Master, he testified that plaintiff's account was correct, with the exception of two items; he then proceeded to state that the plaintiff's intestate was indebted to him for work done on his farm, and also on his mill, for which sums he alleged the intestate had failed to give him credit on the books; these he proceeded to prove in detail.

Plaintiff objected to the defendant's proving his account by
(60) his own oath, for the reason that it was more than two years old, and to his proving more than sixty dollars of it, if it were not two years old. But the Master permitted him to prove his whole account. For this the plaintiff excepted to the report.

The cause being set for hearing upon the bill, answer, proofs, report of the Master and exceptions filed, was transmitted to this Court.

Fleming and *Barber,* for the plaintiff.
Boyden, for the defendant.

BATTLE, J. There is one question embraced in the plaintiff's exception to the Master's report, which, if sustained, will render it necessary to have the account retaken. It is, that though the plaintiff examined the defendant, under an order of the Court, obtained for that purpose, his answers are not evidence for himself, except where they are directly responsive to the interrogatories put to him. It is clearly settled that an answer to which a replication has been filed, is only evidence for the defendant, in the particulars in which it is responsive to the allegations of the bill, and that all other matters of defense therein set up must be proved by the defendant; 2 Story Eq., secs. 1528 and 1529. Neither Judge Story nor any other elementary writer whose work we have examined, states, particularly, what effect is to be given to the answers made by defendant when examined upon interrogatories, but in the case of *Chaffin v. Chaffin,* 22 N. C., 255, RUFFIN, C. J., whose knowledge of equity practice was extensive and accurate, said with respect to the examination of a defendant upon the stating of an account before the Master, that "it has been thus made evidence for him, so far as it is responsive to the interrogatory, in the same manner, and upon the same principle that the defendant's answer is evidence for him." "In suits for accounts" (he continued), "it is impossible the pleadings can put

every matter precisely in issue, and, therefore, when the parties go before the Master, the plaintiffs may help out their bill by special interrogatories to the other party. But then, the interrogatories (61) must be looked at in the light of being particular charges, supplemental to those more general ones of the bill; and so the responses are, in this sense, to be transferred to the answer, and made evidence in the cause, though subject to contradiction." It appears, then, that the answers made by a defendant to interrogatories upon his examination before the Master, are evidence for him, upon the same principle, and to the same extent only, as is his answer to the bill. It follows that if if he be examined as to the items of the plaintiff's account, his reply will be evidence for him, upon the ground that as to them the plaintiff has made him a witness in the cause, and the same rule would apply as to any other matters about which the plaintiff might think proper to interrogate him; but he can not be allowed to become a witness for himself to prove charges which he may have made against the plaintiff, and as to which no interrogatories have been put to him. Such charges he may prove to the extent of sixty dollars, if he be prepared to do so, under the book-debt law; and all above that amount he must prove, if he can, by independent testimony. In the present case, however, the counsel for the defendant contends that the answer to the bill must be taken as true, because there was no replication filed. This would be so if the parties in the Court below had not proceeded to take proofs, as if a replication had been filed. The transcript shows that the cause was set for hearing upon bill, answer, proofs, report of the Master and exceptions filed, and then, by consent, was transferred to the Supreme Court. When proofs have been taken, we consider the case as if a replication had been filed, and we allow an amendment to that effect here, as we are authorized to do by sec. 17, ch. 33, Rev. Code; see *Jones v. Poston,* 55 N. C., 184.

The cause must be referred again to the Master to state an account between the parties, upon the principle herein declared.

PER CURIAM. Decree accordingly.

(62)

AMELIA WILLIAMSON and others v. H. B. WILLIAMS.

1. A guardian is entitled to commissions on payments made for goods bought of a firm, of which he was a member; but not on charges for board while his ward lived in his family.

2. Where a guardian waited six months after the principal in a note, held by him as guardian, died insolvent before he sued the surety, who also became insolvent before suit was brought, such surety, though much indebted, being, up to one month before his failure, in good credit, and failed suddenly, the guardian having opportunity all the time of knowing the true condition of the obligors, it was *Held,* that by his laches he made himself responsible for the loss of the debt.

CAUSE removed from the Court of Equity of MECKLENBURG.

The defendant having been held liable to account by a previous declaration of this Court, it was referred to A. C. Williamson, Esq., Clerk and Master in Equity of MECKLENBURG, to state the account between the defendant and his wards. At this term the commissioner filed reports, setting forth, separately, the defendant's indebtedness to his wards, to which both plaintiff and defendant excepted. The plaintiff and defendant excepted. The plaintiff excepted because the commissioner allowed five per cent commissions on individual vouchers (naming them by their numbers), being accounts for goods and money furnished to complainant Amelia by the firm of H. B. & L. S. Williams, of which he was a member.

2. The plaintiff excepted to the allowance of commissions on the sums mentioned in said report, charged by the defendant against his ward Amelia for her board in her guardian's family.

The defendant excepted to the commissioner's report because that he was charged with a debt, due by bond from John E. Penman and W. W. Elms to the defendant, as guardian, for principal and interest, about $1,192. The commissioner reports the testimony, which proves the facts to be, in substance, that the bond was given for the hires, for the year 1855, of slaves belonging to the defendant's wards, which bond
(63) fell due on January, 1854. Penman having made a deed of trust of all his property in the latter part of 1854, died intestate in May, 1855, and at July Term of Mecklenburg County Court of that year administration was taken on his estate. In November following, suit was brought on the bond against the said administrator and the surety, returnable to January Term, 1856, of the said Court. At April Term, 1856, the pleas of fully administered were found in favor of the administrator, and a judgment was taken against Elms for the debt; an execution was issued thereon, and *"nulla bona"* returned by the Sheriff of Mecklenburg, Elms, in the meantime, having also failed. In November, 1854, Penman made a deed of trust of all his property for the payment of his debts. The property consisted of two houses and lots in Charlotte, and a large number of interests in gold mines of uncertain value, and at the time of his death was utterly insolvent. Elms, the surety, from January, 1854, to October, 1855, was in the possession of a large amount of property; in the latter month (October) judgments were taken against him to the amount of $167,714; of which judgments, the amount of $46,568 was taken by the Bank of Charlotte, of which the defendant was the president. Elms' credit was good until shortly before the rendition of these judgments, though it was generally known that he was very largely indebted. After these judgments, he was generally known to be insolvent. Penman, Elms, and the defendant, all

three, resided in the town of Charlotte. One witness stated that in the winter of 1854, or early in the spring of 1855, he was protested as the endorser of Elms' paper, in the Bank of the State, and he refused to endorse for him any further. It appeared that each of the banks know that Elms was doing business in the other, but neither knew of the amount of his liabilities to the other.

On these facts, the commissioner thought the guardian was guilty of negligence, and so charged him with the amount of the debt.

Thompson and *Fowle,* for the plaintiff. (64)
Wilson, for the guardian.
Lowrie, for one of the wards, made defendant.

BATTLE, J. This cause now comes before us for further directions, upon the exceptions taken by both parties to the Master's report. The complainants except to the commissions allowed the defendant, Williams, as guardian, upon the disbursements for bills paid for his wards to mercantile firms of which he was a partner. We see no reason for this exception. The guardian was as much bound to make payment to the partnership of which he was a member, for goods purchased for his wards, as he would have been to any other partnership or person. The exception is overruled.

But the next, which is to the allowance of a commission on the sum retained by him for the board of his ward with himself is allowed. We suppose that an executor or administrator can not claim a commission on a sum retained in payment of his own debt, upon the ground that a retainer can not be considered a disbursement, within the meaning of the statute which gives commissions. So, we think a guardian can not consider that as a disbursement, with reference to commissions, which consists merely in keeping in his own pocket money due from his ward to himself.

The exception of the defendant, Williams, is that the Master has refused to credit him with the amount of a bond and the interest thereon, payable to him as guardian by John E. Penman and W. W. Elms. The bond was given for the hire of negroes during the year 1853, and became due on 1 January, 1854. It was for the sum of $1,089, with a credit of $107.50, endorsed as paid on 18 August, 1855. The defendant alleges that the bond was lost without any negligence on his part, but the Master reports to the contrary, and the exception brings the question before us for review. Upon an examination of the testimony, and applying it to the law as established in relation to the responsibility of guardians, we are led to the conclusion that the Master's report is correct.

In Rev. Code, ch. 54, sec. 23, it is made the duty of the guardian (65) to lend out the surplus profits of his wards' estate upon bonds with

sufficient security, but it is expressly required of him "that when the debtor or his sureties are likely to become insolvent, the guardian shall use all lawful means to enforce the payment thereof, on pain of being liable for the same." The guardian, then, was acting within the line of his duty in permitting the bond to remain uncollected when it fell due, as both the principal and his surety were then (as he had every reason to believe) entirely solvent. Such, and no more, is the effect of the decision in *Goodson v. Goodson,* 41 N. C., 238, to which we were referred by the defendant's counsel. But when the principal obligor failed, by making an assignment, in trust for the payment of his debts, in the latter part of the year 1854, it was the duty of the guardian to take immediate steps for the collection of the debt, or have it better secured. It will not do to tell us that it is not proved that he knew of the assignment. He lived in the same town with the principal debtor, knew that he had but little property except in gold mines, in which he was a speculator, and of the value of which nobody could tell. He ought then to have kept himself informed of the pecuniary condition of that debtor, and it was negligence in him not to have done so, for if he had, he might have saved the debt. After the insolvency of the principal, he was not justified in relying solely upon the surety for so large a sum, no matter what may have been the apparent wealth and actual credit of that surety. That such has been the construction of our statute in relation to the duty of the guardian in such cases, appears, we think, from *Boyett v. Hurst,* 54 N. C., 167, and *Nelson v. Hall,* 58 N. C., 32. In the latter case, indeed, the plaintiff, who was an executor, and who was directed by the will of his testator to keep the money invested in good bonds, was not held responsible; but it was, partly, because the sum was very small, only $50, and partly because the principal became insolvent only a few months before the failure of his surety. Here the debt was large, and the principal lebtor made his assignment
(66) more than twelve months, and died several months before the failure of the surety, and before the guardian made the least effort to collect the debt. In the other cases cited by the defendant's counsel, the executors or administrators were not held responsible for the loss of certain debts, but it was because they showed much more diligence in attempting to collect them than can be pretended for this defendant; see *Deberry v. Ivey,* 55 N. C., 370, and *Davis v. Marcum,* 57 N. C., 189.

The exception is overruled, and the Master's report, after being reformed in the manner made necessary by our sustaining one of the plaintiff's exceptions, will be confirmed.

PER CURIAM. Decree accordingly.

HENRY MITCHELL and others v. WILLIAM WARD and another.

Where a sheriff left his county for something over a month, on necessary business, with an intention of returning by a given time, it not appearing that he was insolvent, it was *Held*, that the fact of a deputy having applied a portion of the taxes of a given year to a judgment against him (the sheriff) for the taxes of a preceding year, without being instructed so to do, by the sheriff, was not a sufficient ground for the sureties of that year to have an injunction to *restrain the sheriff from paying the taxes of that year, otherwise than as the law directs.*

APPEAL from an interlocutory order of the Court of Equity of MARTIN.

The plaintiffs allege that they became the sureties of the defendant W. W. Ward on his Sheriff's bond, at October Term, 1859, of Martin County Court; that since then the said Ward had conveyed all his property for the payment of his creditors, and has become insolvent, leaving no indemnity for them, and that he is a defaulter (67) for a large amount; that the said Ward had left the State, and, as plaintiffs believe, did not intend to return; that previously to going off, he placed the tax lists of the county of Martin for the year 1860 in the hands of the other defendant, William J. Hardison, one of his deputies, and that the said deputy, under the direction of the said Ward, was collecting the said taxes of 1860, and applying the money to his (Ward's) private debts, and, in particular, that he had paid $500 of the money thus collected to one D. W. Bagley, the County Trustee, on a judgment obtained against him (Ward) at a previous term of the Court for taxes due of a former year.

The prayer is that they "may be restrained by an order and injunction of this Honorable Court, from applying the money, or any part thereof, received for taxes due the present year to any other purpose, use or benefit than as the law directs"; and that they may be in like manner restrained as to any of the said taxes which they may hereafter collect.

The defendants both answered. Ward denies that he left the State with a view to a permanent removal. He says that, having a very distressing and dangerous disease in his eyes, he left the State on the 12th of April, 1860, for the purpose of obtaining medical aid in the city of New York; that he publicly made known his intention of going, and his purpose in going, and also let it be known that he would return before July Court of that county, but that he did in fact return on 21 May. He admits that he made a deed of trust to secure divers of his creditors, but denies that he is insolvent. He says that, having private claims in the hands of the defendant Hardison, a constable, to the amount of more than a thousand dollars, and also having placed in his hands tax lists for previous years, on the eve of his departure he placed this list for 1860 also in his hands. He says that he owed D. W. Bagley

$500, a balance of a judgment, and that he gave Hardison directions to pay this balance for him, but he did not direct him to pay the amount out of the tax money of 1860, nor did he direct him to pay it
(68) out of any particular funds in his hands. He admits that Hardison told him that he paid it out of the taxes of 1860, but says it was not necessary for him to do so. Hardison gives the same account of this payment, but says it was not necessary that he should have used this particular money, as he could easily have collected from other sources enough to have met the claim.

On the coming in of the answers, the Court ordered the injunction to be dissolved as to Hardison, but to be continued as to Ward to the hearing. From this order, Ward appealed to this Court.

No counsel appeared for the plaintiff in this Court.
Rodman and *Stubbs,* for the defendants.

MANLY, J. We are not aware of any principle of equity by which the continuance of the injunction can be sustained.

The bill alleges that the defendant Ward, Sheriff of Martin County, upon whose bond plaintiffs are sureties, had become insolvent, and left the county not to return; that his tax lists were placed in the hands of a deputy, the other defendant, who was collecting and misapplying the moneys. The answers deny the insolvency and the permanent removal from the county, but admits that the deputy paid a judgment which he had general instructions from his principal to pay, with moneys not applicable to it. The answers both state the judgment was for taxes due the previous year, and the deputy had lists of taxes for both that and the then current year to collect; and the misapplication in question was without authority from the Sheriff.

Upon the coming in of the answers, the injunction was dissolved as to the deputy, but continued as to the Sheriff until the hearing.

Upon this state of the pleadings, the question is, whether the Sheriff will be kept under an injunction not to misapply funds which are
(69) in his sands *virtute officii,* upon an admission of a misapplication in one instance by a deputy, under the circumstances stated.

It seems to us an injunction in such a case can not be sustained, except upon a principle which will justify a resort to a Court of Equity in all cases of public officers to enjoin a fulfillment of their duties; and thus it will be in the power of the sureties, through that Court, to add to the penalties prescribed by the legislative power, for misprison in office, the penalty of contempt of Court. We know of no instance in which such an equity has been recognized by the Courts.

The Sheriff is bound to the performance of his duties under the obligation of an oath, and by other severe pains and penalties, and also by

a strict accountability to others at short intervals. For moneys in his hands withheld from the proper owner or office, he is subject to summary judgments, with penalties. For neglecting or refusing to perform any duty, he is not only subject, generally, to a pecuniary penalty, but is furthermore liable to be indicted as for a misdemeanor, and upon conviction deprived of office, as well as punished according to the common law; Rev. Code, ch. 99, sec. 122; ch. 29, sec. 5; ch. 34, sec. 119; ch. 105, sec. 11.

These are the safeguards which the law has provided for the public, and, in ordinary cases, where no grounds are laid for a receiver and sequestration, they must suffice for the sureties.

The order made below continuing the injunction as to the Sheriff until the hearing, and which was appeal from, should be

PER CURIAM. Reversed.

(70)

RICHARD BLACKNALL v. WILLIAMSON PARISH.

1. Where a paper-writing was signed and sealed by the owner of land, with blanks as to the name of the bargainee and left with an agent, who was authorized, by parol, to fill up the blanks with the name of the purchaser and the price, it was *Held*, that, though such an instrument could not operate as a deed, yet, it was a contract for the sale of land, signed, for the person to be charged therewith, by his lawfully authorized agent, and could be specifically enforced.
2. A memorandum or note of a contract may be signed by one in the name of his principal, so as to comply with the requisitions of the statute of frauds, without being thereunto authorized in writing.

CAUSE removed from the Court of Equity of ORANGE.

This was a bill filed for the specific performance of a contract, by which the defendant bound himself to convey to the plaintiff a tract of land, described by its metes and bounds, and lying in Orange County. The allegations in the bill (which are sustained by the evidence filed) are that the defendant, being about to remove from the county of Orange, where he lived, to the western part of the State, authorized one Harrison Parker to sell for him the land in question, and to enable him to do so he prepared a deed, describing the premises, and purporting to convey the same in fee, but leaving therein blanks as to the name of the bargainee and the price, with instructions, when he might make sale of the land, to fill up the blanks in the deed and deliver it to the purchaser; that afterwards, Parker made a sale to the plaintiff, at a reasonable price, and, accordingly, filled up the deed in the requisite particulars, with the name of the plaintiff and with the price, both supposing the instrument was thus made good as a deed; that Blacknall gave his bond for the money to the defendant's agent, who used the same in

the purchase of a slave for the defendant, and it was subsequently paid to defendant's assignee.

The prayer of the bill is for a specific performance of the contract evidenced by the imperfect deed, and to stay, by an injunction, the proceedings of an action of ejectment, which the defendant had
(71) brought against the plaintiff, and which was then pending in the Superior Court of Orange County.

The defendant answered, denying the authority of Parker to sell to Blacknall, and alleging that he had special objections to plaintiff's having the land, which are stated; and that the deed in question was prepared for the purpose of consummating a sale to one Hopkins, with whom he was in treaty when he left the county, and that his agent had no authority to deliver it to any one else. He relied on the statute of frauds as a bar to the plaintiff's equity.

On the coming in of the answers, the injunction, which had issued in vacation, was dissolved, and the bill continued over as an original bill. Proofs were taken which sustained the plaintiff's allegations and disproved those of the defendant. The cause being set for hearing, was transmitted to this Court by consent.

Norwood, for the plaintiff.
Graham, for the defendant.

BATTLE, J. Upon examination of the testimony taken in this cause, we are entirely satisfied that the land mentioned in the pleadings was contracted to be sold to the plaintiff by an authorized agent of the defendant; that the authority under which the agent acted, was by parol, and that the contract was entered into by the agent's filling up certain blanks in an instrument, which the defendant had signed and sealed, and left with the agent to be by him made complete by filling up such blanks and delivering it as the deed of the defendant to the person who should become the purchaser. We are further satisfied that what was intended to be a sale was made fairly, and for a price which, at the time, was not inadequate, and further, that the price was, subsequently, received by the defendant.

It has been properly admitted by the plaintiff that the instrument which was delivered to him by the agent of the defendant as a deed for the land in question, could not operate as such, because it was not
(72) complete when it was signed and sealed by the defendant. In *Davenport v. Sleight,* 19 N. C., 381, and again in *Graham v. Holt,* 25 N. C., 300, it was held that an instrument signed and sealed in blank, and handed to an agent, only verbally authorized to fill up the blank and deliver it, was not the bond of the principal, and that after declarations of the principal approving of the delivery of the agent, made in

the absence of the instrument, and without any act in relation to it, would not amount to an adoption and ratification of the delivery.

The case before us is one of a deed for land, instead of a bond for the payment of money, but the principle is the same. The instrument must be complete before it can be delivered by an agent, acting under a mere parol authority, as the act and deed of his principal.

The plaintiff, not being able to set up a legal title under the instrument in question, insists, nevertheless, that it is evidence of a contract, the specific performance of which he has a right to have enforced in a Court of Equity. The defendant objects to this, and relies, in support of his objection, upon the statute of frauds, which declares "that all contracts to sell or convey any lands, etc., shall be void and of no effect, unless such contract, etc., or some memorandum or note thereof, shall be put in writing, signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized," etc.; Rev. Code, ch. 50, sec. 11. The question, then, is, *first,* whether the contract for the sale of the land was put in writing; and, *secondly,* was it signed by the party to be charged therewith, or by any person by him thereto lawfully authorized. We think that there can be no doubt that the instrument, which, for the reasons above stated, could not operate as a deed, may be regarded as a contract put in writing. It is, in truth, a written contract more than ordinarily complete, both in form and substance, and the only question admitting of any sort of doubt, is whether it has been signed by the defendant, or by any legally authorized agent. We are of the opinion that it can not be considered as a contract with the plaintiff, signed by the defendant himself, independ- (73) ently of any act of his agent, because, when the defendant put his name and seal to it, no such contract had been made. But we think that, in legal effect, it was signed for him, and in his name, by his properly constituted agent. The failure of the agent to make the instrument operate as the deed of his principal, did not prevent him from causing it to operate as the simple contract of his principal; for nothing is more common than for an agent to fill up blanks in a promissory note signed by his principal, and nobody has ever doubted that the principal was bound by it. That the authority of the agent, in all such cases, may, under the statute of frauds, be by parol, is well settled; 1 Parsons on Cont., 42; 2 Kent's Com., 612; *Coles v. Trecothic,* 9 Ves. Jun., 250.

The plaintiff is entitled to a decree for a specific performance, and also to recover back all the costs which he has been compelled to pay in the action of ejectment at law, and also the costs which he has had to pay upon the dissolution of the injunction in the Court of Equity below; to ascertain which, an account may be ordered.

PER CURIAM. Decree accordingly.

Cited: Magee v. Blankenship, 95 N. C., 569; *Cadell v. Allen,* 99 N. C., 545; *Smith v. Browne,* 132 N. C., 368; *Rollins v. Ebbs,* 138 N. C., 149; *Flowe v. Hartwick,* 167 N. C., 452.

Dist.: Loftin v. Crossland, 94 N. C., 85.

ISAAC W. HUGHES v. R. W. BLACKWELL and others.

1. Where a plaintiff in his bill makes direct charges, and calls upon the defendant by special interrogatories to make discoveries as to those charges, the answer, directly responsive to such interrogatories, becomes evidence for the defendant, as well as against him, notwithstanding that a replication to the answer had been put in.
2. The payment of interest upon a mortgage debt within ten years before the filing of a bill to foreclose, repels the presumption of payment or abandonment arising from the length of time.

(74) CAUSE removed from the Court of Equity of CRAVEN.

On 23 August, 1844, John Blackwell conveyed, by way of mortgage to the defendants, R. M. Blackwell, Zophar Mills and John D. Abrams, the property which is the subject of this controversy, lying in the town of New Bern, to secure a note of that date for $6,000, made by the said John Blackwell and one John M. Oliver, and on the same day the said John Blackwell executed another mortgage deed for the same property, to secure a debt of $1,943.34, due on an account. On 1 July, 1845, the said John Blackwell executed a mortgage deed to R. M. Blackwell for the same property, to secure a note payable to him for $3,500, bearing even date with the said mortgage deed, and due two years after date with interest from the date. In September, 1856, the said John Blackwell executed a deed of trust to James C. Justice, as trustee, to secure to the plaintiffs a large amount of debts due them, in which said deed are embraced the premises in question. In the spring of 1857, a bill of foreclosure was filed by the said R. M. Blackwell and Zophar Mills and John D. Abrams, and the said R. M. Blackwell, to have the said debts paid and satisfied by and through the means of the said mortgage, and pending the proceedings thereon, the bill in this case was filed by the plaintiffs to set aside the mortgage deeds upon several grounds, the one of which that has come under the consideration of this Court more particularly is, that from the length of time elapsing between the day the said notes became due and the time of bringing the bill to foreclose, the presumption of payment, satisfaction or abandonment arose. The plaintiffs, anticipating that the defendants would set up the payment of a part of the principal or interest within the ten years, in order to repel the presumption otherwise arising upon the

efflux of that period, among divers other special interrogatories, ask the defendants as follows: "Did John Blackwell pay any money for interest on the said several notes and accounts? If so, when? How much? Who was present? Where was the payment made? How made? Were they endorsed as credits? If so, in whose handwriting? By whose authority and in whose presence?" To these interroga- (75) tories, the defendants, R. M. Blackwell, Mills and Abrams, answer as follows: "And the said defendants, Robert M. Blackwell, Zophar Mills and John D. Abrams, further answering the said interrogatories as to the payment of interest on the said several notes and accounts, say: Subsequently to the receiving of the said mortgage deeds they had large dealings with the said John Blackwell and John M. Oliver, consisting of sales of merchandise in the city of New York, belonging to the said John Blackwell and said Oliver, and half yearly, on the first days of July and January in each year, these defendants rendered accounts current, in which were regularly charged the interest on said several notes and accounts, and said interest was thus regularly paid up to 31 December, 1849. And they further answer that the said interest so paid was not regularly endorsed as credit on said notes and account, but, according to their best recollection, endorsements were made on said notes, showing that the interest had been paid previous to a transfer of them to James M. Blackwell, as truetee, etc.; but said notes now being in their possession, or accessible by these defendants, they can not answer positively as to that matter; nor do they remember in whose handwriting such endorsements are, but they believe they were made by one of these defendants (probably by R. M. Blackwell), or by their authority."

On the production of the notes in evidence, the following endorsement appears on that for $6,000, to wit:

"Received the interest on the within note up to 20 September, 1854.
R. M. BLACKWELL & Co."

And on that for $3,500, the following, to wit:

"Cr. the within note by seven hundred and thirty-five dollars, received through John Blackwell & Co., being three years' interest on within note up to 1 July, 1848, this 20 April, 1848.
R. M. BLACKWELL."

The main question was, whether the facts disclosed in the answer, being thus specifically called out by interrogatories, did not become evidence in the cause, notwithstanding plaintiff's repli- (76) cation.

J. W. Bryan and *Haughton,* for the plaintiffs.
Fowle, Green, McRae and *E. G. Haywood,* for the defendants.

BATTLE, J. The debts alleged to be due from the defendant John Blackwell to the defendants R. M. Blackwell, Mills and Abrams, for the security of which the mortgages which the plaintiffs seek to set aside, were given, are clearly proved to be fair and *bona fide* debts, founded upon sufficient and valuable considerations. The plaintiffs virtually admit the truth of this, but they allege that the debts have been paid and the mortgages satisfied and abandoned. In support of their allegations, they rely mainly upon the clearly established fact that after the mortgages in question were executed, John Blackwell, the mortgagor, remained in possession of the mortgaged premises for more than ten years, and, as the plaintiffs state, without the payment of any part of the principal or interest of the debts to the mortgagees, or either of them, and without the acknowledgment of the existence of the debts within that time. The plaintiffs insist, therefore, upon the presumption of law that the debts have been paid, and, consequently, that the mortgages themselves have been satisfied and abandoned. If all these allegations be true, the legal consequence contended for by the plaintiffs is clearly established by the authorities cited by their counsel. See among others, *Lyerly v. Wheeler,* 38 N. C., 599, and *Roberts v. Welch,* 43 N. C., 287. But the defendants deny the statement that no part of the interest due on these debts has been paid, and, on the contrary, aver that it was regularly paid every year, until 1848. They state the manner in which the payments were made, and produce the bonds mentioned in the pleadings, of $6,000 and $3,500, with an endorsement on each in the handwriting of R. M. Blackwell, of a certain amount of
(77) interest paid thereon. The account for $1,943.34, which is one of the debts mentioned in and secured by one of the mortgage deeds, is also produced; upon which there is no endorsement of the payment of interest, but the defendants aver positively that the interest was paid on that also, as well as one the bonds, up to the time mentioned above. If these allegations of the defendants be true, then the same authorities to which we have already referred show that the presumption for which the plaintiffs contend is rebutted. The question then arises: Are they sufficiently proved, so that the Court can declare them to be true? The defendants contend that they are fully and sufficiently proved by their direct and positive answer to special interrogatories put to them by the plaintiffs upon these very points; and that the plaintiffs have not shown anything to repel the force of the evidence thus furnished by the answer. In support of this position, the defendants rely upon 2 Stor. Eq., sec. 1528; 2 Fonb. Eq. B, 6, ch. 2, sec. 3, note g; *Pember v. Mathers,* 1 Bro. Ch. Cases, 52, and *Chaffin v. Chaffin,* 22

N. C., 255. The plaintiffs deny the application of the rule to the present case, because, they say, that the allegation of the defendants with regard to the payment of interest on the debts was denied by the replication put in to the answer; that such allegation was a matter of defense set up by the defendants, which they were bound to prove by testimony, and that their answer, being thus denied by the replication, was not evidence for them. For this is cited *Lyerly v. Wheeler,* 38 N. C., 170 and 599, and it is also supported by *Gillis v. Martin,* 17 N. C., 470. The plaintiff's position would have been completely sustained if they had not made statements in their bill with regard to the payment of interest on the debts, and called upon the defendants by special interrogatories to answer them. They thereby made the defendants witnesses as to that fact, and the answer was thus made evidence for the defendants, as well as against them. This is shown by *Lyerly v. Wheeler,* cited and relied upon by the plaintiffs themselves. In that case, at page 601, the Court says: "An answer after replication is not evidence for the defendant, except as it is made so by (78) discoveries called for in the bill, and which are responsive to direct charges or special interrogatories." The other authorities which have been already referred to as being relied upon by the defendants, are to the same effect. Had the plaintiffs made no charges in their bill about the non-payment of interest, and asked no questions upon the subject, but simply stated the time when the bonds were given and the mortgages executed, and then relied upon the lapse of time, as affording a presumption of the payment of the debts and a satisfaction and abandonment of the mortgages, the defendants would have been compelled to allege such payment in their answer as a fact, going to repel the presumption, and then, upon a replication being put in, their answer would not have been evidence for them, and they must have failed in their defense, unless they could have produced proofs independent of their answer. These observations do not apply to the debt and mortgage for $3,500, because the bond was payable two years after its date, in 1845, which brought it within the ten years before the bill for foreclosure, mentioned in the pleadings, was filed. As the only object of the bill was to set aside the mortgages, and as no account is prayed from the defendant Justice, the trustee, it has failed of its purpose, and must be

PER CURIAM. Dismissed with costs.

Cited: Jackson v. Spivey, 63 N. C., 263; *Longmire v. Herndon,* 72 N. C., 631.

(79)

WILLIAM H. JOYNER, Adm'r, and others, v. THOMAS H. CONYERS, Adm'r., and others.

1. Where an executrix procured an order of court to sell certain slaves, in which she was willed a life-estate, upon a suggestion that such a sale was necessary for the payment of the debts of her testator, and in a short time after the sale she took conveyances from the purchasers, for the same slaves, without ever having been out of possession, it being also made to appear that there were no debts of the estate unpaid at the time of the orders to sell, it was *Held*, that the executrix took nothing by her purchase, and should be declared a trustee for the remainder men.
2. Damages assessed against a railroad company, on the condemnation of land to the use of the company, belong to the tenant for life and remainderman, in proportion to the period for which each suffers the incumbrance.

CAUSE removed from the Court of Equity of FRANKLIN.

Thomas Y. Richards, who died in 1831, by his will, devised and bequeathed as follows: "I lend to my sister, Polly Richards, the tract of land whereon I now live, and six negroes, named Sam, Jerry, Amy, Hinton, Lucy and Lavinth, together with my stock of every description, during her lifetime, and after her death, I give to my nephew, John W. Womath, five hundred dollars, to be raised out of the estate, and the balance of which estate I will and bequeath to the bodily heirs of my five sisters, that is, Frances Duke (who is now dead), Martha Bowers, Rebecca Hefflin, Nancy Blacknall and Sally Conyers, to be equally divided among said heirs, with this exception, that I give and bequeath to my nephews Thomas Bowers and Thomas Conyers, one horse apiece, worth seventy-five dollars, more than the rest of said heirs, forever." Polly Richards was appointed the sole executrix in the said will, and she qualified and took upon herself the burden of executing the trusts therein. By a former suit in equity between the plaintiff W. H. Joyner, administrator *de bonis non* of the estate of Thomas Y. Richards, and the other persons who are parties to this suit, a decree was passed declaring that all the children of the five sisters of the testator, after the death of Polly Richards, and after deducting a legacy of $500 to John Womath, were entitled to have the said property equally divided among them *"per capita,"* with the exception of the two horses to Thomas H. Conyers and Thomas Bowers.

The said Polly Richards entered upon the land on the death of her brother, the testator, and took charge of the slaves and other property. The perishable property was sold by her for payment of debts, and afterwards, under a special order of the County Court, at March
(80) Term, 1832, of Franklin County, on a suggestion that a further sale of property was necessary to pay debts, a girl by the name of Lucy (named in said order) was sold to one Archibald Yarborough

for $134, and afterwards, another special order of the Court was obtained at March Term, 1834, upon a like suggestion, for the sale of another slave, by the name of Peggy, which slave was sold accordingly to Sarah Conyers, for $130. Both of these negroes remained with the executrix, and possession of them was never demanded of her, nor taken by the purchasers, but each of them, shortly after these sales, formally executed titles to her, the said Polly Richards. Since then she claimed the said slaves as her own up to her death, which took place in 1855.

The plaintiffs, who are the remaindermen, allege that neither of these sales of Lucy or Peggy was demanded by the condition of the estate of Thomas Richards, for that the property first sold by her was sufficient to pay all the debts of the estate, and they charge that such sales were mere devices, concerted with the said Archibald Yarborough and Sarah Conyers, whereby it was agreed that they should respectively bid off the negroes offered for sale, and should each convey the same back to the said Polly Richards, by which devices she attempted to acquire a full estate in the said female slaves, in which before she had only a life interest.

The bill further alleges that the sum of $150 was recovered for damages to the land in question, from the Raleigh and Gaston Railroad Company, the track of said road being located upon a part of the land devised to the said Polly for life, as above stated, and that she received and used the whole amount of said damages, and the plaintiffs insist that they are entitled to a share of that sum, in proportion to the amount of damage done to their estate in remainder.

The bill sets forth that the said Polly Richards cut down and sold timber to the Raleigh & Gaston Railroad Company, which was not merely taken off in the necessary course of working the land, but that the timber was cut for the express purpose of being sold, and (81) amounted to waste.

The prayer of the bill is that the said slaves, Lucy and Peggy, and their increase, may be decreed to be delivered up to the plaintiff W. H. Joyner, the administrator *de bonis non* of Thomas Y. Yarborough, that the same, with the hires of the said slaves since the death of Polly Richards, may be divided among the plaintiffs according to the provisions of the will, and for that purpose, that a sale of the said slaves shall be ordered, and an account of the hires. The bill further prays for a proportionate share of the land damages and a compensation for the damage and waste done to their estate in remainder.

The answers being by persons in their representative characters, do not affect the questions involved.

At December Term, 1859, this Court ordered an account of the estate of Thomas Y. Richards in the hands of his executrix, Polly Richards, to

be taken by the Clerk of this Court, and at the present term, Mr. Freeman reported "that on 21 March, 1832, when the girl Lucy was sold, the executrix had assets more than sufficient to pay the debts of her testator, together with all the expenses attending the same, and also that on 8 September, 1834, when the girl Peggy was sold, she had more than sufficient to pay the debts of her testator."

There was replication to the answer and proof taken, and the cause was set down for hearing on the bill, answer, exhibits and former orders, and sent to this Court.

J. J. Davis and *W. F. Green,* for the plaintiffs.
Eaton, for the defendants.

MANLY, J. When this cause was under the consideration of the Court at December Term, 1859, the sale by the executrix, Polly Richards, of the girl slaves, Lucy and Peggy, and the buying them back again in a short time afterwards, was of so suspicious a character, that an account was ordered of the assets of the estate, that we might see whether
(82) the sale was necessary to pay the debts. The report of the Clerk, at this term, negatives the supposition that it could have been for the purpose of raising assets to pay debts. The assets in hand were already abundantly sufficient for that purpose. It could have been, therefore, only for the purpose of changing the title. As the executrix was to have a life estate in these girls, with an interest in remainder limited over, she had a motive for desiring to change the estate which she held. No form of a sale without necessity, under the influence of such a motive, could effect her object; the estate remained the same.

The facts of the case, and especially the significant one disclosed by the report of the Clerk, constrain us to hold the sale of both the slaves, Lucy and Peggy, inoperative and void. They and their offspring must be accounted for and surrendered to the administrator *de bonis non* of Thomas Y. Richards, to be accounted for by him to the persons entitled in remainder.

There must also be an account of the hires of the slaves since the death of Polly Richards.

With respect to the damages recovered by Polly Richards, the tenant for life of the land, from the Raleigh and Gaston Railroad Company, we are of opinion the plaintiffs are also entitled to an account. By the condemnation of the land, under the provisions of the charter of the road, the company acquired an easement in the same for ninety-nine years. The $150 assessed as damages were not assessed, we take it, for the injury done alone to the life estate, but to the estate in remainder also. The persons, therefore, in remainder are entitled to a part of this fund, viz., such an amount of the same as will be proportional to the

period of time for which they suffer the incumbrance. This, we mean, is the general rule applicable to cases of this sort. There may be special cases in which other elements will properly enter into the calculation; as, for instance, the special location of the road might affect, materially, the calculation of relative damage. If it ran through the yard of the tenant for life, the rule would not do the tenant full justice, (83) while if it went through a remote woodland, it would do more justice. It is referred to the Clerk to enquire and report to what part of this sum of $150 the persons in remainder are entitled.

It is also alleged that there was a waste of the land by the tenant for life by cutting timber not needed for the estate, but which was cut for market. The Clerk may make enquiry into this matter also, and report results.

PER CURIAM. Decree accordingly.

HENRY S. CLARK v. DAVID LAWRENCE, Trustee.

1. Whenever it can be clearly proved that a place of sepulture is so situated that the burial of the dead there will endanger life or health, either by corrupting the surrounding atmosphere, or the water of wells or springs, a court of equity will grant injunctive relief.
2. Where a bill was filed, praying to have a nuisance abated, and for an injunction to restrain the defendant from erecting it in future, and the act complained of was of the character of a nuisance, but the testimony was not sufficient to satisfy the court that it amounted to a nuisance in the particular case, the court directed an issue to be tried in the superior court to determine the fact.

CAUSE removed from the Court of Equity of PITT.

The bill is filed to obtain an injunction to restrain the defendant, who is the trustee of the Baptist congregation in the town of Greenville, from permitting the churchyard to be used as a cemetery.

The lot in question adjoins the lot upon which the plaintiff's dwelling house is situated, and was purchased by the Baptist congregation about 1827, the plaintiff's lot being at the time unoccupied and unimproved—there being no house upon it until 1845. At the time the plaintiff purchased his lot, which was in 1850, there were only two graves (84) on the lot in question, and these were in the part most remote from his dwelling.

In December, 1857, there were two burials of dead bodies on this lot, about three feet from the boundary line of the plaintiff's lot, and about thirty-five feet from one well, and seventy-two from another, from which he supplied himself and family with water. These dead bodies were deposited in wooden coffins, and buried to a depth of three or four

feet, and in one case the grave was lined at the bottom and up the sides with brick and cemented. The soil was of a mixture of clay and sand, and the ground sloped from the graves towards the plaintiff's wells, which, together with his dwelling house, were situated in a northerly direction from the graveyard. The bill alleged that this situation exposed himself and family to the effluvia arising from decaying bodies, and which the south winds that generally prevail in summer, will bring directly into his house, by which the health of plaintiff's family and the value of his lot will be irreparably injured. The bill further alleges that the quality of the water in plaintiff's wells has been so impaired by their close proximity to these graves, as to render them unfit for use. This fact is denied by the answer. There was evidence to show that the water in the plaintiff's wells had formerly been good, but that it is now very bad.

There was much other testimony, which, in the view taken by the Court of this case it is not deemed necessary to set out.

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

Rodman, Shaw and *J. H. Bryan,* for the plaintiff.
Donnell, for the defendant.

BATTLE, J. The jurisdiction of the Court of Equity to restrain by an injunction the erection or continuance of a nuisance, either
(85) public or private, which is likely to produce irreparable mischief, is well established. It is equally well settled that the destruction of, or injury to the health of inhabitants of a city or town, or of an individual and his family, is deemed a mischief of an irreparable character. In the case of a city or town, where the apprehended injury is clearly proved, the Court will not hesitate to grant the injunction, even against the erection or continuance of a water grist mill, though such mills are generally deemed of public benefit, and the building of them has been encouraged and protected by our statute law. See *Attorney-General v. Hunter,* 16 N. C., 12; *Attorney-General v. Blount,* 11 N. C., 384. In the case of a private nuisance, caused by a mill pond, the Court will interfere, indeed, but with more caution and hesitation, both because the public benefit arising from the mill is opposed to the private interest of an individual, and because where the land of the individual is overflowed, as in most cases it will be, and the damages assessed by a jury therefor exceed twenty dollars, the party may, at law, by repeated actions, compel an abatement of the nuisance; *Eason v. Perkins,* 17 N. C., 38; *Barnes v. Calhoun,* 37 N. C., 199. See also *Spencer v. R. R.,* 8 Simons, 193.

The same principle which would excite into activity the restraining

power of the Court, where the health of the community, or of an individual member of it, is in danger of being destroyed or impaired by a mill pond, will be equally ready to interpose its protection when a similar danger is threatened from the establishment of a cemetery in a city or town, or very near the dwelling house of a private person. This, we think, was recognized in *Ellison v. Commissioners,* 58 N. C., 71, though the decision in that case, on account of its peculiar circumstances, was averse to the application for the injunction. In cases of this kind, the plaintiff will not have to encounter the difficulty that a place for the burial of the dead, within the limits of a city or town, or near the residence of a private person in the country, is considered a (86) matter of public weal. On the contrary, the public sentiment is already, or is becoming to be in favor of more secluded spots, where we, like the Patriarch of old, "may bury our dead out of our sight." Whenever, then, it can be clearly proved that a place of sepulture is so situated that the burial of the dead there will endanger life or health, either by corrupting the surrounding atmosphere, or the water of wells or springs, the Court will grant its injunctive relief upon the ground that the act will be a nuisance of a kind likely to produce irreparable mischief, and one which can not be adequately redressed by an action at law. In the present case, the evidence upon which the cause has been brought before us for a hearing, does not so clearly satisfy us of the fact of a nuisance, either existing or apprehended, as will justify us in granting an injunction without further inquiry. Under such circumstances, the usual course is to require the party to establish his allegations of a nuisance by an action of law; *Simpson v. Justice,* 43 N. C., 115, and the cases there cited. That course would be most appropriate, and would be adopted by us, if, as was said in the *Attorney-General v. Hunter, ubi supra,* "the right infringed were of a doubtful character, as the right of view over another's ground." But, in a case like the present, where the thing complained of is certainly of the character of a nuisance, and the only doubt is whether the testimony proves that it is so, in the particular case, we think that we can accomplish the same purpose in a manner more convenient to the parties, and quite as satisfactory to ourselves, by directing an issue to be tried in the Superior Court of Law for Pitt County, whether the burial of the dead in the church lot mentioned in the pleadings has produced, or, if continued, is likely to produce, sickness in the plaintiff's family, or to impair their comfort, either by corrupting the air or the water in his wells. Let an order be drawn accordingly.

PER CURIAM. Decree accordingly.

Cited: Frizzle v. Patrick, post, 357; *Redd v. Cotton Mills,* 136 N. C., 344; *Cherry v. Williams,* 147 N. C., 457.

(87)

JONATHAN D. ROUNTREE v. WILLIAM McL. McKAY, Trustee, and others.

1. Where a bill was filed by a judgment creditor against a trustor and his trustee, to have satisfaction of his judgment out of the resulting interest of the trustor, alleging that the debtor had not a legal title to any property whatsoever, and that the interest sought to be subjected was one which only could be reached in a court of equity, it was *Held*, not to be necessary to state that the plaintiff had taken out a *fi. fa.* on his judgment, and that the same was returned *nulla bona*.
2. Where a bill was filed by a judgment creditor to subject the resulting interest of the trustor in personalty, and it appeared that other judgment creditors, as well as plaintiff, had levied *fi. fas.* on the trustor's interest in the land conveyed in the deed of trust, it was *Held*, that such other judgment creditors were necessary parties to the bill.
3. Where an objection, for the want of parties, was taken *ore tenus*, for the first time, on the argument of the demurrer in this court, which was deemed valid, the court refused, nevertheless, to dismiss the bill, but remanded it without costs to the court below, that it might be amended as to parties.

THIS was an appeal from a decree of the Court of Equity of WILSON, overruling a demurrer.

The plaintiff, Jonathan Rountree, recovered against John Waddill, Jr., and Thomas Waddill, a judgment in this Court, at its December Term, 1859, for $7,587, with interest and costs. The plaintiff alleges in his bill that defendants have no legal title to any property whatever, out of which their judgment could be satisfied, but that they have an equitable interest in a very large property, which they conveyed to the defendants McKay and Fuller, as trustees, to secure other creditors; that said property consists of land and personal estate; that the deed of trust has been standing ever since February, 1858, during which time the trustors, the Messrs. Waddill, have had the possession and use of the property, and by such use have paid off a considerable portion, at least one-half, of the debts secured, and that if it had not been for the plaintiff's judgment, they do not believe that there would have been any sale of this property, but that since the rendition of this judgment, the trustees have proceeded to advertise a sale of all the property

(88) conveyed to them. The bill alleges further, that a writ of *fieri facias* on the plaintiff's judgment has been levied on the trustors' interest in the real estate conveyed, and that several other judgment creditors have also levied executions on this resulting interest in the real estate, and he does not believe it will sell for enough to satisfy the plaintiff's judgment.

The prayer is, that the plaintiff's judgment may be satisfied out of the resulting interest of the trustor in the personal estate, and to that end, that the defendants may set forth the several debts mentioned in the deed of trust, which have been satisfied, and the names and amounts

of those not satisfied, also the notes and accounts conveyed to them in the said deed of trust, and a detailed statement of all the assets now on hand. The prayer is, further, that the trustees may be decreed at once to make sale of the property and pay off the debts secured, and that any balance that may be in their hands may be applied to the payment of the plaintiff's judgment.

The defendants demurred, for the cause that the bill does not set forth that the plaintiff had taken out a *fieri facias,* and had the same returned by the Sheriff *nulla bona.* On the argument here, the defendants' counsel assigned, *ore tenus,* a further ground of demurrer that the creditors mentioned in the bill as having had their executions levied on the trustor's interest in the real property conveyed in trust, were not made parties to the bill.

The Court below overruled the demurrer and ordered the defendants to answer, from which ruling the defendants appealed.

Strong and *J. H. Bryan,* for the plaintiff.
Neill McKay and *Fowle,* for the defendants.

BATTLE, J. The particular ground on which the demurrer is based, to wit, that the plaintiff has not set forth in his bill that he has issued an execution against the defendants to his judgment at law, and had a return by the Sheriff of *nulla bona,* can not be sustained. The bill alleges expressly that these defendants had not the legal title (89) to any property whatever, and the only interest which they owned which could be made liable to the satisfaction of the plaintiff's debt, was one which could be reached only in a Court of Equity. This is sufficient, without the allegation of the fact, for the want of which the defendants have demurred, as is clearly shown in *Tabb v. Williams,* 57 N. C., 352.

If the objection insisted upon in the demurrer were the only one which could be taken to the bill, we should, of course, overrule it, and at once require the defendants to answer. But their counsel have insisted here, for the first time, by a demurrer *ore tenus,* upon a defect in the bill for the want of parties, in that the creditors, who, the bill states, had obtained judgments against the defendants J. and T. Waddill, and caused executions thereon to be levied on their resulting interest in the real estate conveyed to the other defendants, as trustees are necessary parties in taking the account prayed for in the bill. These creditors, we think, are necessary parties, because they are interested in having the creditors secured by the deed of trust paid out of the proceeds of the personal estate, so as to leave a larger surplus of the real estate, or its proceeds, for the satisfaction of their executions, while it may be to the interest of the plaintiff to have the trust creditors paid out of the real estate, in order to leave a larger surplus of personal property to satisfy

his debt, and the defendants are all interested in having the conflicting claims of the plaintiff and the other judgment creditors adjusted in one suit.

The demurrer *ore tenus* for the want of parties must, then, be sustained; but the effect will not be to have the bill dismissed, but to have it remanded, without costs, in order that the plaintiff may amend his bill by making the necessary parties; see *Caldwell v. Blackwood,* 54 N. C., 274. An order to this effect may be drawn accordingly.

PER CURIAM. Cause remanded.

Cited: Carr v. Farrington, 63 N. C., 562.

---

(90)

JAMES HUNT and wife and others v. CHARLES FRAZIER and others.

1. Courts of equity do not assume jurisdiction to reform deeds unless the transaction be based on a valuable or meritorious consideration.
2. Where A had loaned B, his brother, a sum of money, and taken a conveyance of a tract of land, and some slaves as security for the repayment, and the two brothers came to an agreement that A should convey the property to D on certain trusts, to let B's wife and children live upon the land and enjoy it for the life of the mother, and then to be sold for the payment of A's debts, and the overplus to be paid to her children, it was *Held,* that the deed of trust was founded on a valuable consideration, and as such the court's power to reform its defects could be properly exercised.

CAUSE removed from the Court of Equity of GRANVILLE.

The bill is filed to obtain a decree for reforming a certain deed from one William Hunt to Portius Moore, which deed is in the following words:

"This indenture, made and entered into this 27 November, 1838, between William Hunt, of the county of Granville, and State of North Carolina, of the one part, and Portius Moors, of the county of Person, and State aforesaid, of the other part, witnesseth: That for and in consideration of the sum of one thousand dollars, to him secured to be paid, the said William Hunt doth hereby bargain and sell to the said Portius Moore a certain parcel or tract of land lying in the county of Granville, and State aforesaid, and on the waters of Grassy Creek, bounded as follows (setting out the boundaries), containing two hundred and twenty-four acres, more or less. Also, the following negroes, to wit, Margaret, otherwise called Peggy, about the age of thirty-six or seven, and two children, Rody, of the age of six or seven, and Charles, of the age of five, the title of the aforesaid land and negroes, I, the said William Hunt, doth hereby warrant and defend to the said Portius Moore,

his heirs and assigns forever, in trust for the following purposes, to wit, that the said Portius Moore is to manage said land and negroes in the best manner that he can, for the benefit of Lucinda Hunt and her children, and is at all times to furnish said Lucinda Hunt (91) out of the proceeds of said land and negroes, if sufficient, a comfortable support, and the balance, if any, to pay over to the said William Hunt, until the above named sum of one thousand dollars, with the interest thereon, shall have been paid; and the said William Hunt doth further retain to himself the right of tending such part of the plantation as may not be wanted for cultivation by the family, and after the said sum of one thousand dollars, with the interest thereon, shall have been paid, then the said privilege shall cease, then the said William Hunt doth hereby warrant and defend the said title of the said land and negroes, and their increase, to the said Moore, in trust for the benefit of the said Lucinda Hunt and her children. In witness whereof, I have set my hand and seal, this date above written.

"In presence of: WILLIAM HUNT. (Seal.)
WILLIAM B. FRAZIER.
DENNIS O'B. FRAZIER."

At the same time, William Hunt took from the trustee, Moore, the following bond:

"Know all men by these presents, that I, Portius Moore, of the county of Person, and State of North Carolina (trustee for Lucinda Hunt), am held and firmly bound unto William Hunt, of the county of Granville, and State aforesaid, in the sum of one thousand dollars, which payment well and truly to be made, I bind myself, my heirs and assigns. In witness whereof I have set my hand and seal, this 27 November, 1838.

"The condition of the above obligation is such, that whereas, the above named William Hunt hath this day conveyed to the above bound Portius Moore, a certain tract of land and three negroes, as named in the deed and bill of sale (in trust for the benefit of Lucinda Hunt and her children), the proceeds of which is to be applied to their use, so as to furnish them with a comfortable support, and the balance, if any, to pay the said William Hunt, in each and every year, until the sum of one thousand dollars, with the interest thereon, shall have (92) been paid, then the above obligation shall be void, otherwise to remain in full force and effect. Given under my hand and seal, the date above written. PORTIUS MOORE. (Seal.)"

The plaintiffs in this bill are the heirs-at-law, children and grandchildren of Lucinda Hunt, and the defendants are the heirs-at-law of Portius Moore and William Hunt, and the prayer of the bill is to have

the deed from William Hunt to Moore reformed by inserting words of inheritance, which, it alleges, were omitted through the ignorance and want of skill in the draftsman. The plaintiffs have continued in the possession of the lands and slaves in question from the date of this deed down to the present time. Portius Moore died in the year 1849, and William Hunt in the year 1853, and there was no evidence that he ever claimed the land after the death of Moore.

William Hunt and James Hunt, the husband of Lucinda Hunt, were brothers, and at the time the above recited deed was made, William Hunt was unmarried, and about fifty years of age. The property conveyed in the deed had originally belonged to James Hunt, and had been conveyed to the said William, together with the slaves, as security for the said sum of one thousand dollars, and a witness who was present at the time the deed was executed stated that the understanding was that Lucinda Hunt should executed to William Hunt a bond for $1,000, and was to retain the land until the debt was paid.

The defendants, in their answer, resist the prayer of the bill upon the ground that there is no evidence that William Hunt meant to convey more than a life estate to the trustee, Moore, and because, as they allege, there was no consideration for this deed.

By an amendment to their answer, defendants set out that in the year....., some of the negroes in question were levied on under an execution against James Hunt, and sold, whereupon, the trustee, Moore, brought an action against the purchaser to recover them back; (93) which action Moore, after taking a bond of indemnity from William Hunt, and Lucinda Hunt compromised by agreeing to pay $366.48, which money was paid by William Hunt. The defendant claimed to have this sum added to the $1,000, and have the land declared a security for the whole sum in case the Court should decree a reformation of the deed. The cause being set for hearing upon the bill, answer, exhibits and proofs, was transferred to this Court by consent.

Fowle, for the plaintiff.
Moore and *Reade,* for the defendant.

PEARSON, C. J. It was the intention of the parties to vest in Moore a fee simple estate. This is clear from all the circumstances of the case. The warranty is to Moore and "his heirs." The bond of Moore binds "his heirs" for the performance of the trust, and, indeed, the purpose of the parties, and the trust set out in the deed, made it necessary to give to the trustee the legal estate in fee. So the omission of the word "heirs" in limiting the legal estate was the effect of accident, or occurred through the ignorance or mistake of the draftsman.

Courts of Equity do not assume jurisdiction to reform deeds, unless the transaction be based on a valuable or a meritorious consideration.

William Hunt did not stand in a relation to the wife and children of his brother which imposed on him either a natural or a moral obligation to make provision for them; consequently the suggestion of a meritorious consideration is out of the question, and the case depends on the allegation of a valuable consideration.

We are satisfied from the pleadings and proofs, in connection with the deeds exhibited, that the transaction was of this nature: William Hunt, a man of good estate, and without family, had been induced to advance in aid of James Hunt, who was his brother, had a large family, and had become embarrassed and much reduced in his estate, the sum of one thousand dollars, and as a security therefor had (94) taken from him a conveyance of the land on which he lived, and the negro woman and her two children, who assisted his wife in domestic matters. Whereupon, it was concluded between them that William, instead of holding the title as a security for his money, should convey it to their friend Moore, who was to hold it as a security for the debt, and at the same time manage it in such a way as to furnish the wife and children of James a home and the means of subsistence. The liberality of William did not extend so far as to make *a gift* of the land and negroes to the wife and children of his brother, but only to postpone the collection of the money due to him, in order to let the wife and children have a comfortable support out of the profits of the property, retaining, however, his lien on the property as security for the payment of the amount of his debt, together with the interest thereon.

Viewed in this light, the wife and children of James are not simply volunteers, nor is the transaction one of mere bounty on the part of William Hunt, but the securing of his debt of one thousand dollars with interest, formed a valuable consideration, and the unusual circumstance that the trustee was required to execute a penal bond, binding himself and his heirs to perform the trust, and hold the property as a security for the debt and interest, shows, beyond question, that the parties did not treat the conveyance as voluntary, and without consideration.

It follows that the plaintiffs are entitled, in equity, to have the deed reformed so as to vest the legal estate in the heirs of the trustee, but in urging their right to be relieved from the effects of a mistake, they are met by another maxim of equity, "he who asks equity must do equity," and inasmuch as William Hunt, for the purpose of saving a part of the property, was compelled to make a further advance of the sum of $356.45, it is right that this latter sum should be added to the original sum of $1,000, and that the property should be held as a security for the whole sum, with the interest thereon.

This meets the equity of the case, for the additional outlay
(95) is embraced by the spirit of the agreement, and had a necessity for it been foreseen the deed would, assuredly, have made provision for it.

The time at which the money and interest is to be paid, is not expressly fixed, either by the deed or the bond; it was evidently not the intention to require payment so long as the proceeds of the property should be needed for the comfortable support of Mrs. Hunt, and, we think, according to its proper construction, the deed gives to her the proceeds of the property during her life, and at her death, the money charged thereon, together with interest, is to be raised out of the property, and the residue is then to be conveyed to her children.

PER CURIAM. Decree accordingly.

Cited: Day v. Day, 84 N. C., 410; *Powell v. Morrisey,* 98 N. C., 429; *Pickett v. Garrard,* 131 N. C., 197.

SAMUEL S. BIDDLE v. WILLIAM W. CARRAWAY and others.

1. Where a testator directed a pecuniary legacy of $1,500 to be paid to his wife by his executors "out of my estate," for a certain purpose, and by a codicil reduced the amount to $750, "to be paid by my executors," it was *Held*, that the terms of the codicil did not annul the force of the words "out of my estate," contained in the will.
2. Where a testator, after bequeathing certain property for the payment of his debts, gave the residue of his property in specific devises and bequests, and then bequeathed general pecuniary legacies with the direction "to be paid by my executors out of my estate," and the fund provided for the payment of debts, proved insufficient for the purpose, it was *Held* (PEARSON, C. J., dissentiente), that the pecuniary legacies were a charge upon the specific ones, and that the latter must be exhausted before the former could be touched. But whether they were a charge on the land specifically devised—*Quere?*
3. Personal property, which a testator has given away in his lifetime, and which does not need the aid of his will to pass tthe title to it, does not abate for the payment of debts, where there is a deficiency of assets, although the testator confirms the gift in his will.

(96) CAUSE removed from the Court of Equity of LENOIR.

Snoad B. Carraway died in the county of Lenoir about the year 1858, leaving a last will and testament, in which he appointed the plaintiff and the defendant William W. Carraway, executors, and this bill is filed against defendant Carraway and the legatees and devisees, and prays, among other things, for a construction of the executor's will.

The parts of such will as are necessary to a correct apprehension of the matters in controversy, are as follows:

"First. I wish my just debts to be paid out of the sales of my perish-

able property, not hereafter given away; should my perishable property be insufficient to pay my debts, I wish the following negroes to be sold on a credit of one year, with interest from the sale, Rosetta, Jordan, Joshua, Noah, John, Wesley, and also the children the said Rosetta may hereafter have; should the said negroes not be necessary for the payment of my debts, in that case I give and bequeath them to my son, W. W. Carraway, and Mary J. Nicholson, to be equally divided between them."

Second. This clause, after devising and bequeathing to Sarah F. Carraway, wife of the testator, a tract of land with the improvements, also slaves, stock, farming utensils, furniture, etc., proceeds as follows: "I hereby direct my executor to pay to my wife, Sarah F. Carraway, one thousand five hundred dollars out of my estate, to repair and furnish the house at Brandon, in Wake County, also an ample sufficiency of every necessary for the support of herself and family one year.

"Seventh. I give and bequeath unto Cousin Louisa Carraway, five hundred dollars, to be paid by my executors out of my estate."

The testator, in the other clauses of his will, devises and bequeaths, specifically, to his children and to his sisters, a large real and personal estate.

To this will, there was a codicil in these words: "Whereas, I, Snoad B. Carraway, of the county of Lenoir, and State of North Carolina, have made my last will and testament, in writing, bearing date January the twenty-eighth, one thousand eight hundred and (97) fifty-six, in and by which I have directed my executors to pay to my wife, Sarah, fifteen hundred dollars, for the purpose of repairing and furnishing the house at Brandon, Wake County. Now, therefore, I do by this, my writing, which I do hereby declare to be a codicil to my last said will and testament, and to be taken as a part thereof, order and declare that my will is, that the sum of seven hundred and fifty dollars shall be paid by my executor to my wife, Sarah, to finish the improvements and furnish the house at Brandon, Wake County, the chief part having already been done."

The pleadings disclose the fact that after exhausting the proceeds of the sale of the perishable property, and of the sales of negroes, provided by the testator as a fund for the payment of debts, there remained due from the estate debts to the amount of $5,400. The principal question raised by the pleadings is, whether the general pecuniary legacies to Mrs. Carraway, and the pecuniary legacy to Louisa Carraway, are charges upon the specific legacies, or whether they fail through a deficiency of assets.

The cause being set down for hearing upon bill, answers and exhibits, was transferred to this Court by consent.

J. W. Bryan, for the plaintiff.
Strong and *Fowle,* for the defendants.

BATTLE, J. The bill was filed for the purpose of obtaining a construction of the will of Snoad B. Carraway, deceased, and the main questions raised by the pleadings are, whether the legacies given by the testator to his wife to repair and furnish "the house at Brandon, in Wake County," and for one year's support of her herself and her family, and the legacy of $500 given to the testator's cousin, Louisa Carraway, are bequeathed in such terms as to make them a charge upon the specific legacies; or, are they to be regarded as mere pecuniary legacies, not so charged, and, therefore, first liable for the payments of debts,
(98) upon a deficiency of the assets appropriated for that purpose?

The language of the bequest to the wife is as follows: "I hereby direct my executors to pay to my wife, Sarah F. Carraway, one thousand five hundred dollars, out of my estate, to repair and furnish the house at Brandon, in Wake County. Also, an ample sufficiency of every necessary for the support of herself and family for one year." The bequest to Louisa Carraway is of "five hundred dollars, to be paid by my executor out of my estate." By a codicil, the testator declared his will to be "that the sum of seven hundred and fifty dollars shall be paid by my executor to my wife, Sarah, to finish the improvements and furnish the house at Brandon, Wake County, the chief part having already been done." A question has been made upon the terms of the codicil, whether they revoke and annul the force of the expression contained in the will, that the legacy is to be paid by the executor out of the testator's estate. We think clearly that they do not; because it is manifest that the testator's only intention was to lessen the amount of the legacy, the object of the bequest having been already partly accomplished. In the late case of *Dalton v. Houston,* 58 N. C., 401, the following passage from 1 Jarman on Wills, 160, in regard to the effect of a codicil upon a will, is quoted with approbation, and we think it governs the present case: "In dealing with such cases (says Mr. Jarman), it is an established rule *not to disturb the dispositions of the will,* further than is *absolutely necessary* for the purpose of giving effect to the codicil."

Another question has also been made, whether the bequest for the widow's year's support is expressed in the terms "to be paid by the executor out of the estate," and we think it is, by force of the word "also" coming immediately after the legacy given for the repair and furnishing of the house at Brandon.

These questions are preliminary to the main one, which we will now proceed to consider. In discussing this question, we will first remark, that if the testator had simply directed the legacies to be paid out

of his estate, without saying by his executor, we should not hesi- (99)
tate to hold that they were a charge upon the land as well as upon the personal property; the former, however, being only an auxiliary fund to be brought in after the latter, as the primary funds had been exhausted. In support of this proposition, we should rely upon *Bray v. Lamb,* 17 N. C., 372, as one directly in point. The expression there was, "I give and bequeath unto Nancy Guilford Bray, five hundred dollars, to be raised and paid out of my estate." The Court held the legacy to be well charged upon the land. In delivering the opinion, we do not discover that RUFFIN, Chief Justice, laid any particular stress upon the word "raised," and we are unable to perceive any difference in the meaning of the terms "raised out of my estate," and "paid out of my estate." We do discover, though, that he emphasizes the word *"estate,"* to show that the realty as well as the personalty was included in its signification. We do not overlook the fact that his Honor uses the word "raised," and it was natural that he should do so, because that word was used in the will, but we can not perceive that he assigns to it a meaning stronger than would have been conveyed by the word "paid," to which it is conjoined. But it is unnecessary to pursue the enquiry, as it is contended in the present case that, as the legacies are to be paid out of the estate *by the executor,* the land can not have been meant, because the executor has no control given him by the will over the land, and, therefore, the term "estate" must be restricted to the personal estate. Supposing that to be so, still the expression may furnish an argument that if the testator *intended* to charge the legacies upon the real as well as the personal estate, and failed to do so as to the land, because he directed them to be paid by his executor, it shows conclusively that he intended them to be paid out of the primary fund, to wit, the whole personal estate. Waiving, however, this argument, we are inclined to the opinion that when a testator directs a pecuniary legacy to be paid by his executor out of his estate, he thereby, either expressly or by the necessary construction of his language, gives it a preference over his specific legacies, or, in other words, he means that it shall be (100)
paid anyhow, or in any event, provided all the personal assets are not exhausted in the payment of debts. But, if we are mistaken in this as a general proposition, we are satisfied that the testator so intended in the present case, and that such intention is so clearly manifested in the will itself, that we are bound to give effect to it.

The general proposition is, we think, supported by principle, as well as by the authority of the leading case, *Sayer v. Sayer,* Prec. Chan., 392. The general rule undoubtedly is, that specific legacies do not abate in favor of pecuniary legacies. This is founded on the presumed intention of the testator that they shall not so abate; but it is clear that the

testator may declare a different intention, and may, if he think proper, by express words, or by a necessary implicaion, put general or pecuniary legacies upon the same footing in this respect with specific legacies, or may impose them as a charge upon such legacies, so that upon a deficiency of assets for the payment of debts, the specific legacies shall be first exhausted before the general or pecuniary legacies can be taken. There are two classes of cases where such will be the result: first, where a testator gives specific and pecuniary legacies, and afterwards says that such pecuniary legacies shall come out of all his personal estate, or words tantamount. Secondly, where there is no other personal estate than the specific legacies; for, in that case, they must be intended to be subject to the pecuniary legacies, otherwise those legacies would be mocked; see *White v. Beaty,* 16 N. C., 87 and 320. In *Sayer v. Sayer,* the specific legacy was not subjected to the payment of the general legacy on account of the special words of the will, but the general principles with regard to the two classes of cases above specified were clearly recognized and laid down by the Lord Chancellor. In the will now before us, the testator, in plain terms, directs the general or pecuniary legacies in question to be paid by his executor "out of his es-
(101) tate," which, as there is no exception, must mean out of his whole estate.

But if the proposition that a general or pecuniary legacy is charged upon a specific one (when there is a deficiency of assets to pay both), by the express direction to the executor to pay it out of the testator's estate, is denied or doubted, we then say, with great confidence, that the testator, in the present will, has given a preference of the pecuniary legacies over the specific ones. The testator has, as we think is apparent from the will itself, given away all his estate, both real and personal, specifically, except the fund which he directs to be first applied in the payment of his debts. Of the sufficiency of that fund for the purpose intended, he expresses a doubt by saying, "Should my perishable property be insufficient to pay my debts, I wish the following negroes to be sold," etc. He then specifies six negroes whom he wishes to be sold for the payment of the residue of his debts, giving them, if not wanted, or so many of them as might not be wanted for that purpose, to certain specified legatees. The testator then, having given away specifically all his personal estate, except the perishable property which he devoted to the payment of his debts, and which he manifestly supposed might not be sufficient for the purpose, and which the answers admit was not sufficient for the purpose, out of what fund could he have intended his general legacies to be paid when he directed them to be paid out of his estate? The reply is obvious that he intended that they should be paid out of the personalty which he had given away in specific legacies, if it

should become necessary to do so. In this view of the case, we think that we are fully sustained by the decision of this Court in *White v. Green,* 36 N. C., 45. There the general legacy was given in terms not so strong in favor of a preference over specific legacies as the present. The words were, "I give and bequeath to my wife's son, William Watson, the sum of five hundred dollars, to be paid to him by my executor out of such moneys as he may think best." The case came on to be heard upon an appeal from a decree made in the Court below, and RUFFIN, C. J., in delivering the opinion of this Court said: "His (102) Honor held that the legacies to the nieces were not at all liable, because they were specific, and do not abate with or contribute to general legacies. That, we know, is the general rule, but there is an exception to it, within which, we think, this case falls. If a general legacy be expressly charged upon a specific legacy, then, of course, it is payable thereout. So, if a pecuniary legacy be given, or there be no fund to pay it, or rather, if there never was any fund to pay it, except the specific legacies, owing to the fact that everything is given away specifically, the necessary construction is that the general legacy is to be raised out of the personal estate, although specifically bequeathed. For it is not to be supposed that the testator meant to mock the legatee; *Sayer v. Sayer,* Pre. Ch., 393; Rop. on Legacies, 255 (3 Ed.); *White v. Beattie,* 16 N. C., 87 and 320. This will descend so minutely into the enumeration of articles, that it is merely to be inferred from the will itself that it disposes of, or professes to dispose of, all the property the testator had. But the answers, which are to be taken to be true, remove all doubt. They state that the testator left nothing, and had nothing at the making of the will, applicable to the payment of this legacy, but such as he has given specifically. He left cash and debts due to him to the amount of about $100; but he owed a larger sum. This we think a sufficient ground of itself for holding the specific legacies liable, without recurring to the direction to the executors to pay the pecuniary legacy 'out of such moneys as he may think fit.' Those words, however, strengthen the inference of the charge; because 'moneys' could not mean cash in hand (of which there was only about $20), but meant cash to be raised by the sale or hiring of *property.*"

These remarks are, in our opinion, almost, if not quite, as applicable to the facts of the case now before us, as they were to that in which they were made, and lead irresistably to the conclusion that the testator, in the present case, intended to charge, and has effectually charged, the general legacies in question upon all the specific legacies, so that all the latter are to be taken for the payment of the testa- (103) tor's debts before the former can be touched. The specific legacies to the widow herself will be taken, or, if all are not wanted, will abate *pro rata* with the others.

We have examined *Everett v. Lane,* 37 N. C., 548, and *Shaw v. McBride,* 56 N. C., 173, to which our attention has been called by the counsel for the defendants, and do not find anything in them inconsistent with the principles which we think lead to the conclusion at which we have arrived.

The personal property which the testator had given away in his lifetime, and which did not need the aid of his will to pass the title to it, can not be taken, because such gifts are not legacies of any kind.

The questions on which we have declared our opinion are the only ones which have been argued before us, and we presume the parties may now frame a decree which will put an end to their litigation.

MANLY, J., concurred in the above opinion.

PEARSON, J., *dissentiente.* The large fund not specifically bequeathed, consisting of perishable property, crops, etc., debts due testator and certain slaves, turns out not to be sufficient to pay the debts and general pecuniary legacies.

The question is, what is to be done in this unexpected state of things?

It is clear the specific legacies must abate in order to pay the debts; but must a further abatement be made to pay the general pecuniary legacies in full? or to contribute *pro rata,* so as to divide the loss? Or are the pecuniary legacies to fail because of this want of funds?

The general rule is admitted to be that specific legacies do not abate in favor of general pecuniary legacies, unless there is something in the will to show an intention on the part of the testator to give a preference to the latter. The rule is founded on this reason: A specific legacy is a perfected gift, made by the testator himself, who points out the
(104) identical subject of the gift, whereas, a general pecuniary legacy is only a direction to the executor to pay a certain amount provided he has funds in his hands.

I do not find any ground in this case for making an exception to the general rule. 1. It is a correct principle, that if one makes specific bequests of *all of his estate,* and also makes a general pecuniary legacy, it will be implied that it was his intention to subject the specific legacies to the payment of the pecuniary legacy, "for otherwise he would mock the legatee"; *Sayer v. Sayer,* Pre. Chan., 393. "Suppose one possessing a personal estate at B and C only, bequeath it specifically to D and E, and then gives a legacy to F generally, the personal estate at B and C will be liable to the payment of this legacy, *as there never was any other fund out of which the legacy to F could have been satisfied";* 1 Roper, 418; Toller on Executors, 226.

The difficulty seems to be in making the application of the principle, which no doubt arises from the fact that it always appears to be a

"hard case" that a legatee should lose the bounty which he expected, and which was intended for him. There is no doubt that every testator intends and expects that all the legatees will get what he gives them, and when an unexpected state of things arises, so that some must be disappointed, it is considered hard that one to whom a small *money* legacy is given, say $500, should lose it all, and one to whom a specific legacy of the value of many thousands is given, should get all of it, which is ordinarily the case. But reverse the position, shall one to whom a small specific legacy is given, say a watch or riding-horse, be obliged to give it up for the benefit of one to whom a legacy of $10,000 is given, and then the supposed hardship is put on the other side. This is the mode to test the principle and avoid the danger of a misapplication.

No one can read *White v. Beattie,* as at first decided, 16 N. C., 87, without being satisfied that the Court was led into a misapplication of the principle because of the supposed hardship. Indeed, when the case was again brought before the Court eighteen months afterwards, 16 N. C., 320, the former decree is reversed, and Judge (105) HENDERSON, after showing that the principle only applies where the testator gives away *the whole of his estate in specific legacies,* and then gives a pecuniary legacy, and that it does not apply when there is *any portion* of the estate not given away in specific legacies, although such portion may be lost or wasted by the executor, or consumed *in the payment of debts,* concludes by saying the case of *Sayer v. Sayer* does not support the former decision. "The truth is, when the case was before us heretofore, the facts were strangely misconceived."

In *White v. Green,* 36 N. C., 45, the same principle came up for application; the principle is correctly defined; *Sayer v. Sayer* and *White v. Beattie* are cited, and the Court say: "It is nearly to be inferred from the will itself, that it disposes, or professes to dispose of, all the property the testator had; but the answers remove all doubt; they state that the testator left nothing, and had nothing applicable to the payment of this legacy, but such as he had given specifically." Whether that is not another instance where the Court, after correctly stating the principle, depart from it in making the application, by introducing the words *"left nothing, and had nothing applicable to the payment of this legacy,"* may be questioned; for, taking the principle as defined in that case, and in *White v. Beattie* and *Sayer v. Sayer,* it is obviously necessray, in order to make it applicable, that the testator should give away the whole of his estate in specific legacies, for otherwise the natural inference is, that he was mistaken as to the amount of his debts, which is by no means an unusual thing, and there is no necessity for presuming that he intended to charge the specific legacies

with the payment of the pecuniary legacies, in order to avoid the inference "that he intended to mock the legatee." So, in my opinion, the principle does not apply to our case.

2. The words, "to be paid by my executors out of my estate," added to the legacy of $500, can not, in my opinion, be allowed the effect of making this case an exception, because they are not sufficiently
(106) expressive of an intention to charge the legacy of $500 on the specific legacies. Instead of giving to them the effect of making a charge, I think they are rather to be treated as expletive, or words of surplusage. A testator gives his negro man "Jacob to A, to be delivered to him by my executor"; these words are expletive, and amount to no more than would be implied; and he gives $500 to B, "to be paid by my executor out of my estate"; these words are expletive, for, as a matter of course, if paid at all, it will be paid out of the estate. Should it, contrary to all expectation, turn out that the balance of the estate is all exhausted in the payment of debts, so as only to leave "Jacob" on hand, it seems to me a strange result that the negro given to A must be sold in order to pay B the $500! At the most, it would seem that B could only expect A to divide the loss with him, and yet, if the words amount to a charge, B must be paid the whole $500, although A will thereby get nothing at all. To justify such a result, surely the intention to create a charge ought to be clearly expressed.

Bray v. Lamb, 17 N. C., 372, is relied on to support the position that these words create a charge. The words there were: "I give Nancy Bray five hundred dollars, to be *raised* and paid out of my estate." The case was attended with some peculiar circumstances, which are referred to in support of the conclusion, but the main stress was put upon the word *"raised"* out of my estate, which word was supposed to be peculiarly appropriate to create a charge; and it is remarkable that the words "to be paid" out of my estate are treated as amounting to nothing, and are not alluded to in the opinion; so, that which the builders then rejected as useless, is now to be made the cornerstone!

In the earlier cases cited by Powell on Devises, when land was not liable for the payment of simple contract creditors, the Courts seized on almost any words to create a charge in favor of such creditors. "I direct my debts to be paid" out of my estate; or, "I wish all of my just debts to be paid," were held sufficient to create a charge on land in
(107) favor of creditors; but since the law has been changed, such words are treated as mere surplusage, and no meaning is attached to them, and, as far as my researches have gone, such an effect never was given to words of this kind in order to create a charge in favor of general pecuniary legatees, at the expense of specific legatees, and in our case, in respect to the other pecuniary legacies to the widow, as she

is a specific legatee of a large amount of property, she, as such, will be obliged to contribute to pay her own pecuniary legacies! Can it be supposed in the absence of plain words that such was the intention of the testator?

PER CURIAM. Decree according to the opinion of the Court.

Cited: Lassiter v. Wood, 63 N. C., 364; *Devereux v. Devereux,* 78 N. C., 389, 490; *Worth v. Worth,* 95 N. C., 242; *Heath v. McLauchlin,* 115 N. C., 402.

Dist.: Mitchener v. Atkinson, 62 N. C., 27; *Hines v. Hines,* 95 N. C., 484.

THOMAS HADLEY v. WILLIE D. ROUNTREE.

Where dealings between a father-in-law and his son-in-law, wherein the latter had been the other's agent, were closed in a hurried manner, and a note given by the father-in-law at the importunate solicitation of the son-in-law, on calculations made by him, under a promise that the whole settlement should be open to subsequent examination, and the answer to specific allegations of errors was unfair and evasive, it was *Held,* that an injunction to restrain a judgment at law on such note should be continued to the hearing, and that the judgment should stand as security for whatever might be ascertained to be due.

APPEAL from an interlocutory order of the Court of Equity of WILSON.

The plaintiff, Hadley, and the defendant, Rountree, entered into a written agreement 16 December, 1856, wherein it was stipulated that the said Hadley was to put the said Rountree into possession of his mills and farm on the 1st of the next ensuing January, which the latter was to hold until 1 January, 1859; that Hadley was to pay for all hires of hands, buildings and purchases for the use of the (108) premises; that Rountree was to give his personal attention to the business, and was to receive, at the end of each year, one thousand dollars as his wages, and that any advances of money which he might make were to be deducted out of the proceeds of the farm, mills, etc., and the business to be closed at the end of each year by note. At the close of 1857, Rountree presented his account, and Hadley gave him a note for $14,815.91, on which suit was brought at law and a judgment recovered. The bill is brought to enjoin the collection of this judgment, and to have an account taken between the parties, alleging fraud and imposition in the conduct of the defendant in obtaining the note from him, and many false charges and suppressions of credits in the account on which the note was founded. The plaintiff alleges that he is an old man, and that his business had become much confused, and having much

confidence in the defendant, who is his son-in-law, he was induced, for the purpose of relieving himself, to enter into the contract above stated. He says towards the close of the year 1857, the defendant became urgent for him, plaintiff, to settle with him and give him a note for the amount due; that to get rid of these importunities, and relying on the word of the defendant, who promised that the whole account should be re-examined by some competent person, and any errors that might appear should be corrected, he was induced to sign the note aforesaid; that all the calculations were made by the defendant, and that the plaintiff did not at all canvass them, nor any of the items of the account; that all the vouchers, receipts, etc., on which this account was alleged to be based, were retained by the defendant, and that he had refused to surrender them to the plaintiff. Among other specifications of the falseness of this account, it is alleged that the defendant had failed to give him credit for seven bales of cotton, of the crop of 1856, which were on hand when the defendant took charge of the business, and that no notice is taken of this cotton in any part of the account.

To the allegation as to the cotton, the defendant answers as
(109) follows: "This defendant has no recollection of the seven bales of cotton having been committed to his hands, and does not believe it to be true; but of this the defendant is certain, if it ever came to his hands, the complainant received the proceeds. There would appear no item of it in the account of 1857, since the transactions, under the contract, for each year were to be kept distinct."

To the charge that the defendant had withheld the vouchers, the defendant answers and admits that he kept them, but says, "Of this the plaintiff cannot complain, since they are of no service to him whatever—consisting of receipts for money paid to third persons, sheriff's receipts for money paid on executions against him, etc., etc. There is no evidence of debt whatever held by this defendant against the complainant among these vouchers, and they are, and always have been, open to the inspection of the complainant."

The conflict between the last recited passage of the answer and several items of charge in the account filed by the defendant as an exhibit, is pointed out in the opinion of the Court.

On the coming in of the answer, the Court below ordered the injunction, which had been issued in the case, to be dissolved, and the plaintiff appealed to this Court.

A. M. Lewis, for the plaintiff.
Dortch and *Strong,* for the defendant.

PEARSON, C. J. By force of the agreement executed 16 December, 1856, the defendant was bound, at the close of the year 1857, to render an account.

From the answer and the account filed as an exhibit, we are satisfied that, so far from rendering a full and fair account, as he was bound to do, the defendant induced the plaintiff to execute the note mentioned in the pleadings upon the footing of calculations by himself, upon loose statements and detached papers, without time for examination; so that, in fact, there was no account rendered, and nothing done by the parties, considering the relation in which they stood, (110) which can be allowed the effect of a settlement.

The answer is unfair and evasive in many respects; for instance, to the charge that when the defendant took possession of the farm and mills there were on hand, among other things, seven bales of cotton, which the defendant had failed to account for; the response is: "This defendant has no recollection of the seven bales of cotton having come into his hands, and does not believe it to be true; but of this the defendant is certain, if it (the seven bales of cotton) ever came to his hands, the complainant received the proceeds. There would appear no item of it in the account of 1857, since the transactions, under the contract, for each year were to be kept distinct."

The first attempt is made to evade this charge by treating the seven bales of cotton as of no more importance than a stack of fodder, about which the defendant could not be expected to have any distinct recollection! The second is by a suggestion that the seven bales of cotton, being of the crop of 1856, did not form an item in the account of 1857, as the transactions of each year, by the contract, were to be kept distinct. If this cotton did not make an item in the account for the year 1857, it certainly would not in the account for the year 1858! But supposing this cotton to have been on hand on 1 January, 1857, and in regard to a fact of that importance, an agent, who is bound to render an account, is not at liberty to leave the matter in doubt, then it did properly form an item of account for the first year, as much as the lumber and other articles on hand when the defendant took charge of the business, and the loose and general statements of the answer in regard to it shows the sort of "settlement" made on 1 January, 1858, when the plaintiff was induced to execute his note.

Again, the bill charges that the defendant kept possession of all the vouchers, receipts, etc., on the footing of which the calculations were made and the note executed. The answer admits this, and by way of explanation says: "The plaintiff can not complain, since (111) they are of no service to him whatever—consisting of receipts for money paid to third persons, sheriff's receipts for money paid on executions against him, etc., etc. There is *no evidence of debt whatever held by the defendant against the complainant among the said vouchers,*" and yet, in the account filed with the answer as an exhibit, is this item:

"Note due 1 January, 1857, with interest to 1 January, 1858, $1,718.33," which is thus charged to the plaintiff, but is held by the defendant. Again: although the note is executed 1 *January,* 1858, as for a balance, $14,815.91, then due, in the account, set out for the purpose of showing that balance, there are several charges in *January and February,* 1858, *e. g.,* cash paid Moses Rountree 19 *January,* 1858, $958.14; cash paid Rountree & Co., 4 February, 1858, $370.21.

It is unnecessary to make further specifications. "The judgment at law ought only to be allowed to stand as a security for whatever may be found to be due to the defendant upon taking an account between the parties, on the footing of the principal and agent"; *Franklin v. Ridenhour,* 58 N. C., 422.

There is error in the decretal order dissolving the injunction. It ought to be continued to the hearing.

PER CURIAM. Decretal order reversed.

Cited: Levin v. Gladstein, 142 N. C., 490.

---

(112)

WILLIAM C. EBORN, Adm'r., v. JOSEPH WALDO, and another.

1. There is no ground for going into a court of equity to recover back damages, assessed at law, in behalf of a defendant to an action of replevin, upon the ground that the plaintiff has the title, and has brought another action of replevin, but can not recover back those damages in that or any other action at law.
2. Except to stay waste or prevent some irreparable injury, the writ of injunction is only issued as ancillary to some primary equity, which the bill seeks to enforce.

CAUSE removed from the Court of Equity of MARTIN.

The plaintiff in this suit is the administrator of one Abner Williams, and the bill alleges that the intestate, Williams, being much impaired in mind by an immoderate use of spirits, was induced by the defendant, Waldo, to make him a power of attorney to sell a negro slave, named Jack, belonging to said Williams, and afterwards, a few days before the death of Williams, the defendant, Waldo, sold the negro to one Morrisett, the other defendant in this suit. The plaintiff, Eborn, as the administrator of Williams, brought an action of replevin against Waldo and Morrisett, to recover back the slave, and under that writ the slave was put into his hands by the sheriff. The plaintiff was nonsuited in that action of replevin, upon a technical point, and a jury being empaneled, assessed defendants' damages, for the detention of the slave during the action, at $316, and execution issued for the amount. It is stated in the bill that Waldo is totally insolvent.

The plaintiff brought another action of replevin for the slave against the same parties, which was pending at the filing of this bill.

The prayer of the bill is that the plaintiff be allowed to pay the money into court and await the decision of the action at law, now pending, and for an injunction to restrain the collection of the execution during that time.

Upon defendant's filing his answer, the injunction was ordered to be continued to the hearing, and the cause being set for hearing upon bill and answer, was transferred to this Court by consent.

Donnell, Winston, Jr., and *Warren,* for the plaintiff.
Rodman, for the defendants.

MANLY, J. If we suppose in the second action of replevin, (113) which the bill alleges is now pending, the plaintiff established his right to the slave in question, and, by consequence, established the position, that the results of the first action were not in accordance with the rights of the parties, still the bill is without equity.

The court of equity does not interfere to prevent the enforcing of a recovery at law for errors of both law and fact, much less will it interfere to prevent the operation of what may be regarded as a hard feature in the law. The assessment of damages, after the nonsuit, on the trial of the first action of replevin, was in strict accordance with the course of the Court, under the law regulating that action. No error is even alleged, and the probability that a second action may result differently is not ground for arresting the execution of the first.

It is not an anomaly without parallel that property upon one trial is established to be in a party, and upon a second, found to be in the other. Such inconsistency results from the infirmity of human tribunals, and is, for the most part, caused by the blunder or laches of the losing party on the trial of the first. A court of equity is surely not expected to protect parties from the consequences of their blunders and negligences at law.

There were open to the plaintiff, in this case, three modes of redress: an action of trover, of detinue, and of replevin. He chose the latter, which is subject to the incident, that if he lose the suit by verdict or *nonsuit,* where he is put into possession of the property under the writ, damages shall be assessed against him for the detention. The recovery complained of, therefore, arose from his preference of a form of action, and failure in it from any cause. Whosoever adopts it, is supposed to foresee its perils, and, relying upon the impregnable nature and easy proof of his title, to be willing to encounter the hazards. It may be remarked, in this connection, that our opinion, as to the want of equity in the bill, is not at all dependent upon the enquiry, whether the damages

recovered in the first action may or may not be recovered back
(114) in the second, should the plaintiff succeed. For, if it be conceded that they may be, there is no allegation of the insolvency of Morrisett, whereby the judgment at law would be of no avail.

This brings us to another ground of objection to the bill, viz., that no relief is sought by it which can constitute a *corpus* for the Court's jurisdiction.

It is hardly necessary for us to refer to the many cases in which we have found it necessary to declare, recently, that a bill for an injunction, merely, without asking other relief, can not be maintained, except in cases of waste and irreparable injury. In all other cases, injunction is ancillary *process,* and is only proper where it is in aid of a primary equity, set forth in the bill. No such equity is disclosed.

It is not a bill to have judgments at law set off, the one against the other; for there is no prayer to that effect, and no allegation of defendant's insolvency, which is the basis of equity jurisdiction in such cases. *Iredell v. Langston,* 16 N. C., 392. Its object seems to be to obtain a reversal by the Court of Equity of the judgment in the first action of replevin, upon the ground that there is no relief, at law, through the subsequent action or otherwise. But this is clearly inadmissible. A court of equity never allows an appeal to it for a new trial of a case, which depends upon legal defenses, and which has been tried at law. *Pearce v. Nailing,* 16 N. C., 289.

PER CURIAM. Bill dismissed.

Cited: Martin v. Cook, post, 200.

(115)

JONATHAN HAVENS v. JAMES E. HOYT and others.

Where it appeared that a contract made with a corporation to do certain work, was fulfilled to the satisfaction of the board of directors managing the concerns of the corporation, and that such work was done on favorable terms, and was beneficial to the company, it was *Held,* that a court of equity would not, on the allegation of one of the corporators that there was a secret agreement between one of the directors and the contractor to divide the profits, enjoin the payment of the stipulated compensation.

APPEAL from an interlocutory order of the Court of Equity of BEAUFORT.

The bill is filed by the plaintiff, as a stockholder in the "Washington Gas-Light Company," in behalf of himself and the other corporators of the said company, against the defendants, as president and directors of the said company, and against James E. Hoyt, individually. The

bill alleges that the directors appointed James E. Hoyt, one of their number, to make a contract in behalf of the company with some competent and responsible person, for the erection of the necessary gas works, and laying the necessary pipes, in order to effectuate the purpose of the company, and that the said Hoyt did make a contract for the constructing of the said gas works and appurtenances, with one Samuel Merrill; and that he was, at the time, secretly, a partner with the said Merrill, and was to have two-thirds of the profits arising from the fulfillment of the undertaking, and that he fraudulently, and by combination with Merrill, and for their mutual gain and profit, put the amount of compensation at a higher sum than the work was worth; and at a higher price than the said Merrill had previously offered to do it at; that the work was nearly finished, and that the directors were about to pay to Merrill and his secret partner, Hoyt, the last payment due for the construction of the said works; that the portion of the said Hoyt's profits is $800, and thirteen shares of the capital stock of the company.

The prayer is, that the Court will declare the share of the said profits coming to Hoyt, to belong to the company, and direct an injunction to the president, secretary, treasurer and directors of the (116) said company, forbidding them from paying over the said sum of $800, and from giving certificates for the said thirteen shares of stock to the said James E. Hoyt, and for general relief.

The answers of both Hoyt and the directors say that Merrill was the lowest bidder; that his bid was $1,000 less than the only other bid made for the work, and that this bid was made to the directors themselves, and not to James E. Hoyt, as their agent, and by them, as a board, accepted; and that all that Hoyt had to do with it, except as a director, was to have the contract with Merrill formally executed according to the terms offered and accepted. They both say that the terms were reasonable; and that the work has been done satisfactorily, and the company express their willingness to pay the compensation agreed upon, whenever released from the injunction.

Hoyt, in his answer, says that he recommended Merrill to the board, and informed them that, as he was without means, he expected to assist him in the execution of the contract, both as to advancing the money necessary to buy materials, and in procuring him security to perform his part of the obligation; that these assurances were made as inducements for the company to employ Merrill; and he believed that it was understood by the company that he would participate in Merrill's contract; that he did enter into an agreement with the said Merrill to furnish all the money necessary, and to carry on the work, to go on to the cities where gas works were in the most successful operation, and obtain information as to the best and most economical manner of con-

structing and using them; that he not only, according to this contract, advanced the money necessary to begin the undertaking, but he went to the Northern and other cities, and examined diligently into the several modes of erecting and working gas works, and obtained an amount of information which enabled Merrill to do the work cheaper and better than it otherwise could have been done; and, besides this, he gave constant attention to the work as it was going on, and he says his part of the profits (two-thirds) was by no means unreasonable. The
(117) company, however, say they were not aware that Hoyt was to be a partner with Merrill; but they say the work was well, judiciously and cheaply done.

On the coming in of the answers, on motion, the injunction was ordered to be dissolved, and the plaintiff appealed.

Donnell, Fowle & Warren, for the plaintiff.
Rodman, McRae & Carter, for the defendants.

MANLY, J. Our reflections upon the questions presented by the pleadings in this case have conducted us to the conclusion that the injunction was properly dissolved in the Court below.

This conclusion has been induced, chiefly, by the purport of the answer from the president and directors of the company. This body express their entire satisfaction with the manner in which the work contracted for has been executed, and announce their willingness now to pay for the same according to the contract. It seems to us a single corporator of a joint stock company has not the power to repudiate a contract made by his authorized agents, the directors, in the face of such avowals. His redress, if he have any, is against the board of directors, and a writ restraining them from the fulfillment of the work assigned them ought not to be continued without an allegation, at any rate, of irreparable mischief. Should the directors participate in any fraud, or be guilty of gross negligence in office, to the prejudice of a stockholder, they might, we take it, be liable to him.

The two positions of defendant, Hoyt, that is, in the board of directors, and in copartnership with Merrill, are not consistent. The duties appertaining to them, respectively, may, and probably will, be irreconcilable. Hence, they can not be occupied covertly, without subjecting the party to suspicion, and to a rigid accountability. But upon questions arising out of that condition of things, as between the company and director, we do not propose to enter, and have referred to the
(118) matter only in order to obviate any misconstruction of our views.

The single question now before us, is, ought the injunction to be continued at the instance of a stockholder, when the answer of the

directors of the company, confirming to that extent the answer of the defendant, Hoyt, declares that the contract was an advantageous one for the company, was at the lowest price offered, and has been faithfully executed; and when the company express their wish now to make the deferred payment, if not restrained by the Court.

There is no error in the interlocutory order appealed from.

PER CURIAM. Affirmed.

JOHN R. RIGGS and others v. C. V. SWANN, Adm'r.

There is, in this State, no statute which requires that the declaration of a trust, made at the time when the legal title to land or slaves passes to one, who agrees to hold in trust, shall be in writing.

CAUSE removed from the Court of Equity of CRAVEN.

John R. Riggs, being indebted to Seth Muse in the sum of $702.50, in 1846, made a deed to the said Muse for two negro slaves, Abram and Joe, as security for that sum, and at the same time took from the latter a deed of defeasance, declaring the terms on which the said slaves were conveyed to Muse, the substance of which was, that whenever the said sum of $702.50, with interest, was paid, Muse should reconvey the said slaves to Riggs. According to the spirit and meaning of this trust, the said Riggs remained in possession of the slaves, Abram and Joe, until 1850. On 14 January of that year, in order to pay off a part of the debt then due to Muse, it was agreed between them two and one Samuel Jones, who was the brother of Riggs' wife, that Muse (119) and Riggs should both join in a conveyance of the two slaves to Jones, and that he should convey one of them, Joe, to Muse, absolutely, at the price of six hundred and fifty dollars, which was to be credited on the said debt of $702.50.

The bill alleges that a part of the above arrangement was that the said Samuel Jones was to have the use of Abram at the price of $125 a year, until his work should amount to the balance of the debt due Muse, and that he was then to convey him to the plaintiffs, the children of the said John R. Riggs; that Riggs had put other property in his hands to assist in paying off this balance, and that a part of the arrangement was, that whenever Riggs should stand particularly in need of the said slave, Jones was to let him come and assist him in his work, and it is alleged that during some part of each year, as long as Jones lived, the slave was in Riggs' possession. The bill further alleges that, by means of the hires of Abram, and the other means put into Jones' hands, he has received more than enough to satisfy the whole, principal and interest, of the debt to Muse, and still hold an overplus, to which the plaintiffs are entitled.

Samuel Jones died in 1855, and the defendant Swann administered on his estate. The prayer of the bill is for a surrender of the slave, Abram, and an account of the hires of the slave, and the other property put into the hands of defendant's intestate, Jones, on the trusts aforesaid.

The defendant answered, but did not profess to know anything of his own knowledge, but he insisted on the statute requiring contracts about slaves to be in writing, as a bar to plaintiffs' equity. There were proofs taken which sustained the plaintiffs' allegations. The cause was set down on the pleadings and proofs, and sent here by consent.

J. W. Bryan, for the plaintiffs.
Hubbard, for the defendant.

PEARSON, C. J. The bill is not filed for the purpose of obtaining specific performance of an agreement to convey the slave mentioned in the pleadings, but for the purpose of setting up and having enforced a trust declared in favor of the plaintiffs by their father at the time the title was passed to the intestate of the defendant, Swann. (120)

The objection that the declaration of trust was not in writing, and was, therefore, void, is not tenable. There is, in this State, no statute which requires the declaration of a trust made at the time the legal title passes to one, who agrees to hold in trust, shall be in writing. This question is settled by the case of *Shelton v. Shelton,* 58 N. C., 292, and the learning on the subject is there fully explained. In that case, the subject matter was land; in this it is a slave; but there is no distinction between land and slaves. The act of 1819, Rev. Code, ch. 50, sec. 11, puts contracts to sell land and slaves on the same footing, and has no reference to a declaration of trust, as is shown in that case. The objection based on the rules of evidence, is also there shown to have no bearing on the question. In short, that case is decisive of this; and it is unnecessary to elaborate the subject any further.

PER CURIAM. Decree for the plaintiffs.

Cited: Whitfield v. Cates, post, 139; *Ferguson v. Haas,* 64 N. C., 778; *Gorrell v. Alspaugh,* 120 N. C., 367, 373; *Hughes v. Pritchard,* 122 N. C., 61; *Owens v. Williams,* 130 N. C., 168; *Gaylord v. Gaylord,* 150 N. C., 236; *Anderson v. Harrington,* 163 N. C., 142; *Brogden v. Gibson,* 165 N. C., 25.

SAMUEL JOHNSTON v. H. C. MALCOM and wife and another.

1. A deed combining the two characters of a deed of trust to secure creditors, and a deed of settlement in trust for a wife and children, may operate and have effect in both characters, provided it has been duly proved and registered.
2. A deed of settlement, in trust for a wife and children, proved and registered three years after the date of its execution, was *Held*, to be valid as against creditors, whose debts were contracted after such registration.

CAUSE removed from the Court of Equity of CABARRUS. (121)

Samuel N. Black, on 12 December, 1849, conveyed by deed to Hugh McAulay and his heirs, two tracts of land and twelve slaves, in trust, to secure all his creditors (naming them and the amount of their debts); the deed then proceeds: "And whereas, the said S. N. Black has, unfortunately, contracted the habit of intemperance, so much so that he is frequently unqualified properly to discharge and manage his affairs, and being desirous to secure a good and respectable living for his wife and children, as he received a large share of his property by his wife, it is, therefore, understood, stipulated and agreed," etc., and then gives her the sole and separate use in all the said property not required in the payment of the trustor's debts, and then limits the remainder to his son, the defendant Calvin, and any other child he might have by their marriage, with certain contingent limitations in the case of her death and that of Calvin.

This deed was first proved before the Clerk of Cabarrus County Court on 2 January, 1850, and was shortly afterwards registered.

Afterwards, at April Term, 1853, of Cabarrus County Court, it was proved in open Court by the subscribing witness, and was ordered to be registered, and was registered on 8 June, 1853. Previous to this time all the debts owing by Samuel N. Black had been paid off. On 28 August, Black bought of the plaintiff, Samuel Johnston, a negro woman slave and two small children, at $775, and the said Samuel N. Black, his wife, the said Judith E., both signed a note for the price of the slaves, she negotiating and conducting the whole trade. Suit was afterwards brought against Black on this note, and he dying in 1853, it was continued against his executrix, the said Judith, and a verdict and judgment taken against her on the pleas then in issue. Afterwards, on a *sci. fa.* against her, to show cause why she should not pay this judgment out of the assets of Samuel N. Black's estate in her hands, she pleaded fully administered and no assets, which pleas were found in her favor. Judith Black has since married the defendant Mal- (122) com, and this bill is brought against them, and against her as executrix, and against the trustee, McAulay, and Calvin M. Black, the

only child and tenant in remainder under the said deed, seeking to set aside the deed of trust as to the settlement to the feme defendant and her son, on the ground it could not operate in the double aspect of a deed in trust for creditors and a deed of settlement for the sole and separate use of the wife and her children; and insisting, furthermore, that, not having been registered within six months after it was made, it was null and void as to creditors, according to the twenty-fourth section, thirty-seventh chapter of Revised Code. The bill also prays a discovery of assets in the hands of the said Judith, which it is alleged she fraudulently conceals, etc., and seeks to subject certain property to the payment of his debt, on the further ground that, acting under a power of attorney from her trustee, she sold property conveyed in trust, and gave the proceeds to her husband, with which he bought other property, which she now claims as trust property, but which is, in fact, the property of her late husband, Samuel N. Black. The answer of the defendants is full as to the state and condition of the property now held by the said Judith and her husband, but it is not germain to the questions treated of in this Court.

Fowle, for the plaintiff.
Boyden, for the defendants.

PEARSON, C. J. The opinion of the Court is with the defendants on both points made on the argument.

1st. The deed executed by Samuel Black to McAulay, 12 December, 1849, combines the character of two instruments—a deed of trust to secure creditors, and a deed of settlement in trust for a wife and children, and there is no reason why it may not operate and have force and effect in both characters, provided the ceremony which the law requires in respect to attestation, probate and registration is duly complied with.

An analogy may be found in the case of a will, where, most (123) usually, the same instrument contains a will of personalty, according to the common law, and a will of land, according to the statute, and no objection was ever made, although, originally, the mode of attestation was different, and the probate of one was required to be in the Courts of Law, and of the other in the ecclesiastical Courts. The probate of the instrument in one character had no effect upon its validity in the other.

In respect to the probate and registration of the instrument now under consideration, in its character of a deed of trust to secure creditors, no question is presented. This Court is of opinion that in its character of a deed of settlement in trust for a wife and children, the probate, in open Court, at April Term, 1853, and its registration on

8 June, 1853, made it valid, not only between the parties, but as against creditors whose debts were contracted afterwards, and that it was void only as against creditors whose debts were in existence, or in contemplation, at the date of such registration. This, we believe, has been the universally received construction of Rev. Statutes, ch. 37, sec. 29, and Revised Code, ch. 37, sec. 24, and we are satisfied, upon a consideration of the purposes of these enactments, that this is the proper construction. A mere voluntary deed to a stranger, without any *meritorious* consideration whatever, is allowed to have this effect.

2d. As the bill of sale for the slaves, which was executed by the plaintiff, passed the title to Black, and his estate has had the benefit of the purchase, the signature of Mrs. Black must be treated as having been done in the mere character of her husband's security, and can derive no aid from the fact that McAulay, the trustee, had given her a power of attorney to act as his agent in respect to the trust property. So, the case is that of a *feme covert* executing a bond without making it a specific charge on her separate estate, and without the concurrence of the trustee, and falls under the doctrine announced by this Court; *Knox v. Jordan,* 58 N. C., 177.

There will be a decree declaring the opinion of the Court on these points, and subject thereto the plaintiff may take an order (124) of reference for an account.

PER CURIAM. Decree accordingly.

JOSEPH WEISMAN v. PENELOPE SMITH and others.

1. Whether a court of equity would interfere to compel a specific performance of a contract between two joint owners of land that neither should sell without first giving the other the refusal of it—*Quere?*
2. A sale of a part of the interest of one, by the consent of both of two joint owners of land, as to which there was a right of pre-emption, without any provision as to its future exercise, justifies the inference that such right was intended to be abandoned.
3. On the death of one of two joint owners of land, between whom the right of pre-emption existed, it was *Held,* that such right can not be enforced specifically against his devisees.
4. Where the defendant has a distinct equity, he must set it up by a cross bill; or by an original bill; but he can not have the benefit of it by an answer.
5. After the death of one of the members of a copartnership, the statute of limitations begins to run in favor of his personal representative against a claim to have an account of profits received by him.

CAUSE removed from the Court of Equity of WAKE.

The plaintiff, Weisman, and Richard Smith, deceased, on 21 January, 1843, entered into an agreement in writing, to purchase and work, in copartnership, black lead or plumbago mines in the county of Wake. Smith, by said agreement, was to advance the requisite funds to purchase the lands containing the mineral, to an amount not exceeding $10,000, and as soon as the lands were purchased, Smith was to convey one-half thereof to Weisman in fee, and Weisman was to pay Smith $3,500 at the expiration of five years, without interest, for his moiety, for which the plaintiff pledged his interest; and should the purchase of the necessary lands exceed $10,000, the excess should be a charge upon the profits of the concern. As soon as the purchases were made, the parties
(125) were to commence the business of raising, preparing for market, and sellnig the mineral, under the name and style of "Smith & Weisman," and the plaintiff was to lend his constant attention to the business personally. The covenant concludes thus: "And it is further covenanted as follows, to wit, that if either party shall, at any time, wish to withdraw from the 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 twelve months' notice thereof, and to whom the refusal to purchase shall always be given within that time. And the parties do severally bind themselves, their heirs, executors, administrators or assigns, to the strict performance of this last article."

Smith, in pursuance of this contract, bought a large quantity of land, lying mostly in separate and disconnected parcels, for which he took deeds in fee simple to himself, for which he paid an excess over ten thousand dollars of about six thousand dollars, and the bill charges that he cut fire wood and received rents from the said land up to the time of his death, in 1852, and afterwards his devisees, the defendants Penelope and Mary Ann, did the same, until they sold the whole of their interest in the premises, in April, 1854. The plaintiff also charges that the said Smith obtained large quantities of the mineral, plumbago or black lead, which he sold in the Northern markets, and for which he received the money, at high prices, but did not account with the plaintiff for any part of it.

In October, 1849, Weisman, with the consent of Smith, agreed to sell to one James Hepburn, one-half of his interest in the said mines, to wit, one-fourth part thereof, at the sum of $10,000, and on receiving the sum of $3,500 in cash and $6,500 in a note payable to Weisman, and endorsed by him to Smith, he, Smith, made to Weisman and Hepburn a deed for one-half of all the several tracts of land that had been purchased by him for the purposes of mining, as stated, except two small tracts hereafter referred to, and took from them a mortgage of

their interest to secure the said sum of $6,500. This latter sum (126) Smith claimed for advancements made by him over and above the sum of $10,000, which he was bound by the contract to invest. This sum of $6,500 has since been paid by Hepburn to the assignees of Smith.

In the month of April, 1854, James Hepburn sold his interest in these mining lands to William H. Winder, of the city of Philadelphia, and subsequently, to wit, on 20 April, 1854, Mrs. Penelope Smith and Miss Mary Ann Smith, the devisees of the said Richard Smith, sold their interest, to wit, one-half of the said land, to the said William H. Winder, and he took a deed in fee for the same. Winder and others obtained a charter from the Governor of the State in 1854-'55, for an incorporated company, called the Herron Mining Company, and the lands and mines were worked afterwards by that company. The bill alleges that previously to the sale to Winder, the plaintiff proposed to Mrs. Smith and her daughter, to take their share of the lands and mines, according to the provisions of the covenant, and offered them a full price for them, but they refused to let him have them; that he has made offers to Winder, and to the Herron Mining Company, to pay them what they gave for the premises, and take the whole property, but they have refused to comply with this request.

The bill was filed on 24 September, 1857, and insists that the plaintiff is entitled, according to the terms of the contract of 1843, to have his election to take the whole of the lands, etc., purchased from the Smiths by Winder, and sold to the corporation at the price the latter gave for them; and he now elects, and prays the Court to decree him a conveyance of the premises by the said Herron Mining Company; also, an account from the executors of R. Smith of his share of the rents and profits derived from the property by him in his lifetime, and an account of the same from Mrs. Smith and her daughter while they had and used them; also, from Winder and the Herron Mining Company since they have come into possession.

The answers of the several defendants were filed, but it is not necessary to notice more of their contents, than that they insist (127) on the statute of limitations in bar of the accounts asked for, all the time pleading three years before the filing of the plaintiff's bill. Also, Mrs. Smith and her daughter say that at the time of the sale to Hepburn, it was expressly agreed that the mill and mill site should remain the property of Smith exclusively, and should be excepted from the conveyance by him to Weisman and Hepburn, and that by the agreement of all parties, an instrument of writing was drawn up to that effect, which the plaintiff promised to sign, but that he suddenly left the city of Raleigh and returned to Philadelphia, and that another portion of four acres was to be exempted for a church.

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

PEARSON, C. J. 1. The plaintiff is not entitled to a specific performance of that part of the agreement executed by him and Richard Smith on 21 January, 1843, in which it is stipulated that if either party should wish to sell, he shall give the other "the refusal," or what was aptly called on the argument, "the right of preëmption."

We are inclined to the opinion that a court of equity could not have interfered to compel a specific performance between the *original* parties. Such stipulations are against public policy, and operate in restraint of alienation; for which reasons they are not favorites, either in courts of law or courts of equity. At law, an understanding of this nature is not treated as a grant of an easement or privilege, or as a condition, so as to be attached to the land in respect to which it is made, but merely as a collateral personal covenant, for a breach of which the party may be entitled to an action for damages; *Blount v. Harvey,* 51 N. C., 186; *Keppel v. Bailey,* 2 Mylne & Keene, 577, where it is said: "Incidents of a novel kind can not be attached to property at the fancy or (128) caprice of any owner," because "it is clearly inconvenient to the science of the law that such a latitude should be given"; "great detriment would arise, and much confusion of rights, if parties were allowed to invent new modes of holding and enjoying real property, and to impress on their lands a peculiar character which would follow them into all hands, however remote."

Considerations of this kind apply as forcibly in equity as at law; consequently, the Court should not treat such agreements as creating a trust, binding the parties and privies to a specific performance, but should leave the party aggrieved by breach thereof to his remedy at law. If one takes land in fee simple, and covenants not to alien, a court of equity will not interfere by injunction to prevent him from doing so, but will leave the party to his remedy at law. This is clear. The covenant under consideration is, in effect, a modified agreement not to alien, and falls under the like reason.

We are also inclined to the opinion that the effect of the sale by Weisman to Hepburn, with the concurrence of Smith, of one-half of his interest in the lands, and of the deed executed by Smith to Weisman and Hepburn, vesting in them, as tenants in common, the legal right to one undivided moiety of the lands, made such a change in the relation of the parties as to annul and supersede the stipulation which had been made between Weisman and Smith in respect to the right of pre-emption. It was based on the footing of the copartnership, and was an

emanation of the idea entertained by the parties of a "grand monopoly" in respect to the mines, which suggested that if one of the parties should ever wish "to withdraw from the said concern," it was highly probable that the other party would desire to become the owner of *the whole*, and the stipulation was made to enable him to possess himself of the monopoly. The firm, which was known under the name and style of "Smith & Weisman," was dissolved by the transactions above referred to, and it is fair to infer that the idea of a monopoly was abandoned and passed away when the firm ceased to exist; for no allusion is (129) made to this stipulation in Smith's deed, and Hepburn is not required to become a party to it, although he acquired one-fourth of the land as a tenant in common. All mutuality was in this way destroyed, and the fulfilment of the stipulation was, in fact, rendered impracticable. Was Weisman, owning one-fourth, entitled to a preëmption right in respect to the whole of Smith's half? Or only to one-half of that half? Did Weisman communicate to Hepburn an interest in the preëmption, so as to give him the right as to one-fourth, both in respect to Smith and Weisman? Was Smith bound to offer the refusal to Weisman alone? Or to Weisman and Hepburn jointly? Or to them severally, each one-fourth? And, *per contra*, had Smith a preëmption right as against Weisman alone, or Weisman and Hepburn jointly? Or the two severally? The parties have not enabled the Court to answer these questions. The absence of any provision for this new state of things raises a presumption that the stipulation in question was treated and considered by all parties as being defunct.

We are of opinion that upon the death of Mr. Smith, the stipulation did not follow the land and bind his devisees in respect to it, so as to entitle the plaintiff to enforce it against them or their assignees. It could only have this effect by giving it the character *of a trust*. We can conceive of no ground to clothe it with this character. On the contrary, the considerations above suggested tend to show that the Court would not allow it to be so treated, except as between the original parties, even if an intention to make it a trust had been expressed by the terms of the agreement.

The clause whereby the parties "bind themselves, their heirs, executors, administrators and assigns, to the strict observance of this article," has no further effect than the same words added to a bond for the payment of money. It may be that the plaintiff can maintain an action at law against the personal representatives of Smith, or his real representatives—that is, his devisees, for breach of this covenant, but there is no ground on which he can treat a purchaser as holding in trust for him; because no trust was created in his favor by the (130) original agreement.

2. The plaintiff is entitled to a declaration in the decree, that he owns one-fourth of the legal and equitable estate in all the lands set out in the deed executed by Smith to Weisman and Hepburn, 1 February, 1850, free from an incumbrance or lien by reason of the mortgage executed by himself and Hepburn to Smith, and to a further declaration that the mortgage debt has been satisfied, and to a decree for a reconveyance. This equity was yielded by the defendants on the argument, except as to four acres of land, which, it is alleged, are given to the church, and four acres on which the mill is situated. In respect to which they allege a cross equity to have a specific performance of an agreement to convey the same to Smith, executed by Weisman and Hepburn. Whether the defendants will be able to establish the cross equity, or whether it can be met by the plaintiff on the ground that it was obtained without consideration, and by the undue exercise of the influence which Smith held over them by reason of his being a creditor, and having them in his power, or will, at all events, be allowed only to the extent of giving a lien on the mill as a security for the amount expended by Smith in the erection of the mill, are questions into which we will not now enter, because they are not presented in a proper manner by the pleadings. Where the defendant has an equity, he must set it up by a cross bill. This is a well settled rule of the Court. The decree, however, in this case will be so framed as to be without prejudice to this equity of the defendants, so as to enable them, if so advised, to seek to have it set up by an original bill, when the matter can be fully presented without being attended by the complication and confusion that a cross bill filed in this case would necessarily have produced, considering the very voluminous pleadings and exhibits relevant to the several equities which the plaintiff seeks to enforce.

3. The plaintiff's right to an account against the personal representatives of Smith is barred by the statute of limitations. It is true (131) that, as between copartners and tenants in common, the statute of limitations does not run until, as HENDERSON, C. J., expresses it in *Wagstaff v. Smith,* 17 N. C., 264, "There is a *cesser* of the privity or connection from which the accountability arises." In that case, and in *Northcott v. Casper,* 41 N. C., 303, the relation of the parties was not changed, but in our case, on the death of Smith, there was a change in the relation of the parties. Smith, of course, could no longer be a copartner, or a tenant in common, and consequently, an action accrued for or against his personal representatives to have an account of the profits received, which action is barred by the statute; for, although his wife and daughter acquired his estate as devisees, the estate passed to them as assignees, and the relation which had previously existed between him and the plaintiff was of course at

an end. So, the right of action in respect to the profits accrued at that time; for there was "a *cesser* of his privity or connection as tenant in common," a new relation then commenced between him and the devisees, and the case is the same as if one tenant in common sells. That is, a *cesser* of his relation as tenant in common; and a cause of action then accrues to all of the tenants in respect to the arrearages of profits, and a new relation begins between the other tenants and the purchaser.

The bill was filed 24 September, 1857. Mrs. Smith and Miss Mary sold to Winder 20 *April,* 1854, at which time there was a *cesser* of the connection with the plaintiff as tenant in common. So the plaintiff's right to an account against them is barred, except from 24 September, 1854. For all profits or moneys received for or on account of, or out of the lands after that date, he is entitled to an account as against Mrs. Smith and Miss Mary, and the defendant Winder and the Herron Mining Company. How far the fact that the developments of lead ore cropped out in so many places, and the quantity of wood was so great as to leave ample room for all the tenants in common to come and take their share, distinguishes that species of profits from the receipt of rent, either in money or produce paid by the lessees of the several houses and cleared pieces of ground in the many tracts of land, is (132) a question which may be presented by exception to the account.

PER CURIAM. Decree accordingly.

DAVID MOORE and others v. DANIEL MOORE, Executor.

In determining whether a limitation of property does or does not amount to a perpetuity, regard is had to possible, not actual, events, and the fact that the gift might have included objects too remote, is fatal.

CAUSE removed from the Court of Equity of CALDWELL.

Jesse Moore died in the said county, leaving a last will and testament, in which, after making various specific devises and bequests, the testator proceeds: "Item 7. My will is that all the rest of my property of every description, and my money, be kept by my executor, whomsoever I map appoint; it shall be kept as a fund. Should any of my children or grandchildren come to suffering, in any other way, save by idleness, drunkenness, or anything of the kind, so as to become an object of charity, I want the said executor to give a part of this to such child or grandchild."

The bill is filed by the next of kin of the testator, and prays for a distribution of this fund amongst them, upon the ground that the bequest is an attempt to create a perpetuity, and therefore void.

The cause being set for hearing upon bill, answer and exhibit, was transferred to this Court by consent.

Mitchell, for the plaintiffs.
No counsel for the defendant.

(133) BATTLE, J. Upon the best consideration which we have been able to give to this case, we are clearly satisfied that the bequest contained in the seventh clause of the testator's will can not be sustained. It is an attempt to create a fund and keep it in existence for a purpose which *may* not be finally accomplished for a period longer than that which the rule against perpetuities will allow. Whether the administration of this fund by the executor as "treasurer" is to be deemed a power or trust in him, the necessary effect of it will be that the fund will be tied up and kept from commerce during the entire lives of the testator's children and grandchildren, which it is manifest may be, and probably will be, much longer than a life or lives in being at the testator's death, and twenty-one years afterward. This makes the bequest void, although it might happen that all the grandchildren would die within twenty-one years after the death of all the testator's children. In a case of this kind, it is well known to be "an invariable principle in applying the rule under consideration, that regard is had to possible, not actual, events, and the fact that the gift might have included objects too remote, is fatal to its validity, irrespectively of the event." In the present case, it is plain that the gift of the fund *might* be needed by the objects of the testator's bounty for some time after the time allowed by the rule against perpetuities, that is, after twenty-one years from the death of the last survivor of the testator's children; see 1 Jarman on Wills, 227 *et seq.,* where the subject is fully discussed and explained; see also 2 Rop. on Leg., 298 *et seq.*

In deciding against the validity of the bequests upon the ground that it violates the settled rule on the subject of perpetuities, we do not intend to give or intimate an opinion whether the objects of the intended charity are sufficiently definite, or the manner in which they are to be ascertained is pointed out with sufficient precision.

The plaintiffs are entitled to a decree according to the prayer of the bill.

PER CURIAM. Decree for the plaintiffs.

(134)

W. H. KNIGHT, Ex'r., v. F. H. KNIGHT and wife, and others.

1. Where a testator gave property, real and personal, specifically, and then devised and bequeathed all the "balance of his estate" to certain parties in general terms, and after making his will, the testator acquired property, real and personal, it was *Held*, that this after-acquired property fell into the residium bequeathed generally, and that upon a deficiency of funds provided for the payment of debts, the after-acquired personalty was first liable.

2. Personalty in the hands of an executor or administrator, whether bequeathed specifically or otherwise, is first liable to the payment of debts, unless specifically exempted, and the real estate belonging to the deceased, whether descended or devised, is not liable until the former is exhausted.

CAUSE removed from the Court of Equity of EDGECOMBE.

The plaintiff in this suit is the executor of the last will and testament of Jesse C. Knight, and the bill is filed to obtain from the Court a construction of the said will. In the ninth clause of the will the testator bequeaths and devises as follows:

"Item 9. All the balance of my estate and effects, with all money or moneys due, I wish to be disposed of according to items third, fourth, fifth and sixth, except such perishable effects as he shall be deemed best to sell, which he shall sell on a credit of six months, with interest; and after paying all my debts and expenses of administration, the balance of the proceeds shall be distributed by the several items."

By item 3 of the will, the testator gave to W. H. Knight certain lands and personal property on certain conditions and limitations. By item fourth, he gave property, real and personal, to Sally Knight, on certain limitations. By item fifth, he gave property to W. H. Knight for the sole and separate use of Martha A. Lawrence, wife of A. B. Lawrence. By item sixth, he devised and bequeathed property to Susan, wife of A. B. Nobles.

After the making of the will, the testator acquired several tracts of land, and also a considerable amount of personal (135) property.

The plaintiff shows from an account filed that the notes and proceeds of the perishable property will be insufficient to pay the debts of the testator, leaving, after these are exhausted, debts to the amount of $11,315.54, to meet which deficiency some of the legacies will have to abate. It is for the purpose of obtaining the direction of the Court as to which of the legacies shall abate that this bill is filed.

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

Bridgers and *Rodman*, for the plaintiff.

No counsel appeared for the defendant in this Court.

MANLY, J. Upon a consideration of the contents of the will of Jesse C. Knight, we are of opinion, in the first place, that the property acquired subsequently to the making of the will, falls into the residuum spoken of in the ninth clause. According to the provisions of the statute of 1844 concerning wills, embodied in the Rev. Code, ch. 119, sec. 6, a will in reference to the real and personal estate comprised in it, speaks and takes effect as if it had been immediately executed before the death of the testator, unless a contrary intention appear from the will. As nothing appears to rebut this legal construction, its effect, in the case before us, is to throw the after-acquired lands as well as personalty into the residuum.

In the second place, we are of opinion that the *personalty* of the residuum is the fund primarily liable to the payment of debts. It is in all respects a true residuary fund not specifically bequeathed, but disposed of in general terms to a class of legatees.

It appears from a summary statement of the executor that the aggregate amount of unpaid demands against the estate is $11,315.54.

We take it for granted the residue of personalty will not be sufficient to satisfy this amount, and have considered the will with reference
(136) to the fund next liable, and conclude, in the third place, that the legacies of personalty must abate. These legacies all appear to be specific, and they must, therefore, abate ratably.

Since the statute of 1846, Rev. Code, ch. 46, sec. 44, the personalty in the hands of an executor or administrator, whether it be bequeathed specifically or otherwise, is first liable to the payment of debts, unless specifically exempted; and the real estate belonging to the deceased, no matter in what condition it is found, whether descended or devised, is not liable until the former is exhausted; *Graham v. Little,* 40 N. C., 407.

By operation of the wills act of 1846, the lands acquired by Jesse C. Knight subsequently to the making of his will, pass under the residuary clause. The distinction in this respect between real and personal property, theretofore existing, is thus abolished; and both pass alike under a bequest of the residue. What would have been the effect of this without our act of 1844, prescribing the order in which real and personal property shall stand in their liability to pay debts, it is unnecessary to enquire. By that act, personalty is put in the front, and we accordingly hold that the specific legacies of personalty must abate.

PER CURIAM. Decree accordingly.

Cited: Wiley v. Wiley, 61 N. C., 134; *Saunders v. Saunders,* 108 N. C., 330; *University v. Borden,* 132 N. C., 489.

(137)

R. M. WHITFIELD and wife and others against JAMES H. CATES.

1. Where there is no allegation of fraud, imposition, oppression, or mistake, the court will not set up a parol agreement, and declare an absolute deed to be a mere security for money advanced.
2. Where a valuable consideration has been paid by the person to whom an absolute deed for slaves is made, the allegation of a parol trust in favor of a third party, forms no exception to the rule in courts of equity, in respect to declaring such a deed a mere security for money loaned.
3. Although a plaintiff may fail as to the principal equity he seeks to establish, he may fall back on a secondary equity, provided it is not inconsistent with the principal equity, and the allegations in the bill are sufficient to raise it.

CAUSE removed from the Court of Equity of PERSON.

The bill is filed by R. M. Whitfield and his wife, Susan, and his children, alleging that the said R. M. Whitfield was improvident, and being desirous to provide for his wife and children, the said other plaintiffs, he made a conveyance, dated March, 1840, of seven slaves (naming them), being all the slaves he owned, for the consideration, expressed in said conveyance, of $750; that said conveyance was made upon the express understanding and agreement that the defendant was to hold the slaves for the benefit of, and in special trust and confidence for, the wife and children of the said R. M. Whitfield, and that they were to have the privilege of redeeming the same at any time by paying him whatever amount he might advance of the $750, with interest; that the defendant paid, at the time, $330 in cash, and gave up a note he held on the said R. M. Whitfield for $70, making in all $400, and executed a bond for $350, the balance of the $750; that some short time thereafter, in the absence of the plaintiff R. M. Whitfield, the defendant prevailed on his wife, the plaintiff Susan, to give him up the bond for $350, alleging as a reason for her so doing the improvidence of her husband; that he being a relation and a professed friend, she had entire confidence that he would deal fairly with the plaintiffs in respect to the said bond; that the said slaves were worth at least $1,300 at the time; and that the said amount of $400 was all that defendant has ever paid toward said slaves; that the defendant did not take possession of the slaves at first, but a short time after the contract he came for them, and, under a pretense set up by him that it was necessary to keep off creditors, for him to take possession of the property, and believ-
ing in the sincerity of his purposes, the plaintiffs consented for (138)
him to take the slaves into his possession, except one, which remained in the possession of the plaintiffs; that afterwards he sent them all back to plaintiffs, who kept possession of them for six or seven years; that some eight or ten years ago, under the like delusive promises and assurances, he again got possession of the slaves, except the same one

which had formerly remained with them; that by the same kind of delusive statements and professions of kindness and affection, he lulled the suspicions of the plaintiffs, and did, from time to time, put them off when they called upon him to redeliver the slaves to them, and otherwise perform the trust he had undertaken in behalf of the wife and children; that about a year before the filing of the bill, the defendant had the said conveyance registered, and has since then set up claim to the absolute right to the slaves. The bill, among other interrogatories, calls on the defendant to answer as to the said bond for $350, whether the same has ever been paid to plaintiffs, or either of them, or to any one else? and if so, when? and where? and to whom?

The prayer is that the defendant may be declared a trustee in behalf of the wife and children, and that an account may be taken of the amounts paid and of the hires of the said slaves, and for general relief.

To this bill the defendant demurred. There was a joinder in demurrer, and the cause set down for argument, and sent to this Court.

Reade and *Fowle,* for the plaintiffs.
Graham, for the defendant.

PEARSON, C. J. The principal equity which the bill seeks to enforce is the ordinary case of converting a deed absolute on its face into a security for money, by parol proof of an agreement to that effect.

There is no allegation of fraud, imposition, oppression or mistake, which is necessary in order to bring the case within the applica-
(139) tion of that doctrine, as has been decided over and over again by this Court. On the argument, it was insisted that this case differs from the ordinary one, for here the bargainee, upon repayment of the money, was not to reconvey to the bargainor, but was to convey to *his wife and children,* in whose favor the trust was declared, and *Shelton v. Shelton,* 58 N. C., 292; *Riggs v. Swann, ante,* 118, were relied on. The position that this is the case of parol evidence to establish a declaration of trust as distinguished from a *condition,* is not tenable, and the cases cited have no application. The defendant paid a part of the purchase money and secured the balance by note. This *raised a use for him,* and when the legal estate passed, the two united so as to give him the estate, both legal and equitable, and by the force and effect of the deed, he became the owner to all intents and purposes. The purpose of the parol evidence is to show an agreement by which his estate was to close, and he was to hold in trust for the wife and children of the bargainor on repayment of the purchase money; which is neither more nor less than a condition, by which his principal estate was to be defeated; in other words, a deed, absolute on its face, and vesting in the bargainee an absolute estate, is to be converted into a security for money,

and upon his estate being defeated, he is directed to convey to the wife and children of the bargainor, instead of the bargainor himself, which is a distinction without a difference, for, in either case, an absolute estate is defeated by parol evidence. In *Shelton v. Shelton,* a grandmother *paid the purchase money,* and instead of taking the title herself, directed the title to be made to A, and, by parol, made a declaration of the trust in favor of her grandchildren. By force and effect of the deed. A acquired only *the legal estate,* and a trust would have resulted to the grandmother, by reason of her having paid the price, so the effect of the parol declaration was simply to *direct the trust* from herself and give it to the grandchildren.

In *Riggs v. Swann,* a father had mortgaged two slaves. The mortgagee agrees to take one of the slaves, absolutely, in satisfaction of the debt, and reconvey the other. The father directs the title (140) to be made to A, and, by parol, makes a declaration of the trust to wit, A is to hold in trust until the hire pays off a debt due him, and then in trust for two of the children of the mortgagor. A had paid nothing for the slave, and but for the declaration would have held the legal title, in trust, for the father. So, the effect of the declaration was simply to divest *the trust* from himself and give it to the two children after a debt was paid.

In these cases, the person to whom the deed was made never had the use or equitable estate, and the effect of the deed was simply to pass to him the legal title. But in our case the defendant, by force of the deed, acquired absolutely both the legal and equitable estate, and the attempt is, by parol evidence, to defeat his estate. "Note the diversity."

Although the plaintiffs have failed to establish their principal equity, there is a secondary equity disclosed by the bill. It is alleged that the defendant induced the wife of the plaintiff to give up to him the note for $350, which he had given to secure the balance of the purchase money, without paying anything for it, and under the delusive assurance that it was best for her to do so, because of the improvidence of the husband. So, the defendant holds the note thus fraudulently procured to be surrendered to him, and has never paid the amount due thereon. The demurrer admits these allegations and the fraud charged. It follows that it can not be sustained in respect to this note, and being bad as to part of the bill, it is bad as to all, according to a well settled rule of this Court.

It is also well settled that although a plaintiff may fail as to the principal equity which he seeks to establish, he may fall back on a secondary equity, provided it is not inconsistent with the principal equity, and the allegations in the bill are sufficient to raise it. It is certainly not inconsistent with the main purpose of the bill for the

plaintiffs, failing in that, to insist that the defendant should, at least, pay the full price, which he agreed to give, and not avail himself of a fraud in procuring the surrender of the note, which he had (141) executed as security for a part of it, and the allegations are made with sufficient certainty.

PER CURIAM. Demurrer overruled.

Cited: *Shields v. Whitaker,* 82 N. C., 521; *Knight v. Houghtaling,* 85 N. C., 34; *Wilkie v. Womble,* 90 N. C., 255; *Davis v. Ely,* 100 N. C., 284; *Gorrell v. Alspaugh,* 120 N. C., 367; *Hughes v. Pritchard,* 122 N. C., 62.

J. H. JACKSON and wife and others against E. H. RHEM, Jr., Adm'r, and others.

Where a man and woman live together as man and wife, and are so reputed in the neighborhood, up to the death of one of the parties, and have children which they treat as legitimate, a court will not declare against the marriage except upon the most overwhelming proof that there was no marriage.

CAUSE removed from the Court of Equity of LENOIR.

This was a petition for a distributive share, and it sets out that Edward Rhem, late of the county of Craven, died intestate in the year 1855, and left a large personal estate, which went into the hands of the defendant E. H. Rhem, Jr., as his administrator; that Edward Rhem left no children, but left surviving him a brother and a large number of nephews and nieces, children of deceased brothers and sisters, among which latter class are the *feme* plaintiffs in this suit, who are the children of Melchor Rhem, a deceased brother of the testator, Edward Rhem; and that representing their deceased father, they are entitled to a distributive share of the estate of the said Edward Rhem, deceased.

The defendants, in their answers, deny that the *feme* plaintiffs are entitled to represent their deceased father in the distribution of the said estate, being, as the answers allege, illegitimate children. Testimony was taken on both sides, from which it is apparent that Melchor Rhem and the mother of the *feme* plaintiffs lived together for twenty years as man and wife, and were reputed as such in the neighborhood, but there was no evidence that they had been actually married. (142) A copy of a marriage bond, certified by the Clerk of the County Court of Lenoir, was produced, which bond recited that Melchor Rhem had obtained license to marry Alice Davis, the mother of the *feme* plaintiffs.

Several witnesses testified that they had heard Melchor Rhem say on

several occasions, both before and after the death of his reputed wife, that he had never married her.

The cause being set for hearing upon bill, answer, exhibits and proofs, was sent to this Court by consent, and after argument here, the Court directed issues to be tried in the Superior Court of Lenoir:

1st. Were the said Melchor Rhem and Alice Davis ever lawfully married?

2d. Were the plaintiffs, or either of them, born in lawful wedlock?

These issues were submitted to a jury, who found both in favor of the plaintiffs. Which finding was certified to this Court, and at this term the defendants' counsel moved the Court to dismiss the plaintiffs' bill, notwithstanding the verdict, or to order another trial of the issues, on the ground that the verdict is against the weight of the evidence.

Stevenson, for the plaintiffs.
J. W. Bryan and *G. Green,* for the defendants.

BATTLE, J. The issues made by the pleadings in this case were, first, whether the defendant, E. H. Rhem's intestate, Melchor Rhem, was ever lawfully married to the mother of the *feme* plaintiffs, and if so, were the said *feme* plaintiffs born in lawful wedlock? Upon these disputed questions of fact, the testimony was so conflicting, and it was so doubtful on which side the weight of it preponderated, that we felt unwilling to decide it without the aid of the verdict of a jury of the county where the alleged man and wife had lived. Issues for that purpose were, accordingly, under an order of this Court, sent down to be tried in the Superior Court of Law for that county; and upon the trial there had, the jury have found both issues in favor of the plaintiffs, of which a certificate has been properly transmitted to us. The (143) counsel for the defendants have appeared in this Court and moved us, upon a consideration of the testimony, to render a decree dismissing the plaintiffs' bill, notwithstanding the verdict, or to order another trial of the issues, upon the ground that the verdict on the first trial is decidedly against the weight of the evidence. We do not feel at liberty to grant either alternative of the defendants' motion. We are of opinion that when a man and woman have lived together for many years, treating each other as man and wife, and have been so reputed to be in the neighborhood where they lived during all the time in which they thus cohabited; and where they have had children which were treated by the parents as legitimate, up to the death of the latter, we think that the testimony which should induce a Court to declare against the marriage of the parties, and thereby to bastardize their issue after their deaths, ought to be so overwhelming as to leave not a doubt about the facts thus declared. It was a well known rule of the

ecclesiastical law, that if two persons who labored under canonical disabilities intermarried with each other, the marriage could not be declared to have been void after the death of both or either of the parties. That rule does not prevail in our law, because we do not recognize the ecclesiastical as part of our common law of marriage, but the principle upon which it was founded, that the validity of a marriage ought not to be questioned after the parties, or either of them, have by death been deprived of the opportunity of supporting it by proof, may well influence our Courts in deciding upon the existence of a marriage and the legitimacy of issue after the death of both or either of the parents.

Our opinion is, that the plaintiffs are entitled to a decree declaring the facts found by the issue, and for the relief consequent thereon.

PER CURIAM. Decree accordingly.

Dist.: Ferrall v. Broadway, 95 N. C., 555; *Berry v. Hall,* 105 N. C., 165.

(144)

THE ATTORNEY-GENERAL against JEREMIAH N. ALLEN.

1. After a cause is in this court and the party is ready to have it heard, a motion to dismiss, for want of a prosecution bond, will not be entertained.
2. Chapter 99, section 8, Revised Code, which directs the tax on legacies to strangers in blood, imposed by the preceding section, to be retained by the executor or administrator "upon his settlement of the estate," and directs the tax to be paid into the clerk's office, has reference to his settlement with the individual to whom the legacy is bequeathed, and not to the final settlement of the estate, and the tax must be paid into the office on the settlement with the legatee.

CAUSE removed from the Court of Equity of CRAVEN.

This was a bill of information, filed by William A. Jenkins, Attorney-General, against the defendant, Allen, who is the administrator *cum testamento annexo* of Isham Jackson, deceased. It alleges that, by his will, Isham Jackson bequeathed a considerable pecuniary legacy to a natural son, one Daniel Jackson; that by the revenue law of North Carolina, a tax of three *per cent* upon this legacy is due the State, which sum the defendant has failed to pay over upon demand.

The answer admits the material facts averred in the bill, and states the amount of the legacy in question to be $632.84, upon which the tax amounted to $18.98. This sum defendant paid into the Clerk's office on 20 October, 1860, more than six months after the bill was filed. The defendant alleges that, by the terms of the statute upon revenue, he was not bound to retain and pay over the tax until the final settlement of the estate, which final settlement had been delayed by the pendency of a suit against him as administrator.

The eighth section of the ninety-ninth chapter of the Revised Code, upon the construction of which the case is made to turn, is in the following words, viz.:

"The executor or administrator of every such deceased person, on his settlement of the estate, shall retain out of the legacy or distributive share of every such legatee or next of kin, the tax properly chargeable thereon; and in case he may have sold any real estate, and there shall be any surplus in his hands, not needed to pay debts and charges, he shall retain the proper tax of each person entitled to such (145) surplus; which taxes he shall pay to the Clerk of the Court of Pleas and Quarter Sessions of the county wherein the will was proved or administration granted."

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

Henry C. Jones, for the plaintiff.
J. N. Washington, for the defendant.

PEARSON, C. J. 1. The motion to dismiss for want of a prosecution bond, made in this Court, is not allowed. Such matters should be attended to in the preliminary stage of a suit. After a case is in this Court and the party is ready to have it heard, a motion to dismiss for want of a prosecution bond is "behind time."

2. The objection, which is faintly made by the answer, that an illegitimate son is not "a stranger in blood," was properly abandoned on the argument.

3. The point made on the construction of the statute, Rev. Code, ch. 99, sec. 8, is against the defendant. "On his settlement of the estate," taken in connection with the words, "shall retain out of the legacy or distributive share of every such legatee or next of kin," does not refer to a final settlement of the estate, but to his settlement, so far as the legatee or distributee is concerned, out of whose legacy or share the tax is to be retained. When an administrator, as in this instance, pays over a legacy and retains out of it the amount of the tax, for what purpose should he keep it in hand until there can be a "final settlement" of the estate? *Cui bono,* except to tempt him to apply the amount (which would otherwise be idle in his pocket) to his own use?

4. It appears by the exhibit filed that the defendant paid the amount of the tax to the County Court Clerk on 20 October, 1860, but the bill was filed March, 1860. So, the defendant is again "behind time"; for taking the matter as ground against a further prosecution of the suit, in order to be a bar, it should have been accompanied (146) by the payment of all costs up to that date. The plaintiff will have a decree for the amount of the tax (to be satisfied by the money

in the Clerk's office) and for his costs, which really seems to be the point in the case.

We will take occasion to say that the payment of taxes is a duty which every good citizen ought to attend to. If he is remiss in regard to it, he has no right to object to a "bill of cost." The State is not, and ought not to be, required to be at the expense of having an agent to make a demand in each and every case. Every good citizen should be prompt to pay his taxes.

PER CURIAM. Decree accordingly.

JOHN C. JOHNSTON against JOHN B. CHESSON, Jr., and others.

Under the statute of distributions in this State, Rev. Code, chap. 64, secs. 1 and 2, representation is not admitted among collateral kindred after brothers' and sisters' children, and, consequently, uncles and aunts of an intestate take to the exclusion of the children of a deceased uncle.

CAUSE removed from the Court of Equity of WASHINGTON.

The bill is filed by the administrator of Otis W. Chesson, and prays the instruction of the Court as to his duty in the administration of the estate. He sets out that his intestate left him surviving an uncle, one Nathaniel C. Chesson, an aunt, Sarah Chesson, who has since married one Swain, and a cousin, John B. Chesson, Jr., son of a deceased uncle. The defendants in this suit are the uncles and aunts and the said John B. Chesson, Jr., who claims an equal share with his uncle and aunt in the estate of the intestate. The cause being set for
(147) hearing upon bill and answer, was transferred to this Court by consent.

H. A. Gilliam, for the plaintiff.
Winston, Jr., for the defendant.

BATTLE, J. The bill is filed for the sole purpose of obtaining the decision of the Court upon the question whether, in the distribution of the personal estate of an intestate, the son of a deceased uncle can, by right of representation, claim an equal share with an uncle and aunt, who are the nearest of kin to the intestate. This question is settled by the express words of our act of distributions, which says that in the case of an intestacy, "if there be neither widow nor children, nor any legal representative of children, the estate shall be distributed equally to every of the next of kin of the intestate, who are in equal degree, and to those who legally represent them," with a *proviso* "that in the distribution of the estate there shall be admitted among the collateral kin-

dred no representative after brothers' and sisters' children"; see Rev. Code, ch. 64, secs. 1 and 2. There was a similar provision in the English statute of distributions of the 22d Charles II, and it has always been held that among the uncles and aunts and other more distant kindred of an estate, there could be no right of representation allowed; 2 Williams on Executors, 930. In the rules of the descent of real estate, the right of representation is indefinite, as well among collateral as lineal kindred; see Rev. Code, ch. 38, sec. 1, rule 3. This has always been the law, both in England and in this State (see *Clement v. Cauble,* 55 N. C., 82; *Haynes v. Johnston,* 58 N. C., 124), and in consequence of it the real estate of an intestate will often devolve, in part, upon a person who can not take any portion of his personal estate. The law upon the subject has been so long and so firmly established that it is unnecessary for us to attempt an explanation of the reasons upon which it was originally founded.

PER CURIAM. Decree accordingly.

Cited: *Nelson v. Blue,* 63 N. C., 660.

(148)

ANDREW S. MASON and another against DEMPSEY B. SADLER, Adm'r.

Where a testator bequeathed as follows: "I lend to my wife, during her life, all my negroes (three in number) for the purpose of raising and educating my two sons," which was but a reasonable share of her husband's estate, and gave in the same will, in appropriate terms, to his wife, as guardian to his two sons, the remainder of his estate, it was *Held*, that the former clause conferred upon her, for life, a beneficial interest in said property, with a recommendation in behalf of the two sons.

CAUSE removed from the Court of Equity of HYDE.

Osborne Foy Mason, by his will, dated 14 January, 1841, bequeathed as follows: "First, I lend to my wife, Polly, during her life, all my negroes, to wit, Charles, Clarissa and Betsy Ann, and their increase, for the purpose of raising and educating my two sons, (Andrew) Shanklin and Ausbond, * * * and for her year's provision, one hundred and twenty dollars." "I give and bequeath to my two sons, Shanklin and Ausbond, at the death of my wife, Polly, all my negroes, viz., Charles, Clarissa and Betsy Ann, and their increase," with contingent limitations over.

"All my perishable estate, except such that I have allotted to my widow, I wish to be sold on a credit of six months, and at the expiration of two years, after proving the will, I wish my executor to pay over to my widow, as guardian of my two sons, all the funds on hand, for

the purpose of raising and educating my sons, and for the purpose of her providing them a dwelling and land to live upon."

By a codicil, he devises as follows: "The land I lately purchased of Joseph Swindell, I have lent to my wife her lifetime, and at her death I give and bequeath the same to my two sons, Shanklin and Ausbond." The bill asserts an equity in behalf of the two sons, Andrew Shanklin and Osborne (called in the will Ausbond), as arising to them from the first clause of the above will, and seeks to have the widow declared a trustee for their benefit in respect to the slaves therein mentioned. Mrs.

Mason, the mother, lived on the land mentioned in the codicil (149) from 1841 to 1847, and in that year was married to one Richard

Sadler. Before this marriage, one of the slaves mentioned in the will of Foy Mason, to wit, Clarissa, was sold by the administrator with the will annexed of her husband, for the payment of debts, and Mrs. Mason became the purchaser at four hundred dollars; of this sum, she paid out of the money arising to her from her husband's will, for her year's allowance, $120, and some further amount out of the money arising from the hire of Charles. The unpaid balance of this note was discharged by Sadler, the second husband. While residing on the land left her by her husband, the plaintiffs, who were small, lived with her, and did some light work, and afterwards, when she married, they went with her to the dwelling of her second husband and spent some year or two in that family, sometimes working in the crop. They afterwards lived at other places in the neighborhood and worked. Sadler, the second husband, took all the slaves into his possession, and kept them during the lifetime of his wife; after her death, which occurred in 1850, he delivered Charles and Betsy Ann to the guardian of the plaintiffs, but as to the woman Clarissa and her children, he retained them, insisting that, by the purchase of his wife and the payments made by her and himself, the absolute property in these slaves vested in him. The plaintiffs were not sent to school at all, and it appeared were, at times, badly clad, but this seemed to arise more from the straightened circumstances of the mother, during her widowhood, than from neglect or indifference. It took all that could be made by the hire of Charles and Betsy Ann to support the family in the condition mentioned. As to Clarissa, she soon had a family of small children, and added to the expense of the family. On the death of Richard Sadler, this suit was brought against his administrator for the recovery of Clarissa and her children, alleging that she had been paid for out of the hires of the said three slaves, which they said belonged to them; alleging, also, that they had never received the benefit of the said property, either in maintenance or education, or in any other way, and praying an account of the hires of the slaves while in the possession of the said

Richard Sadler, and of the Woman Clarissa and her increase (150) since his death.

The answer of the administrator of Richard Sadler insists that the beneficial use of the slaves belonged, by a proper construction of the will, to Mrs. Mason, and as such, the right to the two slaves, Charles and Betsy Ann, for his wife's life, vested in him, and as to Clarissa, she was his by his wife's purchase.

The proofs taken in the cause establish the facts of the case as stated.

The cause was set down to be heard on bill, answer and proofs, and sent to this Court.

Donnell and *Carter,* for the plaintiffs.

No counsel appeared for the defendant in this Court.

MANLY, J. The question presented by the pleadings is, whether the language used by the testator, Foy Mason, in the first clause of his will, creates a trust, in his wife, of Charles, Clarissa and Betsy, for the sons, Andrew and Osborne.

It seems that Clarissa was sold by the administrator to pay debts—bought by the widow and paid for, partly, by funds arising from the hires of the other slaves, and the object of the bill is to follow the fund and to hold the property in which it was invested as security *pro tanto.*

Thus, the equity of the bill rests upon the principle that the slaves loaned to the wife for life was a trust, solely for the benefit of the children during that term. Indeed, that is the leading allegation of the bill. This, we think, is a misconstruction of the will. Considering the clause in connection with the other bequests of the will, we are of opinion the wife, under the bequest, took an absolute legal estate, and that the words, "for the purpose of raising and educating my two sons," have not the effect to qualify that estate. Our interpretation is, that the words mean to give a reason for the gift, and in that way to suggest and (151) recommend a duty that was incumbent on her.

This construction is strengthened by reference to the terms of the provision, made in another part of the will, for the sons. It is there directed that certain property be sold, and after two years from the probate of the will, be paid over to his widow, *as guardian* to his sons, for the purpose of raising and educating them, etc. The language used in these clauses is so different that we can not suppose the testator meant the same thing. The inference is, that as the latter bequest was certainly intended for the benefit of the sons, the former was intended for that of the wife, with an admonition, as she had the means afforded her, to take care of the children.

It will be found, upon examination of the will, that if the wdiow takes no beneficial interest in the bequest of the slaves aforesaid, that a very

inadequate provision is made for her. This is contrary to the general tenor of the instrument, and to the dispositions towards the wife manifested in it. It would be calculated to provoke a dissent, inevitably, and the consequent disturbance of his arrangements, which he could not have desired or contemplated. The facts of the case show that with all the assistance given in the will, it was a hard struggle for her to keep the property together and maintain herself and family in the humblest manner. But a small portion—about $80—of the income from the slaves was devoted to the purchase of Clarissa, the balance having been paid by the application of her year's provision to that object, and by moneys furnished by her second husband, the defendant's intestate.

The term for which the property is given, it seems to us, is significant of the purpose of the testator. A loan for life is appropriate and usual in cases of gift for the donee's own use, but it is of rare resort where it is intended the donee shall hold for the benefit of others. It is not such language as would naturally be adopted for effecting a purpose of that kind.

There is no warrant, therefore, either in the language of the bequest or the intention of the testator, as gathered from the entire in-
(152) strument, for severing the beneficial interest from the legal estate.

The language in which the bequest is clothed is simply demonstrative, and amounts, at most, only to an injunction on the legatee to enjoy the property given in a particular manner.

This case is distinguished from *Little v. Bennett*, 58 N. C., 156. There, the *entire estate* of the testator was given to the wife to raise and educate the children, and to dispose of among them as she might think proper. This was held to confer a beneficial interest on both, which might be enforced in a Court of Equity. But it was placed expressly upon the ground that it could not be intended for herself alone, because there would then be nothing for the children; nor could it be intended for the children alone, because in that case, the mother would be left destitute, and, therefore, it was intended to be given to both. In the case before us, distinct provision is made for each, and we are of opinion the words annexed to the bequest for the wife do not confer upon the children rights that will be enforced by the Court.

PER CURIAM. Bill dismissed.

EDWARD WHITE and wife and others against JOSEPH HOOPER, Adm'r, and others.

1. A bill will not lie at the instance of the heirs, against the administrator of one who had executed a bond to make title, to enjoin the latter from making a deed to the obligee, upon the ground that he had not paid the purchase money, but fraudulently pretended to have had done so, and to nullify the contract. It would be the duty of the administrator, if the money, in such a case, was not collected, to enforce the payment, and he would be liable if he failed to do so.
2. The remedy of the heirs at law, in a case where the obligee had not paid the purchase money on a bond to make title, would be to file a bill against such obligee to compel a specific performance.

CAUSE removed from the Court of Equity of ROCKINGHAM. (153)

The bill is filed by the heirs-at-law of James D. Taylor, and sets forth that in 1834, their ancestor made a bond to convey a tract of land (describing it) to Anderson Crowder, whenever the purchase money for the same should be paid; that the said purchase money has never been paid; that the said Anderson was very poor, and was always unable to pay the sum agreed in said bond to be paid; that their ancestor died in 1839, and the said Anderson in.....; that no administration was taken on the estate of the said James D. Taylor until the defendant took out letters at August Term, 1856, of Guilford County Court, for the express purpose, as plaintiffs believed, of making a deed to the heirs of the said Crowder, on the assumption that the purchase money was paid to the said Taylor in his lifetime, and they say, by way of anticipation, that the defendants, the children of the said Crowder, are setting up certain mutilated bonds, from which the names of the obligor has been cut, which they pretend were given for the said land and paid and taken up by their ancestor in his lifetime; but that the same are feigned, and gotten up for the occasion. The prayer is that the administrator, Hooper, may be enjoined from making title to the premises, and that the said simulated papers may be surrendered for cancellation.

The defendants answered very fully, but as the merits of the equity as disclosed in the bill are alone treated of by the Court, a further notice of the pleadings is not necessary.

Morehead and *Gorrell,* for the plaintiffs.
Fowle, for the defendants.

MANLY, J. This is a bill filed by the heirs-at-law of James D. Taylor against the administrator and heirs-at-law of Anderson Crowder, to enjoin the administrator from making a title to the latter, upon the allegation that their ancestor did not pay for it. The bill admits that

Taylor executed a bond for a title, but alleges that the evidences
(154) of payment have been fraudulently procured or fabricated. The prayer is that a conveyance of the land may be perpetually prevented by an injunction; or, if already made, that the deed may be recalled and cancelled, and that the evidences of payment may be impounded.

We think the plaintiffs have mistaken their equity. Their ancestor having entered into the bond, the administrator, under the provisions of the Revised Code, ch. 46, sec. 37, is bound to carry it into execution according to its conditions. If the money has been paid, the administrator's sole duty is to make the title; if it has not been paid, his duty is to collect, and, thereupon, to make title. So that, in either case, he is charged with the specific execution of this testator's obligation.

The equity of the heirs-at-law of Taylor, according to the allegations of their bill, and upon the supposition that the purchase money was never paid, would be to call for a specific performance themselves, and not to nullify the contract altogether; or, in calling the administrator to an account, they would have a right to regard the failure to collect this debt, or the making title without requiring its payment, as a culpable negligence or waste in respect to his assets, and make him account for the same.

The above view of the case is taken upon the allegations of the bill alone, disconnected from the answers and proofs. It is due to the latter to say that they do not leave the merits of the bill unaffected.

The complainants are not entitled to the relief they seek, and the bill must be

PER CURIAM. Dismissed with costs.

Cited: *Grubb v. Lookabill,* 100 N. C., 271.

---

(155)

WILLIAM C. SANDERLIN and wife against WILLIAM ROBINSON and others.

Where a woman and her intended husband, upon the eve of marriage, were induced by her brothers to sign a marriage contract, by which her property was to be conveyed to trustees in such manner as to deprive her not only of the right to dispose of the rents and profits thereof during coverture, but also of the right to dispose of the property itself, both during the coverture and afterwards, if she survived, and gave the ultimate remainder over after her death without issue, she being at the time advanced in life, it was *Held*, that such a contract, unless proved by the clearest testimony to have been fully understood and freely assented to by the intended wife, must be declared fraudulent as to her, and inoperative as against the husband, except so far as it can be presumed that he freely assented to it.

SANDERLIN *v.* ROBINSON.

CAUSE removed from the Court of Equity of NEW HANOVER.

The complainants in this suit being about to be married, the brothers of Mrs. Sanderlin, then Margaret Robinson, induced them to sign a deed of marriage settlement, conveying to trustees certain property, land and slaves, which was owned by Margaret Robinson absolutely. This deed is in the following words:

"STATE OF NORTH CAROLINA—New Hanover County.

"This indenture, made this the 1st day of July, in the year of our Lord one thousand seven hundred and fifty-eight, between Margaret Robinson, of the State and county aforesaid, of the first part, and William Sanderlin, of the State and county aforesaid, of the second part, and William Robinson and John A. Corbitt, of the State and county aforesaid, of the third part, witnesseth: That whereas, a marriage is about to be solemnized between the said Margaret Robinson and William Sanderlin, and it is agreed by and between the said Margaret Robinson and William Sanderlin, that if the said marriage should take effect, then, notwithstanding the said marriage, he, the said William Sanderlin, his heirs, executors, administrators or assigns, shall not intermeddle with or have any right, title or interest, in law or equity, in or to any part (156) of the estate, real, personal or perishable, now belonging to Margaret Robinson. Now, this indenture witnesseth, that for the making of the said agreement good and effectual in law, and for the keeping and preserving the several estates above mentioned, to and for the separate use of her the said Margaret Robinson during her life, and should she die without issue, then the estate to return to her present heirs, before the marriage, and so that the same shall not be in the power or disposal of the said William Sanderlin, or liable to the payment of his debts and incumbrances, he, the said William Sanderlin, doth, for himself, his executors and administrators, covenant, promise and agree that all the profits or increase that hereafter shall be made of the same shall be ordered, disposed and employed by the said William Robinson and J. A. Corbitt, trustees, for such uses and interests and purposes, and in such manner and form, as the said trustees may think proper, and it shall also be lawful for the said trustees, at any time from and after the said marriage shall take effect, to commence an action or suit at law or equity against any person or persons for recovering to the said Margaret Robinson, the said trustees doth promise and agree for themselves, their heirs and assigns, to do and execute all and every such further act or acts for the better settling, receiving the moneys, goods and estates of the said Margaret Robinson, declared for her separate use and benefit, provided also, and it is concluded and agreed by and between all the said parties to these presents, that the said trustees shall be indemnified and

saved harmless out of the said separate estate of the said Margaret Robinson, from all manner of costs, charges, damages or any trouble which they may sustain or incur for recovering any part of the estate of the said Margaret Robinson, or any other account whatever relating to the said separate estate."

The deed is signed and sealed by all the parties thereto, and in the presence of two attesting witnesses; and it was read over to the parties a few minutes before the ceremony, Sanderlin remarking at the time that he did not understand it, but would sign it, as he was not
(157) marrying for money. The complainant, Margaret, at the time of her marriage, was about forty-five years of age, and was a woman of fair understanding, though of limited education. The deed in question was prepared by the direction of the brothers of complainant, Margaret, and was presented to her and Sanderlin for the first time just before the ceremony.

It was in evidence that a deed had been prepared at the request of Margaret, in which was reserved to her the right of disposing of her property, during coverture and afterwards, should she survive, and this being unsatisfactory to the brothers, they had the one in question prepared as above recited.

There was much testimony taken, but in view of the case taken by the Court, the Reporter deems it unnecessary to set it out. The bill is filed to have the marriage articles reformed and corrected, so as to settle and secure the real and personal estate of complainant, Margaret, to her sole and separate use, with power to dispose of the same at any time in such manner as she may think proper, and for general relief.

The cause being set for hearing upon bill, answers, exhibits and proofs, was sent to this Court by consent.

W. A. Wright, for the plaintiffs.
Person and *Strange,* for the defendants.

BATTLE, J. The bill is filed for the purpose of having a marriage contract, alleged to have been executed by the plaintiffs upon a misapprehension and mistake of its terms, corrected, and a settlement made in conformity with the real intention of the parties. There are some allegations of fraud and undue influence exercised over the *feme* plaintiff, which are not sustained by any competent testimony, and which we shall, therefore, dismiss from our consideration. Indeed, it is hardly necessary for us to notice the extrinsic testimony in relation to the execution of the contract at all, except merely to say that it tends to support the inference, which the law draws from the terms of the contract

itself, that they are, *per se,* a fraud upon the rights of the *feme* (158) plaintiff, and must be relieved against in this Court.

The property which the parties intended to settle by the instrument which they executed, belonged, before the marriage, exclusively to the woman. By the contract, she is made to give up her right to dispose of it, by deed or otherwise, not only during coverture, but even after the death of the husband, in the event of her surviving him. More than this, she renounces the privilege of receiving and disposing of the rents and profits of the estate during the coverture, the instrument providing that they shall be "ordered, disposed and employed by the trustees for such uses, interests and purposes, and in such manner and form, as the said trustees may think proper." As a final disposition of the estate, it is, after a life estate reserved to her, limited, "in default of her issue, to return to her present heirs before marriage." The provision in favor of her issue could hardly have been expected to amount to much, when it was remembered that she had arrived at the age at which women, ordinarily, cease to have offspring. The case, then, presents this singular result, that a woman of the mature age of forty-six, having a comfortable estate in land and slaves, is, for the privilege of getting married, induced by her brothers to enter into a contract, by which her intended husband is deprived not only of any benefit to be derived from her property during coverture, but of every possibility of getting it, or any part of it, after her death, should he be the survivor; she submits to have her fee simple estate in the lands, and her absolute estate in the slaves, cut down to a life estate; her power of disposing of the property is taken away, both during and after coverture, and even the rents and profits are to be expended by the trustees as they may think proper; and it is substantially limited after her death to persons who are her relations, indeed, but entire strangers to the consideration upon which the contract was founded.

Such a contract, unless proved by the clearest testimony to have been fully understood and freely assented to by the intended wife, must be declared to be fraudulent as to her. In laying down this (159) proposition, we are fully sustained by the decision of this Court in *Scott v. Duncan,* 16 N. C., 403. There, a settlement, and not a mere contract for a settlement, was made, in which the estates were settled to the use of the husband and wife for their joint lives, but not subject to his debts or disposal; and if she survived, to her for life; and upon her death, without issue living, over to her two sisters and their children. RUFFIN, J., who delivered the opinion of the Court, made some remarks so applicable to the case before us, that we can not do better than quote his language:

"A most important circumstance presents itself to our consideration

upon first opening this case. The deed is an absolute and irrevocable disposition of the property, although made by a person who was not likely to have issue. That an absolute settlement should be made on the children of the marriage, would not surprise us. We should expect that the husband would require it, and not leave it to the wife, without his consent, or that of the trustee, to appoint it away to strangers, or to the issue of another marriage. But here, issue, though mentioned in the deed, could hardly have been anticipated by a lady of fifty years of age. In such a case, the want of a power of revocation and reappointment astonishes. It is against the proneness of the human heart to retain the dominion over property. But if we are surprised at finding no such power reserved to the wife during the coverture, how much more must we be struck when we come to see that although the deed contemplates her surviving the husband, yet, in that event also, her hands are perfectly tied. Her estate does not become her own again, though her necessities may require a sale. She is not even allowed to devise it among her own relations. This deed fixes, by irreversible doom, the course of the lady's estate, against her own necessary use of it, and power of reasonable disposition after discoverture; and this, not as against her own children, but as to collaterals, who are strangers to the consideration upon
(160) which it was made. It is impossible for a Court of justice to say that any extrinsic evidence—anything out of the deed itself—could entirely remove the suspicion of fraud, or of mistake, arising from gross ignorance in the parties, which these strange omissions create. Nothing but imposition, or taking advantage of a fatuous confidence, could bring to the point of actual execution such an instrument. Upon the face of the deed, it is fraudulent."

If there were any words of conveyance in the instrument now before us, by which the property of the wife was conveyed to the trustees, the case would be almost identical with *Scott v. Duncan, supra,* in the facts, as it is entirely so in the principle; for it is evident that the principle must be the same, so far as the instrument may be affected by fraud or mistake, whether it be an actual settlement or a mere contract for one. In either case, the Court of Equity has jurisdiction to reform it, by directing the execution of a deed of settlement in accordance with the proved or admitted intention of the parties. It may not be improper to notice here, that the bill treats the present instrument as a mere contract for a settlement, and not an actual settlement, as seemed to be supposed by the counsel for the defendant in his argument before us.

We have already remarked that the extrinsic evidence, so far from rebutting the legal inference of fraud or mistake arising from the instrument itself, tends to confirm it. A part of that evidence is, that the instrument in question was read over to the intended husband and wife,

and was executed by them, just before the marriage ceremony was performed. Upon that circumstance, an argument is founded that if the parties to the marriage knew the contents of the instrument, and mistook its legal effect, they can not have relief; as there is a well established distinction between a mistake as to a matter of fact, and one as to a matter of law. The case of *Scott v. Duncan,* to which we have already alluded, affords us the following satisfactory reply to a similar objection: "But it is, then, a reliance that the deed was read over to her; and it is argued that a mistake of its legal operation could (161) not be averred. It is clear that where the parties are perfectly aware of the actual contents of the deed, and each, acting on his own judgment, or that of his counsel, omits to insert a clause, for fear it may affect the deed in law, they can not be helped. But here the question is one of imposition and abuse of confidence. The very enquiry is, whether she did, in fact, know and understand what was in the deed and what was not. It was read to her, it is true; but what a time to produce a complicated marriage settlement to an uninstructed female, dressed for her marriage! Was it read to her in the hope that she would or would not understand it? To whom could she apply for advice, but to the very person who had contrived the imposition on her. I wonder that she had not signed and sealed without a question." These remarks are almost as pertinent and applicable to the facts of case before us, as to that wherein they were made. Our conclusion, then, is that the *feme* plaintiff is clearly entitled to relief against the contract, which she was induced to execute in contemplation of her marriage. We are equally clear that the husband is also entitled to have the settlement which must be decreed, so arranged as to leave him the chance of having the slaves and other personal property, appointed for his use by a will or an instrument in the nature of a will, executed by his wife during her coverture. The husband was probably as much ignorant of the contents of the instrument which he executed as was his wife. But even supposing that he knew its contents, he was called upon to execute it under such circumstances as to make it inoperative against him, except so far as we can infer that he freely assented to it. A settlement by which the intended wife's property was to be so settled to her sole and separate use as to keep it free from the intended husband's debts and incumbrances during the coverture, was certainly in the contemplation of the parties, and to that intent he is bound by his contract, but we can not believe that he freely excluded himself from any benefit, or possibility of benefit, from her property, not only during the coverture, but even after it, although he might be the survivor; (162) see *Taylor v. Rickman,* 45 N. C., 28.

The proper decree, if drawn in accordance with the principle of our

decision, will be, that the property, real and personal, mentioned in the marriage contract referred to in the pleadings, shall be conveyed to some suitable person, as trustee, in fee as to the land, and absolutely as to the slaves and other chattels, in trust for the sole and separate use of the wife during coverture, and if she should survive her husband, then in trust for her in fee of the land, and absolutely of the personalty; but if she should die without issue, during coverture, then to her heirs-at-law and next of kin, exclusive of her husband, with a power of revocation and appointment by a will, or by a paper-writing, properly attested by two credible witnesses, in the nature of a will, executed during coverture, in case she died during the lifetime of her husband. Such a settlement will give to the wife as much control over her estate as she can be allowed to exercise, without being liable to the improper influence of her husband; and will restore to her the complete ownership, in the event of her surviving him. It will give effect to the disposition contained in the contract of settlement in favor of those whom she therein calls "her present heirs before marriage," in case of her dying without issue during the coverture, unless she chooses to dispose of it to her husband or to some other person, by the exercise of the power of revocation and appointment, reserved to her to be exercised during coverture, by means of a will or a paper-writing in the nature of a will. The plaintiffs are entitled to their costs against the defendants Daniel and William Robinson, and must pay costs to the defendant Corbitt. The other defendants must pay their own costs.

PER CURIAM. Decree accordingly.

---

(163)

CHARLOTTE C. SCALES, Executrix, against PETER SCALES and others.

1. Courts of equity will not anticipate and decide questions which can not be attended with any present practical results.
2. Where a testator bequeathed certain of his property, specifically, and then provided, "the balance of my estate to be sold and the proceeds divided among my children hereinafter named," it was *Held*, that the bonds, notes and accounts due the testator, and the cash on hand, were not embraced in this clause.
3. A legacy to a granddaughter, who died before the will was made, is void.

CAUSE removed from the Court of Equity of ROCKINGHAM.

The bill is filed by Charlotte Scales, the executrix of the last will and testament of James Scales, deceased, and prays the aid of the Court in construing the said will, which is as follows:

"First. I give unto my beloved wife, Charlotte C. Scales, the tract of land whereon I now live, containing eight hundred and five acres,

for and during her natural life, or so long as she may continue a widow, but in case she marries again, to have one-third part thereof; also, I lend her the following negroes during her life, to wit, Daniel, Smith, John, Leathy, Aggy, America, and each of their youngest children, Mitchell, Pinckney, Henry and Granville, three head of horses, four cows and calves, six beef cattle, twenty head of hogs," etc., * * * "and after the death of my wife, I give the said tract of land to my three youngest children, Elizabeth, Susan and Nicholas Dalton, to be equally divided between them.

"2d. I give to my sons Peter and Hamilton Scales the tract of land Peter now lives on.

"Item 3d. I give to my son Peter Scales three negroes, Martha, Charles and York.

"Item 4th. I give to my son James Scales, two negroes, Peggy and Sabry, and four hundred dollars.

"Item 5th. I give to my son Hamilton Scales, three negroes, Joseph (Jr.), Frank and Alexander.

"Item 6th. I give to my son Rawley Scales, three negroes, Burch, Biddy and Sam."

In the succeeding clauses of the will, the testator gives a number of specific legacies to slaves, and several pecuniary legacies. (164) The thirteenth item is as follows: "I give to my two granddaughters, Mary Ellington and Lucy V. Irwin, one hundred and fifty dollars each. The will then concludes as follows: "My will and desire is that the balance of my estate not disposed of, be sold, and the money equally divided between my children hereinafter named, to wit, Peter, James, Hamilton, Robert, Rawley, Elizabeth, Nicholas D. and Susan, after deducting as much as will pay for a tombstone for my grave, containing my name and age; also, the negroes and other property loaned to my wife during her life, after her death, be sold, and the money equally divided between all my children, agreeable to law; and lastly, I constitute and appoint my beloved wife, Charlotte C. Scales, my executrix of this my last will and testament."

The bill prays to be instructed: Firstly, whether the plaintiff, Charlotte C. Scales, takes absolutely the horses, cows and calves, beef cattle, hogs, money, etc., given her in the first item of the will, or whether she takes only a life estate, and if the latter, then how far she may become responsible for such as shall be consumed or lessened in value by the use.

Secondly. Do the bonds, notes and accounts due the testator, and the cash on hand, fall into the residuary fund created by the last clause of the will? or did the testator die intestate as to them?

Thirdly. The bill sets out that Mary Ellington, to whom the testator bequeathed a pecuniary legacy of one hundred and fifty dollars, by the

thirteenth clause of his will, died before said will was made, leaving several children surviving her, and it prays the advice of the Court whether this legacy vested in her children, as the representatives of their deceased parent, or did the testator die intestate as to this fund? or does it fall into the residuum created by the last clause of the will?

Fourthly. The bill alleges that, at the making of the will, the testator had only one slave named Alexander, a child of the woman Aggy, then about eighteen months old; by the fifth clause of the will, the
(165) testator gives to his son Hamilton, slaves, Joseph (Jr.), Frank and Alexander; by the first clause he gives to his wife, for life, woman slave, Aggy, and her youngest child. At the time the will was made, this child, Alexander, was Aggy's youngest child, though she had another, born between the making of the will and the testator's death. To whom does Alexander belong?

Fifthly. The bill further shows that, at the death of the testator, there was a crop growing on the land devised to the plaintiff, and that she kept some of the negroes specifically bequeathed to herself and to the testator's children, on the land, in order to mature the crop; that this crop, when so matured, passes into the residuum, in which she and some of the children, whose slaves she employed, have no interest. Are they entitled to an allowance for the hires of the slaves employed in cultivating the crop?

The cause being set for hearing upon bill, answer and exhibits, was sent to this Court by consent.

No counsel appeared for the plaintiff in this Court.
Morehead, McLean and *Gorrell,* for defendants.

BATTLE, J. The bill is filed by the executrix of James Scales, deceased, for the purpose of obtaining the advice of this Court as to the construction of the will of her testator, in several specified particulars.

1. The executrix wishes to know whether she has an absolute interest or only a life estate in certain property of a perishable kind, and if the latter, how far she may be responsible for its consumption in the use; and also, how the proceeds of the slaves, given to her for life, and then to be sold, are to be divided. Those are questions which will arise after her death, and she has no interest in having them decided now. We have often said that we will not anticipate and decide questions which can not be attended with any present practical results.

2. The residuary clause of the will does not include the money on hand, or that due on bonds, notes and accounts, because it can not be presumed that the testator intended them to "be sold." *Pippin v.*
(166) *Ellison,* 34 N. C., 61, is a direct authority upon this question. This fund is, therefore, undisposed of by the will, and must, after

the payment of debts and the pecuniary legacies, for which it is primarily liable, be divided amongst the testator's next of kin, according to the statute of distributions. The residuary clause, however, imposes the expense of procuring a tombstone for the testator, upon the proceeds of the property therein directed to be sold.

3. The legacy of the granddaughter, Mary Ellington, who died before the testator's will was made, was void, and did not become vested in her children, because there was no person in existence to answer the description contained in the will at the time when it was made, or at any other time during the life of the testator. The Revised Code, ch. 119, sec. 28, differs from the Revised Statutes, ch. 122, sec. 15, in using the words "child or other issue," instead of child or children, which would include a grandchild, if such were living and capable of being a legatee at the publication of the will, but we think it can not embrace one then dead. The statute was intended to apply to a *lapsed,* and not a void, legacy. This legacy being void, does not pass under the residuary clause, for the reason given in the answer to the next preceding question, but is distributable among the next of kin.

4. The slave Alexander does not pass to the widow, because, at the death of the testator, when the will speaks, he was not his mother's youngest child; but he does pass to the testator's youngest son, Hamilton, because he answers the description given in the will in every particular, and there is no room for extrinsic proof, because there is no latent ambiguity. The youngest child of Aggy will, of course, belong to the widow for life.

5. The owners of the several slaves who were employed in the cultivation of the crop, will be entitled, respectively, to their hires. For this, see *Harrell v. Davenport,* 58 N. C., 4.

PER CURIAM. Decree accordingly.

Cited: Hastings v. Earp, 62 N. C., 6; *Hogan v. Hogan,* 63 N. C., 225; *Gordon v. Pendleton,* 84 N. C., 100; *Twitty v. Martin,* 90 N. C., 647; *Vaughan v. Murfreesboro,* 96 N. C., 320.

Dist.: Harkness v. Harkey, 91 N. C., 199.

---

(167)

SIMON J. LATHAM and others against GILBERT L. MOORE and JOHN J. SHERROD.

Where one takes the note of the estate from an administrator, *mala fide,* as for instance, in payment of the administrator's own debt, he cannot hold the fund from the next of kin, or those who are entitled to be substituted in their place, unless the administrator was in advance for the estate.

CAUSE removed from the Court of Equity of MARTIN.

The defendant Gilbert L. Moore, as the administrator of one Daniel Ward, sold lands belonging to the estate to one E. W. Cox, who gave his note for the purchase money, amounting to $2,500, dated 8 October, 1857. During the lifetime of Daniel Ward, the intestate of defendant Moore, the defendant Sherrod held his notes to the amount of $1,300, and Gilbert L. Moore was also indebted to him, Sherrod, in the sum of $700, and at the request of Moore, who had qualified as the administrator of Ward, Sherrod assigned to him the said notes against the intestate, and, in consideration of such assignment, and of his own indebtedness, Moore gave his bond, payable to Sherrod, for two thousand dollars, with Friley W. Moore as surety, dated 1 January, 1855, and bearing interest from date. Afterwards, at the request of Moore, Sherrod took from him the note on E. W. Cox, which, with interest accrued, amounted to $2,534.58, and, in payment therefor, gave him $200 in cash, a note on Colin E. Spruill for $859.20, and gave credit on the $2,000 note of Gilbert Moore and Friley W. Moore for the residue of the $2,534.58, viz., $1,475.

Ward, in his lifetime, was the guardian of the minor children of one Powell, and a judgment for the sum of $1,380.48 was recovered against Gilbert Moore, as administrator of said Ward, and also against the sureties on his, Ward's guardian bond, at April Term, 1857, of Martin County Court, for money due the minor children. The bill is filed by the sureties upon Ward's guardian bond and the sureties upon the administration bond of the defendant Gilbert L. Moore, and alleges that he, Moore, has wasted the assets of the intestate's estate to a large amount, and is now insolvent, having made an assignment of all
(168) his property for the benefit of certain of his creditors; that creditors of the estate have obtained judgments against the administrator to a large amount, and have sued out writes of *scire facias* to get judgment against him individually; and that, as a consequence, the sureties upon his administration bond will have to pay the debts, to the amount of the assets so wasted.

The prayer of the bill is to have a receiver appointed to take into possession all the estate of Daniel Ward that can be found, and apply the proceeds, under the direction of the Court, to the payment of debts, and that the defendant John J. Sherrod be ordered to surrender the note on E. W. Cox, to be applied as part of the assets of the estate; also, for an injunction to restrain him from parting with the possession of it.

Friley W. Moore, mentioned above as the surety on the bond for $2,000 given by the defendant Gilbert L. Moore to the defendant Sherrod, is also one of the sureties on the administration bond of Gilbert L. Moore, and is one of the plaintiffs to this bill. Defendant Sherrod

filed a cross-bill against him, setting out the above recited facts, and also, that Friley W. Moore, as surety, had paid him the balance due on the $2,000 note, a judgment having been obtained for the same in the County Court, and it claims that Sherrod, the plaintiff in this bill, is entitled to have the balance on the $2,000 note, which will remain unpaid if the credit was erroneous, set off against any sum to which the said Friley W. Moore may, by the decree of the Court, otherwise become entitled by reason of the purchase of the said note, and also, that Friley and Gilbert Moore ought to pay the plaintiff Sherrod the full amount of what he may be compelled to refund on account of the credit of $1,475.32 on the $2,000 note alleged in the original bill to have been erroneously given.

Sherrod admits in his answer to the original bill, and also in his cross-bill, that he was aware when he purchased the note in question that it was a part of Ward's estate, but alleges that Gilbert L. Moore was in advance of for advancements made for the benefit of the estate, and had, therefore, a right to reimburse himself out of the funds (169) of the estate. In order to ascertain the truth of this allegation, an account was ordered to be taken, from which it appeared that the administrator, Gilbert L. Moore, was in advance to the full amount of the credit of $1,475.32 on the $2,000-note of Gilbert and Friley Moore, less $113.06.

Upon the filing of the cross-bill and answer, the cause was set for hearing upon bills, answers, exhibits and proofs, and transferred to this Court by consent.

Winston, Jr., for the plaintiff.
Rodman, for the defendant.

PEARSON, C. J. An administrator has the right to sell or discount a note belonging to the estate, for the legal title is in him, and the exigency of the estate may make the conversion expedient. But when one takes a note of the estate from an administrator, *mala fide*, as, for instance, in payment of his own debt, so as to be a guilty participator in the abuse of power, he can not hold the fund from the next of kin, or those who are entitled to be substituted in their stead, unless the administrator could have resisted their claim on the ground that he was in advance of the estate, and consequently did not abuse his power, but had a right to apply the note to his own purposes by way of reimbursement; *Wilson v. Doster,* 42 N. C., 231, where the subject is fully discussed and the cases cited.

In respect to the cash payment $200, and the payment by means of Spruill's note, $859, the transaction does not come within the prohibition of the rule above stated. But in respect to the sum of $1,475, which was

entered as a credit on the note of the administrator, the prohibition does apply, unless the administrator was in advance for the estate, and for that reason had the right to use the funds of the estate for his reimbursement. In order to ascertain how this matter stood, an account was taken, by which it appears the administrator was in advance to the full amount of the credit, less the sum of $113.06. So, the ap-
(170) propriation was rightful except as to that amount, as to which the plaintiffs are entitled to a decree for a rateable part, except Friley Moore, whose claim is affected by an equity of the defendant Sherrod, which is set up in the cross-bill.

Among the vouchers of the administrator are "accounts paid," to the amount of $681.15, and it seems there are *notes* due by the intestate still unpaid to the amount of $1,576.52, and the question was suggested, whether, under these circumstances, he was entitled to claim the amount of the "accounts paid" as so much advanced for the estate. We can see no sufficient reason why he is not so entitled. The accounts paid are admitted to have been just debts due by the intestate. How far he has made himself liable to the note creditors by not giving to them the preference to which they are entitled in a due course of administration, over simple contract creditors, is not now the question; but simply, was he in advance for the estate, by having paid off debts of the estate? If so, he was entitled to reimburse himself by making an appropriation of the note in controversy; at all events, that fact is sufficient to repel the equity of the next of kin, or the plaintiffs who claim to be substituted in their stead to follow the fund in the hands of the defendant Sherrod.

The cross-bill was brought to a hearing with the original bill, and relieves the Court from any embarrassment as to the manner in which the decree should be modeled, so as to mete out justice to all the parties. Friley Moore was the surety of the administrator to the note on which the defendant Sherrod entered the credit. So, he has had the full benefit of it, and so far from having an equity to hold the defendant Sherrod responsible, the latter has a plain equity against him to recover so much of the $113.06 as is recovered of him by the other plaintiffs in the original case, for in effect he will have paid that amount on a note to which the said Friley Moore was surety, which being in his exoneration, falls under the well-settled doctrine of subrogation.

PER CURIAM. Decree accordingly.

(171)

L. L. CLEMENTS against HENRY MITCHELL and others.

1. Where one was a partner in a firm in 1855 and in 1857, but alleged that for 1856 he was not a partner, and that his withdrawal was evidenced by a deed which was lost, and it turned out that the deed had been destroyed by himself, and he answered delusively about it, and it appeared that he had acquiesced in certain acts of his partner, treating him as a partner, it was declared by the court that he was to be considered as a partner for the year 1856 also.
2. It was *Held*, by the court, that the destruction of the deed which it was admitted explained defendant's connection with the firm, and that, too, after he knew that it would be necessary to make such explanation, afforded a strong presumption that such deed committed him as a partner.

CAUSE removed from the Court of Equity of MARTIN.

In January, 1854, Joseph Waldo and L. L. Clements, the plaintiff, entered into a copartnership as merchants, in the town of Hamilton, under the name and style of "Waldo & Clements," and did business during the years 1855, 1856, and until March, 1857, when the co-partnership was dissolved, and all the effects of the firm were transferred to the plaintiff, Clements, to collect and pay debts, and adjust the balance between them.

During the year 1855, the defendant Waldo was in co-partnership with the defendant Henry Mitchell, in running a steam sawmill, and in shipping and selling lumber. During this year, the latter firm had considerable dealings with the firm of Waldo & Clements, and bought goods to a considerable amount, which was paid and settled. During 1856, the plaintiff alleges that the said firm of Waldo & Mitchell dealt still more largely, to wit, to the amount of....., and again in 1857. Waldo became insolvent, and in April, 1857, assigned, by deed, all his interest in the said mill, and all other partnership property, debts, etc., to the defendant Mitchell, to enable him to pay the debts of the concern. The plaintiff alleges that he has frequently called on the defendant Mitchell to pay to him the said debt due to the firm of Waldo & Clements, which he has refused to do. The prayer of the bill is for an account and settlement of the balance between these two firms.

Mitchell, in his answer, says that in January, 1856, he rented his interest in the steam sawmill to one William Parr for one (172) year, with the knowledge and consent of Waldo; that a part of this arrangement was, that the lumber on hand should be sold to pay the former debts of the co-partnership of Waldo & Mitchell, and that, therefore, for the year 1856 he was not a partner with Waldo, or any one else, in the said milling business; that this contract was expressed in writing, and deposited with one Daniels, who informed him that it is lost or destroyed.

Waldo, in his answer, says that it is true that Mitchell did agree in writing to let Parr take his place in the business of conducting the mill and lumber business, and whether the legal effect of the instrument was to release Mitchell from liability for the debts of the concern, he is not informed; but he says, "notwithstanding the said agreement, he was of opinion that the partnership of Waldo & Mitchell existed during the year 1856; that he therefore continued to sign the name of the firm, and Parr gave orders on the firm of Waldo & Clements in the name of Waldo & Mitchell; that advances were made by Waldo & Clements during that year on such orders and goods sold, which were charged to Waldo & Mitchell; and that he, Waldo, as a partner of the firm, signed a stated account admitting a balance due as set forth in the plaintiff's bill.

It appears from the evidence filed that during 1856, Mitchell was aware of the manner in which the entries were made in the books of Waldo & Clements, and though he objected to it, yet he afterwards acquiesced in it. It appears also in evidence that Mitchell himself, in 1857, destroyed the deed in question, and that he remarked to Parr when he did so, that it was of no further use and might as well be torn up. Also, that Mitchell was a man of financial means, and that Parr had been acting as engineer in the mill, and was without such means.

Reference was made to the Clerk and Master, who stated the account, charging Mitchell with the debts of the firm for 1856, to which
(173) he excepted, and the cause was heard in this Court on that exception.

B. F. Moore and *Donnell,* for the plaintiff.
Winston, Jr., and *Rodman,* for the defendants.

PEARSON, C. J. The exception of the defendant Mitchell, now heard, is based upon the allegation that he was not a partner of Waldo during the year 1856. This allegation is not proved, and, consequently, the exception must be overruled.

Mitchell admits his co-partnership with Waldo in 1855, and also in 1857, but alleges there was a discontinuance of the co-partnership for the year 1856 by the substitution of Parr in his stead for that year, which he insists resulted by the force and effect of a certain instrument of writing or deed executed by Parr and himself, with the knowledge and concurrence of Waldo.

This deed was destroyed by Mitchell in 1857, and he remarked to Parr at the time "that it was of no further use, and might as well be torn up." No copy of it was preserved, and the testimony in respect to it is so conflicting and of such a character as to render it impossible for the Court to declare what were its contents. We are fully satisfied, however, of this fact, that although the nature of the deed may have

been such as to have the legal effect to bring Parr *in* and make him liable, it did not have the effect to put Mitchell *out* of the firm, and relieve him from liability—the original purpose of the arrangement being to make Parr more stirring in his superintendence of the mills by having his wages depending, in part, on the profits.

Without entering into a particular examination of the evidence, one or two general remarks will be sufficient to show the correctness of this conclusion:

The want of fairness in the answer of Mitchell, by which he attempts to make the impression that the deed had been "lost or de-
destroyed" without any agency on his part, when it is proved
that he had, but a few months before, actually destroyed it him- (174)
self, raises a presumption against him, under which he must be
content to labor. Waldo had failed at the time when Mitchell tore up the paper; so he must have been aware that it was very important for him to be able to relieve himself from liability as a member of the firm, and if the deed had been of the character which he now pretends it was, he would most assuredly have preserved it. The fact that he tore up the deed, saying "it was of no further use," is entitled to more weight than the recollection of a half a dozen witnesses as to the contents of a paper in which they had no particular interest, and which it is not alleged contained any direct words releasing Mitchell and substituting Parr as a member of the firm.

Parr was only a workman, and had no means; Mitchell was a man of substance. If the deed was of the character now imputed to it, can it be seriously insisted that Waldo would not have objected to the arrangement by which a solvent partner was to be withdrawn and a man of straw put in his place? Besides, the firm of Waldo & Mitchell, in the year 1855, had been doing a very heavy business; would this alleged change have taken place by which the firm of "Waldo & Mitchell" was dissolved without a settlement or some more definite provision for paying off the debts and dividing the profits than a mere understanding that the lumber on hand was to be applied to the discharge of debts due for the past year, unaccompanied by any statement of the amount of the debts, or the quantity of lumber?

Waldo, during 1856, made entries on the books of "Waldo & Clements," charging large sums to "Waldo & Mitchell," according to the course of dealing of 1855. These entries were seen by Mitchell from time to time, and although at first he made some objections, he finally acquiesced, and allowed the dealing and entries in the books of "Waldo & Clements" to stand, and be continued to be made against "Waldo & Mitchell," without the slightest notice taken of "poor Mr. Parr!" who is now, by dexterous shuffling, to be turned up as the partner of

(175) Waldo, and Clements is to lose his money on the suggestion that the charges ought to have been entered against "Waldo & Parr"!! a firm which never figured "in book or bill," and of which no man had ever heard until after the failure of Waldo, when Mitchell attempts to trump up Parr as the partner of Waldo, although prior to that event he had himself been content to hold the honor.

PER CURIAM. Exception overruled.

Cited: *S. c.*, 62 N. C., 171-2.

PEYTON S. HENRY, Adm'r, against WILLIAM H. ELLIOTT, Adm'r.

Where one, who had only a life estate in land, made a deed for a fee simple, and the deed contained a warranty in fee, and the vendee, knowing of the defect in the title, gave his notes for the purchase money, upon which judgments were obtained, it was *Held*, that a court of equity would not interfere by injunctive process to restrain the collection of any part of these judgments, but would leave the vendee to his action on the warranty, it appearing that the warrantor was solvent.

CAUSE removed from the Court of Equity of BERTIE.

Jordan D. Elliott, the defendant's intestate, was seized of an estate by the curtesy in a certain tract of land, the remainder of which was in his two children, Richard H. and Sarah Elliott. Jordan D. Elliott being so seized, made a deed to Richard R. Henry, the plaintiff's intestate, purporting to convey the fee simple estate in the land in question, and warranting the title for himself, his heirs, executors, etc. Richard R. Henry, the vendee, at the same time gave three notes for the purchase-money, amounting to five hundred and fifty dollars. The bill admits that Richard R. Henry, at the time of the purchase, was aware of the fact that the vendor, Elliott, had only an estate by the curtesy in the land in question, but avers that said Elliott, at the time of the sale, promised to procure a deed for the remainder from his children.

(176) This allegation was denied by the answer. The vendee, Henry, applied to the children of Jordan D. Elliott to convey him the title to the remainder, which they refused to do. After such refusal to convey, the defendant William H. Elliott, as administrator of Jordan D. Elliott, who had died in the meantime, presented the notes in question and demanded payment, one of which was paid by Richard R. Henry, but he refused to pay the others, whereupon suit was brought upon them against him, and revived after his death against the present plaintiff, and judgment obtained in the Superior Court of Bertie County, and execution issued thereon. This bill is filed against William H. Elliott,

the administrator of Jordan D. Elliott, and seeks to obtain an injunction to restrain the collection of the judgment on these two notes, on the ground of a part failure of consideration.

The bill admits that at the time these notes were given, Richard R. Henry relied on the covenant of warranty in the deed to secure him from loss. And there was no allegation that the estate of Jordan D. Elliott was not sufficient to pay all damages which might have been sustained by reason of the breach of the covenant of warranty.

Upon the coming in of the answer, the injunction which had been granted in this cause was continued to the hearing, and the cause being set down for hearing, was transferred to this Court by consent.

Winston, Jr., for the plaintiff.
Garrett, for the defendant.

BATTLE, J. The plaintiff, admitting in his bill that his intestate, when he purchased the land in question, knew that the defendant's intestate had but a life-estate as tenant by the curtesy in it, puts his claim to relief in this Court upon the alleged ground that the vendor promised to procure from his two children, who were the owners of the remainder in fee in the land, deeds to the vendee for such remainder. This allegation is not admitted by the answers, and there is no proof in support of it, so that the defendant contends that the bill must be dismissed for the defect in the proof of a material allegation. (177)

But the plaintiff insists that, as there was a partial failure of the consideration, he can not, in equity and good conscience, be required to pay the full price of the land. Supposing that there was no objection to his recovery, because of the variance between his *allegata et probata,* there is a decisive objection to his claim; it is, that he admits that his intestate, when he purchased the land, relied upon the vendor's warranty as a security for the amount paid, until the alleged verbal agreement of the vendor to perfect the title should be complied with; and there is no pretense that the intestate's estate is not fully sufficient to answer all the damages which he can recover in an action on the covenant of warranty. He had then a full remedy at law; and he has it still, unless by his own act of purchasing the outstanding title he has deprived himself of it. *Hauser v. Mann,* 5 N. C., 411, and *Richardson v. Williams,* 56 N. C., 116, cited and relied on by the plaintiff's counsel, were decided mainly upon the ground that the defendants, who were non-residents of this State, and had no property here out of which a recovery at law could be made effective, ought to be enjoined, in equity, from the recovery of a debt or damages which could not be recovered back at law, except by means of a suit in another State. The principle of such cases is, that our Court of Equity will give redress where, other-

wise, the party seeking it would be driven into the Courts of another State for the purpose of obtaining it. The other case of *Jones v. Edwards,* 57 N. C., 257, was simply an order for continuing an injunction until the hearing, on account of the evasiveness of the defendant's answer. Neither case affords any support for the argument that the Court of Equity ought to interfere in behalf of a person, who has a plain and adequate remedy at law in our courts; particularly when he had that remedy in contemplation, and relied upon it when he entered into the engagement out of which the controversy arises.

PER CURIAM. Bill dismissed with costs.

JUNE TERM, 1861.

(AT RALEIGH.)

(179)

AMELIA SMITH against LELAND MARTIN and another.*

1. Where slaves were conveyed to a *feme covert*, by a deed of gift, and the first clause of the conveyance passed the legal estate to her and the heirs of her body, it was *Held*, that a subsequent clause of the conveyance, restraining her husband from all control over said slaves, was inconsistent with the first clause and inoperative, and that the slaves vested in the husband *jure mariti*.
2. *Held further*, that in order to create a separate estate in a *feme covert*, there must be words sufficient to raise a trust for her benefit.

CAUSE removed from the Court of Equity of WILKES.

One Robert Martin, the father of the plaintiff, Amelia Smith, who is a married woman suing by her next friend, conveyed to her a female slave by the following deed:

"STATE OF NORTH CAROLINA—Wilkes County.

"To all whom it may concern, know ye, that for and in con- (180) sideration of the natural love and affection, and for other good consideration, hath given and delivered unto my daughter, Amelia Smith, the wife of Samuel P. Smith, my negro girl, named Dinah, aged about twenty-one years, a slave, for life, which said negro girl, Dinah, I bind myself, my heirs, executors, administrators, to warrant and defend unto the said Amelia Smith, and the lawful heirs of her body forever, which said negro, Dinah, with her increase, if any, is not to be at the disposal of Samuel P. Smith in no manner whatever, but is to remain the inheritance of Amelia M. Smith, and the heirs of her body forever. In witness whereof, I, the said Robert Martin, have hereunto set my hand and affixed my seal, this 13 March, 1835.

R. MARTIN. (Seal.)

Test: R. C. MARTIN."

The bill states that the defendant Leland Martin, with full knowledge of the above recited deed, the same having been duly registered, purchased from the husband of the plaintiff a certain slave, one of the increase of Dinah, the slave mentioned in the deed to Mrs. Smith, and holds the same color of a deed from her husband, Samuel P. Smith, and

*This case was decided at the last term of the court and reported, but the MSS. got accidentally misplaced, and was, therefore, omitted.

the object of the bill is to have the defendant declared a trustee for the plaintiff.

The answer resists the recovery upon the ground that, by force of this deed, the absolute legal estate in this slave passed to Mrs. Smith, and vested in her husband *jure mariti,* and, consequently, the conveyance to the defendant was valid. The cause was set for hearing upon the bill, answer and exhibits, and was transferred to this Court by consent.

Boyden, for the plaintiff.
Barber, for the defendant.

MANLY, J. The equity of the bill depends upon the construction of the deed of Robert Martin, dated 13 March, 1835. The question (181) is, whether that deed creates a trust, in equity, for the separate use of the wife. After an attentive consideration of its contents, we think it does not.

The deed conveys to the *feme covert* the slave in terms appropriate to a common law conveyance of the absolute legal estate. No word is used from which it can be inferred that the property was to be held in trust for her; but, on the contrary, it is signified in the strongest and most direct terms that she was to have the legal estate and the legal control. After thus disposing of it, the declaration is made that said property is not to be at the disposal of her husband in any manner whatever, but is to remain the inheritance of the said *feme* and the heirs of her body forever. The purpose to exclude the husband from a power of disposal is manifest, but this purpose is inconsistent with the previously expressed purpose, equally manifest, that she should have the absolute legal estate. As the husband's responsibility for his wife and children is great, the law invests him with rights in the wife's estate to aid him in meeting this responsibility, and the Courts will not divest him of them upon light grounds

It seems to us, a constructive trust allowed to have this effect, ought to be raised only in case some word is used to signify an intention to withdraw the property from the woman's absolute legal control and to establish a trust for her, to the exclusion of her husband. To give in terms appropriate and explicit, a legal estate to a married woman, without such word, and then to declare her husband shall not have the disposal of it, is to express inconsistent ideas. Which of them was paramount in the mind of the donor, and, consequently, what was his intention, we do not certainly know. But the obvious inference from the language used is, that he intended his daughter should have the absolute legal estate and control, without the trammels and expense of a trust; and that his son-in-law should not dispose of the same in any manner. The one is as manifest as the other, and these are inconsistent intentions

which can not stand together. In respect to *wills,* that are construed with more leniency than deeds, we are not aware of any case in which a trust has been held to exist, unless words were used indi- (182) cating a purpose to make a trust. However inartificial, or wanting in technicalities, some phrase was used from which such an intention was gathered. In the cases in North Carolina to which our attention has been directed, where constructive trusts for married women have been the subjects of consideration, words indicating a purpose to raise a trust (such as use, benefit or trust), have been uniformly employed, with one exception, and the question has not been as to the existence of the purpose, but as to its effect in excluding the husband from participation as a *cestui qui trust.*

The exception referred to is *Ashecraft v. Little,* 39 N. C., 236, where the omission of such words as might indicate a purpose to establish a trust, was lost sight of or postponed to another defect that was fatal to the equity of the will. That case did not turn at all upon the point that is now before us.

In *Margetts v. Barringer,* 10 Eng. Con. Chan., 158, which is relied on by complainants as authority, the words are *"to the sole use"* of the *feme covert,* which distinguishes it from the case before us, and shows an intention to create a trust or use in the property distinct from the legal estate.

We are of opinion, therefore, that while it sufficiently appears the donor of the slave desired to exclude the husband from any right of property in the same, it does not sufficiently appear that he desired or intended to accomplish it by the only mode that could be effectual for that purpose.

The wife took an absolute legal estate in the slave, Dinah, and her increase, and they were subject to the matrimonial rights of the husband.

PER CURIAM. Bill dismissed with costs.

(183)

SAMUEL FLOYD and others against JOHN B. GILLIAM, Adm'r, and others.

Where a bond was taken from a trustee under an order of the court of equity, payable to the clerk and master, conditioned for the performance of the trust, it was *Held,* that the representative of the *cestui que trust* had no right to sue on such bond without the leave of the court of equity, and that where such unauthorized suit had been begun, the court would enjoin it until an account of the trust could be taken.

CAUSE removed from the Court of Equity of BERTIE.

At the Fall Term, 1851, of the Court of Equity for Bertie, Samuel Floyd was appointed a trustee to perform certain trusts declared by the

said Court in behalf of one Charles P. Skiles, growing out of a deed theretofore made between said Skiles and James Allen, and he gave bond in the sum of $4,000, with other plaintiffs in this cause as his sureties, payable to the Clerk and Master in Equity of the said county, conditioned faithfully to perform the said trusts. Skiles died in 1851; up to which time the trustee had acted in the said trust, hiring out negroes, receiving hires, collecting and disbursing funds, and taking care of the person of Skiles, who was quite infirm. The defendant Gilliam having been appointed administrator of the estate of Skiles, without any order or leave from the Court of Equity of Bertie, brought suit on the said bond, and it was to enjoin the continuance of this suit that the bill in this case is filed. The plaintiff submits and prays that an account of the trust may be taken in this Court, and avers that he is fully able to pay whatever sum may be decreed against him, and he insists until he fails to pay and satisfy the decree of the Court, the defendants may be compelled to abstain from urging the suit which they have instituted in the Court of Law.

There is in the answer no material denial of the facts as above stated, but the defendants say that Henry Skiles, a son of the said *cestui qui trust,* is, by the deed set out in the pleadings, interested in the fund
(184) therein created, and insists that he should have been made a party to this suit.

The cause was heard on bill and answer.

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

MANLY, J. The bond of the trustee, Floyd, taken by the Court of Equity for Bertie, was a paper of a cause in that Court, and under its control. It was taken on the occasion of Floyd's appointment to the trust of Skile's estate, made payable to the Master, and could only be used by Skiles, or one claiming through him, by leave of the Court. The instrument was designed by the Court as a means of enabling it to enforce the execution of the trust, and should be retained, according to usage, as a security for any sum judicially ascertained to be due from the trustee to this fund. Hence, it was improper for the Master to allow the representative of Skiles, upon his own motion, to take control of the bond, as of a bond payable to his intestate, and sue upon the same. It should have been retained by him subject to the purposes intended, under the control of the Court.

We are of opinion, therefore, upon the filing of the bill by the trustee for an account, it was proper to suspend the prosecution of the suit at law until the account were taken; when, if a balance should be found due to the administrator, the action on the bond could be resorted to for securing its payment.

We do not impugn the general principle heretofore adopted by our Courts, of not staying the *trial* at law, but only the *execution* after judgment. The case before us is excepted from the operation of that principle by the character of the suit, and the instrument sued on. The bond belongs to the office of the Court of Equity, and is under the control of the Court. The Court, therefore, has the power, and ought to have forbid its use whenever the occasion or object is disapproved.

The bill in equity is so manifestly the most appropriate and adequate means of having a settlement of a trust estate, that we think the Court entirely justified in declining to allow the bond and an (185) action upon it at law to be used, primarily, for such purpose. The bond ought to have been regarded only as a security for an ascertained balance. This view steers clear of any conflict with *Williams v. Sadler,* 57 N. C., 378, which has been called to our attention. Ours is not the case of a party litigating a matter both at law and in equity, through rights of proceeding equally open to him. The action at law is upon an office instrument which could not be properly put in suit without leave, and for which leave ought not to have been given in the case in question.

The objection to the bill for the want of a necessary party defendant, viz., Henry Skiles, son of the *cestui qui trust,* we think is untenable. *He* is sufficiently represented by the administrator, Gilliam.

The equity of the bill for an account is unquestionable, and an account should, accordingly, be ordered. In the meantime, the injunction upon the suit at law should be continued until further order.

PER CURIAM. Decree for an injunction and account.

JOHN NOOE and another, Adm'rs, and others against JOHN H. VANNOY and others.

The general rule is, that where a testator, after making his will, sells the property given, the legacy is adeemed. But where the *proceeds* of the sale of property are given to children, and the will intimates that the sale is to be made by the testator himself, who does make it, and no substitution or equivalent is made for such legacy, and the proceeds are reinvested, and are traceable, it was *Held,* not to be a case of the ademption of the legacy by a sale of the property.

CAUSE removed from the Court of Equity of WILKES. (186)

The plaintiffs are the administrators with the will annexed of Joel Vannoy, and the bill is filed praying the advice and protection of the Court as to the proper construction of the following clause of the said will, to wit: "I further give to my children by a former marriage,

the proceeds of the sale of my town property in the town of Wilkesboro, or so much thereof as is herein specified, to wit, to my son Joel Alfred, two hundred dollars; to Elizabeth Caroline Miller, five dollars; to John Hamilton, one hundred dollars; to Rebecca Elvira, formerly married to Welsh, one hundred dollars; to Emily Amanda Welsh, one hundred dollars; to Amelia Adaline Parker, two hundred dollars; to Anne Maria Swink, two hundred dollars; all which legacies are to be chargeable upon my town property and no other."

The plaintiff Nooe married S. M. Vannoy, one of the children by the second marriage. They, with W. W. Vannoy, who is also a son of the second marriage, and the other plaintiffs, who are the children of that marriage, set forth in their bill after the execution of the said will, the testator made a deed of the town property therein mentioned to the said John Nooe, at the price of $1,300, for which he received the cash, having previously contracted to sell it to said Nooe, and having taken his note for the purchase money, which he then and there surrendered, and they insist that by such sale, the legacy given to the defendants, who are the children of the first marriage, was thereby adeemed and taken away, and that the fund arising from such sale not being disposed of by the will, became distributable among the next of kin of the said Joel, of which they each claim a share with the defendants, and they pray that the administrators may be directed to pay accordingly.

The defendants insist that the legacies to them were not adeemed; that it was the intention of the testator to sell the land himself and give them *the proceeds* of it, and they advert to the fact that the sale is not directed by the will to be made by his executrix. They allege that soon after the payment for the town property was made to him on 3

(187) October, 1857, instead of using the money otherwise, he invested the whole, or greater part of it, in the bonds and notes of other persons, and they file as an exhibit the inventory made by the administrators, from which it appears that the testator left on hand a note on John Nooe for $200, dated 25 November, 1857; another on John E. Cranor for $50, dated 27 October, 1857, and another on Wellborn & Rix for $100, dated 14 October, 1857, besides judgments to the amount of $100 on other persons, taken subsequently, but which, they insist, were on notes taken shortly after this transaction, and they insist that by these and other concomitant facts, the *proceeds* of the sale of the town property can be distinctly traced and identified, and that by a fair construction of the said provision they are entitled to the legacies aforesaid.

The cause was heard on the bill, answers and exhibits.

Barber, for the plaintiff.
Mitchell, for the defendant.

PEARSON, C. J. When a testator sells the specific property given in a legacy, such legacy is adeemed, for the property does not belong to him at the time of his death. When the will takes effect, there is nothing for it to operate on, and, of course, the legacy must fail. This is the general rule.

But it is unusual for a father to adeem, in this manner, legacies given to children, and exclude them from his contemplated bounty, when there has been no change of circumstances; and for this reason, the Court is slow to adopt the conclusion that there is an ademption, and will seek, anxiously, for some mode of explanation.

In this case, the testator, after making provision for his second wife, and his children by her, gives to his children by a former marriage "the proceeds of the sale of his town property, or so much thereof as is herein specified," viz., $200 to Joel Alfred, etc., in all $905. It will be remarked there is no power given to his executrix to sell the town property, but he gives the proceeds of the sale of the property (188) without reference to whether the sale is to be made by himself or by his executrix. So, if at the time the will was executed, he had contracted to sell the property, or had in contemplation a purpose to make sale of it himself, these would be apt words to give the expected "proceeds of the sale"—supposing the will to speak as of the time of its execution. But this will being executed in 1856, comes within the operation of the statute (Act of 1844): "Every will shall be construed with reference to the real and personal estate comprised therein to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will"; Rev. Code, ch. 119, sec. 6.

As the *proceeds of the sale* of the property is given, it follows that if such a part thereof as is specified can be traced out and identified, at the time of the death of the testator, the legacy will take effect, and there will be no ademption, or only a partial one. The distinction between a gift of the property itself, and a gift of *the value* of the property, or the proceeds of the sale of property, is well settled, *Pulsford v. Hunter,* 3 Bro., Ch. 416; 1 Roper on Legacies, 246, where it is said, "The last class of cases to be noticed as not falling within the general rule of ademptions, is where the terms of the bequest are so comprehensive as to include within their compass the fund specifically bequeathed, although it has undergone considerable alteration." He illustrates the exception by supposing the value of certain notes and cash in the hands of B, to be given to C, and afterwards the testator changes the notes and cash by an investment into exchequer bills, bonds or mortgages, which are placed in the hands of B, the exchequer bills, bonds or mortgages will pass, because they answer the specification of the fund in the will.

In our case, comprehensive words of description are used, and at the date of the deed to the plaintiff Nooe, "the proceeds of the sale" were in the hands of the testator as a security, for which he held the note of the said Nooe, the testator at the same time received the proceeds (189) of the sale in money, and if he afterwards invested it, and took as security the notes of other persons, it was not an ademption, because the *corpus,* or thing itself, was not changed, and a second or third collection and reinvestment on other securities would not change it.

It was suggested on the argument that the concluding words of the clause of the will under consideration, viz., "all which legacies are to be chargeable on my town property aforesaid, and no other," qualify the words used in the beginning of the clause, and make the several sums demonstrative pecuniary legacies charged on the town property, and no other, instead of a legacy of the "proceeds of the sale," or so much thereof as is specified in the several sums given.

These two sets of words do show a confusion of ideas, and create difficulty in the construction, but we are satisfied that there is a *gift* of the *proceeds of the sale* of the property, or the parts thereof severally specified. We are led to this conclusion because such is the first and prominent expression, and the concluding words are merely incidental, and are added, not for the purpose of changing the gift, but to prevent it from being extended to any other part of the testator's estate. We adopt this conclusion the more readily because it excludes the effect of an ademption of a legacy to *children,* which is unnatural, unless there has been a change of circumstances, or some other provision or substitution in place of the bounty which was originally intended for them.

An examination of the inventory filed by the plaintiffs Nooe and Vannoy, who are the administrators *de bonis non,* shows that these notes taken by the testator came into their hands, one for $200, dated 25 November, 1857; one for $50, dated 27 October, 1857, and one for $100, dated 14 October, 1857. The dates and other circumstances tend to show that these notes were taken as securities for parts of the proceeds of sale received by the testator at the date of the deed to Nooe, *i. e.,* 3 October, 1857, and to fix their identity. What other notes were on hand at the death of the testator, and went into the hands of (190) the executrix, does not appear, the inventory filed by her not being among the exhibits.

These circumstances, in the opinion of the Court, lay a sufficient foundation for a reference to the Master to enquire whether the proceeds of the sale of the town property, or any part thereof, can be traced out and identified at the time of the death of the testator. In aid of the enquiry, he may examine the plaintiffs Nooe and Vannoy on oath, and

require the production of books and papers. The cause will stand for further directions.

PER CURIAM. Decree accordingly.

Cited: Starbuck v. Starbuck, 93 N. C., 187.

SALLIE JONES against CHARLES GEROCK and others.

1. The personal estate, which is in this State, of one residing in another State, in respect to both debts and legacies, must be administered by one qualified to act under the orders and control of our courts and according to our laws, but in regard to the payment of legacies and distributive shares, our courts, from comity, adopt the laws of the domicil.
2. A decree for a distributive share in another State, was *Held*, not to be a bar to a recovery of a distributive share of property lying in this State.
3. The widow of one domiciled in another State, who died intestate, seized and possessed of lands in this State, is entitled to her dower in such lands.
4. Where one, residing in another State, made a will, which was not satisfactory to his widow, who duly entered her dissent on its being offered for probate in that State, and also entered her dissent when it was offered for probate in this State, it was *Held*, that she is entitled to dower and a distributive share of property lying in this State.
5. It was further *Held*, that a decree for dower in another State would be considered as confined to the lands situate in such other State, and as not embracing lands situated in this State.

CAUSE removed from the Court of Equity of JONES.

The bill is filed by the widow of Edward Starkey Jones, of Alabama, who had lands and personal property in the counties of Jones and Onslow, in this State. The bill sets out that the decedent, (191) E. S. Jones, made a will in Alabama, which was duly admitted to probate in Dallas County, in that State, but from which she dissented at the time of its being offered for probate, according to the laws of that State. Afterwards, the said will was duly admitted to probate in the County Court of Onslow, in this State, where a large part of his personal and real estate was situated, and at that term she also dissented from the will of her said husband. The bill is filed against the legatees under the will of E. S. Jones, and against his heirs and next of kin, also against his executors and against the representatives of Richard Jones, a deceased son, who died in the lifetime of the testator, and it prays for dower in the lands lying in this State, and also for an account and a distributive share of the personalty in this State.

The defendants answered severally, but did not deny any of the allegations of fact stated in the bill. They, however, objected to the plaintiff's recovery of dower, as well as her share of the personalty, because the act of Assembly, Revised Code, ch. 118, sec. 1, requires that she must

"signify her dissent to her husband's will before the County Court of the county wherein she resides," and that as she did not reside in any county in North Carolina, she could not make such dissent at all, and, therefore, could not have her dower or distributive share.

The defendants also objected, and showed, that the plaintiff had filed a bill for, and obtained a decree for, a distributive share of her husband's personal estate in the State of Alabama, and that she is barred by such decree from setting up claim to any further share of his personal property in this State.

It was also objected by the defendants, and the fact was shown to this Court, that the plaintiff had filed a bill and obtained a decree for her dower in her husband's lands in the State of Alabama, and had had the same laid off to her, and they alleged such decree and assign-
(192) ment of dower in bar of her application in this Court.

The parties, by their counsel, filed a written agreement that all errors of form are waived, and the case put upon its merits, and the cause was sent to this Court by consent.

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

PEARSON, C. J. The rules of pleading and the orderly mode of proceeding and making entries in a cause are intended not merely for the convenience of the parties, so that they may not be taken by surprise, but also for the convenience of the Court, so as to prevent confusion and embarrassment which is apt to occur whenever the regular course of things is departed from. In this case, the objection to the bill on the ground of it being *multifarious,* and because it improperly prays for a division of the slaves and other personal property, instead of an account and settlement of the personal estate, and the difficulties growing out of the vague entries in the transcript, so that the Court can not see whether the case is set for hearing on bill and answers (taking the answers to be admitted), or on bill, answers, *replication* and exhibits, and is left to inference from the manner in which the cause was treated on the argument, that the latter is the manner in which it was intended to be brought to a hearing, may all be met, so far as the parties to this cause are concerned, by the general statement that "all errors of form are waived, and the case is to be put upon its merits," but still this does not answer the purpose of avoiding the danger of confusion, and of relieving the Court from embarrassment in deciding a case where the claim to a distributive share of the personal estate and a claim to dower out of the real estate, are blended together, although the subjects are governed by different principles of law, and the parties are different.

We think it right to call the attention of the gentlemen of the bar to this matter, so that it may not be drawn into a precedent, and a like indulgence be again asked for. Indeed, it was with much (193) hesitation that we concluded to proceed with this case, according to the *construction* we put on the entries made in "the transcript."

1. The *personal estate* which was in this State at the death of the testator, both in respect to the payment of debts and the payment of legacies and distributive shares, must be administered by executors who are qualified by, and act under, the orders and control of the Courts of this State, according to the law of this State, but in regard to the payment of legacies and distributive shares, from comity, our Courts adopt the law of the *domicil,* which, in this instance, is the State of Alabama. The doctrine on this subject is disposed of by the case of *Alvaney v. Powell,* 55 N. C., 51, and the discussion is so full as not to call for any further elaboration of the question. It is set out in the pleadings and admitted, that by the law of that State, a widow who is not satisfactorily provided for by the will of her husband, may enter her dissent, and will, thereupon, be entitled to a distributive share, as in case of intestacy, and the plaintiff has duly entered her dissent according to the requirement of the law, consequently there can be no reason why she shall not receive such distributive share of the personal estate in this State, and to that end, there will be a decree for an account, etc.

It is alleged by the answers that the plaintiff has obtained a decree for her distributive share in the State of Alabama, and is, therefore, barred of any further claim of a distributive share of the property in this State, as she has already been fully satisfied. But we do not understand the decree in the Court of Alabama as embracing any of the personal estate other than that which was in that State. Indeed, it can not be supposed to embrace the personal estate in this State, for, as we have seen, that must be administered under the orders and by the authority of our Courts, and the Court in Alabama had no control over, or concern with it. So, the decree there, in respect to the property there, is not a bar to her right, to have a like decree here, in respect to property here.

2. In respect to real estate situate in this State, we do not, from comity, adopt the law of the domicil, but apply our own laws as (194) to the mode of descent, transfer, devolution and all other particulars. By the common law, a widow was entitled to dower in all the lands and tenements of which her husband was seized *at any time during coverture,* of an estate of inheritance which she might, by possibility, have issue capable of inheriting. By the act of 1784, the right of dower was restricted to such lands and tenements as the husband *died seized and possessed of.* There can be no question that the widow of one

domiciled in another State is entitled to dower in the lands and tenements situate in this State, of which he was seized and possessed at the time of his death.

When the husband leaves a last will and testament, there is a provision in the act of 1784, under which the widow may enter her dissent and claim dower, and in respect to this provision, the argument stands thus:

If the statute is to be construed *literally,* and applies only to the widows of persons resident in this State, by force of the words, "may signify her dissent thereto before the County Court of the county *wherein she resides,* in open Court, when the will is propounded, or within six months after the probate thereof," it follows, as the provision does not apply to her case, that she is entitled to dower under the general provision, without a dissent, in all the lands and tenements of which her husband was seized and possessed at the time of his death; for the will does not take effect until after his death, and so he dies seized and possessed, notwithstanding any devise or disposition which he may make of such lands and tenements by his will.

If the statute is to receive a *liberal* construction (and this, we suppose, is the true one), so as to make it mean that the widow is to signify her dissent in the County Court where the *will is admitted to probate,* at the time it is propounded, or within six months after the probate thereof, then it applies to the case of a nonresident widow, and it follows that in our case the widow is entitled to dower, because she has signified (195) her dissent in due form in the County Court where the will was admitted to probate, upon the supposition that the provisions in question applies to her. So that, in either way, the plaintiff is entitled to dower according to the prayer of the bill.

If the plaintiff had not entered her dissent in the State of Alabama, but had *taken under the will* the lands devised to her in that State, and had then come here and entered her dissent and claimed dower, we are inclined to the opinion that she would not have been entitled to it, because, having taken *under* the will, she would not be allowed to take against the will here, according to the doctrine established by *Mendenhall v. Mendenhall,* 53 N. C., 287. But as she dissented there, and has also dissented here, and claims against the will in both States, her acts harmonize, and her right seems to be a very clear one.

In regard to the decree which it is alleged she has obtained for her dower in Alabama, and which the answer seeks to set up in bar to her dower in the lands situate here, we must consider it as confined to the lands situate in Alabama, and that the lands in this State were not taken into consideration, so it can not amount to a satisfaction, and is not a bar to the right she now seeks to assert.

There will be a decree for the plaintiff, declaring her entitled to

dower, and also to an account and distributive share of the personal estate.

PER CURIAM. Decree accordingly.

Cited: Medley v. Dunlap, 90 N. C., 528; *Pollard v. Slaughter,* 92 N. C., 81; *Syme v. Badger, Ib.,* 712; *Efland v. Efland,* 96 N. C., 493; *Smith v. Ingram,* 130 N. C., 104; *Jones v. Layne,* 144 N. C., 602, 612.

(196)

BASIL SAIN against WILLIAM M. DULIN.

Where the answer to a bill for a specific performance of a parol contract to convey land, and in the alternative for compensation for improvements, denies the terms of the contract as set out in the bill, and alleges a different one, which was not performed on account of the improper conduct of the plaintiff, and the defendant also insists on the statute of frauds, it was *Held,* that the plaintiff was not entitled to compensation for value added to the land by such improvements.

CAUSE removed from the Court of Equity of DAVIE.

The plaintiff alleged that the defendant had agreed, by parol, to sell him a certain piece or parcel of land, lying in the said county of Davie, on Dutchman Creek, at the price of $7.50 per acre, which land is described in plaintiff's bill, and he alleges that, after some disagreement as to one of the lines, they agreed finally as to the limits of the tract, and plaintiff went into possession and kept it for a year; that during that time he built a house on the premises worth $125, and cleared and otherwise materially added to the value of the land by making other improvements on it; that he held a note on the defendant for over $300, which it was agreed should be taken up by the defendant as a part of the price of the land; that plaintiff has always been ready and willing to make payment of the remainder of the purchase money, and has offered to do so, but that the defendant, without any plausible excuse for such breach of faith, has sold and conveyed the said land to another. The prayer is for a specific performance of the agreement. "Or if that agreement is not in law valid, and can not be executed," he prays that the defendant be decreed to account with him for the value of the improvements added to the land, and for general relief.

The answer of the defendant sets out that he did make a contract with the plaintiff for a parcel of land at $7.50 per acre, according to particular boundaries agreed on between them, and he avers that he has been always willing to comply with the agreement, but that the defendant, after such agreement was entered into, insisted upon a boundary altogether different from that agreed on, and became offended with defend-

ant, and refused to speak to him for some time, and acted in such a manner as to induce him to believe that he would not accept a deed on the real terms of the contract; that the defendant did not offer to give him up the said $300 note, nor to pay the remainder of the pur-
(197) chase money, and he admits that he has sold the land to one Gaither.

The defendant insists on the statute of frauds in bar of the plaintiff's claim to relief. The cause was set down for hearing on bill, answer and proofs taken in the cause, and sent to this Court by consent.

Clement, for the plaintiff.

No counsel appeared for the defendant in this Court.

BATTLE, J. The object of the bill is to obtain compensation for improvements, which the plaintiff alleges that he made upon a certain parcel of land, which the defendant had agreed by parol to convey to him. A prayer for specific performance is, indeed, contained in the bill, but the plaintiff, anticipating that such relief could not be had, relies altogether upon the secondary equity for which he sets up a claim. Were the contract which he states admitted by the defendant, but repudiated because of its being by parol, his claim for compensation on account of the value which he added to the land by his improvements, would be clear, as has been long since settled by the leading case of *Albea v. Griffin,* 22 N. C., 9. But the answer denies the contract as set out in the bill, and alleges one which he avers he was willing to have executed, had he not been prevented from doing so by the misconduct of the plaintiff himself. Under these circumstances *Dunn v. Moore,* 38 N. C., 364, is a direct authority against the claim of the plaintiff to any relief at all. In that case it was decided that part performance, as by paying part of the purchase money, and entering into possession and making improvements, will not take the case out of the statute; but when there is such part performance, if the defendant admit the contract as stated by the plaintiff, and also the part performance, but relies on the statute of frauds, the Court will order an account and decree a compensation to the plaintiff for his payments, and for the value which his expendi-
tures have added to the land; but if the contract be denied, the
(198) Court can not grant any relief, because it can not go into proof of a contract variant from that which is stated in the answer. The principle thus stated we approve, and it is decisive of the present case against the plaintiff.

Our attention has been called to the cases of *Thomas v. Kyles,* 53 N. C., 302, and *Love v. Neilson, Ibid.,* 339, decided at the Morganton Term, 1854, which are supposed to be in opposition to the principle

extracted from *Dunn v. Moore.* The first would seem to be so, but the part of the case which relates to the present question was comparatively an unimportant one in the cause, and was manifestly not much considered, either by the counsel or the Court. Besides, it does not appear from the report that the alleged contract of purchase for the five acres of land was denied in the answer, it being only stated that "it was not admitted," which, as the main dispute was upon another point, may have meant that the answer had not noticed the allegation of the contract. However this may be, we can not give the case the effect of overruling, or essentially modifying, that of *Dunn v. Moore.* The other case of *Love v. Neilson* came before the Court upon the plea of the statute of frauds in bar of the plaintiff's claim for the specific performance of a parol contract for the purchase of one-half of a mill. The plea was sustained, but the Court said that the plaintiff might have relief for his expenditures in improving the mill-site of the defendant, and to that end remanded the cause to the Court below in order that the defendant might there file his answer. As it could not be known whether the answer would admit or deny the contract set forth by the plaintiff, it was manifest that the decision of the Court is not necessarily opposed to the principle adjudicated in *Dunn v. Moore, supra.*

PER CURIAM. Bill dismissed with costs.

Cited: Bonham v. Craig, 80 N. C., 231; *McCracken v. McCracken,* 88 N. C., 275, 285; *Luton v. Badham,* 127 N. C., 98, 106.

---

(199)

JAMES O. MARTIN against C. L. COOK and others.

1. A bill which seeks to rescind a contract in part, without restoring the opposite party to the condition he occupied previously to plaintiff's connection with him, is radically defective.
2. An injunction, except in cases of waste and irreparable injury, is used as an auxiliary only to some primary equity.

CAUSE removed from the Court of Equity of WILKES.

The plaintiff in his bill alleges that the defendant Obadiah Sprinkle was indebted to Jenkins & Roberts, in a bond, for $1,963, dated 16 March, 1854, and on 27 March, 1855, they took from said Sprinkle a deed of trust (executed to defendant Cook) to secure the same, conveying to said Cook two tracts of land (describing them), also 100 head of hogs, blacksmith's tools, two stills, and other personal property; that on 18 January, 1858, in order to oblige Sprinkle, who was his neighbor, the plaintiff gave Jenkins & Roberts his own bond for $1,500, and took an assignment of the bond from Sprinkle without recourse to them,

also an assignment of the deed of trust, likewise without recourse; that said deed of trust was fraudulent and void in law, being intended to enable the said Sprinkle to hinder and delay his creditors; that after making the said deed of trust, judgments were taken in the County Court of Mecklenburg and executions issued under which the said land was sold, and that the personal property conveyed in said deed he has never been able to find.

The bill further alleges that suit has been brought on the bond which he gave Jenkins & Roberts, and judgment taken in the County Court of Davidson, on which execution has issued, and he is threatened with a sale of his property to satisfy the same.

The bill prays for an injunction to restrain the defendants from proceeding to collect the said execution.

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

(200) *Boyden,* for the plaintiff.
Barber, for the defendants.

MANLY, J. The plaintiff's equity for the relief he asks depends upon his willingness to rescind the contract of which he complains, *in toto,* and restore the parties to the condition they occupied previous to their connection with him. This he does not proffer to do, and in this respect the frame of the bill is radically defective.

The *injunction* (except in cases of waste and irreparable injury) is used as an auxiliary only to some primary equity. This primary equity ought to be set forth and insisted upon as the ground of the Court's jurisdiction. The error in the bill is one into which it seems the profession in this State is prone to fall. Their attention has been called to it recently in several cases: *Eborn v. Waldo, ante,* 111; *McRae v. R. R.,* 58 N. C., 395; *Scofield v. Van Bokkelen, Ibid.,* 342; *Patterson v. Miller,* 57 N. C., 431.

PER CURIAM. Demurrer sustained and bill dismissed.

THOMAS J. MIMS against DANIEL W. McLEAN, Adm'r of James Kelly.

In the case of a common injunction, where the answer is full, and the plaintiff fails to prove his allegations by any admission in the answer, being without proof, his injunction must be dissolved.

APPEAL from a decretal order made in the Court of Equity of CUMBERLAND.

The plaintiff alleges in his bill that on 1 November, 1851, he executed

to defendant's intestate, James Kelly, a bond for $500, payable one day after date; that he did not owe Kelly that sum of money, but that the latter had become his security for the purchase of a tract of land, and that this bond was given to cover the contingency of his (201) having to pay for the land; that a few days afterwards, he executed a deed of trust to secure the payment of the bond, and had the same duly registered; that not long afterwards, plaintiff and the said Kelly had a settlement, in which it was agreed that he, Kelly, should keep the land and pay the amount for which he was liable as surety, and that he should give up or cancel the bond for $500; that accordingly the bond in question was given up to the plaintiff, that, being the son-in-law of the intestate, Kelly, by invitation from him, he removed with his family to his house, and remained there for about a year, and then removed to another place; that the furniture which he carried with him to Kelly's house remained thereafter his family left, and that the bond for $500 was also left there in an old pine desk, with other papers of the plaintiff; that Kelly has since died, and the defendant having been appointed administrator of his estate, has brought suit against him at law, and having obtained a judgment thereon, has taken out execution and threatens to sell the plaintiff's property. The prayer is for an injunction and for a surrender of the bond, or a release from the judgment at law, and for general relief.

The defendant, in his answer, says that among the valuable papers belonging to the estate of his intestate, he found the bond of $500, which he urged defendant to pay, but which he abruptly refused to do, simply denying that he owed Kelly anything, without in any manner explaining or accounting for the existence of the bond; that he found the said bond carefully placed away in a trunk, wrapped up in a bundle of other papers, among which was a note on other persons for $1,000; that he found in an old cheese box a large bundle of papers which he did not consider valuable, but he did not find any of the plaintiff's papers, either there or elsewhere about the intestate's residence, and he has no recollection of ever having seen about the house, or elsewhere, the pine desk described in plaintiff's bill. The defendant does not profess to know of his own knowledge anything of the dealings between (202) the plaintiff and his intestate, but from the foregoing circumstances, and from what he has heard from his intestate, he feels justified in denying the plaintiff's allegations, and holds him to strict proof.

Upon the coming in of the answer, the Court ordered the injunction to be dissolved, from which plaintiff prayed an appeal to this Court.

W. McL. McKay, for the plaintiff.
Leitch, for the defendant.

PEARSON, C. J. The equity of the plaintiff is put on the ground that the note in question was satisfied in the lifetime of Kelly, the intestate of the defendant; that on a settlement between the plaintiff and Kelly, the note was surrendered up to the plaintiff, and that he neglected to cancel or destroy it, and left it among his other papers at the house of Kelly (who was his father-in-law), "in an old pine desk."

The defendant does not confess the equity of the bill, but denies all of the facts upon which it rests, and says that, according to his belief, they are not true, and as the ground of this belief, among other things, he avers that the note was found by him, at the death of the intestate, carefully wrapped up with other valuable papers and placed away in a trunk, and that there were no papers of the plaintiff found in the house of the intestate, and no "old pine desk" like the one described in the bill. So, if the note ever had been surrendered to the plaintiff, his intestate must have purloined it and put it among his valuable papers, which the defendant does not believe to be true, and, in confirmation of his belief, he avers that after the death of his intestate, he urged complainant to pay the note, "which he abruptly refused to do, simply denying that he owed Kelly anything, without in any manner explaining or accounting for the existence of the note."

The answer being full, and the plaintiff having failed to prove his allegations by an admission in the answer, *he is without proof,*
(203) and his injunction is gone. *Capehart v. Mhoon,* 45 N. C., 37.

There is no error in the decretal order dissolving the injunction.

PER CURIAM. Affirmed.

Cited: Jones v. McKenzie, post, 206; *Blackwell v. McElwee,* 94 N. C., 429.

NEHEMIAH JONES and others against ROBERT McKENZIE and ALBERT PEACOCK.

In the case of a common injunction, where the answer is full and responsive to the bill, and the equity is not confessed but denied, the injunction must be dissolved.

THIS was an appeal from a decretal order of the Court of Equity of ROBESON.

The bill was filed by Nehemiah Jones, Arthur Jones and Isham P. Watters, to restrain, by injunction, the collection of a judgment obtained against them. It alleged that the said judgment was founded on a sealed note given by Nehemiah and Arthur Jones, as principals, and Watters as their surety; that the said note was for $500, and was given in pursuance of a contract which they made with the defendants in October, 1859, to the effect that the said defendants were to deliver to

plaintiffs, the Messrs. Jones, in as good condition as it was at the time of the contract, a turpentine distillery, on the 1st of the ensuing January, which they were to have and use for one year thereafter, to wit, for the year 1860, at the said price of $500; that previously to 1 January, 1860, and while the said distillery was yet in the possession of the defendants, it was burned and destroyed, with all its furniture and fixtures, as far as it could be burned, and that what could not be burned was rendered worthless and useless for the purposes contemplated in the contract, thus rendering it impossible to fulfill the contract of defendants without rebuilding a distillery in said place, which (204) was not done; neither was any attempt made to deliver the said distillery, and it could not be delivered, and was not; and that during 1860, the defendants had made attempts to sell the *remnants* of the said distillery. Robert McKenzie, one of the defendants, answered that he was, at the time of making the alleged contract, interested in the distillery mentioned in the plaintiff's bill, jointly with the other defendant, Albert Peacock, but that now he is the sole proprietor thereof, and solely interested in the debt sought to be enjoined. He states that he made the contract with the Messrs. Jones for himself and his copartner, and it is not true, as stated, that the distillery was to be delivered on 1 January in as good condition as it was when the contract was made; that no particular time was specified for the delivery of the premises; that defendant finished using the distillery on 14 December, 1859, and a few days before that gave notice to the plaintiffs that he should cease to use the premises on that day, and that he wished them to take charge of the establishment, as he was about to leave the State on a temporary journey, and that there was no obstacle to their getting possession of it immediately; that it is true that before 1 January, 1860, the distillery did take fire and a partial burning took place, and some injury was done to it, and some of the fixtures were burned; but the defendant positively denies that it was rendered useless and worthless and incapable of delivery, as charged in the bill; on the contrary, he avers that very little injury was done to the still, except to the cap, and that the fixtures around it, which were burned, could be replaced without much trouble or expense. He denies that he tried to sell the distillery, but says he refused to do so because of his contract with the plaintiffs. He says that, for the benefit of the plaintiffs, he authorized an agent, soon after the burning aforesaid, to put the distillery and fixtures in as good condition as they were before the burning, at the cost and expense of the defendants, and he is advised and believes that his said agent was not allowed to do so by the plaintiffs, (205) and so he avers.

On the coming in of the answer, the defendants moved for a dissolution of the injunction, which was refused by his Honor, and an order

was made to continue it to the hearing, from which the defendants appealed.

No counsel appeared for the plaintiffs in this Court.

Leitch, for the defendants.

PEARSON, C. J. In October, 1859, the plaintiffs made a contract with the defendants to rent a turpentine distillery for one year, to commence on 1 January, 1860, for which they agreed to pay $500, and to secure the payment thereof, executed a note, under seal, payable nine months thereafter. In December, 1859, a fire occurred, by which the distillery was damaged to some extent. The plaintiffs did not enter and take possession of the distillery, and it was not used during the year 1860. The equity of the bill is put on the ground of a failure of consideration, for that "said distillery, with all its furniture and fixtures, was burned and destroyed as far as it could be burned, and that what could not be burned was rendered worthless and useless for the purposes contemplated in said contract, thus rendering it impossible to fulfill the contract of the defendants without rebuilding the distillery in said place, which was not done, neither was any attempt made to deliver said distillery, and it could not be delivered, and was not."

The answer denies "that the distillery was rendered useless and worthless and incapable of delivery, as charged in the bill, by reason of the fire which occurred," and avers that "very little injury was done to the still, except to the cap of the still; that the fixtures around the still, which were burned, could be replaced without much trouble and expense," and that the defendant McKenzie "authorized an agent soon after the burning aforesaid to put the distillery and fixtures in as good a condition as they were before the burning, at his cost, and he is
(206) advised and believes his said agent was not allowed to do so by said plaintiffs, and he so avers."

So, the parties are at issue as to the matters of fact, and in this stage of the proceeding the Court has no means of deciding which gives the true version. It is the plaintiffs' misfortune to have closed the contract by a note, under seal, and the defendants have the advantage, because they have obtained judgment, and have the law on their side. Like *Mims v. McLean, ante,* 200, it is a *common injunction,* and as the answer is full and responsive to the bill, and the equity is not confessed, but is denied, the plaintiffs have no proof, and, consequently, have nothing to stand on in this stage of the cause, and the injunction ought to have been dissolved; *Capehart v. Mhoon,* 45 N. C., 37.

There is error in the decretal order.

PER CURIAM. Reversed.

Cited: Blackwell v. McElwee, 94 N. C., 429.

MARTHA TILLMAN, Executrix, against RICHARD H. TILLMAN and others.

Where a testator in his will gave a slave to one of his sons, and then provided that should he sell such slave, the proceeds should go into a common fund, and afterwards, by a codicil, made a contingent limitation of the same slave to a daughter in the event of the former legatee's dying without leaving children, and further provided that if any of the slaves bequeathed to the daughter should be sold by him, their value should be made good to her out of his estate, it was *Held*, that, the said slaves having been sold by the testator, the daughter had no claim for its proceeds out of the estate.

CAUSE removed from the Court of Equity of ANSON.

The bill in this case was filed by the executrix of David Tillman, praying the instruction of the Court as to her duties in carrying into execution the will of the said David. The chief difficulty is in relation to the disposition of the proceeds of a slave named (207) Calvin, which was sold by the testator in his lifetime. In the fifth clause of the will he gives Calvin, amongst other slaves, to his son, James A. Tillman. The testator added to his will a codicil, the second clause of which is as follows: "The property which I have given James A. Tillman, in the fifth item of my will, in case he should die without leaving a child or children, I desire to be disposed of in the following manner, to wit, Calvin I give to Mary Ann Smith and her children; Edmund to Frances Cooley and her children, and the balance of the negroes to my three youngest sons, William, David and John. * * * Should I sell any of the negroes given in the fifth item of my will, the proceeds are to go into a common fund.

"Third. In case I should sell and dispose of any of the negroes given to Frances A. Cooley or Mary Ann Smith, either in my will or codicil, it is my wish and desire that the value of said negroes should be paid to them out of my estate."

The only disputed question in the case is as to whether, by the clauses recited, the proceeds of Calvin go to William C. Smith and his wife.

K. P. and *R. H. Battle,* for the plaintiff.
Ashe, for the defendants.

BATTLE, J. Upon any admissible construction of the will of David Tillman, the proceeds of the slave Calvin must be exempt from the claim of the defendants Smith and wife. That slave was, by the fifth clause of the will, given expressly to the testator's son James, and, by a direction equally express, the testator declared in the second clause of his codicil that should he sell him, his proceeds should "go into a common fund." So far there is no difficulty; but it appears that in the same clause of the codicil, the testator limited Calvin to his daughter, Mrs.

Smith, and her children, in the event of his son James dying without leaving issue, and in the third clause of the codicil he directed that should he sell any of the negroes given to his daughters, Mrs.
(208) Cooley or Mrs. Smith, either in his will or his codicil, the value of such negroes so sold should be repaid to them out of his estate. This direction could certainly have been carried into execution as to any of the slaves given in the will to Mrs. Smith, but it can not apply to Calvin, because he can not be said to have been given to her, either by the will or codicil. By the will, he was given to the testator's son James, and that gift was not taken away by the codicil, but only modified by having engrafted upon it an executory limitation to Mrs. Smith and her children, contingent upon the event of the legatee, James, dying without leaving issue.

But it is contended that by the sale of the slave in question, the legacy to James was adeemed, and it is thence inferred that Mrs. Smith and her children took a present interest in him or his proceeds. This argument will not answer, because if the sale of the slave was an ademption of the legacy as to the legatee James, it must be equally so as to the ulterior legatees, Mrs. Smith and her children. The cases cited by the counsel do not apply, because they were not cases of ademption, but only cases where the death of the legatee for life, in the lifetime of the testator, enabled the ulterior legatees to come into possession of the legacies immediately upon the death of the testator. See *Richardson v. Vanhook,* 38 N. C., 581.

There must be a declaration that the defendants Smith and wife are not entitled to have the proceeds of the slave Calvin, sold by the testator in his lifetime, paid to them out of the estate, and as no other difficulty in the construction of the will is suggested, a decree may be drawn in accordance with the above declaration.

PER CURIAM. Decree accordingly.

---

(209)

JAMES S. YARBOROUGH against FREDERICK YARBOROUGH and another.

Where the friends of an infant made an exchange of his slaves for others, and those received in his behalf were carried off by his friends and sold, and he afterwards, without taking any benefit from the arrangement, repudiates it, and recovered in trover for those belonging to him, a court of equity will not interfere to restrain his execution, with the view of compelling him to return the slaves received on his behalf or account for their value.

APPEAL from the Court of Equity of FRANKLIN.

In 1843, Frederick Battle, of Nash County, in this State, by deed of

gift duly executed, gave to the defendants, Frederick Yarborough and Emily Yarborough (his grandchildren), six slaves, amongst which were the two, Robin and Burton, who are most particularly the subject of this suit. These slaves were in the possession of Thomas E. Yarborough, the defendants' father, in the State of Arkansas, he having been permitted to take them thither by the said Frederick Battle.

The plaintiff having a claim upon certain other slaves which were in the possession of Thomas E. Yarboro, to wit, Lewis, Ailsey and Sarah, went to the State of Arkansas, and was about to bring them back to this State, which (as the bill alleges) was disagreeable to the family of the said Thomas, and particularly to his wife, Mary Ann, who was attached to the slaves about to be removed; therefore, with the advice and concurrence of the parents of the defendants, and other family friends, the plaintiff conveyed to one John L. Gervais all the other slaves given by F. Battle to the defendants, excepting Burton and Robert, to wit, Fanny, Milbury, Owen and Ailsey, also three others not given them, but which were all in the possession of their father, to wit, Ailsey (the elder), Lewis and Sarah, in trust for the benefit and support of the said Thomas E. and his wife, Mary Ann, for their lives, and then to all their children, for whom there were four surviving, including defendants. This deed of trust recites, as a consideration, the brotherly love and affection which the said James S., the plaintiff, has for the said Mary Ann and her children, and the sum of ten dollars (210) cash to him in hand paid; but the real consideration, as set forth in the bill, was the surrender by Thomas E. Yarborough to the plaintiff the two slaves, Robin and Burton, so as aforesaid given to the defendants by their grandfather. These slaves the plaintiff immediately put into the market somewhere in the Southwest, and converted them into money.

The defendants being both very young, not having taken any benefit under this arrangement, nor having been consulted about it, through their maternal uncle, Thomas J. Battle, as their next friend, brought an action of trover in the Superior Court of Franklin County, and recovered as the value of the said slaves, Robin and Burton, $2,992, with interest and costs.. The prayer of the plaintiff is that the defendants be enjoined from taking out execution of this judgment until the slaves Lewis, Ailsey (the elder) and Sarah, shall be surrendered to him, or their value credited on the judgment.

The defendants both answered at length, but the facts set out by them become unimportant from the view taken of the subject by the Court.

On the coming in of the answers, the defendants' counsel moved to dissolve the injunction, which was refused by the Court, and an order made that it be continued to the hearing of the cause, from which the defendants appealed.

R. B. Gilliam and *Miller,* for the plaintiff.
B. F. Moore and *Lewis,* for the defendants.

PEARSON, C. J. We are of opinion that the bill does not show on its face any equity against the defendants, Frederick and Emily, who are the plaintiffs in the action at law, and, consequently, the injunction was improvidently granted.

Suppose an infant sells a negro, receives the purchase money, and spends it, and afterwards avoids the contract by a demand of the negro and a recovery in trover for his value, will a Court of Equity enjoin him from issuing execution, unless he will repay the purchase (211) money, or enter credit for the amount on his judgment? If so, the policy of the law in protecting infants against their supposed want of discretion will be defeated.

Or suppose an infant exchanges negroes, and the negro received by him is sold and carried to parts unknown, and afterwards he avoids the contract by a demand of the negro given by him in exchange and a recovery in trover for his value, will a Court of Equity enjoin him from issuing execution unless he will return the negro received by him, or account for the value? No authority was cited in support of the position, and it is manifest that such an interference by a Court of Equity would, in effect, deprive infants of the protection of the law, and subject them to all the consequences of their want of discretion.

In these cases, it is assumed that the infant is a party to the contract, but in the case made by the bill, waiving the objection that as the deed to Gervais recites for its consideration "brotherly love and affection" and the sum of "ten dollars cash," it is not admissible to add to and contradict the deed by averring that, in point of fact, the real consideration was negroes Robin and Burton, there is no allegation that the infants, Frederick and Emily, were parties to the supposed exchange of negroes, and the amount of it is, that the plaintiff, by an arrangement with the parents and friends of the infants, took Robin and Burton, two negroes belonging to them, and converted them to his own use, and in lieu thereof, and by way of compensation, executed the deed to Gervais, conveying certain other slaves in trust for the parents during her life, and then in trust for their children, including the defendants, Frederick and Emily.

The question is, when Frederick and Emily bring an action of trover against the plaintiff and recover damages for the conversion of Robin and Burton, has the plaintiff an equity to enjoin the collection of the judgment, on the ground that the negroes conveyed by him to Gervais are in the State of Arkansas, where they were at the date of the (212) conveyance, and some of them have been disposed of by the father of Frederick and Emily? In other words, can the legal

rights of these infants be fettered and embarrassed by reason of an alleged arrangement with their parents—to which they were not parties, which was obviously against their interest—under which they have not acted or taken benefit, and which they repudiated and avoided by instituting their action at law for the conversion of Robin and Burton? A bare statement of the case is the strongest argument that can be made on the part of the infants; because it shows that if equity interposes against them under such circumstances, the protection which the law gives to infants is illusory; and not only so, but that their property may be taken from them without any contract on their part, but simply by force of an understanding among their parents and friends, in respect to which they were too young to be consulted, and under which they have taken no benefit, but, on the contrary, disavow and repudiate it.

There is error in the decretal order by which the injunction was continued until the hearing. The injunction ought to be dissolved.

PER CURIAM. Reversed.

In the Matter of LEVI S. YATES, Guardian.

Upon the refusal of a bidder at a sale of land by the master, under a decree of court, to comply with his bid, it is not proper, in the first instance, to order a resale of the land, and that the delinquent bidder pay the differerence between the former and the latter sales. The proper course is for the master to report the facts to the court, and for the bidder to be put under a rule to show cause why he shall not comply with his contract.

THIS was an appeal from a decretal order made by the Court of Equity of MARTIN.

A petition had been filed by Levi S. Yates, guardian of Sarah (213) E. Moore, for the sale of certain lands lying in Martin County, and a decree of the Court for a sale passed accordingly, to be made by C. B. Hassell, the Clerk and Master of the Court. At the next term of the Court (Spring Term, 1861), the Master reported (among other sales) that he had offered the "Gardner tract" for sale, when A. H. Coffield, for Coffield & Barnhill, had become the last and highest bidder, at the price of $6,000; that this tract consisted of two parcels, one of which contained two hundred acres, which is described in the report; the other contained one hundred and sixty acres, which was subject to a lease of twenty-four years, of which seventeen years was unexpired. The Master further reported that, after having at first promised to comply with the terms of the sale, the said bidders became dissatisfied with their bid, and after much vacillation, they finally gave him notice that they declined to

give bond and surety according to the conditions made known by him at the sale. The petitioner, Yates, filed affidavits at this term, going to show the explicit terms on which the sale was made, and that the precise character and quantity of the two parcels were distinctly made known by the Master to A. H. Coffield previously to his making the bid for himself and Barnhill.

The transcript sets out that, at this term, the following order was made in the cause:

"Ordered, that the lands purchased by Coffield, for Coffield and Barnhill, be resold by the Master, and that the purchaser pay the difference, if any, between the first and second sale of it, he, Coffield, having failed to comply with the terms of sale." To which is added the further entry: "From the order and decree of the Court, that the purchasers pay the difference, A. H. Coffield and T. E. Barnhill pray an appeal to the Supreme Court, which is allowed to them by his Honor."

B. F. Moore, for Yates.
Winston, Jr., for Coffield.

(214) PEARSON, C. J. There is error in the decretal order appealed from.

The orderly mode of proceeding was for the Court to accept the bid of Coffield and Barnhill by confirming the contract of sale, and then upon the matter set out in the report, to enter a rule against them, to show cause why they should not be required to comply with the terms of the sale. On the return of the rule, the Court, considering the whole matter, as well the facts set out in the report, as those which might be relied on by them, could dispose of it in one of three ways:

1. By an order that Coffield and Barnhill do execute and perform what they had undertaken to do, according to the terms of their bid, which would, in effect, be a decree for the specific performance of the contract—the Court having jurisdiction to make the decree as an order in the cause, as fully as on "an original bill for specific performance," by reason of the fact that the contract is within its cognizance, and all the necessary parties are before it.

2. By an order releasing Coffield and Barnhill from their bid, rescinding the contract and directing the land to be sold over again.

3. Which is the middle course: By an order without absolutely releasing them from their bid and rescinding the contract, that the land be sold over again, they undertaking, as a condition precedent to this order of resale, which is made for *their* benefit and on the basis of their liability to a decree for a specific performance, to pay the costs and charges incident to a second sale, and also to make good the difference in

the price, in the event that as high a bid is not obtained: *Harding v. Yarbrough* (not reported*), decided at June Term, 1856; see also *Claton v. Glover,* 56 N. C., 371.

*There was no opinion filed by the court in the above case, but as the whole matter appears in the decree filed in the case, and it may be of service to the profession as a precedent, the Reporter takes the liberty of appending such decree as a note to this case.

NORTH CAROLINA, SS.:
Supreme Court, June Term, 1856.

E. L. HARDING v. EDWARD YARBROUGH and others.

July 21, 1856.

Upon the opening of the matter this day before the court, by the counsel for the plaintiff, it was alleged that by an order, in this cause, it was, among other things, ordered that the hotel and premises, in the pleading, in this cause, named, should be sold by E. B. Freeman, as a commissioner of this court, to the best purchaser that could be got for the same, to be allowed of by the said commissioner. That in pursuance of the said order; the said hotel and premises were sold by the said commissioner on 28 June, past, and that Edward Yarbrough and Dabney Cosby, having bid the sum of fifteen thousand dollars for the said hotel and premises, the said commissioner, by his report, allowed the said Edward Yarbrough and Dabney Cosby to be the purchaser thereof, at that sum, which sum, by the terms of the sale, was to be paid in sums as follows, namely, $500 in cash down; $4,333 on 1 July, 1857, with interest from the day of sale; $4,833 on 1 July, 1858, with interest, and $4,834 on 1 July, 1859, with like interest, and each of said sums of $4,833 was to be secured by the bond of the purchaser, with approved security. And that the said commissioner, by his said report, had also reported that the said sum so bid was a fair price, and that they had paid down, in cash, the said sum of $500, to the commissioner, but had failed to give approved security for the payment of the residue of the price aforesaid: whereupon, the court, upon hearing the decretal order for sale of the hotel and premises, made at the last term of this court, and the report of the commissioner aforesaid, on motion of counsel for the plaintiff, there being no objection thereto, doth confirm the sale to the said Dabney Cosby and Edward Yarbrough. And thereupon, it is prayed by the counsel of the plaintiff, that the purchasers aforesaid might, on or before Friday, 25 July, instant, complete their purchase aforesaid, according to the terms of the sale, or on that day show to the court cause to the contrary. And in the event that they do not complete their purchase nor show good cause to the contrary, then, that the said commissioner may be directed forthwith to resell the said hotel and premises, and that all the costs, charges and incidental expenses attending the last sale and incidental thereto, and occasioned by the default of the said Dabney Cosby and Edward Yarbrough, together with any loss or deficiency in price and interest arising by such second sale may be ascertained by the clerk of this court, and the same be paid into the office of this court by the said Cosby and Yarbrough, for the benefit of the parties interested in the premises, according to their several interests. And that service of this order on the said Cosby and Yarbrough be made by the marshal of this court—and in case of the absence of either of them, that service on his attorney be deemed good service—whereupon, upon hearing the counsel for the plaintiff, the decretal order for the sale, made at the last term of this court, and the report of the commissioner aforesaid, this court doth order that notice of this proceeding be forthwith served on the said Cosby and Yarbrough by the marshal of this court, in the manner and according to the prayer of the plaintiff, that they complete their purchase or appear at the time specified and show cause why the prayer of the plaintiff should not be granted.

A true copy.—Test. E. B. FREEMAN, *Clerk.*

(215) For the error in not pursuing this orderly mode of proceeding, the decretal order must be set aside.

This extends to the whole of the order in respect to the land bid off by Coffield and Barnhill; for, although it was suggested by their counsel that the part of the order which directs resale was not appealed from, still that was incidentally made with reference to the part appealed from, and the whole must be treated as connected together and making but one order, and not two distinct and independent orders, so as to allow the entire subject to come before the Court, and leave all the parties concerned to take such action as they may be advised.

(216) For the purpose of leaving the question entirely open upon its merits, this Court declines to express any opinion as to whether the orders, made in the Court below, do or do not amount to an acceptance of the bid of Coffield and Barnhill, or to a ratification of the contract if the Master exceeded his power; or upon the question whether, supposing the Master to have exceeded his power, Coffield and Barnhill were not at liberty to withdraw their bid at any time before the action of the Master was ratified.

PER CURIAM. Decretal order reversed.

Cited: In re Gates, post, 307; *Evans v. Singeltary,* 63 N. C., 206; *Etheridge v. Vernoy,* 80 N. C., 80; *Harris v. Bryant,* 83 N. C., 571; *Vaughn v. Gooch,* 92 N. C., 528.

Modified: Pettillo, ex parte, 80 N. C., 53.

Memorandum: Case in *note, Harding v. Yarbrough,* cited, *post,* 308.

WILLIAM NORFLEET and D. P. LLOYD, Executors, against HELEN B. SLADE and others.

1. Where a testator had an estate in land limited over to the defendant on his dying without issue, and he devised the said land to be worked for two years after his death for the payment of his debts, and in his will he gave valuable legacies to the defendant, which she elected to take, it was *Held*, that though the testator died without issue, yet the provision for the payment of the debts must be enforced.
2. Where a testator had derived certain slaves from his maternal grandfather, who had lived in the county of Martin, and it appearing to be a leading purpose with him to restore such slaves to their original place of residence, and to their family connections, he bequeathed to one in Martin as follows: "All my negroes on my Roanoke plantation (which laid in the county of Martin); also, all my negroes on my Edgecombe farms, which I got from Martin County, whether I inherited or purchased them," it was *Held*, that slaves bought by the testator in Martin or elsewhere and removed from that county to Edgecombe, and the children born in Edgecombe of women removed from Martin, and one born of a woman on the Roanoke plantation, but which was casually residing elsewhere, all passed under said bequest.

CAUSE removed from the Court of Equity of EDGECOMBE.

The bill in this case is filed by the executors of Henry S. Lloyd, setting forth difficulties in the way of a satisfactory administration of the estate, and praying that the several disagreeing legatees may come in and litigate the questions made in the case, and that they may be protected by a decree of the Court, as to these several matters of dispute. The bill sets out that the testator owned in Martin County one large tract, called in the will his "Roanoke plantation," which was devised to him by his maternal grandfather, Henry Slade, with a limitation over to his aunts, Helen B. Slade and Mrs. Chloe Hinton, upon his dying without issue, and two other tracts adjoining this, which the testator purchased, the one from William Slade and the other from A. Williams; also, several tracts of land and plantations in Edgecombe County; on the plantations in both of which counties the testator had large numbers of slaves, and other personal property, most of which had been bequeathed to him by his paternal grandfather, Henry Slade, (218) and his maternal grandmother, Mary Gregory.

The testator, being indebted very largely, provided for the payment of his debts as follows: "I authorize and empower my said executors to carry on my farms for the term of two years after my decease, and to adopt all measures for that purpose, if the same be necessary, to pay my debts, and to apply the income thereof as the same may be received, to the payment of my said debts," with a further devise of his town property for the same purpose.

He then proceeds to give and bequeath to his aunt, Helen B. Slade, thus: "all my negroes on my Roanoke plantation; also all my negroes on my Edgecombe farms which I got from Martin County, whether I inherited or purchased them," with a residuary clause to his sister and two brothers. About the year 1858 the testator's grandmother, Mrs. Gregory, having died, and devised to him valuable farms in Edgecombe, the testator removed his residence from Martin County, where he had formerly lived, to the county of Edgecombe, and brought with him a good many of the slaves that had been worked upon the Roanoke farms. The testator died in Philadelphia in January, 1860, and, at the time of his death there were on his Roanoke plantation twenty-seven slaves (which are set forth by name in the plaintiff's bill), all of which slaves were a part of those and their descendants bequeathed to the testator by the said Henry Slade, except one by the name of Weaver, who was bought in Richmond in 1856 and carried to the Roanoke plantation, where he has remained ever since, and never left that plantation. There were thirty-five slaves brought from the Roanoke plantation to Edgecombe, twenty-two of which had been bequeathed to the testator by his grandfather, Henry Slade, or were the descendants of such, and the

remainder of them, and their increase, were bought by the testator in various counties contiguous, and were taken to the Roanoke plantation; two of these, Anderson and Thrower, were purchased in Martin County.

Four of the slaves on the Edgecombe farms, to wit, Granville,
(219) Betsy, Francis and London, were offspring of female slaves removed from Martin to Edgecombe, and born in the latter county.

One of the questions raised, is whether the right and interest of the defendant, Helen, in the said Roanoke plantation, devised to her as aforesaid in remainder by her father, is subject to be used according to the said will of H. S. Lloyd, to pay his debts if necessary.

A further question is as to what slaves pass by the said will to the legatee, Helen B. Slade, whether all the slaves passed that were worked on the Roanoke plantation at the time of testator's death, or only such as were derived from her said grandfather, Henry Slade, and whether the slave, Weaver, the slave purchased in Richmond, passed to her; also, whether Anderson and Thrower, slaves purchased in Martin by the testator and brought to Edgecombe, are included in the bequest to her, the said Helen. Whether Granville, Betsy, Francis and London, the descendants of female slaves brought from Martin and born in Edgecombe County after their removal, pass to Helen B. Slade under the clause in question. Sally was born of a woman which had been given by Henry Slade to the testator, and belonged to the Roanoke plantation. She had been residing among the slaves of the defendant, Helen B. Slade, for a special reason, and was so residing when the testator died; another question is, whether she passed by this clause.

The defendants answered, insisting on their peculiar views of the questions of law governing the construction of the will under consideration, but not disputing any of the facts above stated.

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

B. F. Moore, for the plaintiff.
Rodman and *Dortch,* for the defendants.

MANLY, J. The bill is filed for the construction of the will of Henry

S. Lloyd in certain particulars. Upon a consideration of the
(220) will, in connection with the first and principal point upon which the advice of the Court is asked it seems to us clear that the testator expected and intended all the plantations worked by him to be continued in cultivation two years, for the payment of his debts, and so far as this is practicable and consistent with the rights of others, it ought to be carried into execution. With respect to the Roanoke plantation,

it appears from the will of Henry Slade to be devised to the testator, Lloyd, with a limitation over, in the case of his death without issue, to Helen B. Slade and Chloe Hinton. The death of Lloyd without issue, as stated in the pleadings, vests the rights of property and possession immediately in the devisees in remainder, and with this result we can not interfere so far as Mrs. Hinton is concerned. But, inasmuch as Miss Slade receives a large estate, real and personal, under the will, she is bound to carry out, even to the prejudice of her rights, the manifest purpose of the testator in respect to his Roanoke plantation. This is upon a principle of equity that a legatee who elects to take under the will, must do so subject to all the provisions of the instrument that affects his interest. He can not accept the good and repudiate the bad. The Court is of opinion, therefore, that the profits of the Roanoke plantation, with the others, should be appropriated for two years, if necessary, to pay the debts of the estate, subject to the right of Mrs. Hinton to a proper rent for her interest in the same. It will follow that slaves given to Miss Slade must also be taken by her, subject to the incumbrance of working to pay debts for two years, if necessary. The bequest to Helen B. Slade is in the following words: "And I also give and bequeath to my said Aunt Helen all my negroes on my Roanoke plantation, also all my negroes on my Edgecombe farms which I got from Martin County, whether I inherited or purchased them." The bequest embraces, as we think, all the slaves that were at the time worked upon the Roanoke farm, without regard to the source from which they were derived. It, consequently, includes Weaver, who was purchased in Richmond and put to labor on the Roanoke farm. The child, Sally, is also (221) included, for, although being at the time among the slaves of his aunt, at her residence, the child was born on the Roanoke plantation of a mother belonging to that estate, and was removed for a special reason and purpose only. It was not permanently settled or fixed at the plantation of the aunt and, consequently, had not lost the domicil of its birth. It is to be regarded, therefore, as one of the negroes on the Roanoke plantation.

Considering the other clause of this bequest, we are of the opinion that all the slaves on the Edgecombe farms which had been *removed* to them from Martin, no matter how or from what quarter derived, pass under the bequest, also the slaves on the Edgecombe farms which had been bought in Martin. This will include Anderson and Thrower.

The children, Granville, Betsy, Francis and London, appear to be offspring of slaves removed from Martin to Edgecombe, but born in the latter county. While the testator is making provision to restore the slaves to their original places of residence, and to their family connections, it would be an inconsistent and harsh construction to hold that

he intended to separate infant children from their mothers. We think it was intended the children should go with their mothers, and, consequently, they are embraced in the bequest to Miss Slade.

PER CURIAM. Decree accordingly.

---

(222)

JAMES ADAMS, Ex'r, against MARTHA A. JONES and others.

1. The words, "wheat and corn on hand," in a will, were *Held*, to mean that, only, which was in the granaries of the testator at the time of his death, and not to embrace the ungathered or standing crop.
2. The court will not respond, at the instance of an executor, as to the conflicting interests of two legatees of land; as the executor has nothing to do with the question. The court also will decline to answer as to a hypothetical case.
3. Stock in a railroad company is embraced in the term *property*, directed by the will to be sold.
4. A deposit in a bank is not to be considered as included among *debts* ordered by the will to be *collected* and invested for the benefit of legatees, especially before a demand and refusal, on the part of the bank, to pay.

CAUSE removed from the Court of Equity of WAKE.

The bill in this case was filed by the executor of Austin Jones to obtain a construction of certain clauses of his will and codicil, and the several legatees were made parties defendants.

In clause 8, the testator bequeathed to his widow, Martha A. Jones, "all the wheat on hand, all the corn on hand, also all the bacon and lard on hand."

At the date of the death of the testator, some of the highland corn was ripe enough to be housed, but the lowland corn, which composed more than three-fourths of his corn crop, was not ripe enough to be gathered. There was on hand at this date about thirty barrels of *old corn,* and a much larger quantity at the time of the making of the will.

The question propounded is, whether the ungathered corn passes under this bequest; also whether a share of railroad stock is included in the meaning of the word "property" in a clause directing a sale.

The bill states a controversy between the widow and one of the other legatees as to the respective rights of the two in a tract of land devised in the will, but from the view taken of the question by the Court it is not necessary to be particularly stated.

The executor also seeks to be informed, "when will the liability to make up for the loss of the slaves, by death, cease." No case of the loss of slaves had occurred among the legatees at the filing of the bill.

At the time of the death of the testator there was to his credit, in a branch of the Bank of Cape Fear, $900, for which he had a cer-

tificate of deposit. The executor desires to be instructed whether (223) this deposit is a *debt* due to the estate of the testator, and, as such, coming within a direction to collect debts and invest the proceeds for the benefit of his minor children, or is to be considered as cash.

Phillips and *K. P. Battle,* for the plaintiff.
Miller, for the defendants.

MANLY, J. The bill is filed to obtain a construction of the will of Austin Jones in certain matters of doubt, and for an account and settlement of the estate.

Taking these matters in the order in which they are brought to the attention of the Court, we are of opinion, in the first place, that by the term, "wheat and corn on hand," is meant that only which was in the granaries of the testator at the time of his death. The terms used are not those commonly resorted to to designate growing crops or standing grain. The words crop, or growing crop, or standing crop, are those in popular use for such purpose. The force of the expression, "on hand," also leads to the conclusion that one who uses it has reference only to such things as are capable of present delivery.

In the second place, the Court declines expressing any opinion as to the controversy between the widow and the legatee, Turner, about the eighty acres of land. It is a matter which does not concern the executor in the settlement of the estate. The parties interested must settle it themselves, in such way as they may be advised is necessary and best.

The third enquiry the Court also declines answering, for the reason that it is hypothetical. No one of the negroes given to any of his children has died, and, therefore, the contingency has not arisen upon which alone the construction of the ninth clause of the will can become of any practical utility.

The share of stock in the Raleigh and Gaston Railroad Company is *property* to be sold under the eleventh clause of the will. The word is among the most comprehensive of those in use to signify (224) things which are owned, and subject to be owned and enjoyed.

The deposit of $900 in the Cape Fear Bank is not embraced, according to our opinion, among the debts which are directed in the eleventh clause of the will to be collected and invested for the benefit of his children.

We deem it unnecessary to discuss or decide, in this connection, the precise legal relations which subsist between a general depositor and a bank. Our duty is to ascertain the meaning of the testator, in the language employed by him in the clause in question, and the true rule is to interpret it according to its ordinary acceptation. The common understanding, we think, is to regard a deposit in the bank as *cash*

(at any rate prior to a demand and refusal), and not as a debt due. In making out a descriptive list of one's estate, it would be certainly so classed. We conclude, therefore, the testator did not intend to embrace the bank deposit by the use of such words as "all the debts due me."

Let an account conforming to these views be ordered.

PER CURIAM. Decree accordingly.

Cited: *Redmond v. Commissioners,* 106 N. C., 140.

---

(225)

WILLIAM BALLANTYNE, Executor, against CHARITY TURNER and others.

1. Where a testator gave directions in his will, that his wife should "put out his money and take security for it," it was *Held*, that the executor was not bound or authorized to interfere with the widow in the investment and management of the fund.
2. Where there were two persons of the same name, mentioned in a will, the one a granddaughter, to whom a small legacy was given, and the other a daughter, to whom a larger portion is given in a clause with two others, daughters, it was *Held*, that the daughter was meant in such bequest.
3. A wish expressed at the conclusion of a will that if the testator had not provided his wife with a plentiful support she was to have enough of the interest of his money to make her such plentiful support, was *Held*, too vague and indefinite to impose any duty on the executor.
4. Interest, on a legacy, as a general rule, is only chargeable from the time the legacy is ordered to be paid.

CAUSE removed from the Court of Equity of WAKE.

The bill is filed by the executor of Augustine Turner, praying the Court for a construction of certain clauses in the will, and stating that there are conflicting claims set up by the different legatees, an erroneous decision of which, on his part, might subject him to great pecuniary loss.

The first question presented to the Court is, whether the executor is responsible under a clause directing his wife "to put the balance of his money into safe hands and take security for the benefit of his children hereafter named," or whether the wife was to be the sole judge of the sufficiency of the security taken by her.

The second and third questions, for the reasons stated by the Court, are immaterial.

The fourth question arises on this clause, "My will is that my executor give my grandson, Augustine Perry, when he becomes of age, or put in a guardian's hands for his benefit, the sum of one thousand dollars, * * * and after my said wife's death or marriage, I wish the executors to sell all the property loaned to my wife and not heretofore given away, and equally divide it between Mary Turner, Cynthia Perry, and

Nancy Turner, except my will is that Cynthia Perry have $1,000 less of the amount of property, sold at my wife's death, than Mary Turner and Nancy Turner, on account of the thousand dollars given to Augustine Perry." The executor seeks to know at what time this one thousand dollars becomes payable to Augustine Perry, whether it goes at once into the hands of the guardian or whether it is to be postponed until he arrives at age, or at the death of his grandmother, and whether the said legacy bears interest. The said Augustine Perry had lived with and been supported by his own father, and had never been under the charge of his grandfather. In the former part of the will the sum of (226) $400 per annum is given to his wife during her life, to be derived from the interest of his money, and it is alleged in the bill that, after the payment of debts and specific legacies, there will not be enough of money left to pay the annuity of $400, and the said thousand dollars to Augustine Perry, if it becomes payable before her death; and another question is, what shall be done in case this conflict occurs?

The fifth question arises upon the fact that there are two persons by the name of Nancy Turner, mentioned in the testator's will, to wit, a daughter and a granddaughter, the daughter of his son, Henry Turner, to whom he gives $500, and a daughter, Nancy Turner, mentioned in the before recited clause. The executor desires to know whether this legacy is void, for the ambiguity, or to which individual of that name he is to pay the money arising from the sale as aforesaid ordered.

6. The testator, in his will, requires that a certain negro given to one of his daughters, Mrs. Avery, shall be returned to his estate, if she should die "without a bodily heir," and be sold, and the proceeds divided among his living children. The executor desires to know when this legacy will become vested, and how soon after the contingency, referred to, will it be his duty to make the contemplated sale.

At the close of the will are these words: "If I have not given my wife a plentiful support, she is to have enough of the interest of said money to make her a plentiful support." The executor desires to know whether he is to judge whether the provisions of the will are sufficient, or whether he will be held responsible for the fulfillment of the clause.

K. P. Battle for the plaintiff.
No counsel for the defendants in this Court.

BATTLE, J. The bill is filed by the plaintiff as executor of Augustine Turner, deceased, for the purpose of obtaining the advice and direction of the Court as to the proper construction of his testator's will and the management of his estate. To such of the enquiries as (227)

it is necessary for us to respond at the present time we will give answers in the order in which the questions are put:

1. We find nothing in the will which requires the executor to interfere with the widow in the investment and management of the balance of the money mentioned in the seventh clause. The testator having entrusted her with that business she must be the exclusive judge of the sufficiency of the security upon which the loans are to be made.

2 and 3. We cannot discover any interest which the executor has in knowing what estate the respective husbands of Winifred Avery and Martha Spence take in the slaves given to their wives. He is not constituted by the will a trustee for the *femes covert,* nor are the slaves given for their separate use.

4. The legacy of $1,000 to the testator's grandson, Augustine Perry, is, upon a proper construction of the different clauses of the will relating to it, made payable to him either upon his coming of full age or at the death of his grandmother, should she die before he arrives at that age. The testator first directs his executor to pay it to him "when he becomes of age," but he immediately adds, "or put in a guardian's hands for his benefit," which seems to be inconsistent with the first direction; this, however, is explained by the clause which, after ordering a sale at the widow's death of the property given her for life, directs the proceeds to be equally divided between the testator's three daughters, Mary Turner, Cynthia Perry, and Nancy Turner, with the exception that Cynthia is to have $1,000 less than the other two, on account of that sum being given to her son, Augustine. This is a clear indication that the latter is to have his legacy before he comes of age, provided his grandmother dies before that time, and, in that event, the money must be paid to his guardian, as directed by the will. As it does not appear from the will that the testator was standing in *loco parentis* to his grandson,
(228) and as it does appear from the bill that the grandson had always lived with and been supported by his own father, the legacy will, according to the general rule, bear interest only from the time when it becomes payable. *Harrell v. Davenport,* 58 N. C., 4. The legatee is stated to be only eight years of age, and as the interest on his legacy can not commence before his arrival at full age, *or* the death of his grandmother, we are not informed that it can interfere with the annuity of $400 given to her, and it is, therefore, unnecessary for us to speculate upon the effect which might have resulted from a collision between that annuity and the immediate payment of the legacy, or of interest upon it.

5. The proceeds of the sale of the property given to the widow for life are, at her death, to be equally divided "between Mary Turner, Cynthia Perry, and Nancy Turner," and the testator has mentioned in his will two persons of the name of Nancy Turner, one of whom is his

daughter and the other is his granddaughter, and the question is, whether the legacy is void because of a patent ambiguity. The answer is that if there were a patent ambiguity the legacy would be void, but the apparent difficulty is removed by the fact that, in the bequest under consideration, Nancy Turner is named in connection with the testator's daughters, Mary Turner and Cynthia Perry, which makes it manifest that the legatee spoken of is the daughter and not the granddaughter of the testator, and the mixim, *noscitur a sociis,* gives the legacy to her.

6. It is very doubtful whether the female slave lent to the testator's daughter, Winifred Avery, will, under the limitation contained in the will, ever return to and become again a part of his estate; but if she should, it will then be the proper time to decide what will be done with her.

7. The widow, not having shown any dissatisfaction with the express provision made for her by her husband's will, by dissenting from it, can not claim any additional support under the general terms which he uses in the latter part of it. Such terms are too vague and indefinite to be carried into effect by a judicial sentence. See *Faribault v.* (229) *Taylor,* 58 N. C., 219.

A decree drawn in accordance with the principles announced in this opinion will probably enable the plaintiff to settle the estate of his testator without further difficulty. The costs will be paid out of the estate.

PER CURIAM. Decree accordingly.

JOHN A. RICHARDSON against BERRY GODWIN.

1. Where an insufficient description was given in a bond to make title, parol evidence cannot be resorted to to show what the parties meant, or to identify the particular parcel of land which was the subject matter of the written contract.
2. Where an obligee in a bond to make title, files a bill for a specific performance of the contract, and claims to have the land conveyed according to certain boundaries which he alleges were meant by the contract, and the defendant in his answer denies that such boundaries were meant, and sets out others which he alleges were intended, the plaintiff, not having in the pleadings averred his unwillingness to accept a deed according to the lines as the defendant says he understood they were to be run, and not having offered to release him against any further claim, is not entitled to a decree according to the allegations of the defendant.

CAUSE removed from the Court of Equity of ROBESON.

The bill was filed by the plaintiff to enforce a specific performance of a contract in writing for the conveyance of a certain parcel of land according to particular lines which are set forth in the bill, and plaintiff avers were the lines intended by the agreement. The land in question

was part of a contract of some four thousand acres which was owned by the plaintiff, and the contract is for the conveyance of a part thereof, supposed to be about fourteen hundred acres, "the location of which will more fully appear by reference to a certain plat now in the hands of Berry Godwin, made by Elias Wishart," which plat is made a (230) part of the plaintiff's bill. The plat in question exhibits three lines drawn across the body of the land, two of which the plaintiff alleges were drawn by Eli Wishart, and the one which is east of the other he contends was meant by the parties, and he prays that the defendant may be compelled to convey according to that boundary.

The defendant in his answer says that when the plaintiff and himself entered into the contract set out (which he does not deny) they drew a third line on the plat, formerly made by Wishart, which is still more easterly, and that *that* was the line, according to which the land was to be conveyed, and according to which he says he had always been ready and willing to convey, but had not done so because of the unreasonable and unjust claim set up by the plaintiff, to have the land conveyed according to the middle line.

There were proofs taken on both sides as to the acts and declarations of the parties, in respect to the line intended, but being pronounced by the Court inadmissible to control the meaning of the bond, they are not deemed proper to be reported.

The plaintiff contended on the argument that he was at least entitled to have a conveyance according to the allegations of the defendant, and proposed *ore tenus* to take a decree on these terms, if the Court were of opinion that he had not established his enquiry according to his own allegations and proofs.

Leitch for the plaintiff.
Person for the defendant.

PEARSON, C. J. A specific performance of the contract can not be decreed, because it is not *practicable,* by reason of the vague and indefinite description of the parcel of land concerning which the contract was made. It is settled that where an insufficient description is given, parol evidence is not admissible to show what the parties meant, or to identify the particular parcel of land which was the subject-mat- (231) ter of the written contract. This must be done by the terms of the contract, and an insufficient description cannot be added to or helped out by parol proof of what was said before, at the time of after the written contract was executed. *Murdock v. Anderson,* 57 N. C., 77; *Allen v. Chambers,* 39 N. C., 125.

Whether the plaintiff is entitled to a specific performance, according to the contract, as the defendant in his answer says the line ought to run,

is a question not presented by the pleadings. In order to raise it, the plaintiff must aver that he is willing and has offered to accept a deed for the land according to the line, as the defendant says he understood it was to be run, and that he, the plaintiff, has offered to perform his part of the contract as it was understood to be by the defendant, and to release and acquit him of all further claim. The bill is dismissed with costs, but without prejudice.

PER CURIAM. Bill dismissed.

Cited: Breaid v. Munger, 88 N. C., 299.

JOSEPH WHITE and others against WILLIAM S. BUTCHER and others.

1. The maxim, that equity will not enforce the specific performance of an agreement upon which an action will not lie, at law, for damages, never meant more than that the contract must be such as the law would have recognized, if sued on in proper time and under proper circumstances.
2. One who has executed a bond to make title to land, has no right to insist, in a suit for a specific performance, that the defendant had abandoned his right to relief, while he still holds the bonds given for the purchase money, and has never made an offer to surrender them to his vendee.

CAUSE removed from the Court of Equity of SURRY.

The bill was filed for the specific performance of a contract, in writing, executed by the defendant, Butcher, in the year 1851, in which the defendant binds himself in a penalty, and after reciting that three several bonds had been executed by the plaintiff as the price of (232) the land therein described, which fell due at three several dates, it is provided as follows: "Now, if the said Joseph White shall pay off the said bonds as they fall due, then, when the last of the said payments shall be paid, the said William S. Butcher shall personally, or by his agent or attorney, execute to the said Joseph White, his heirs or assigns, a good and sufficient title deed in fee simple." The bill was filed in the fall of 1857, and alleged the payment of one of the said bonds, and that the defendant, Butcher, had conveyed the land to the defendant, Holderfield, and that he, Holderfield, had covenanted to convey the same to the defendant, Pilson, both of whom had notice of the plaintiffs' equitable claim. The bill alleges that shortly before bringing the suit he tendered the purchase money agreed to be paid, with interest thereon, to the defendant, Holderfield, who was the attorney in fact of Butcher, but that he not only refused to accept the same, but hurried a messenger to the State of Missouri, where Butcher lived, and procured from him a deed for the premises to himself (Holderfield).

The defendants, Holderfield and Pilson, answered, alleging that the plaintiff had only paid a part of the first bond, and had then left the State insolvent, and had abandoned all idea of insisting on his purchase, and that though he subsequently returned, he still had no idea of insisting on the fulfillment of this contract, until he was urged to do so by another person, who enabled him to raise the money which was tendered. The other material allegations of the bill are admitted by the answers. The bill was taken *pro confesso* as to Butcher.

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

Barber and *Mitchell,* for the plaintiffs.
Boyden, for the defendants.

BATTLE, J. It is admitted by the counsel for the defendants that the plaintiff, Joseph White, had at one time the right to the specific
(233) performance of the contract mentioned in the pleadings, but he contends that such right cannot now be enforced, for two reasons:

First. Because no action at law to recover damages would now lie upon it; and

Secondly. Because the right to enforce the contract in equity had been so acted upon by the plaintiff as to justify the defendants in treating it as abandoned.

1. The first ground of objection is clearly untenable. It is true there is a maxim that equity will not enforce the specific performance of an agreement, upon which an action will not lie at law for damages, and, anciently, it was the practice to send the party to law, there to establish the validity of the contract, before he was allowed to proceed in equity. That practice has fallen into disuse, and the maxim never meant more than that the contract must be such as the law would have recognized, if sued upon in proper time and under proper circumstances. If the rule were that equity would not entertain a suit for the specific performance of an agreement, except where, at the same instant, a suit might be sustained for a breach of it at law for damages, there would be no ground for the existence of another well-known maxim, that time is not of the essence of a contract in equity. Upon the efficacy of this maxim it often happens that a party, by a neglect of a strict compliance with his stipulations in a covenant or other contract, with regard to time, loses his right to sue at law, while he may yet have a remedy by a suit for a specific execution in equity. *Walker v. Allen,* 50 N. C., 58; *Falls v. Carpenter,* 21 N. C., 237. Time may, indeed, be made an essential part of a contract, even in the view of a Court of Equity, and in that case that court will require its observance as rigidly as a court of law.

The counsel for the defendants contends that the present contract is one of that kind, and, in support of his position, he refers to the language of the bond for title: "Now, therefore, if the said Joseph White shall pay off the said bonds as they fall due, then, when the last of the said payments shall be made, the said W. S. Butcher shall personally, (234) or by agent or attorney, execute to the said Joseph White a good and sufficient title deed in fee simple." The purchase-money for the land was made payable in three installments, secured by three several bonds, and the counsel contends that the punctual payment of each, as it fell due, and, certainly, the payment of all, when last fell due, was intended as an essential requisite to his obligation to make title. We can not discover any such meaning in this any more than may be found in any other contract for the purchase of land, where the vendor stipulates to make title when the price shall have been paid. There is no clause that the contract shall be void if the purchase-money be not punctually paid, and if there were, it would have been waived by the conduct of the vendor in recognizing the existence of the contract, and offering to perform it after the last bond fell due.

2. The second ground of objection, that the contract of purchase was abandoned by the plaintiff, or that at least that his conduct in neglecting for so long a time to fulfill it, taken in connection with his leaving the State and his insolvency, justified the defendants in treating it as abandoned. It is manifest, from the testimony of Mr. Dobson, that the plaintiff never intended to abandon the purchase, and although he acted in such a manner as would have justified the defendants in taking the proper steps to enforce either its prompt execution or its abandonment, yet no such steps were taken, and the plaintiff's claim to equitable relief still remains. The bonds which the plaintiff gave to secure the purchase-money were never surrendered nor offered to be surrendered to him, and the defendants had no right, while retaining them, to consider and treat the contract as being at an end. Their omission to adopt that course is fatal to their defense. See *Falls v. Carpenter, ubi supra,* and *Sugg v. Stowe,* 58 N. C., 126.

There must be a decree that the defendant, Holderfield, who obtained the title from the defendant, Butcher, after notice of the plaintiff's claim, must make title upon the payment of the purchase money, (235) with interest, after deducting the rents, as to which there must be an account if the parties desire it.

PER CURIAM. Decree accordingly.

Cited: Boone v. Drake, 109 N. C., 82; *Hairston v. Bescherer,* 141 N. C., 209.

FREDERICK N. McWILLIAMS, Ex'r, against J. N. FALCON and others.

Where money is given by will, as a portion to a child, or to one to whom the testator stood *in loco parentis*, or for whose support it was intended to make a provision, or where the legacy is demonstrative, and the fund is productive, it was *Held*, that the legatee is entitled to interest from the death of the testator.

CAUSE removed from the Court of Equity of HALIFAX.

The bill in this case was filed by the executor to the will of Dudley Clanton, setting forth that the said testator bequeathed his real estate to be sold for the payment of his debts, and that if that were not sufficient for that purpose, his personal estate should be sold, and he directed that he should sell so much of his other personal estate as would, with the surplus remaining after the payment of his debts, be sufficient to raise in money $5,000, to be held by the executor as a fund for the benefit of the defendant, Frances, the wife of J. N. Falcon, for her sole and separate use. He provided in the said will that the executor should pay the interest annually to the said Frances during her life, and if she should become discovert, and should need any portion of the principal for her comfort, then to pay to her so much thereof as might be requisite for that purpose; and after her death, to pay what might remain to certain legatees in said will named. The executor, in his bill, states that he had to sell all the land for the payment of the debts, and that he then sold a part of the slaves for the payment of the remainder of the debts, and for the purpose of raising the fund in question; that owing
(236) to difficulties raised as to his right to the possession of the assets, and having to resort to the assertion of his right by suits in court, the settling of the estate was postponed for several years from the death of the testator, to wit, about seven years, and the only question presented by the pleadings is, whether Mrs. Falcon is entitled to have interest counted on her legacy, and paid to her for this space of time.

The bill calls on the persons next in interest to interplead, and to have the question settled by a decree of this court, so as to protect him.

Answers were filed by some of the defendants, and a demurrer filed as to Falcon and wife, and the cause removed to this court.

B. F. Moore for the plaintiff.
Davis and *Batchelor* for the defendants.

PEARSON, C. J. The general rule, according to the English authorities, is to allow a pecuniary legatee interest after the expiration of one year. There are, however, many exceptions. Among others, where the money is given as a portion to a child, or one to whom the testator stood

in loco parentis, or for whose support it was intended to make provision. In such cases interest is allowed from the death of the testator, because the object, *i. e.,* to furnish means for subsistence, does not admit of delay, and the legatee should not be left to starve. So, when the legacy is demonstrative, and the fund is productive, for instance, notes bearing interest or bank stock paying dividends, or negroes yielding hires; for the amount of the accumulated interest or dividends or hires certainly does not belong to the executor, nor has the legatee, to whom the *corpus* (that is, the notes, bank stock or negroes) is given, any right to it; nor should it go to increase the residuary fund, or be treated as undisposed of, and divided among the next of kin. Evidently there is no principle upon which either of these parties can claim a right to (237) be benefited by the delay in settling up the estate, and the rule is to consider the executor as having acted as a trustee, and to hold the accumulation for the use of the party to whose prejudice the delay operated, under the maxim, "Equity considers that done which ought to have been done," and will put the party in the same situation as if it had been done. *Beasley v. Knox,* 58 N. C., 1; *Turnage v. Turnage,* 42 N. C., 127. In such cases, as interest is allowed on the footing of an accumulation of the fund, and not on the ground that the executor is guilty of laches in withholding money that he ought to have paid, the calculation is made from the death of the testator and not from the qualification of the executor.

The case under consideration falls within the principle of both these exceptions; the interest is to be paid to the mother of the testator *"annually* for her sole and separate use"; so, it was manifestly the intention to provide her the means of subsistence. The legacy is demonstrative, and the fund out of which it was to be paid, to wit, the negroes, was productive, and yielded annual profits or hires, and there is no reason why the mother of the legatee should be subjected to loss because of the delay which has taken place in settling up the estate, or that any other person should be benefited by such delay.

The position taken in the answer that interest should not be allowed until the expiration of two years from the qualification of the executor, is untenable. It is supposed to be a corollary from the Act of 1789. That act was intended to remedy the evil of a delay on the part of executors and administrators in settling up estates, on the pretext of outstanding debts, and it requires them to settle up and pay over the assets to the legatees and distributees, at the expiration of two years from the time of their qualification, taking refunding bonds for the benefit of such creditors as may not have been paid; but it is by no means the policy of the law that they should not settle up sooner, if the condition of the estate will allow it, and no inference or deduction from the statute is

admissible which would tend to defeat the object, in aid of which
(238) that statute was passed, and to induce executors and administrators to delay making a settlement by exempting them from the payment of interest until after the expiration of two years. Most assuredly, this result cannot be allowed where the intention is to provide the means for the subsistence of the object of the testator's bounty, or the amount is charged on a productive fund.

PER CURIAM. There will be a decree declaring that the legatee is entitled to interest from the death of the testator.

Cited: Mordecai v. Boylan, post, 367; *Hart v. Williams,* 77 N. C., 428.

LARKIN LYNCH against JOSEPH A. BITTING.

Where it appeared that during a copartnership of eight years duration, there had been occasional calculations of interest and summing up of results and a division of profits, but no surrender of vouchers or cancellation of books, nor release, nor receipt in full, it was *Held*, that the transactions were not of such a conclusive nature as to bar an account.

CAUSE removed from the Court of Equity of YADKIN.

The plaintiff and defendant had been partners in the business of buying and selling slaves from the year 1847 to 1855, during which time large profits were realized from the business, amounting in the latter years of its continuance to as much as twelve thousand dollars. The plaintiff was the more active partner in buying and selling, and the defendant kept the books in which their dealings were entered. It appeared that the entries were mostly made at the dictation of the plaintiff and at stated periods, generally once a year, the plaintiff and defendant together made calculations of interest upon the entries and divided the profits according to the terms of their copartnership, that is, equally.

Sometimes errors in former computations were detected and cor-
(239) rected in their subsequent ones. The defendant insists, by his answer, that a full, fair and conclusive settlement took place between the parties up to April, 1857, and that each party then received his share of the profits then on hand. Afterwards, in 1858, it appears that there had been collected some small debts due the concern, which were accounted for between the partners, and a loss of a debt, by the failure of an attorney in Georgia, also accounted for and divided between them. There was also, at this time, a rectification of the account and settlement of 1857. The answer sets forth the book containing their dealings, and insists that at each of these computations of interest and divisions of

profits there was intended to be, and in fact was, a full and final settlement of all previous matters, and especially was the settlement of 1857 thus final and conclusive, and he relies upon the same as a bar to a further investigation of the dealings of the partnership.

There was some testimony taken, and the cause set down on the bill, answer, exhibits and proofs and sent to this Court by consent.

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

MANLY, J. The parties to this suit were partners in buying and selling slaves from 1847 to 1855, and the bill is filed for an account and settlement of the partnership dealings. The objection brought forward in the answer to the account asked for is that there has already been an account stated between the parties, and a settlement in pursuance of it.

The Courts are averse to unravelling accounts that have once been settled between parties competent to deal with each other, and hence it is a fixed rule not to do so where the accounts have been complete—freely assented to and made the basis of a settlement (except in the case of bills surcharging and falsifying). As evidence of the required conclusiveness of a settlement to bar an account, it is usual in the plea to aver a surrender of vouchers. Between the parties before us there has been no change of the custody of papers, no cancellation of books, nor (240) release nor receipt in full, and, upon the whole, we are not satisfied, upon an examination of the testimony, that any account has ever been stated and conclusively agreed upon by the parties. There has been an occasional calculation of interest and summing up of results as they appeared upon the books of the partnership, and a division of profit balances; but inasmuch as there has been no *final* account at any time stated between them, our inference is that none of the transactions referred to were considered conclusive, even as to the matters embraced, but mere stages in their books to guide them in partial settlements. We find the parties rectifying the settlement of April, 1857 (the one insisted upon as conclusive), and we find them again accounting together in April, 1858, and dividing the balance. In the present state of the case, we do not enter into the matters of controversy between the parties: we hold simply that what appears to us in this case, that is, the striking of balances from time to time upon the partnership books, to aid in making a partial division of effects, is not such an accounting together as will bar a bill for a full account of partnership transactions.

PER CURIAM. Decree for an account.

Cited: Rhyne v. Love, 98 N. C., 493.

ATTORNEY-GENERAL against WILLIAM H. PIERCE, Executor.

A legacy in remainder to collateral kindred, is liable to the tax imposed by the act of 1846, chapter 72, and the proper mode of suing for such tax is by a bill in equity, in the nature of an information, in the name of the Attorney-General.

CAUSE removed from the Court of Equity of CRAVEN.

This is a bill, in the nature of an information, alleging that Stephen Pierce died in the county of Craven in 1849, having bequeathed (241) considerable estate, consisting of lands, slaves, money and choses in action, to his brothers, subject to a life-interest therein to his mother; that the amount in value of said estate is $20,000; that the defendant is nominated in the said will as executor, and as such, responsible for the tax imposed thereon by the revenue law of the State. The prayer is that the said executor be decreed to pay the said tax.

The answer of the defendant admits the material facts set out in the information, but contends that the legacies set out in the bill, being interests in remainder, are not liable to the tax imposed by the statute law of the State; but, at any rate, if so liable, the tax does not attach upon the said interests, until after they come to the legatees in possession. He also objects that by the Act of 1858 the bill should have been filed in the name of the State.

The cause was set for hearing on bill and answer, and transmitted.

Henry C. Jones, for the plaintiff.
Green, for the defendant.

BATTLE, J. This is an information, in the name of the Attorney-General, filed for the purpose of recovering from the defendant, as the executor of Stephen J. Pierce, the tax on legacies to collateral kindred, imposed by the Act of 1846, chapter 72. The defendant, in his answer, sets up two objections to the claim, one of which goes to its merits and the other only to the form of the remedy.

1st. The first objection is, that the tax specified in the act referred to, does not attach to the legacy in question, because it is the bequest of a remainder, after a life-estate given to the mother of the testator; or if it do attach to the legacy, it is not to be paid until the property comes into possession upon the death of the tenant for life. The objection, in either form of it, is untenable. The words of the act are sufficiently extensive to embrace such a legacy, and the manner in which the executor is directed to account for and pay over the tax by the fourth section, shows (242) that it is due immediately. The bequest of a remainder in slaves, or the specified articles, will, of course, be of less value than the

whole interest in such slaves or other chattels, but it will have some immediate value, and that can be ascertained in the mode pointed out by the Act of 1848, ch. 81, for assessing the value of slaves and other specific personal estate given by will to collateral kindred.

The second objection is to the form of the suit, the defendant insisting that the bill ought to have been filed in the name of the State, as is expressly required by Laws 1858, Chap. 25, Sec. 80. The answer is, that the 114th section of the latter act excepts from its operation taxes due under the provisions of any former law, and *S. v. Brim,* 57 N. C., 300, shows that under such law, an information in the name of the Attorney-General is the most approved form of proceeding.

The plaintiff is entitled to a decree for an account, and to have the amount of taxes to which the State is entitled ascertained and paid in the manner prescribed by law.

PER CURIAM. Decree accordingly.

Cited: *S. v. Bridgers,* 161 N. C., 258.

WHITMEL J. HILL, Adm'r, against JOSEPH J. WILLIAMS.

1. An answer, when directly responsive to the allegations of the bill, or to an interrogatory put in the bill, or on a special examination, is to be taken as true, unless it be proved not to be true by the oath of two witnesses, or of one witness with corroborating circumstances equal to the force of another witness, or by some other kind of evidence which is entitled to the weight of two witnesses on oath.
2. Where one, on the footing of a friend, neighbor and relative, undertook to manage the moneyed affairs of an old lady, without any stipulation as to compensation, and without intending to make any charge, it was *Held,* that he was not entitled, after her death, to claim a remuneration for his services, and that his being held to a strict account by her administrator, did not vary the case.
3. Where an agent withheld the notes of his principal from her administrator, which notes were of long standing, and large amounts of interest had accumulated, and being warned by the administrator that he would be held liable for interest on the accumulation unless he surrendered the notes, or had them renewed, it was *Held,* that he should be made liable so to account from the date of the filing of the bill.

(243)

CAUSE removed from the Court of Equity of HALIFAX.

The bill was filed by the plaintiff as an administrator of Mrs. Temperance Dawson, asking for an account and settlement of defendant's agency in managing her plantation and pecuniary matters. It appeared from the pleadings and proofs that Mrs. Dawson had added to her estate a large property that had formerly belonged to her son, which she purchased at sale of property under a deed of trust; that the whole of her estate consisted of a large and valuable plantation and about sixty

slaves; that her son, the former owner of a part of it, after the sale of it to his mother, remained with her, and controlled and managed the plantation business and money matters until his death in 1846, when the defendant, who was a neighbor and relation, on the footing of a friend, undertook the management of her affairs. It is alleged that the defendant, as the agent of Mrs. Dawson, from the time of the death of her son, up to the time of her own death in 1857, received the proceeds of the crops made on her farm; also the proceeds of the sale of several slaves, and other moneys, and invested the same, or a large part thereof, in the notes of divers persons to whom he loaned the money, and agreed, as to such part as was not invested that he would pay interest thereon, and this bill is filed for a discovery of these amounts, and for an account and settlement. The plaintiff alleges that just after the death of Mrs. Dawson there were in the defendant's hands notes of several years standing, on which interest had accumulated to a large amount, and that he called the attention of the defendant to the fact that this interest was an unproductive fund, and desired the defendant to hand over these notes
(244) to him that he might administer them in the due course of law; but that the defendant refused to do so, saying that he would have the notes renewed. He insists that the defendant shall pay interest on this fund from the date of such notification up to the time of the decree. The plaintiff also alleges that he demanded a full settlement of the agency, which was refused by the defendant, unless the plaintiff would agree to go into such settlement without time to examine his counterclaims, and on other terms which were unreasonable and inadmissable.

The answer of the defendant sets forth that on 21 October, 1847, he had a settlement with Mrs. Dawson of all the charges which she had against him, and on that occasion she fell in his debt in the sum of $40.32, for which she gave her note, and he proffers to exhibit the said note. The defendant denies that he agreed to take any part of Mrs. Dawson's money and pay interest, but says he always made known to her he would not hold, keep or use her funds on these terms, but would loan out the same whenever he had a safe opportunity of so doing. The defendant, further answering, says that he furnished the said Temperance, at different times, a list of her notes in his possession, in order to enable her to give in the amount of interest for which she was taxable under the revenue laws of the State, one of which, he says, was furnished shortly before her death; that these papers had come to the possession of the plaintiff, and he prays that he may be compelled to produce the same. The defendant states the balance in his hands, and proposes to pay over the same to the plaintiff. He says he has been at great trouble and expense in the management of the business undertaken by him, and he thinks he is entitled to compensation.

There was replication to the answer, and, by consent of parties, it was referred to Messrs. R. H. Smith and W. R. Smith, as commissioners, to state the account between the parties, and it was ordered that each party have leave to examine the other on oath on written interrogatories, and that the defendant file in the office of the Clerk and Master all papers in his possession relating to the business affairs of T. W. Dawson.
The commissioners reported a balance against the defendant of (245) $3,200.22. The commissioners set out with a charge against the defendant founded on a paper which is referred to as (1), which is as follows:

PAPER (1).

"Mrs. T. W. Dawson has deposited in my hands, for safe keeping, the proceeds of her crops for several years, with directions not to loan it out, but I have concluded it would be best to violate her orders, and within the last fourteen months I have loaned out four thousand, four hundred and fifty-eight dollars, which I suppose she should give in as a part of her taxable property.

"July 18, 1853. JOS J. WILLIAMS."

This is the basis of the first item in the account stated, which is "1853, July 18. Dr. the defendant to $4,458." The second item is interest on the same to 16 April, 1860, $1,811.43. The next item is dated 15 June, 1854, and is for $1,000, with interest on the same to 16 April, 1860, and is based upon the following:

PAPER MARKED (2).

"Add one thousand dollars to your list of money given in last year loaned out. June, 1854. "JOS. WILLIAMS."

The defendant excepts to these items, and says that the account ought not to begin in 1853, but in July, 1854, and that the third item ought not to bear date of June, 1854, but of June, 1855; and he produces the following papers, marked (3) and (4), to substantiate that exception:

(246)

PAPER (3).

"I hold in my care, for Mrs. T. W. Dawson, the following notes of hand:

"One note drawn on K. Taylor for $200, with interest from 8 October, 1851	$ 200.00
"Do. S. Ward, Bryant Bennett, B. Williams, for $1,412.25 Int. from 12 June, 1852.	1,412.25
"Do. Bryant Bennett, for $759.09; int. from 10 September, 1853	250.09

"Do. Jordan & Howell, note, $281.41; int. from 14 October, 1853 $281.41
"Miles Davis and J. Upton note, $1,000; int. from 20 October, 1853 ..... 1,000.00
"A. & H. Harris, Norfolk, $515.11; int. from 2 July, 1853..... 515.11

"$4,458.77 $4,458.77
6

$267.52.62. Jos. J. WILLIAMS."

PAPER (4).

"State of North Carolina, Halifax County.

"I, Joseph H. Whitaker, Clerk of the Court of Pleas and Quarter Sessions for said county, do hereby certify that on examining the records in my office, I find that Mrs. Temperance W. Dawson listed in the year 1854, two hundred and sixty-eight ($268) dollars in annual interest, and in 1855 she listed three hundred and twenty ($320) dollars, and in 1856 she listed four hundred and fifty-eight ($458) dollars. Given under my hand this 11 April, 1860." (Signed by the Clerk.)

The defendant also files letters from A. & H. Harris, dated in September, 1854, acknowledging a balance of upwards of $500. From all which he insists that the error complained of is apparent.

The only other exception raising a question was one by the plaintiff, objecting to the allowance of commissions to the defendant, and refusing to charge interest upon the interest accumulated in his hands, and which defendant was warned would be insisted on unless the notes were handed over to the administrator, or by himself renewed.

These exceptions were set down for argument, and heard at this term.

B. F. Moore for the plaintiff.
Badger, Barnes and *Conigland* for the defendant.

(247) PEARSON, C. J. The first exception of the defendant is allowed.

The commissioners did not duly appreciate the *technical force* which is given to an answer when directly responsive to the allegations of the bill, or to an interrogatory put in the bill, or on special examination. Such answer is to be taken as true, unless it be proven not to be true by the oaths of two witnesses, or of one witness with corroborating circumstances amounting to the force of another witness; or by some other kind of evidence which is entitled to the weight of two witnesses on oath.

In this case there was no witness, and the plaintiff, to disprove the answer, relied on the evidence furnished by papers marked (1) and (2).

As an explanation of this seeming contradiction, the defendant makes the allegation of a mistake in both of these papers in respect to the dates, and avers that the proper date of the paper marked (1) should be "1854," instead of 1853, and that of the paper marked (2), "1855," instead of 1854, and to show this mistake, he produces papers marked (3) and (4). By an inspection of the papers marked (1) and (3), it is manifest that the one was made from or with a direct reference to the other, and taking into consideration the fact that papers (1) and (2) do not purport to have been made for the purpose of being *the basis of a charge* as between Mrs. Dawson and her agent, the defendant, but simply for the purpose of furnishing her the amount to be listed by her as taxable interest, in which view it was not necessary for the paper to have a date (as it was to be acted on at the time), and, of consequence, but little attention would be given to the accuracy of the date, we accept this explanation as entirely satisfactory, and reject the conclusion of the commissioners, because it involves the inference not only that Mrs. Dawson willfully neglected to list her taxable interest at the proper time, but that in 1854, having the papers (1) and (2) before her, she knowingly took a false oath in listing the amount called for by paper (1), and omitted the additional amount called for by paper (2), and the further inference that the defendant has sworn falsely in his answer, and also has been guilty of manufacturing evidence, (248) to wit, the paper marked (3), under circumstances equivalent to perjury. We will here remark that the recital in paper (1) that Mrs. Dawson had directed the defendant *not to loan out her money,* is made obviously for the purpose of furnishing her with an excuse for not having listed any taxable interest in the year 1853, and when we find her in 1854 listing her taxable interest on the basis of that paper, the fact that it was made out in 1854 is manifest without calling in aid the weight to which the answer is entitled.

The paper marked (3) is the proper basis of charge in stating the account, and that furnishes the respective dates from which interest should be calculated, and disposes of the sixth exception on the part of the plaintiff.

The second exception of the defendant is overruled, and the first exception of the plaintiff is allowed. The defendant having undertaken to transact the money matters of Mrs. Dawson on the footing of being a neighbor and a relation, and without making any stipulation or intention of making a charge for it, has no right, after her death, to claim remuneration. It may be, if he had apprised her of his intention to charge for his services, she would not have employed him; but it is sufficient to say, as he undertook to do it gratuitously, there is no principle upon which a promise by her to pay for his services can be implied.

It may be that he expected she would make a will and give him a legacy. If so, his disappointment is no more than what all persons having expectations of the kind are liable to. Nor can we yield our assent to the position that although he did not intend to make a charge, still, as her administrator requires him to give an account of his agency, he, on that footing, becomes entitled to compensation. We do not see how this follows. It is to be presumed that he was, at all times while she lived, ready and willing, if called on by her, to come to a settlement and make out a statement showing how matters stood between them, and he was under a similar obligation to do so when called upon by her per-
(249) sonal representatives, upon whom the law imposed the duty of requiring a settlement. This case is distinguishable from that supposed by the defendant's counsel on the argument; a guardian strikes a rough balance without charging commissions, and proposes to close the matter on that footing; if it is declined and he is required to go into a settlement, produce regular vouchers, and acquit himself of any neglect in failing to collect debts and matters of that kind, whereby he is chargeable, although he has made no gain, he may well, then, insist upon an allowance of commissions; because he is by law expressly entitled to charge commissions; but there is no statute by which the defendant is entitled to commissions, and in the absence of a contract to that effect, he was not so entitled, and, therefore, could not, like the guardian, propose to waive his right to commissions, provided he was not held to a strict accountability.

The second exception of the plaintiff is withdrawn.

The third exception is allowed. As there was a large amount of unproductive interest due upon the notes he held, belonging to the plaintiff's intestate, it was his duty, upon being warned to pay over the notes, or have them renewed, to have done so, and the loss of interest upon this interest, incident to his neglect and refusal, should fall on him by striking the balance at the time the bill was filed.

The fourth exception is overruled, and also the fifth, for the same reason: The answer being responsive, is evidence for the defendant, and supports the claims covered by these exceptions.

There will be a reference to have the account stated according to this opinion.

PER CURIAM. Decree for an account.

Cited: *McNair v. Pope,* 100 N. C., 408.

AUGUST TERM, 1861.

(AT MORGANTON.)

(250)

TATHAM against WILSON.

Where a husband and wife brought suit in a court of equity for the distribution of a fund limited to them and others by deed, as joint owners, and after an interlocutory decree for an account, but before the account was taken, the husband died, it was *Held*, that the wife, surviving, was entitled to the fund.

THIS cause was removed from Court of Equity of MACON.

After the hearing of the cause at a former term of the Court, and a decree for an account against the defendants, who had the fund in their possession, it was referred to Mr. Dodge, the Clerk of this Court, to report the names of the children of Rachel Wilson, and the amount of the several shares to which each was entitled.

The Clerk reported at large, and there was no exception taken to his report, except one, filed by W. L. Love, the administrator of William Tatham. In the report, the Clerk states that William (251) Tatham intermarried with Isabella, one of the children of Rachel Wilson, and joined with his wife and others in bringing the suit for the proceeds of the property, limited to them after the death of Rachel Wilson, and that a decree was passed declaring the plaintiffs entitled to an account of the fund, and that afterwards the said William Tatham died, and Mr. Love administered and became a party to the suit, and the question was made before the commissioner whether the share of said fund belonging originally to Isabella, the wife of said William, enured to his representative, or whether she is entitled to the same.

The commissioner reported that Isabella Tatham, the wife, was entitled to the share aforesaid, and on this ground the administrator excepts.

The cause being set down for argument, it was argued at this term by

Henry and *Shipp*, for Love, the administrator, and
Gaither and *N. W. Woodfin*, for Mrs. Tatham.

PEARSON, C. J. The exception is overruled. It is clearly settled that where a husband dies after an interlocutory decree for an account, the wife surviving, becomes entitled to the amount that may be recovered by the final decree; indeed, the wife, surviving, is entitled, although the husband should not die until after final decree; for he does not actually

reduce the chose into possession by a judgment or final decree; that can only be done by execution or payment to the husband, and the legal effect given to a judgment or decree is to give the husband the benefit of taking, by survivorship, in case of the wife's death; *Nanny v. Martin,* 1 Eq. Ca. Ab., 68; *McCauley v. Phillips,* 4 Ves. Jun'r, 15.

PER CURIAM. Decree according to report.

JUNE TERM, 1862.

(AT RALEIGH.)

(253)

BRYAN W. GREEN and others against CARTER B. HARRISON and others.

A clerk and master in equity is no such party to a suit pending in his court as to entitle him, under the fourth chapter, twenty-third section, of the Revised Code, to appeal from an interlocutory order appointing another than himself a commissioner to sell real estate.

MOTION on previous notice for a *certiorari* to the Court of Equity of WAKE, to bring up to this Court the proceedings of this case. The whole matter sufficiently appears from the opinion of this Court.

Winston, Sr., for the applicant.
B. F. Moore and *Miller,* for the opposers.

BATTLE, J. This is an application to this Court for a writ of (254) *certiorari,* founded upon the following statements of facts: The widow and children of Bryan Green, deceased, filed their petition in the Court of Equity for the county of Wake, in which they set forth that the said Bryan Green had died intestate, leaving a large real and personal estate, and that Carter B. Harrison had been duly appointed his administrator; that the estate was very much indebted, so much so that it would require not only all the perishable estate, but a considerable number of slaves, to pay the debts, and that it would be very much to the interest of the petitioners, who were the widow and next of kin of the deceased, to have a part of the real estate sold and substituted in the place of slaves in the payment of debts. Some of the petitioners were of full age and others minors, who sued by their guardian, and a decree was prayed to carry into effect the object of the petition. Carter B. Harrison, the administrator, was made defendant, and filed an answer, in which the facts stated in the petition were admitted, and he expressed the opinion that the best interests of the petitioners would be promoted by the course proposed. And an order of reference having been made to the Clerk and Master, he reported that it would be to the advantage of the petitioners to have the object of the petitioners carried out. A decree was thereupon made ordering a sale of certain portions of the real estate, and appointing the administrator a commissioner to make the sale, etc. Robert G. Lewis, the Clerk and Master of the Court, opposed so much of the decree as related to the appointment of the com-

missioner to make the sale, insisting upon his right to be appointed, and upon his opposition being overruled, prayed an appeal to the Supreme Court, which was refused.

The only question now presented to us, and upon which it is proper for us to express an opinion, is whether the applicant for a writ of *certiorari* had a right to appeal from the order made in the Court of Equity for Wake County. The order, notwithstanding the form of it, was an interlocutory one, made in the progress of a suit of equity.
(255) If the applicant had a right to appeal from that order, he must derive it from the provisions of the Revised Code, ch. 4, sec. 23, which are as follows: "The Superior Court may, whenever it shall be deemed proper, allow an appeal to the Supreme Court from any interlocutory judgment, sentence or decree, at law or in equity, at the instance of the party dissatisfied therewith, upon such terms as shall appear to the Court just and equitable," etc. The right of appeal, then, is given to a party to the suit. Who is a *party* to an action at law or a suit in equity? We understand that by such a *party* is meant one who is directly interested in the subject matter—who has a right to make defence—control the proceedings—adduce testimony—cross-examine the witnesses introduced on the other side, and to appeal from the judgment or decree; see 1 Green. on Ev., secs. 523 and 535; 20 How. St. Tri., 538-n; 2 Bouvier's Law Dic., 284. All other persons are regarded as strangers to the action or suit. Tested by this definition, can the Clerk and Master, claiming a right to be appointed a commissioner to sell lands in the progress of a suit in equity, be deemed a party to the suit? Is he directly interested in the subject matter of the suit? Or has he a right to make defence, control proceedings, adduce testimony and cross-examine the witnesses of the opposite side? Certainly not. He can not then, in any proper sense, be deemed a party, and not being such, the statute does not give him any right of appeal.

Under the first section of the fourth chapter of the Revised Statutes of 1836, a right of appeal from the county to the Superior Court of Law was given to either the plaintiff or defendant, or to any person "who shall be interested." Under the latter clause of this section we held in *Murphrey v. Wood,* 47 N. C., 63, that a purchaser of land under an execution issued on a dormant judgment, had such an interest in the subject as entitled him to intervene and appeal from an order of the County Court setting such execution aside. And again, in *Watkins v. Pemberton,* 47 N. C., 174, we decided that the next of kin of an intestate was interested in an order of the County Court, obtained by an administrator to sell the slaves belonging to the estate for distribution,
(256) instead of having them divided specifically, and that they might appeal from it. The clause under which these decisions were

made, has been omitted in the Revised Code; see chapter 4, section 1; and we presume such appeals could not now be allowed. No such provision was ever made in the grant of the right of appeal from the Superior Court of Law or Court of Equity to the Supreme Court. (See 1 Rev. Stat., ch. 4, secs. 22 and 23; Rev. Code, ch. 4, secs. 22 and 23), and it follows that no person but a party can appeal from the sentence, judgment or decree of the former court to the latter. As the present applicant was not a person who could appeal from the interlocutory order made in the Court of Equity for Wake County, he can not be allowed the writ of *certiorari* to bring up the record of the suit, or any part of it, to this Court.

We abstain from expressing any opinion in relation to the decree made in the Court below, except merely to say that the present applicant can not bring it before us for review, either by appeal or by writ of *certiorari*. The applicant must pay the cost of his motion.

PER CURIAM. Decree accordingly.

DILLIN & CHERRY against JOHN W. SESSOMS.

A motion to dissolve an injunction may be continued for any cause the court may deem sufficient, even without a written affidavit.

APPEAL from the Court of Equity of WASHINGTON, Fall Term, 1861.

The bill in this case was filed for an injunction to restrain, in part, the collection of a judgment at law, alleging a failure of consideration and other matters; an answer was filed by the defendant, but the merits of neither the bill nor answer are material to the questions considered by this Court. These arise altogether upon the following (257) transcript from the Court below:

"Cherry and Dillin against John W. Sessoms.
"Injunction.

"The cause being called, the complainant moved for a continuance, for cause shown; pending which, the defendant moved to dissolve the injunction. Ordered by the Court, that the cause be continued to the next term. Appeal by the defendant."

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

MANLY, J. The record does not state with distinctness the ground of appeal in this case, and we are not quite sure that it is properly appre-

hended. It is set forth that, on the calling of the case, the complainant moved a continuance for cause shown, and, pending this motion, the defendant moved to dissolve the injunction. The Court continued the cause, and the defendant appealed.

If the matter of complaint be that a motion to dissolve an injunction must be heard at the first term when it is made, we do not think it is sustained by any rule of law or of practice. Such questions, like all others, arising either upon the final hearing, or in earlier stages of cases, are subject to be continued by the Judge for any cause which he may consider, in the exercise of a sound legal discretion, to be sufficient.

If the complaint be that there should have been an affidavit filed, setting forth the cause for continuance, we think it equally untenable. The Rev. Code, ch. 31, sec. 57, pl. 13, applies exclusively to actions at law, as is manifest from the language of the clause and from the subject matter of the whole chapter. We are not, indeed, aware of any restriction upon the power of a Judge, sitting as a court of equity, to continue a cause before him in any stage, or pending any motoin in it, (258) when he may deem it expedient for the purposes of justice. It is a power subject only to his sound discretion.

We have not called to our aid the statute of 1861, second extra session, chapter 10, section 4, for the reason that it is not necessary to derive the power exercised in this case from any other source than the general discretionary powers of a court of equity; and for the additional reason that it seems to be uncertain whether the law of 1861 was in force at the time of the making of the order of continuance in question.

The appeal should be dismissed, with costs against the appellant, and the same certified to the Court of Equity for Washington County, to the end that the said Court may proceed in the cause.

Per Curiam. Appeal dismissed.

ARCHIBALD McKAY and others against DANIEL McNEILL and others.

1. Where it appeared that the title to land, sought to be sold for partition, was subject to be divested out of the petitioners, by the terms of an executory devise, which extended to it, it was *Held*, that the court could not order a sale of the premises.
2. Where a bill is filed to have land sold for partition, but no actual partition is asked in the alternative, and no general relief prayed for, the court will not order such actual partition, though the parties might seem to be entitled to it, if the bill had been framed otherwise.

Appeal from the Court of Equity of Robeson.

The bill was filed by the plaintiffs as the heirs at law of Neill McNeill, deceased, for the sale of a certain tract of land, which came to them, as

they allege, after the failure of certain limitations in the will of said Neill McNeill. They set forth in the bill that as to the land in question, it was devised in said will as follows: "My plantation, my woman Bet, stock of all kinds, farming utensils, household and kitchen (259) furniture, books, cart, chair, and whatever I may possess, not otherwise disposed of, to be my son David's, his natural lifetime, and my single daughters, remaining on the plantation, should they live longer, to be his heirs and the heirs of each other in the plantation, whilst single, and should my son Daniel have a male heir, he shall be heir to my plantation after the death of my single daughters." The plaintiffs allege that David is now dead, and that the three daughters, Catharine, Jane and Elizabeth, were single at the time of the death of the testator, and resided on the plantation in question with their brother David, but that they all three married and removed from the plantation; and these, with their husbands, are made defendants to this bill. The plaintiffs allege that Daniel is still alive, and is married, and has been so for several years, but that no child, either male or female, has been born to him.

Daniel McNeill answered and opposed the sale of the land, on the ground that during his life no sale of the premises could take place, as no absolute title accrues to the children of Neill McNeill until the removal of the contingency of his having a male child born to him. Elizabeth and Catharine, two of the daughters mentioned in the will of the testator as being single and resident on the land, but who are now married, with their husbands, demurred to the bill.

The cause was set for argument on the bill and demurrer, and the Court ordered the demurrer to be overruled, from which the defendants appealed to this Court.

Leitch, for the plaintiffs.
Shepherd and *W. McL. McKay,* for the defendants.

BATTLE, J. The will, which we are called upon to construe, is certainly inartificially drawn, and some of its terms are somewhat obscure, but we think enough appears to show that the construction contended for by the plaintiffs is correct. The land in controversy was given to the testator's son David, for life, and the daughters, who were living on the premises at the testator's death, were to have it for (260) life also, provided they remained single and survived David. But they married and left the premises; so this life estate was defeated by the condition annexed. The only other devise of the land is to the male heirs of the testator's son Daniel, which, as Daniel has yet no son, remains an executory one. The consequence is, that as the life estates

given have terminated by the death of David and the marriage of the daughters, the land belongs to the heirs at law of the testator, subject to the executory devise in favor of the heirs at law of Daniel McNeill. Such being the case, the Court can not order a sale, because it can not defeat the executory devise and convey a good title in fee simple to the purchaser. *Watson v. Watson,* 56 N. C., 400.

That, however, does not deprive the plaintiffs of the right to have a partition of the land, and if the bill contained either a specific prayer in the alternative for that purpose, or even a prayer for relief generally, we should not hesitate to order a partition among the parties specifically, but in the absence of any such prayer, we would not be justified in ordering what the parties have not asked, and what, so far as we know, they do not want.

We must, therefore, sustain the demurrer and dismiss the bill, but it is without prejudice to the right of the plaintiffs to file a bill for a partition of the land according to their interest in the same.

PER CURIAM. Bill dismissed.

Cited: Marsh v. Dellinger, 127 N. C., 362.

---

(261)

MARY EASON, Adm'x, against JOSEPH B. CHERRY and others.

Where one of a copartnership, by any means, gets a fund belonging to the firm, he is not at liberty to appropriate it to his own exclusive benefit but must share it with his copartners.

CAUSE removed from the Court of Equity of BERTIE.

Joseph B. Cherry, William H. Tayloe and Alfred Eason, entered into a copartnership for the purchase of a large quantity of cypress timber (standing), with the purpose of jointly working it into shingles, and of shipping and selling the same, for which they gave their joint notes to the proprietor, one Roscoe, for the sum of $5,000. Afterwards, instead of working the timber, they sold it for an advance of $800, for which the partner Cherry received the money. In the purchase and use of said timber, each of the said partners was to pay one-third of the expenses, and receive one-third of the profits. Cherry agreed, on receiving the money, on the resale of the timber, to pay Roscoe the original purchase money, but he has failed to do so, and is now insolvent. After receiving the money on the resale, he advanced of it to Eason the sum of $2,601 for which he took his notes, payable to himself (Cherry), and on which suit has been brought and judgment taken, and it is to enjoin the collection of this judgment that this bill was filed by Eason's

administratrix, he being now dead. The ground of this application is, that the original debt is still due Roscoe, and suit has been brought thereon, and judgment and execution will be obtained against the three, Cherry, Tayloe and Eason's estate; that Cherry is insolvent, and judgment and execution will be taken against him for more than the amount of his share of the property; that Eason's estate (he being now dead) is good for his part of the debt to Roscoe, and Tayloe is good for his half of it, but if Cherry is permitted to enforce the judgment he has obtained on account of the advancements to him, he will lose the benefits of these advancements, on account of the insolvency of Cherry. The prayer is, therefore, to restrain Cherry from pressing an execution at law on this judgment against Eason's estate.

There is no controversy as to Cherry, but Tayloe answers and insists that inasmuch as Eason has received so much of the joint (262) copartnership funds, and he (Tayloe) has received nothing, and, inasmuch as he is able, and will have to pay half of the original purchase money to Roscoe, he is entitled to share in one-half of the advancements made by Cherry to Eason, and that as to that much of Cherry's judgment against Eason's administratrix, she should be decreed to pay it to Tayloe.

The cause was set for hearing on bill and answers, and upon a motion to dissolve the injunction, was sent to this Court by consent.

Garrett and *Barnes,* for the plaintiff.
Winston, Jr., for the defendant.

BATTLE, J. There can be no doubt that the plaintiff is entitled to relief against the defendant Cherry; but we think it is equally clear that the defendant Tayloe is entitled to share in the relief. The plaintiff's intestate and the defendants being partners in the purchase and sale of a lot of timber, mentioned in the pleadings, whatever part of the partnership funds came to the hands of either of the members, before a final settlement of the concern, belonged equally to all. This is so obvious a principle of the law of partnership that it scarcely needs the aid of an adjudicated case for its recognition, but if it did, that of *Allison v. Davidson,* 17 N. C., 79, is one directly in point. It was there held, among other things, that where of four partners, one died insolvent, largely indebted to the partnership, and two others, without the consent of the fourth, received their shares from the executor of the deceased, the sums so received remained, as between the survivors, joint stock. So, in the present case, Cherry being insolvent, largely indebted to the partnership, the sum received from him by the plaintiff's intestate is, as between her and the defendant Tayloe, joint stock, to which they are

equally entitled. An analogous principle prevails among co-sure-
(263) ties, so that when one of them, by any means, gets a fund belonging to the principal, he is not at liberty to appropriate it to his own exclusive benefit, but must share it with his co-surety. This has been decided in many cases, among which are *Barnes v. Pearson,* 41 N. C., 482, and *Leary v. Cheshire,* 56 N. C., 170.

PER CURIAM. A decree may be drawn in accordance with this opinion.

JANE BENNETT against JACOB MERRITT and others.

1. Where the agent of a trustee received money, arising from the sale of trust property, made by collusion with him, it was *Held*, not to be a defense to a bill against such agent to follow the funds in his hands, that he had paid the money over on liabilities which he had incurred for the trustee.
2. Where trust property is wrongfully sold by a trustee, by collusion with another, who did not, however, receive any part of the price for which the property sold, it was *Held*, that the principle of following the trust fund, in its converted state, does not apply to such other person.

CAUSE removed from the Court of Equity of WAYNE.

Thomas Bennett, of the county of Sampson, died about 1857, leaving a widow, the present plaintiff, Jane, and one daughter, Virginia, his distributees, and the defendant James R. Parker administered on his estate. Afterwards, in August, 1857, Virginia, the daughter, died, leaving her mother, the said Jane, her sole distributee. J. R. Parker also administered on her estate. The said Parker took possession of the personal estate of both, consisting of slaves, household furniture, stock of horses, etc., carriage, growing crop, provisions on hand, notes, etc., on several individuals. In March, 1858, the defendant Jacob Merritt insinuated himself into the confidence of the plaintiff and married her, she having first made a deed of marriage settlement,
(264) securing all her property to her sole and separate use, and constituting himself (the said Merritt) her trustee. It turned out that Merritt, at the time of this marriage, was a married man, and had a wife then living in the State of Alabama, and was otherwise a very faithless and unworthy man. Shortly after the marriage with Mrs. Bennett, he set himself to work, by harshness and intimidation, to get her property in his hands, and to sell all of it he could get. Parker, the administrator, who seems to have understood the character of Merritt, thwarted him as much as he could in his designs of despoiling Mrs. Bennett of her property, and kept much of it in his hands, while it

appears that the defendant Monk, an uncle of Merritt, aided and abetted him in his designs. It appeared that Mrs. Bennett was induced, after the marriage, to remove from her homestead in Sampson to a place called Magnolia, in Duplin County, belonging to Monk, and he admits that he advised their removal to this place, but says it was from kind and benevolent motives.

It is alleged in the bill, and admitted, that Merritt made a conveyance of all his interest in the slave property, which had belonged to Mrs. Bennett, to the defendant Monk, but he says that this conveyance was by no means made in fraud of the *cestui qui trust,* but for a valuable consideration, to wit, the indemnity of him (Monk) for debts paid and liabilities incurred by him for the said Jacob. It appeared that Merritt succeeded in getting two of the slaves, Hillory and Ellender, which he sold for $....., and delivered $900 of the money to Monk, who, in his answer, says he paid it out on liabilities which he had incurred for Merritt, and he goes into a list and minute account of such payments. Monk answers that he had no knowledge how the money arose, but the proofs on this subject, in the opinion of the Court, are sufficient to fix the knowledge upon him.

Merritt got possession of another slave belonging to Mrs. Bennett, by the name of Dilsey, and in company with Monk was proceeding to carry her out of the State to sell her. On arriving at Goldsboro, they consulted an attorney, who told them they could not sell the (265) slave unless they got the authority of Parker, the administrator. They then went back to Parker, who executed a bill of sale to Monk for Dilsey, and he conveyed her, in like manner, to Merritt, who took her to Richmond and sold her and received the money for her. Monk, in his answer to this allegation, says that Dilsey was an unmanageable slave, and had lately run away, and that her mistress was displeased with her, and wished her sold. He denies receiving any part of the purchase money.

The prayer of the bill is for a decree of nullity of the marriage, and that Monk deliver up, for cancellation, the conveyance of the property to him by Merritt, and that he account for the value of all the property belonging to Mrs. Bennett which was sold by Merritt, and for the $900 received by him, as being the proceeds of her property, also for a decree against him for the price of Dilsey, and also a decree against Merritt for an account of all the property which came into his hands.

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

B. F. Moore, for the plaintiff.
McRae, for the defendants.

PEARSON, C. J. The allegation that at the time of the marriage the defendant had a wife who was then living, is clearly proved; of course his marriage with the plaintiff was void, and she is entitled to a decree of "nullity of marriage" so far as she is concerned. She is also entitled to a decree making void the deed by which, in contemplation of marriage, she conveyed her estate to Merritt, in trust, for her sole and separate use. She is also entitled to a decree that the conveyance of the slaves, made by Merritt to Monk, shall be surrendered and cancelled, so as to remove the cloud from her title.

We are also satisfied by the evidence that the $900 which Merritt handed over to the defendant Monk, to secure him against the (266) liabilities which he had entered into for Merritt, was money received by Merritt for the two negroes, Hillory and Ellender, and, on the ground of following the trust fund, the plaintiff is entitled to a decree against Monk for that amount. He faintly denies notice, but that is clearly fixed on him, and the ground on which he puts himself in respect to this money, to wit, that he had paid it to the creditors of Merritt, to whom he had become liable as surety for Merritt, will not avail him. That money, in his hands, was a part of the trust fund, and he knew it; consequently, Merritt, as a trustee, had no right to apply it to the discharge of his debts, and the defendant Monk had no right to do so for him.

In resect to the woman Dilsey, we have had more difficulty in coming to a conclusion. She was conveyed by Parker to Monk, and he made a bill of sale to Merritt, for the purpose of enabling Merritt to sell her. Merritt did accordingly sell her, but it does not appear, according to proofs, that Monk received any part of the purchase money; on the contrary, we are satisfied that Merritt used the money received by him as her price himself; so the principle of following the trust fund, in its converted states, does not apply, and putting out of view the averment that the woman Dilsey was thus sold by the consent of the plaintiff because of the slave's insubordination, and also the averment that it was done under the advice of respectable counsel, we can see no ground on which the defendant Monk can be made liable in respect of this slave, even if we suppose he acted collusively, and became an actor in the transaction with an intent to aid Merritt, the trustee, to get into his hands this negro and sell her, and appropriate the purchase money to his own use; for when Monk takes the ground that no part of the money can be traced to his hands, he can not be reached on the principle of following the fund, and there is no other principle by which, in equity, he can be made liable.

The defendant Merritt is chargeable with all the funds which came to his hands, by reason of the sales made by him or otherwise.

As to the other property, the deed executed by Merritt to Monk does not include it, and there is no proof of his having taken it (267) into his possession, so there can be no decree in respect to it. So the plaintiff must be left to her own vigilance in gathering it up. There will be a decree against Parker for an account.

PER CURIAM. Decree accordingly.

KENNETH GILLIS and wife against WILLIAM HARRIS and ROBERT HARRIS, Executors.

However deeply impressed the court may be as to a testator's particular intention, if he has been grossly negligent in setting forth his purpose, and to declare such to be his intention, would require the court to ignore the principles which have been adopted to give effect to the intentions of testators, such declaration will not be made.

CAUSE removed from the Court of Equity of GRANVILLE.

The suit is brought against the defendants, as executors, to recover a legacy of "three small negroes," given to the plaintiff Mrs. Sarah Gillis in the will of her father, Robert Harris, who died in the county of Person on the....day of....., 1847. The will is dated 1 June, 1842, and probably was written about that time, but the proofs go to fix its actual execution on the....day of....., 1847, when it was materially altered by interlineations and additions. As there were many facts brought into the argument arising from the face of the will, it is deemed advisable to set it out in full:

"Item 1. I give to my son, William Harris, one horse, bridle and saddle, one cow and calf, one bed and furniture, 273½ acres of land, whereon he now lives, six negroes, by name, Linda, etc., and unto him and his heirs forever, which he has already received.

"Item 2. I give and bequeath to my son Lawson Harris, one horse, bridle and saddle, one cow and calf, one bed and furniture, (268) three hundred acres of land, adjoining, etc., which he has already received and expended the value to his own use.

"Item 3. I give and bequeath unto my daughter, Sarah Gillis, one feather bed and furniture, one mare, bridle and saddle, four negroes, by name, Dice, Jenny, Peggy, Jacob; to her and her heirs forever, which she has already received.

"Item 4. I give and bequeath to my son Robert Harris, one horse, bridle and saddle, one bed and furniture, seven negroes (naming them), to him and his heirs forever, which he has already received.

"Item 5. I leave to my beloved wife, Sarah Harris, the tract of land whereon I now live, during her life, or my widow; also, as many of my

negro men and women as she chooses out of the number I leave; two choice horses; four cows and calves; all my stock of hogs, 15 choice sheep (several small articles), the rest of my black people to be divided after William Harris receives one, the value of Tine, which my son Robert Harris has, over the number of his brother William. Also, it is my desire that my son William to have fifty-three dollars, to make his tract of land equal value with the tract I gave my son Lawson; also, it is my desire that my daughter, Sarah Gillis, to have three small negroes more, which will make her number seven, equal to her brother's number.

"I give and bequeath unto the heirs of my son Lawson Harris, deceased, two negroes, Milly and Jeff, to them and their heirs forever.

"Item. I give and bequeath unto my son Robert Harris, the tract of land whereon I now live, containing 600 acres, after the death or marriage of my wife, to him and his heirs forever; also, the negroes which I leave her, to return to my estate at her death or marriage.

"I give and bequeath unto my daughter, Sarah Gillis, the tract of land whereon my brother, Overton Harris, lived, containing 150
(269) acres, to her and her heirs forever. My other two tracts of land, not mentioned, including the mill tract and the other tract above, containing 640 acres, and all my negroes not mentioned, to be equally divided between my two sons, William Harris and my son Robert Harris, and my daughter, Sarah Gillis, and the heirs of my son Lawson Harris, deceased, and the rest of my property, wagon, still, etc. It is my desire that my son William shall have thirty acres of land surveyed off from the tract on which I reside, adjoining the tract I have given him, and the balance of the tract to my son Robert, as before recited."

The two sons, William and Robert, were appointed executors. There was much litigation growing out of this will, first, on an issue of *devisavit vel non,* then as to the construction in respect of the manner of dividing the residue with Lawson's children—then this suit was brought, alleging a general waste and mal-administration, which pended in that shape several terms, but, by consent of the parties, the claim was narrowed to the legacy of "three small negroes," given in the fifth item of the will. This claim is resisted on the ground that this legacy had been paid and satisfied by the conveyance of negroes to the children of Mrs. Gillis, in the lifetime of the testator. This conveyance was by a bill of sale, dated November 7, 1845. The effective words of this instrument are, "Know ye, that I, the said Robert Harris, for and in consideration of the love and affection which I have and bear unto my beloved daughter, Sarah Gillis, of the State of Georgia, Cass County, and for divers other good causes and considerations, me hereunto moving, have given and granted, and by these presents do give and grant unto the said heirs

of the said Sarah Gillis, one negro woman, named Lizzie, Easther, Susan, William and Thomas, and all her increase hereafter," with a clause of general warranty of title. The facts, as gathered from the depositions, in regard to these slaves, are, that Lizzie, the mother, had been accused and taken before a magistrate for burning a tobacco barn, and the charge was compromised by the master's consenting to send the woman out of the State. She was first sent a short distance into (270) Virginia, and then she and her three children were put into the hands of Daniel Gillis, one of the children of Sarah, with the bill of sale, and carried to Cass County, Georgia, where the family resided. There was much testimony as to the intention of the testator in making this conveyance, the effect of which is mentioned in the opinion of the Court. The case was heard upon bill, answer, exhibits and proof.

Graham, for the plaintiff.
Miller, for the defendants.

PEARSON, C. J. We are deeply impressed with the conviction that if the testator could now be asked, "Was it your intention, in addition to the four negroes which you gave to Mrs. Gillis, and the four others which you gave to her children, also to give her three small negroes by your will," the answer would be, "That was not my intention; for my object was to make all my children equal."

If, by the application of the principles of law which have been adopted for the purpose of giving effect to the intention of testators, there should be a failure to give effect to the intention in this particular instance, the reply is, it must be ascribed, not to any defect in the principles of law, but to the unaccountable neglect of the testator.

Assume, as insisted upon on the part of the defendants, that the will was written and signed in 1842, the day of its date. If it was the intention of the testator, by his deed of gift in 1845 of four negroes to the children of Mrs. Gillis, to satisfy the legacy to her of "three small negroes," it was neglect, on his part, not to have that fact set out in the deed. Again, if such was his intention, he was guilty of the most unaccountable neglect in 1847, when the paper was in his presence, formally attested by two witnesses, for the purpose of giving it legal effect, in not then revoking the legacy of "three small negroes" to his daughter, on the ground that he had made her equal to her brothers by the gift to her children.

Law is made for the vigilant and not for the negligent, is a maxim which may be applied as well to those who are giving (271) away property, as to those who are seeking to acquire it. In our case, it was the neglect of the testator not to give evidence of his inten-

tion, and there is no ground on which it can be presumed. The gift, which is insisted upon as a satisfaction of the legacy, was not of *three* small negroes, but of *four* negroes, one of whom was a grown woman, and the gift was not to the daughter, but to her children, and if parol evidence were competent to show the intention, there is no evidence that at any time the testator declared that the intention was to satisfy the legacy by this gift. In *Howze v. Mallett,* 57 N. C., 194, the testator required the legatee to admit, expressly, in writing, that the money was received in satisfaction of the legacy.

The conclusion that the legacy was not adeemed by the gift, is irresistible on principles well settled—putting the case on the supposition that the paper was signed by the testator in 1842 (as to which there is no proof). On the supposition that the paper was not signed until after the gift, there is no ground on which to base an argument in support of an ademption. So, taking it either way, the defendants have failed to establish the allegation that the legacy is satisfied.

There must be a decree that the plaintiffs are entitled to the value of the three small negroes, to be fixed two years after the death of the testator, with interest from that date; as to which, there will be a reference.

PER CURIAM. Decree accordingly.

Cited: Chambers v. Kerns, post, 282; *Millsaps v. McLean,* 60 N. C., 82; *Leathers v. Gray,* 101 N. C., 166.

---

(272)

SUSANNAH CLARK and others against JOSEPH BELL, Executor.

Where a negro woman slave was willed to one for life, and then to be free, and such slave formally elected to remain a slave, it was *Held,* that the *status* of such woman, after such election, was fixed as from the testator's death, and that her offspring, born after that event, remained slaves, and that she and her offspring passed by a residuary clause of the will.

CAUSE removed from the Court of Equity of CHATHAM.

The only questions in this cause grow out of the provisions of the will of Elijah Bell, taken in connection with the fact that the woman formally refused to accept of the boon of freedom, offered to her by the will of her late owner. The whole matter is sufficiently set forth in the opinion of the Court.

No counsel appeared for the plaintiffs in this Court.
Phillips, for the defendant.

MANLY, J. The bill is filed to obtain a construction of the will of Elijah Bell, in respect to the disposition made therein of the woman

Louisa, under the present circumstances of her case. The clauses of the will material to the enquiry are the fourth and ninth, which are, respectively, as follows:

"4th Item. I give and bequeath to my sister, Susannah Clark, during her natural life, a certain negro girl, by the name of Louisa, and after the death of my sister as aforesaid, I direct and request that the said negro girl, Louisa, be set free."

"9th Item. I give and bequeath to my brother, Thomas Bell, all the residue of my property, both real and personal, that I have not heretofore given away, to him and his heirs, in fee simple forever."

An enquiry has been made, under the direction of the Court below, from which it appears that the woman is unwilling to accept of freedom upon the condition of leaving the State. This enquiry has been conducted with such apparent care, that the Court is satisfied with the result. Under these circumstances, the Court is called upon to declare what disposition should be made of the woman and her (273) children, born since the death of the testator.

It will be seen by reference to our statute laws, Rev. Code, ch. 107, secs. 45, 46, 47, 53, that emancipation can only be effected in certain prescribed forms, and upon the condition of the manumitted slaves leaving the State not to return.

It is said in *Hogg v. Capehart,* reported in a note to *Feimster v. Tucker,* 58 N. C., 71, that freedom will not be forced upon any one. It is not the policy of the law to do so. It, therefore, follows that the refusal of the woman to leave the State, that is, to accept of the bequest of freedom upon the conditions which would make it lawful, frustrates and makes void the bequest. The children of the woman Louisa were born after the death of the testator. The election of the mother, by which the bequest becomes void, determines the *status* of her offspring. The will is fixed by the death of the testator, and is considered to take effect and determine the state of the property as from the death. Her election (although subsequent) not to conform to the requirements of law, made the bequest void from the beginning, and the right of emancipation, which she might have claimed, has not inured to the benefit of her children.

The mother and children, then, falling back into the estate, the remaining enquiry is, do they go to the next of kin, as property undisposed of by the will, or do they pass to the residuary legatee?

After due consideration of the contents of the will, we see no sufficient reason for withholding them from the residuum.

A general gift of the residue includes legacies not effectually disposed of, whether they fail by lapse or by illegality, unless it be clear upon the will that the intention was different.

We do not suppose that the testator expected this, or any other provision of his will, to fail and fall into the residuum, but the rule of the Courts is that such will fail there, unless it shall appear from the restricted terms of the residuary clause itself, or from other
(274) parts of the will, that this was not his intention; *Sorrey v. Bright,* 18 N. C., 113.

PER CURIAM. Decree accordingly.

JOHN C. CAMP and another against WILLIAM S. MILLS and others.

A bill in equity, for a discovery and an account, by one of two wards against one of two joint guardians, alleging that he had, exclusively, received the estate of the wards, in which bill the other guardian is made plaintiff, and the other ward defendant, is not multifarious.

CAUSE removed from the Court of Equity of POLK.

The bill is filed in the names of John C. Camp and Columbus Mills against William S. Mills and William A. Mooney and Sarah Louisa, his wife, alleging that John C. Camp and Sarah Louisa Mooney are the only surviving children and heirs at law of James T. Camp, who died intestate in the year 1841, and that the plaintiff Columbus Mills and the defendant William S. Mills became their joint guardians, and entered into a joint bond in the sum of $20,000, with Govan Mills as their surety; that the defendant William S. Mills took possession of the property of the wards, consisting of lands and slaves; rented out the land and received the rents, and hired out the slaves and received the hires, during the whole period of the minority of the said wards, and that the said Columbus Mills did not at all interfere in the management of the wards, or their estates, or the incomes thereof. The bill states that the said Sarah Louisa intermarried with the defendant William A. Mooney in the year 1857, and the plaintiffs are ignorant whether any settlement, partial or complete, was ever made between her and her husband and the said W. S. Mills; that the plaintiff J. C. Camp became of age in the year 1854; that they are ignorant as to what amount of rents, hires and other estate of the wards came into the hands of the said
(275) W. S. Mills, and the prayer of the bill is for a discovery and for an account as to both of the wards, so that the plaintiff J. C. Camp may recover what is due to him, and the other plaintiff may be discharged of his liability on account of his joint guardianship with the defendant W. S. Mills, both as guardian for the plaintiff John C. and for the defendant Sarah Louisa Mooney.

To this bill the defendant W. S. Mills demurred, on account of multifariousness.

The cause was set for argument on the demurrer and sent to this Court to be heard.

Dickson, for the plaintiffs.
Shipp and *Phillips,* for the defendants.

BATTLE, J. It appears from the bill that the plaintiff Columbus Mills and the defendant William S. Mills were, in 1842, duly appointed joint guardians to the plaintiff John C. Camp and the *feme* defendant Sarah Louisa Camp, and to secure the faithful discharge of the duties of their office, gave a joint bond in the penal sum of $20,000. If, after the marriage of the female ward, and the coming of age of her brother, the other ward, a suit in equity were necessary for calling for an account from their guardians, we can see nothing to object, but much to approve, in having it done in one, instead of two or more suits. It is manifest that a bill might have been filed in the name of both wards, as plaintiffs, against both guardians, as defendants, in which the respective rights of each plaintiff and the liabilities of each defendant could have been ascertained upon which a decree might have been founded to secure such rights and to enforce such liabilities, with exact justice to each and all the parties. If one of the wards had declined to become a plaintiff, he or she might have been made a defendant, together with the guardians, and the same result might have been obtained. To a bill in either form, it is certain that the objection of multifariousness would not apply. Such objections may be divided into three classes of cases: 1st, those in which there are different persons plaintiffs or defendants (276) of which some have no kind of privity with others; 2dly, those in which the same party sues or is sued in different capacities; 3dly, those in which the parties are the same, and they sue and are sued in the same capacities, but several and distinct subjects are brought into question.

The present case is clearly excluded from either class; for there is no party that has no kind of privity with the others; there is none that sues or is sued in different capacities, and there are no several and distinct subjects brought into question. See Calvert on Parties to Suits in Equity, 89 (17 Law Lib., 52).

It only remains to see whether making one of the guardians a plaintiff instead of a defendant, varies the case, and we think it does not. If the allegations of the bill are true, as by demurrer they are admitted to be, no relief is sought against Columbus Mills, and there is no necessity that he should have a decree against either of the parties. He is a necessary party to the suit, in order that he may be bound by the final decree in the cause, and he will be equally bound, whether he be a plaintiff or a defendant; see *Wilkins v. Fry,* 1 Mer., 262. It follows that the bill is not multifarious, and the demurrer must be overruled.

PER CURIAM. Demurred overruled.

EDWARD R. CHAMBERS, Adm'r, against CHARLES L. PAYNE and others.

1. A bequest of slaves to one, for life, with a limitation over to his or her children *equally to be divided*, is not controlled by the rule in Shelly's case, but confines the interest of the first taker to his or her life.
2. Where children take as a class at the expiration of a life estate, each child takes a vested interest at its birth, subject to be partially divested in favor of the other children of the class as they are born, and upon the death of one of the children during the existence of the life estate, his or her interest goes to his or her representative, and not to ulterior limitees dependent on the first taker's dying without issue.

(277)

CAUSE removed from the Court of Equity of DAVIDSON.

Simon Williams, in 1809, bequeathed as follows: "I lend unto my son, Alanson Williams, and my son-in-law, Anthony Sale, in trust, for the only use and benefit of my daughter, Betsy Payne, during her natural life, against the claim or contract of her present or any future husband, the following negroes and their future increase: Thena and her two children (the names not known), David, Ransom, and Revey; my will and desire is that the negroes and their future increase, lent to my son, Alanson Williams, and Anthony Sale, in trust for the use and benefit of my daughter, Betsy Payne, against the claim or contract of her present husband or husbands, during her natural life, shall be equally divided among the heirs of her body forever; but for want of such, my will and desire is that the said negroes and their future increase be equally divided among my other children or their representatives." Betsy Payne, the legatee herein mentioned, received the slaves bequeathed, and kept them until 1857, when she died, having disposed of the said slaves and their increase (now very numerous) by her last will and testament. The said Betsy Payne had one child, which died in its infancy, many years before her death, and never had any other. The plaintiffs are the brothers and sisters of Betsy Payne and their representatives, and claim by virtue of the limitation over after the death of Mrs. Payne. The defendants claim under the will of Betsy Payne. The cause was heard on bill, answer, proofs, and exhibits.

B. F. Moore for the plaintiffs.
Fowle and *Kittrell* for the defendants.

BATTLE, J. Had the testator's daughter, Mrs. Payne, passed through life without having had a child, we should not have hesitated to
(278) hold that the claim of the other children of the testator, and their representatives, under the ulterior limitation to them, would not have been prevented by the operation of the rule in Shelly's case, in her favor. That rule would have been excluded, either upon the prin-

ciple adopted by the court in *Payne v. Sale,* 22 N. C., 455, on the construction of the same will which we have now before us, or upon that of *Swain v. Roscoe,* 25 N. C., 200. The counsel for the defendant has ventured to call in question the propriety of the decisions in both these cases, and has suggested reasons and produced authorities to show that they would have been ruled otherwise by the English Court, but we do not feel at liberty to impeach them. Indeed, the principle of the latter case has been since confirmed, and must be considered now as a settled rule of construction in this State. Under that principle we hold that Mrs. Payne took a life estate only in the property bequeathed to her.

We come now to consider the case in the event which happened: that she bore a living child, which, however, died in her lifetime. Did that child take any interest in the property, under the limitation, after her life estate, "to be equally divided among the heirs of her body forever." The answer to this question is to be found in the rulings of the Court in *Swain v. Roscoe, ubi supra; Evans v. Lea,* 40 N. C., 169; *Knight v. Wall,* 19 N. C., 125; *Sanderlin v. Deford,* 47 N. C., 74, and several other cases, including *Mason v. White,* 53 N. C., 421.

From these cases it will clearly appear that in bequests of personal property, like the present, heirs of the body mean children; that when children take, as a class, at the expiration of a life estate, each child takes a vested interest at its birth, subject to be partially divested in favor of the other children as they are born, and that upon the death of one of the children during the existence of the life estate, his or her interest goes to his or her representative, and does not devolve upon the other children by virtue of the limitation unless an intention (279) to that effect is manifested in the will.

Assuming, then, as we must, that Mrs. Payne's child took a vested interest in the property as soon as it was born, the next enquiry is, what was the extent of that interest. It could be none other than the absolute interest which, of course, excluded the ulterior limitation to the testator's own children. This will appear from many cases in our own Reports and particularly from *Sanderlin v. Deford, ubi supra,* where the subject is more fully discussed than in most of the others. Upon the death, then, of Mrs. Payne's child, the vested interest which it took in the legacy devolved upon its personal representative, from whom Mrs. Payne or her husband took it as her child's next of kin.

The only case to which the counsel for the plaintiff, in the able argument which he submitted, has referred us, which at all impugns any of the principles we have stated, is *Jarvis v. Wyatt,* 11 N. C., 227. Of that case, it is only necessary for us to remark that the point decided may be supported by the peculiar language of the will, or, if it can not be supported on that ground, it must be considered as having been over-

ruled by the numerous cases since adjudicated upon that point, to several of which we have already referred.

Believing that the birth of Mrs. Payne's child defeated the ulterior limitation under which the plaintiffs claim, it is unnecessary for us to notice particularly the objection that that limitation is too remote, and therefore void. *Sanderlin v. Deford,* already referred to, would, if its aid were necessary, be a strong authority in favor of such objection. There, the form of expression in the will, "for want of such heirs," is almost identical with that in the will now before us, and it was said by the Court that if the will had been made before the Act of 1827 (as the present will was), the limitation would have been too remote. But it is needless to enlarge upon this question, as, for the reasons given upon another part of the case, we are of opinion that the plaintiffs have
(280) no claim to the property in dispute, and their bill must be

PER CURIAM. Dismissed with costs.

Cited: Britton v. Miller, 63 N. C., 270; *Conigland v. Smith,* 79 N. C., 304; *Leathers v. Gray,* 101 N. C., 167, 168.

JOSEPH F. CHAMBERS, Executor, against JOHN B. KERNS and others.

1. An executor is not liable for interest on money collected by him unless he receives interest on the same.
2. Where an intended legacy of a tract of land was sold by the testator, and a bond given by him to make title, which, however, was not done in his lifetime, it was *Held*, that the intended legatee had no claim upon the proceeds of a note taken by the testator for the purchase money of the land.

CAUSE removed from the Court of Equity of ROWAN.

The bill was filed by the executor of Peter Kerns, praying for instructions as to the discharge of his duty under the will, and for an account and settlement of the estate in his hands by a decree of the Court of Equity for his protection, etc.

A reference was made to L. Blackmer, Esq., as a commissioner to state the account with the executor, which was stated, and was excepted to in two particulars—one of which was that the commissioner had charged the executor with interest on money collected by him and held for distribution. The other exception was that the commissioner refused to pass into the residuary fund a note given by Fisher and others for a certain tract of land, which, in his will, written before that time, was devised to John B. Kerns. On the sale of this land, the testator, Peter Kerns, gave Messrs. Fisher, Craige, Nesbit, and Daniel Kerns a bond to make

them a title on the payment of the purchase money, and took their joint note for $2,500. It was contended before the commissioner that as the land for which the note was given, was intended for John B. Kerns, in the will of Peter Kerns, he should have the proceeds of the note taken for the same, and that it should not fall into the residuum, (281) and the commissioner so held—for which Caldwell and wife and other residuary legatees excepted. The cause was set down for argument on the exceptions and sent to this Court.

R. A. Caldwell for the plaintiffs.
J. E. Kerr and *Boyden* for the defendants.

PEARSON, C. J. The exception in respect to the note of Fisher and others, for $2,500, given to secure the price of a tract of land sold to them by the testator, is allowed.

By a residuary clause, the testator directs "the money on hand and the money *arising from the collection of my bonds, notes and accounts,* be equally divided between my wife, Fanny," etc. These words include the note of "Fisher and others," and the question is, on what ground should this note be taken out of the express words of the residuary legacy? The ground assigned is that this note was given as the consideration of a tract of land which, by the third clause of the will, is devised to John B. Kerns, and which the testator, after the execution of the will, sold to "Fisher and others," giving his bond for title when the purchase money was paid.

We confess we are unable to see the force of this position. Suppose the testator, when he sold the land, had been satisfied with the security of the note and passed the title by making a deed to "Fisher and others," John B. Kerns would not, most manifestly, have been entitled to the note. Because the sale of the land devised to him was a revocation of the devise. The fact that the testator did not see proper to make a deed to Fisher and others, but chose to retain the title as security for the payment of the note, does not, in any way, alter the case in respect to this question of revocation; for the plain reason that in the one case, as well as in the other, he had ceased to be the owner of the land which was the subject of the devise.

It is a familiar principle of equity, acted upon every day, *i. e.,* by a contract to sell land, the purchaser becomes the owner and the vendor holds the title in trust for him on payment of the (282) purchase money; so that any appreciation of the value is the gain of the purchaser, and any depreciation (by burning of the buildings, etc.) is his loss. In other words, the effect of a contract of sale is to make the vendee the owner of the land, the title being retained by the vendor as a security of the purchase money.

These are well settled principles of law, and if by their application the intention of the testator is disappointed, the Court can say it is not the fault of the law, but the neglect of the testator in not adding a codicil to set out his intention, made necessary by the alteration in the condition of his estate, caused by his act of selling the tract of land devised to John B. Kerns; see *Gillis v. Harris, ante,* 267.

Whether the purchasers of land in a bill for the specific performance on payment of their note must call for a conveyance from the heirs at law of the devisor, or from the devisee, is a question not now presented; it is certain that the title, no matter whether it has descended to the heirs at law or passed under the will to the devisee, is held merely as a security for the payment of the purchase money, and that the ownership and beneficial estate vested in the purchasers by force of the contract of sale, and the legal title is held in trust for them on payment of the purchase money.

The exception in respect to the charge of interest is allowed so far as there is a charge of interest for cash on hand. An executor is not expected or allowed to invest cash on hand so as to make interest, and is not chargeable for interest, unless it be proved that he has made interest. Of course, he is chargeable with interest on the sale notes from the time they fell due, as he is presumed to have collected it on all such notes as were not promptly paid.

PER CURIAM. The account will be reformed accordingly.

Cited: Rue v. Connell, 148 N. C., 306.

---

(283)

BENTON RAY, Adm'r, and others against EDWARD M. SCOTT and others.

A suit in equity seeking to set aside a deed, because of incapacity on the part of the bargainor, and fraud and imposition on the part of the bargainee, is not for the same matter as one alleging that a deed was intended to be only a contract to convey on payment of the purchase money, and was erroneously worded, because of the ignorance, mistake or fraud of the draftsman, and a plea alleging the matter of the former suit in bar of the second, was overruled.

CAUSE removed from the Court of Equity of ORANGE.

The bill alleges that Moses Leathers agreed with the defendant Scott that he would sell him the tract of land in question, lying on Eno River, at the price of $2,000, whenever the purchase money for the same was paid to him, and that such purchase money was to be paid within thirty days thereafter, and that the parties proceeded, as he supposed, to reduce this contract to writing, and that a writing was

then and there prepared by the defendant Edward M. Scott, which he supposed was an instrument embracing the terms of their contract as above set out, but that in fact and in truth the instrument was an absolute conveyance of his land to the said Scott in fee simple; that this departure was by the mistake, ignorance or fraud of such draftsman; that the instrument in question is not formal in its terms, and was well calculated to mislead Leathers, who was himself ignorant and unacquainted with the business of conveyancing; that Scott paid him no money then, nor has he since paid him any; that the said Scott was well known to him to be at the time utterly insolvent, and that he never would have thought of selling him his only tract and homestead without some security for the purchase money. The bill further alleges that the said Scott has conveyed the land in question to the defendant Webb, as a trustee, to secure the debts of the other defendants, Sims and the McCawns, and that they had notice of Leathers' equitable claim; that the said trustee has sued him in an action of ejectment, and threatens to turn him out of possession. The prayer is that the deed in question may be reformed, and that it may stand, as it was intended to be, a bond to sell and convey the land in question (284) to the said Scott on the payment of the purchase money, and that the defendants may be enjoined from proceeding at law to oust him of his possession, and for general relief.

This suit was originally instituted in the name of Moses Leathers, but his death having been suggested, Benton Ray, his administrator, and the children and heirs at law of the said Moses, by their next friend, the said Benton Ray, were made parties plaintiff. The defendants pleaded in bar that the plaintiffs' intestate, Leathers, had, before the commencement of this suit, brought suit in the Court of Equity, alleging that Scott and Sims, being both very desirous of getting his land, came to his house, and finding him in a debauch of several days duration, when he was totally unfit to make a contract, persuaded him to sign a paper, the contents of which he was too drunk and stupefied to know and understand, but which turned out to be a deed in fee simple to Scott for his land for $2,000 which, it was expressed in the said instrument, the said Scott was thereafter to pay; that the land was afterwards conveyed by Scott, in trust, for the benefit of Sims and the McCawns, and that the whole transaction was in pursuance of a fraudulent combination between Scott, Sims and John and William McCawn, the prayer of which former bill is stated to be for a declaration that such deed is void for the fraud, and that it be surrendered for cancellation. The plea avers the identity of the parties and of the cause of action, and concludes in bar of the said suit.

The cause was set for argument on the bill and plea of defendants.

Graham, for the plaintiffs.
Phillips, for the defendants.

PEARSON, C. J. The only question presented is this: Taking the matters alleged in the plea to be true, is the equity which the plaintiffs seek to set up by their bill now filed, the same as the equity (285) which the intestate attempted to set up in the first bill, and which was adjudged against him; in other words, does this bill seek to enforce the *very equity* which has been adjudged and decided by the decree in the first suit.

Upon this argument the Court is confined to the matters alleged in the bill and the matters set out in the plea, and for this reason, very great particularity is required in framing the plea. Without deciding whether this plea is informal in this, that it does not set out, in so many words, the bill in the first case, and does not set out the decree in that case, but simply states the substance and effect and material parts of the bill and decree, we put our decision on the ground that the equities are not the same, and that the equity of the bill, now before us, was not adjudged by the former decree.

The equity, which the bill seeks to set up is that the intestate of the plaintiffs, having made a contract to sell his land to the defendant, Scott, the intention was to reduce the *contract of sale* to writing, and in drafting the writing, either by the mistake or the ignorance or the fraudulent design of the draftsman, who was the defendant, Scott, the paper was so worded as to be a *conveyance* of the land instead of a *contract to convey* on the payment of the purchase-money

The equity of the first bill was, that the plaintiffs' intestate never intended, either to convey, or to contract to convey, his land, and that he was induced to sign and execute the paper, at a time when, from the effects of drinking, he was incapable of making a contract, and so the deed was obtained from him by fraud, and was void by reason of his incapacity.

These equities are wholly distinct and different: The first bill would have made the deed void and of no effect, against all persons, either as a contract to convey, or as a conveyance of the estate, or any part of it. This bill seeks to make the deed void as a conveyance, but establishes it as a contract to convey upon the payment of the purchase-money. Let the plea be overruled and the defendants be required to answer.

PER CURIAM. Plea overruled.

(286)

CAIPHAS QUICKEL and another against C. C. HENDERSON and others.

A bond to indemnify the surety of A against all notes, bonds, etc., signed and entered into for B, extends to notes, bonds, etc., signed and entered into for B & Co.

THIS cause was removed from the Court of Equity of LINCOLN.

The testator of the plaintiffs, Jacob Killian, was the creditor of Barrett & Co., by a note signed by Barrett & Co., as principals, and J. A. Ramsour as surety, upon which suit was brought, judgment obtained, and execution issued against each of the partners and against the surety, and returned *nulla bona,* and it was admitted that these parties were, and still are insolvent. After this note was given, to wit, in 1857, the plaintiff, Ramsour, for his indemnity against the liabilities he had incurred for E. S. Barrett, took a penal bond in the sum of $20,000, with the other defendants, Briggs, Hoyle and Henderson, as sureties, payable to him, the said Jacob A. Ramsour, and conditioned as follows: "Whereas, the said Jacob A. Ramsour hath heretofore bound himself by bills, bonds and notes, for the payment of various sums of money, as the security of Elisha S. Barrett, now, therefore, if the above bounden, E. S. Barrett, shall well and truly pay off and discharge each and every of the said bills, bonds and notes, in and by which the said Jacob A. Ramsour, is bound as aforesaid, for the said E. S. Barrett, on or before the .... day of 185.., or shall on or before the day aforesaid, in anywise discharge and save harmless the said Jacob A. Ramsour from any and all liabilities, debts, contracts or charges, for or on account of all said bills, bonds, and notes, then, the above obligation to be void, otherwise to remain in full force." Signed by E. S. Barrett, B. F. Briggs, C. C. Henderson and L. A. Hoyle, with their seals affixed, and delivered to the said Ramsour.

The plaintiffs, called on these obligors to indemnify Ramsour, the obligee, by paying this note to the executor of Jacob Killian, but this was refused, on the ground, that as J. A. Ramsour is insolvent and can not pay anything, therefore, he can not be indemnified, and again, for that the indemnity extends only to liabilities incurred by E. (287) S. Barrett, and not such as had been incurred for E. S. Barrett & Co. The defendants demurred, and the cause being set down for argument on the demurrer, was sent to this Court.

Fowle, for the plaintiffs.

No counsel for the defendants in this Court.

MANLY, J. Two grounds are relied upon to sustain the demurrer in this case.

1. That there has been no breach of the conditions of the bond by actual or probable loss on the bond of the complainant, Ramsour, and

2. That the bond is for the indemnity of Ramsour as surety of E. S. Barrett, and does not extend to cases in which Ramsour is surety of Barrett & Co.

The first of these grounds seems to be disposed of by *Ferrer v. Barrett,* 57 N. C., 455, which was a bill similiar, in all respects, to the one before us, where the same ground of demurrer was taken, and after full consideration overruled. We content ourselves by a reference to the reasoning in that case.

The second ground is also untenable. There is nothing in the language of the bond to restrict the indemnity to obligations in which Barrett is sole principal, and we can perceive no reason for such restriction. The individuality of co-partners is preserved and is not merged as in incorporated societies. Each is responsible, severally, for the debts of the company, and it is not less the debt of Barrett, nor is Ramsour less the surety, because others, beside Barrett, are responsible upon it as principals.

PER CURIAM. Demurrer overruled with costs.

Cited: Moore v. Henderson, 116 N. C., 669.

---

(288)

W. G. BOWERS and wife against EDMUND STRUDWICK and others.

A mortgagee having agreed with the wife of the mortgagor, that upon a part of his debt being satisfied, he would assign for her benefit, his interest in the debt, and the property mortgaged, and in pursuance thereof, having assigned the same to a third person, *Held,* that the assignee was entitled to enforce against the wife's legatees, an agreement, by which, at the time she was soliciting him to aid her in securing the benefits, she engaged that upon her death, her interest in the property mortgaged, should be subjected to pay the debts due to such assignee by the mortgagor.

CAUSE removed from the Court of Equity of ORANGE.

The pleadings and evidence in this case, showed that John Witherspoon was indebted to Charles J. Shannon, in a sum, which, in 1853, amounted to about $5,500, and, that to secure it, he had, in 1837, given a mortgage upon sundry slaves. In 1853, he was also indebted to Edmund Strudwick, in the sum of about $5,000, which had accumulated during a period of twenty-five years.

In 1853, Mr. Shannon was induced, from friendship, to Mrs. Susan Witherspoon (wife of John Witherspoon), to consent that if the principal of his debt (about $2,750), were paid or secured, he would assign

his interest in the mortgaged property for her benefit. At this time, the slaves were worth about $4,500. Mrs. Witherspoon, thereupon, persuaded Edmund Strudwick to secure said debt, engaging, that if he would do so, she would provide, that after her death, the slaves should be applied to the payment of the debts due to him, as above stated. Henry K. Witherspoon was to join Strudwick in this arrangement, becoming jointly bound, and sharing in the benefits; but afterwards, for a reasonable consideration, he assigned his interest therein to Strudwick. Thereupon, Mr. Shannon, the principal of his debt having been secured, through the intervention of Strudwick, gave a bond to the latter (Henry K. Witherspoon being connected with the transaction, as above set forth), providing for the transfer to him of the debt and mortgaged property, upon the *payment* of what had been secured. This payment was afterwards made; about $1,100 of it coming from the means of Strudwick. (289)

Owing to some differences between Mrs. Witherspoon and Strudwick, the whole matter was left to the award of John W. Norwood, Esq., who, as a preliminary, ordered Shannon to convey the slaves to Strudwick, and reserved the other points for further consideration. The conveyance was made, but, before the arbitrator had settled the matter, Mrs. Witherspoon died (early in 1854), having survived her husband but a short time. Thereupon the arbitration came to an end. Mrs. Witherspoon made a will, under which her daughter Mary, wife of the plaintiff, William G. Bowers, received an interest in her estate; and Strudwick qualified as administrator, with the will annexed, at August Term, 1854, of Orange County Court.

In June, 1854, John K. Witherspoon, who was duly authorized to do so, by all the next of kin, and legatees of Mrs Witherspoon, excepting the plaintiff, Mary, made a settlement with Strudwick, whereby, in consideration that he released his debts against John Witherspoon, deceased, all the slaves except Virgil were transferred to said Strudwick. Virgil was, by that arrangement, reserved for the use of the complainant, Mary, who was, at that time, some twenty-three years of age, but was absent in Philadelphia. She intermarried with Bowers in the latter part of 1857.

The bill which was filed to Spring Term, 1858, of the Court of Equity for Orange County, prayed that Strudwick should be declared a trustee of Mr. Shannon's interest in the property mortgaged, so far as it had not been exhausted in paying Mr. Shannon's principal money, for the benefit of Mrs. Witherspoon's estate; that the slaves should be sold, and if there were anything left, after satisfying the original debt due Mr. Shannon, it should be paid to W. G. Bowers, as administrator, of John Witherspoon, deceased, and for other relief.

The cause was set for hearing, at Spring Term, 1861, of Orange Superior Court, and ordered to be transmitted to the Supreme Court.

(290) *Graham,* for the complainant.
Phillips, for the defendant, Strudwick.

PEARSON, C. J. By the accumulation of interest, the mortgage-debt exceeded the value of the slaves; so it is assumed on both sides that Doctor Witherspoon's equity of redemption being of no value, was abandoned, and may be put out of the consideration.

The equity of the plaintiff is put on the ground that the claim of Doctor Strudwick to hold the negroes as a security for the debts due to him by Doctor Witherspoon, according to the understanding and agreement made between him and Mrs. Witherspoon, should not be allowed, because it would disappoint the expectations of Mr. Shannon, whose sole object in agreeing to transfer the mortgaged negroes on payment of the principal of his debt, and to forgive the accumulated interest, was to benefit Mrs. Witherspoon exclusively, and so the claim made by Dr. Strudwick, if allowed, would be a fraud on Mr. Shannon.

The doctrine that a court of equity will not enforce the performance of an agreement made in fraud of a third person, is a familiar one, but it is based upon a very refined principle—difficult of application to the ordinary transactions of life, and is put upon the ground of preventing *positive* and *actual* fraud.

Our opinion is against the plaintiffs. Mr. Shannon, upon the facts of the case was not the mere dispenser of a charity. He had a prudent regard to his own interest; and the amount of it is this: he was willing, in order to avoid the necessity of enforcing his rights as mortgagee, and the embarrassments to which he would have been subjected in taking the negroes out of the possession of Dr. Witherspoon and of Mrs. Witherspoon, owing to the peculiar relations of respect, etc., existing between them, to forgive the accumulated interest on his debt and to transfer and assign his right and title under the mortgage, provided the principal of his debt was paid, or security for prompt payment was given; with the understanding that any of the mortgaged negroes that could be retained by this arrangement should be held for the
(291) benefit of Mrs. Witherspoon.

The question is: As Mrs. Witherspoon, in order to comply with the condition which Mr. Shannon annexed to his bounty, to wit, the immediate payment or security for the prompt payment of the principal of his debt, was under the necessity of coming to an understanding with Dr. Strudwick, that if he would enable her to perform the condition imposed by Mr. Shannon, and would allow

her the full use of the property during her life, he should, after her death, hold the negroes as a security for the debts due to him by Dr. Witherspoon, does the doctrine of preventing a fraud apply to the case and forbid the Court from allowing the agreement made between Dr. Strudwick and Mrs. Witherspoon from being acted on and carried into effect by Dr. Strudwick, who has acquired the legal title?

We are of opinion that the doctrine that equity will not enforce an agreement in fraud of a third person does not apply to the case.

Mr. Shannon was generous in agreeing to forgive the accumulated interest, but by stipulating that the pricipal of his debt must be paid, or its prompt payment be secured, he gave up the right to be considered in the light of a mere dispenser of a bounty, because he imposed a condition, and, of course, expected that Mrs. Witherspoon would be under the necessity of making some agreement or arrangement in respect to the property, to enable her to comply with the condition. Doctor Strudwick, in the exercise of a spirit of generosity, equal to that of Mr. Shannon, aided Mrs. Witherspoon, and enabled her to comply with the condition. What ground is there to support the allegation that when Doctor Strudwick, as a condition to the aid which he was about to render, stipulated that after the full enjoyment of the property by Mrs. Witherspoon during her life, it should then stand as a security for his debts due by Dr. Witherspoon, he perpetrated a fraud upon Mr. Shannon, and on that account should not be allowed to have the benefit of the arrangement made between him and Mrs. Witherspoon? We can see none, either in law or equity or morals. (292) Mr. Shannon made no stipulation in behalf of the *children* of Mrs. Witherspoon. His object was, after securing, without further embarrassment, the payment of the principal of his debt, to secure to Mrs. Witherspoon the full enjoyment of such of the mortgaged negroes as could be saved, after a compliance with his terms. These were complied with, and his obligation to transfer all of his right and title under the mortgage deed on the payment of the residue of his principal money, was absolute, and without any declaration of trust in favor of the children of Mrs. Witherspoon, or any other stipulation with a view of restricting Mrs. Witherspoon from the privilege of making an agreement necessary to enable her to comply with his terms. A payment of a part of a debt is not a *satisfaction* of the whole, as between the creditor and debtor, but when a third person comes in and assumes the payment of a part, in satisfaction of the whole, the case is materially altered, and there is then no reason on which the creditor can object to an agreement which the debtor was under the necessity of making, in order to enable him to pay the part required.

So, in the view we take of the case, Dr. Strudwick has not been

guilty of any *positive or actual fraud,* so as to entitle the plaintiffs to take the ground that a court of equity ought not to allow him to insist on the arrangement by which the negroes, after the full enjoyment of Mrs. Witherspoon, during her lifetime, were to be held by him as a security for his debts; but we are satisfied that Dr. Strudwick, so far from having perpetrated a fraud, either on Mr. Shannon or the children of Mrs. Witherspoon, has acted the part of a friend, and by making himself liable to Mr. Shannon for the principal of the debt, and thereby securing to Mrs. Witherspoon the full enjoyment of the negroes embraced by the mortgage, has entitled himself to an equal share of credit in acting as the friend of Dr. Witherspoon and Mrs. Witherspoon and the family. Indeed, the equity which the bill seeks to set up under cover of the bounty of Mr. Shannon to Mrs. Witherspoon, is
(293) based on the idea that his intention was to restrict her full enjoyment in this: Mrs. Witherspoon was not to be at liberty to dispose of the negroes, as seemed right to her, according to her convictions of justice and moral duty, but she was obliged to forego all such obligations and allow the negroes to devolve on her distributees, under the statute of distributions, unless she saw proper to make a will and give them to her children in proportions differing from the manner in which they would have been entitled under the statute. This assumption of the right, on the part of Mr. Shannon, to control the free agency of Mrs. Witherspoon in disposing of the negroes, is inconsistent with the idea of making her the absolute owner, and is contradicted by the face of his bond.

The effect of the bond of Mr. Shannon, dated 27th December, 1847, to Dr. Strudwick (H. K. Witherspoon having released his right under the bond, may be put out of the case), was to give Dr. Strudwick a right to an absolute conveyance by Shannon of all his right and title to the negroes under the mortgage, on the payment of $1,500. Strudwick, under this bond, had a right to call for an absolute conveyance of Shannon's title without any declaration of trust, either in favor of Mrs. Witherspoon or of her children. So, the deed executed by Shannon in pursuance of the award of Mr. Norwood, was simply a performance of the obligation imposed on Mr. Shannon by his bond—the sum of $1,500 having been paid to him.

Thus, the legal title passed to Dr. Strudwick, subject only to the parol trusts, admitted by his answer, as growing out of the understanding between him and Mrs. Witherspoon; that is, to allow Mrs. Witherspoon to have the full use of the negroes during her life, and then in trust as a security to Dr. Strudwick for the debts due him by Dr. Witherspoon, leaving a resulting trust in favor of Mrs. Witherspoon after the payment of the debts due to Dr. Strudwick.

By her will, Mrs. Witherspoon disposes of her interest among her children, giving a part to Mrs. Bowers, one of the plaintiffs. (294)

In June, 1854, after the death of Mrs. Witherspoon, all of her children, except the plaintiff, Mrs. Bowers, made a full settlement with Dr. Strudwick of all matters growing out of this and other transactions, as appears by a deed executed by the parties of that date, by which Dr. Strudwick releases all of his debts of every kind, and takes the negroes not before disposed of, *except Virgil,* as his absolute property.

Mrs. Bowers was not a party to this arrangement, and the question is, has her claim, under the bequest by her mother's will, to set up the resulting trust after the satisfaction of the debts due to Dr. Strudwick, been waived, or released, or surrendered, in any manner.

It is said this result has been effected by her acceptance of the negro *Virgil,* and by several letters of hers to Mr. Norwood, which are exhibited.

Without discussing the questions made in respect to her mental capacity, it is only necessary to say that it does not appear that in accepting Virgil, or while writing the letters, she had a full knowledge of her rights, and there is no evidence that she ever did or said anything with an intent to confirm the settlement made by her brothers and sisters with Dr. Strudwick, and there is nothing to show that she did not receive Virgil, supposing him to be a part of her legacy under her mother's will. The plaintiffs have an equity to redeem the negroes and to set up the resulting trust after the payment of the debts due by Dr. Witherspoon to the defendant, Dr. Strudwick, and to this end are entitled to an account, on the footing that Virgil is to be considered part of the property liable, in the first instance, to the payment of the debt of Dr. Strudwick. So they will take an order for an account, or will submit to have the bill dismissed, as they may be advised.

PER CURIAM. Decree accordingly.

Cited: S. c., 60 N. C., 612.

---

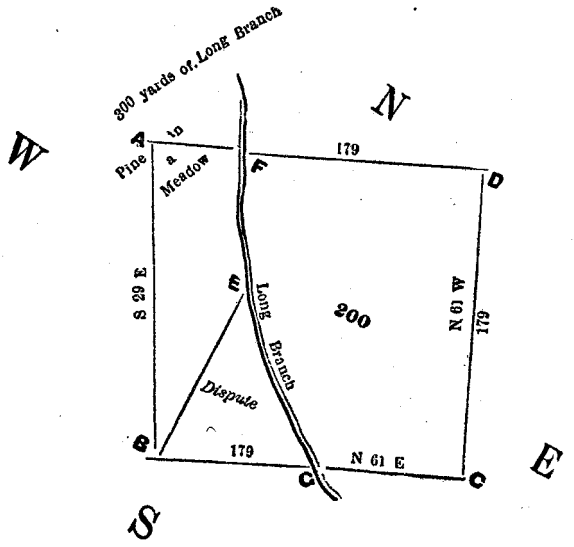
(295)

MOORE T. SEALEY against GILBERT BRUMBLE and JOEL BRITT.

Where land, which was sold to A under a mistaken description, was afterwards conveyed by the same owner to B by a proper deed, for a valuable consideration, without notice to B of the mistake, it was *Held,* that a bill to reform the former deed and correct the error, would not lie against either A or B; but it appearing that A had got paid for part of the same land twice, he was not allowed to recover costs on the dismissal of the bill.

CAUSE removed from the Court of Equity of ROBESON.

One Isham Cox conveyed to defendant Gilbert Brumble the tract described in the plat annexed, A, B. C. D, also another tract adjoining Gilbert Brumble, who sold and conveyed to one Ward a part of the first mentioned tract purporting to be 100 acres, by metes and bounds, as follows: "First survey containing 100 acres, beginning at a pine, in a meadow, about 300 yards south of Long Branch (A), running south 29 degrees east 179 poles to a stake, two sweet bays and two water



oaks, in the edge of the ten mile swamp (B); then *north to the hill of the Long Branch* (E); then the various courses of the hill of the
(296) Long Branch to the upper line (F); thence to the beginning, containing one hundred acres, be the same more or less." The plaintiffs allege that the call of the second line, B, E. is a mistake in the draftsman, and should have been *N.* 61 *E. to the hill of the Long Branch,* which would have carried it to G. The proofs show that in the original deed from Cox to Brumble such was the course, and that by that course the hill of Long Branch was passed at G; that by running from B to G, 100 acres would be embraced, but that by going to E, only about 50 would be the amount; that Brumble had, for many years, recognized B, G, as the line, and the area B. G, E, had been claimed by Ward, and those claiming under him down to the plaintiff Sealey, whose deeds all followed the one above described. Brumble sold all of the lands contained in his deeds from Cox, embracing the whole area

A, B, C, D, to the defendant Joel Britt, not at all noticing the part he had conveyed to Ward.

The deed from Brumble to Ward omits the words of inheritance, necessary to convey a fee simple, which the plaintiff also says was a mistake, and prays to have that rectified.

The plaintiff alleges that he came in for a valuable consideration under Ward by a line of conveyances, describing the land in the same mistaken terms as are embraced in the deed to Ward.

The prayer is that the mistake be corrected by the insertion of the proper course from the second corner; also, that the deed may be corrected as to the words of inheritance, and for general relief.

Brumble denies that the mistake exists as to the course of the second line, but as to the omission of the word heirs, he admits the mistake, and avers his willingness at all times to have corrected it.

Britt insists in his answer that he was a purchaser of both these tracts of land at a full price, without notice, and there is no proof filed that he did have notice of the equity of plaintiff.

The cause was heard on bill, answers, proofs and exhibits. (297)

Leitch and *M. B. Smith,* for the plaintiff.
Shepherd, for the defendant.

PEARSON, C. J. Britt is a purchaser for valuable consideration, without notice of the alleged mistake. He paid the price and took a deed for the whole tract of 200 acres, according to the original boundaries, with a warranty as to the whole tract; so it is hard on him to be obliged to give up the part actually covered by the deed under which plaintiff claims, and fall back on the warranty. In respect to the part which the plaintiff alleges ought to be included because of a mistake, he may well take the benefit of the maxim, "When the equities are equal, the law must prevail." The bill must therefore be dismissed as to him.

Brumble, by his answer makes an issue on the allegation of a mistake in respect to the boundary. But as the title has passed out of him and vested in Britt, we are relieved from the necessity of deciding this issue, because, in reference to the title, any correction or deed which he might be required now to make would be inoperative and of no effect, and the bill is not framed with a view to any ulterior remedy for breach of warranty. There is no allegation that the deed under which plaintiff claims contains a warranty, and of course no secondary relief in aid of a resort to an action at law on a warranty, if one had been made, can be decreed. The bill must, therefore, be dismissed as to this defendant, also, so far as it relates to the mistake alleged in respect to the boundary.

The mistake by reason of the omission of words of inheritance being admitted, the plaintiff is, of course, entitled to a decree against the defendant Brumble to have the deed corrected, and as he admits the mistake, and avers a willingness at all times to have corrected it, the plaintiff would have been required to pay the costs according to the course of this Court, but the conduct of the defendant Brumble in selling and receiving pay for the same land twice, which he certainly did (298) as to the part of the land not drawn in question by the alleged mistake, and his avoiding the question in reference to the mistake as to the boundary by the transfer of the title to his co-defendant takes from him all right to claim costs.

As the decree dismisses the bill so far as the defendant Britt is concerned, and also as to the defendant Brumble except as to the mistake in respect to the words of inheritance, the objection taken on the hearing on the ground of multifariousness is avoided.

Indeed, after the expense and delay of prparing a case for hearing has been incurred and taken place, the Court would not be inclined to put the case off on a ground which does not affect the merits of the controversy.

The bill will be dismissed as to Britt, with costs, and will be dismissed as to Brumble so far as it relates to the alleged mistake in respect to boundary, without costs; and there will be a decree, without costs, against the defendant Brumble for the execution of a deed with words proper to pass a fee simple estate, so as to correct the mistake in that particular.

PER CURIAM. Decree accordingly.

THE ATTORNEY-GENERAL against CALEB OSBORN et al.

1. Where a grant of 3,000 acres of land was made as a bounty under the Act of 1788, in respect to a particular seat for iron works, it was *Held*, that such a grant was appendant to the seat, and exhausted the bounty intended to be given by the statute; so that one who afterwards became owner of the seat, and rebuilt the works there, after the former works had gone down, and were abandoned, had no right to another bounty, in respect of such seat, and that a second grant for bounty in such a case was void.
2. Whether the requirements of the statute of 1788, Rev. Statutes, chapter 75, in regard to making the entry—its return to the county court, the order of survey and the appointment and report of a jury should be strictly complied with as a condition precedent to the issuing of a grant, or whether such matters are merely directory, and do not affect the validity of the grant.—*Quere.*
3. Whether a grant, which includes within its boundaries, a large scope of country, say an area of ten miles by seven, but which in its face, purports to be for 3,000 acres of vacant land, the excess being included in older patents is void—*Quere.*

CAUSE removed from the Court of Equity of ASHE. (299)

This is an information, filed in the name of the Attorney-General, to vacate and set aside a grant of 3,000 acres of land.

The grant was taken out under the provisions of an act of the General Assembly, passed in the year 1788, entitled, "An act concerning iron and gold mines." See Rev. Statutes, Chap. 75. The information alleges various grounds upon which it is sought to set aside this grant:

1st. That the entry taker failed to transmit a copy of the entry to the next term of the County Court, after it was made.

2d. That a subsequent County Court ordered a warrant of survey, without sufficient proof that the requisite amount of iron had been made at defendant's iron works.

3. That the record made of this transaction in the County Court is altogether irregular, defective and void.

4th. A paper which is relied on as being the report of the jury, is in evidence, and it shows that it was signed by two or three names not contained in the order appointing the jury, and then the said report is ordered to be confirmed. Various other irregularities in the entries of the County Court are set forth in the information, but in the view taken by the Court they need not be stated here.

5th. That the surveyor appointed to make the survey did not make any actual survey, but made out a plat, arbitrarily, without doing so.

6th. That the whole proceeding, embracing the plat of survey and the grant, is delusive and fraudulent; that they embrace, in their exterior boundaries, at least 45,000 acres of land, and profess to take only such land as had not been granted by older grants, which is set down at 3,000 acres, whereas, the information alleges, and the proof shows, that there was in the grant at least eight thousand acres (300) of unappropriated land—and that much of this was of prime quality and fit for cultivation. The plaintiff avers that the survey is at least ten miles long and seven miles wide, and the defendants well knew of this large quantity of vacant land within their grant, and well knew the excellent quality of much of the land, and purposely devised this scheme to defraud the State out of its public land and revenue.

7th. The information alleges, and the proofs establish, that many years ago a man by the name of John Cox owned a forge for the manufacture of iron at the same place where the defendants have their forge (Elk Creek forge), by virtue of which they made an entry and obtained a grant of 3,000 acres of land (not included in the defendants' boundaries) under the act of 1788, for the use of the said iron works, and that the said grant is still in force.

The defendants, in their answer, insist that Cox's forge at Elk Creek went down many years ago, and was entirely abandoned for any purpose

of making iron, and that they have not received any of such bounty from him, and are in nowise privy to him in respect to such bounty, and that they have the same right to be encouraged in their enterprise as if they had located their iron works at a different spot from that on which they are established. They deny all combination and fraud.

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

Elaborate surveys were made, by order of this Court, of all the country embraced within the lines of the grant, showing the various tracts heretofore granted, and the amount of vacant land, which were used on the hearing.

Badger, Neal, Crumpler and *W. P. Caldwell,* for plaintiff.
B. F. Moore, Boyden, Mitchell and *Fowle,* for defendants.

PEARSON, C. J. It is not necessary, for the purpose of disposing of this case, to decide whether, in reference to grants of this
(301) description, all of the requirements of the statute in regard to the manner of making the entry—its return to the County Court—the order for a survey, and the appointment and report of a jury, should be strictly complied with as a condition precedent on which the validity of the grant is made to depend, according to the law as settled in reference to the sale of land for taxes, or whether such matters are only *directory,* so that a grant issued by the proper authorities for land which is the subject of grant, is to be held valid, and can not be declared void and of no effect, notwithstanding the requirements of the statutes have not been observed according to the law as settled in respect to grants issued under the acts in reference to ordinary entries and grants of vacant land.

2. Nor is it necessary to decide whether a grant which includes within its boundaries a large scope of country, say ten miles by seven miles square 45,000 acres, but which, on its face, purports to be a grant of 3,000 acres of vacant land, the excess included in the boundaries being covered by older patents, is in law void, for the want of power in the Governor to issue such grant. We will take occasion to remark, however, without reference to the question of power, that its exercise leaves open a wide door for the admission of fraud, and certainly calls for extreme vigilance on the part of the public authorities.

3. Nor is it necessary to decide whether the defendants were guilty of *actual fraud* in obtaining a grant for some 5,000 acres more than they claimed to be entitled to. It may be, under the circumstances, that owing to the large scope of country covered by the survey, and the infinite number of tracts of land held by older grants, embraced wholly

or in part by the lines of the survey, they did not know, positively, the fact of this large excess, and were intent only on including, at the least, enough vacant land to fill their complement of 3,000 acres, and it is certain the case does not fall under *Attorney-General v. Carver,* 34 N. C., 230; for there everything on the face of the survey and plat was right, and there was no ground to admit of any doubt or question of its correctness, so far as the papers showed, and the (302) fraud was made palpable by the fact, *afterwards disclosed,* that the natural boundaries called for extended the lines *two miles* instead of 200 poles, on the settled rule that course and distance are controlled by a call for natural objects as the boundary. This fact, of itself, convicted both the surveyor and the grantee of a fraud, and there could be no mistake about it. But here, the survey and plat show that a large extent of country was included; the surveyor says 33,000 acres of older patented land is embraced, which, being deducted, leaves 8,000 acres the subject of the grant; so it does not appear, palpably, that the defendants were aware of the large excess of vacant land, and we should require strong proof to lead us to the conclusion that either the County Surveyor, *Calloway,* or his deputy, *McMillan,* knew of the fraud, if any such existed on the part of the defendants, and prostituted themselves in the discharge of the duties of their office, in order to aid the defendants in defrauding the State out of an indefinite number of acres of land not fit for cultivation, and which was subject to entry at five cents per acre; not exceeding, at any estimate, the amount of $300 as the sum, out of which, in this view of the case, the State has been defrauded by the corruption, not only of the defendants, but of the County Surveyor and his deputy—both sworn officers.

4. For we put our decision on the ground that the grant was issued against law; that is, without the authority of the law, and in a case that did not come within the operation of the statute of 1788, "to encourage the building of iron works." The statute recites, "Whereas, it appears to the General Assembly that *several places* in this State are advantageously situated for the building of iron works," "Be it enacted, that three thousand acres of vacant land, not fit for cultivation, *most convenient to the different seats,* is hereby granted for every set of iron works, *as a* bounty from this State, to any person or persons who will build and carry on the same, to be under the following rules and regulations."

It is alleged in the information, and proved by evidence, that one Cox had, many years ago, built and carried on iron works (303) at this "identical seat," and had, by reason thereof, applied for and obtained a bounty of 3,000 acres of vacant land. The question is:

Was this bounty land of 3,000 acres appendant to the *seat of the iron works,* or was the intention to give a bounty of 3,000 acres of land to every person who would, upon that seat, from time to time, build and carry on iron works? Upon the former construction, when the iron works should be built and carried on at the particular seat, the bounty of three thousand acres of land most convenient to the seat was to be given, and although the bounty land was not annexed to *the seat,* so that the seat could not be conveyed without passing the bounty land, or the bounty land could not be conveyed, wholly or in parcels, without also conveying the seat of the iron works, still the bounty was exhausted, and could not be claimed in behalf of any other person who should purchase or otherwise acquire the ownership of the seat after the bounty land had been severed from it. Upon the latter construction, every person who, by purchase, descent or otherwise, might at any time, acquire title to the seat, would be entitled to a bounty of three thousand acres of land, so that all that was necessary to do, in order to acquire a title to another bounty of three thousand acres of land was for the man who had obtained the bounty to let the works go down and sell off the three thousand acres of land which had been received as a bounty, and then rebuild and carry on the works long enough to make five thousand pounds of iron, and thereupon entitle himself to another bounty of three thousand acres of vacant land, not fit for cultivation, "most convenient to the seat;" then let him sell to a stranger the seat for the iron works after he has ceased carrying on the works, and let the purchaser of the seat rebuild and make five thousand pounds of iron, and he gets another bounty of three thousand acres of land, *most convenient to the seat,* and so *ad infinitum,* until all of the vacant land in the county is absorbed by these successive bounty grants!

This latter construction can not be adopted, and we hold, according to the true construction of the statute, the grant of the
(304) bounty of three thousand acres of land to Cox, in respect and as appendant to this particular seat on which he had built and carried on iron work, exhausted the bounty intended to be given by the statute, and no one who afterwards became the owner of the seat had any right to claim another bounty of another three thousand acres of land. It follows that the grant in question was issued against law, and is, therefore, void.

PER CURIAM. Decree accordingly.

JOHN CHAMBERS and others against WILLIAM REID and others.

Where a bequest was made, to the children of a brother and sister of the testator, to which is added, "that is, on the supposition, that my brother is dead; but if he is alive at the time of my death, then he is to receive one-half of my estate," it was *Held*, that no question as to whether the estate was to be divided, according to *heads* or *stocks* could arise, for that the brother took one-half of the estate, and his children nothing.

CAUSE removed from the Court of Equity of MECKLENBURG.

David Chambers died in the year 1858, having made and published his last will and testament, in which, after several dispositions of his property in various clauses, he bequeaths as follows: "Item 7th, It is my will that, after all the foregoing items of my will are fully carried out, that the balance of my estate be disposed of as follows: To be equally divided between the children of my brother, John Chambers, and the children of my deceased sister, Nancy Woodward, each to share equally in all respects; that is, on the supposition that my brother be dead, but if he is alive at the time of my death, then he is to receive one-half of my estate himself."

It turned out that at the testator's death his brother John Chambers was living, but in a distant State, and had not been heard from by his brother for many years. He, John, had at the death of the (305) testator nine children who are all parties plaintiff, and they claim to share equally, each with the children of Mrs. Woodward, after deducting one-half of the estate for their father, John Chambers.

The children of Mrs. Woodward, of whom there are five, and the executor of the will, are made parties defendant, and insist that these children are entitled to have one-half of this residuary interest divided among them, conceding that John Chambers is entitled to the other half. The cause was set down for hearing on bill, answer and exhibits, and sent to this Court.

Fowle, for plaintiff.
Wilson and *Boyden,* for defendant.

BATTLE, J. We have no hesitation in saying that the construction of the will in question, contended for by the defendants is correct. Had the latter part of the clause, which relates to the supposition of the death of the testator's brother John, been omitted, then his nine children would have taken equally *per capita* with the five children of the testator's deceased sister, according to the well known rule aplicable to such bequeaths. See *Bryant v. Scott,* 21 N. C., 155; *Harrell v. Davenport,* 58 N. C., 4; *Roper v. Roper, Ibid.,* 16. But the reference by the testa-

tor to his brother John, and saying that if he were alive he should receive one-half of the estate himself, is, we think, a sufficient indication of intention that the divisions should be *per stirpes,* so that if John had been dead, his children would have taken only one-half of the estate, to be equally divided between them, leaving the other half to be equally divided between the children of the ddceased sister. See *Bivens v. Phifer,* and the cases therein referred to, 47 N. C., 436. However that may be, we are satisfied that as John was alive, he took all that was intended for him or his family, which excludes his children, and leaves one-half of the legacy for the children of the testator's de-
(306) ceased sister, Mary Woodward. A decree may be drawn in accordance with this opinion.

PER CURIAM. Decree accordingly.

In the Matter of YATES.

Where a court of equity is resorted to, for the sale of land, after the sale is ordered to be confirmed (by which the bid becomes *accepted*), if the master informs the court that the bidder refuses to comply with the terms of the sale, no order prejudicing the rights of the bidder can be made until he is made a party to the proceedings by the service of a rule upon him to show cause.

THIS is an appeal from an interlocutory order made by *Osborne, J.,* at Fall Term, 1861, of the Court of Equity of MARTIN.

The Supreme Court having reversed the order directing the land in question to be resold, and that Coffield and Barnhill pay the difference between the first and a second sale, the cause came on for further consideration of the Court, and the following order was made: "Upon reading the report of the Master, it appearing thereby that the tract of land described in the petition as adjoining the land of C. Moore and others, bounded by the Roanoke River on the north, C. Moore and others on the south, Simmons, Grady & Co., on the west, had been sold by the said Master and bid off by one Archibald H. Coffield for himself and Turner E. Barnhill, as the last and highest bidder, at the price of $6,000, and the said Archibald H. Coffield had been accepted by the Master as the purchaser thereof at the said sum, which sum, by the terms of the sale, was to be paid in sums as follows: $3,000 on 1 January, 1862,
(307) with interest from 1 January, 1861, and $3,000 on 1 January, 1863, with interest from 1 January, 1861, and each sum was to be secured by the bond of the purchaser, with good security. Whereupon, also, the decretal order for the sale of the premises being read, and now the matter being again moved by the counsel for the

petitioner, Coffield and Barnhill apposed the motion, and they offered to file affidavits establishing the fact that before the sale no information was given to them, or either of them, as to the true state of the title of the petitioner to the land aforesaid; and they also opposed the motion, on the ground that the purchasers had no actual notice of this motion; the Court doth confirm the sale to the said Archibald H. Coffield, and thereupon, on the prayer of the counsel for the petitioner, the Court doth order that notice of this proceeding be served on Coffield and Barnhill by the Sheriff of this county, requiring them to appear at the next term of this Court, and complete their purchase as aforesaid according to the terms of the said sale, or then show cause to the contrary. And in the event that they do not, or that said Coffield does not complete the said purchase, or show to the Court cause to the contrary, the said master forthwith re-sell the said premises, and that all the costs, charges and incidental expenses attending the said sale and occasioned by the default of the said Coffield and Barnhill, together with any loss or deficiency in the price and interest arising by a second sale, be ascertained by the master, and the same be paid into the office of this Court by the said Coffield and Barnhill for the benefit of the petitioners."

From this order Coffield and Barnhill prayed an appeal to the Supreme Court, which was allowed.

B. F. Moore for the petitioners.
Winston, Jr., for Coffield and Barnhill.

PEARSON, C. J. When the case was here before (ante 212) we pointed out the "orderly mode of proceeding," where the agency of a Court of Equity is resorted to in order to sell land.

On the coming in of the master's report, if the Court is satisfied that the interest of the petitioner, for whom the Court is acting, has been attended to, the first order is to confirm the sale. The (308) effect of which is to *accept* the bid of the purchaser, which is necessary, in order to "bind the bargain," so far as the petitioner is concerned. The purchaser is not a party to this order. He is not, then, before the Court, and of course his rights are not in any way prejudiced by the order of confirmation.

Whereupon, the Court being informed by the Master that the purchaser declines to comply with the terms of the sale, a rule is taken on him to show cause; which may be returned instanter if the purchaser is present. The object of the rule is to bring the purchaser before the Court, and upon its return *both* parties are then heard, and the Court adopts one of the three orders set out in our former opinion.

His Honor erred in making any further order until the return of the rule; and indeed, the order which is made assumes that the purchaser will not be able to show any good cause, and proceeds to direct what shall be done in that event.

We presume his Honor was misled by the orders made in *Harding v. Yarbrough, ante* 215, which the reporter appends as a note to this case on former hearing. In that case, the purchaser made no difficulty, because of a defect in the title, or any irregularity in the mode of conducting the sale, or otherwise. The sole difficulty grew out of an inability to give the security. So in *Harding v. Harding,* 18 Eng. Ch. 514, from which the order in *Harding v. Yarbrough* was taken, there had been a reference, as to the title (which is always done in England, on account of the very complicated condition of title in that country), and the only object was to compel the purchaser to comply with the terms of sale. In our case the purchaser had a right to be heard in reference to his objections to the manner of making the sale, or to the title, or any other ground of objection, and the object of the rule was to give him a day in Conrt, and an opportunity of being heard. So the entry in *Harding v. Yarbrough* had no application.

This opinion will be certified that further proceedings may be taken in the Court below; the orders in that Court being reversed, ex-
(309) cept so much as confirms the sale, and directs a rule on the purchaser to show cause at the next term.

PER CURIAM. Reversed.

Cited: Edney v. Edney, 80 N. C., 84; *Capel v. Peebles, Id.,* 93; *Farmer v. Daniel,* 82 N. C., 157; *Burgin v. Burgin, Id.,* 199; *White, Ex parte, Id.,* 380; *Harrell v. Blythe,* 140 N. C., 416.

JAMES P. ALLEN against JOHN PEARCE and others.

1. Where the obligee, in a bond for title, paid a material portion of the purchase money down, and gave a note for the residue, and entered into possession and continued it up to the time of a suit in ejectment by the obligor, it was *Held,* to be a strong case for the court of equity to interfere by injunction, to prevent the obligee from being turned out, under the execution, in the suit at law.
2. Where, to a bill for an injunction, the defendant answers lightly and evasively to material allegations, the injunction will not be dissolved.
3. Where a new matter is introduced in an answer, in avoidance of the plaintiff's equity, it will not be considered on a motion to dissolve.

Appeal from the interlocutory order of the Court of Equity of WAKE, ordering the dissolution of an injunction, BAILEY, J.

The defendant, John Pearce, on 15 June, 1857, entered into a penal bond payable to the plaintiff, James P. Allen, which was conditioned that "if the said J. P. Allen shall fully comply with the contract in the above premises, and pay to the said John Pearce the remainder of the purchase-money, with interest and necessary costs of these transactions, which is $175.10, seventy dollars of which is this day paid in cash and the receipt whereof is hereby acknowledged, and the remainder is $107.10, with interest from the 7th, then the said John Pearce is to make him a good and lawful title to the above lands." The plaintiff immediately went into possession of the premises, and has occupied them ever since.

Before this suit was brought, Pearce falling into pecuniary difficulties, conveyed the land in question to one Geo. W. Thompson, as trustee for the payment of his debts, and on 29 September, (310) 1861, he sold the same at public auction to the defendant, Marcellus Pearce, and made him a deed in fee simple for the same. The plaintiff alleges that he attended at this sale by the trustee and made objection thereto. Also that the defendant, Marcellus, had full knowledge of the equitable claim of the plaintiff, and so had the said G. W. Thompson, when the deed of trust was made to him.

The plaintiff alleges that before this sale, and before this suit was brought, but after the money fell due, he tendered the purchase-money in full, and demanded a deed in fee simple from the said Pearce and the other defendants claiming under him, which was refused.

The plaintiff further shows that the defendant, Marcellus Pearce, sued him in ejectment and obtained a judgment by default, and is threatening to turn him out of the possession. The prayer is for an injunction (which issued) and for an account for the ascertainment of the balance of the purchase-money, and for a conveyance to him of the legal title on the payment thereof also for general relief.

The defendants admit the bond to make title to plaintiff; they also admit that the payments, alleged, have been made; the defendant, Pearce, admits also the tender, but denies that it was in full or that it was made before the execution of the deed of trust. The manner of this denial is noticed in the opinion of this Court. The defendant, Marcellus Pearce, denies that the plaintiff forbade the sale by the trustee, but alleges that he assented to the sale and urged the running off of the land.

On the coming in of the answer, the defendants' counsel moved for a dissolution of the injunction, which, on argument, his Honor granted, and it was ordered to be dissolved; from which order the plaintiff, by leave of the Court, appealed.

Fowle, for the plaintiff.

A. M. Lewis, for the defendants.

BATTLE, J. The right of the plaintiff to call upon the defendant, John Pearce, for a specific execution of his contract, for the sale (311) of the land in controversy, is clear beyond all question. The contract for the sale is in writing, a part of the purchase-money was paid in cash, and a note given for the residue, and the plaintiff thereupon took, and still continues in, possession. The plaintiff alleges that before the execution of the deed, in trust, by the said John Pearce to the defendant, Thompson, he tendered to Pearce the balance of the purchase-money, and demanded a conveyance, which was refused. And this defendant admitting the written contract of sale, and admitting also the tender, denies that it was in full, or was made before the execution of the deed in trust. The denial, however, is made so slightly and evasively as to have very little weight. It is true, that the tender was made after the note became due, but it is idle to say, as the defendant, John Pearce, does, that the contract was abandoned, and the plaintiff's equity relinquished. There cannot be the slightest pretense that this case is an exception to the maxim that in equity "time is not of the essence of the contract." See *Falls v. Carpenter,* 21 N. C., 237, and the note to Battle's edition.

The defendant, John Pearce, had then no right, upon his answer, to move for a dissolution of the injunction, and the other defendants have no greater rights than he has, as they do not deny that they purchased with notice of the plaintiff's claim.

The allegation, faintly made by the defendant, Marcellus Pearce, that the plaintiff assented to the sale by the defendant, Thompson, as trustee, is an averment of new matter which may possibly avail him, if he can prove it on the hearing, but it cannot be considered, on this notice to dissolve the injunction, it being an established rule that the injunction must be continued, unless the equity, set forth in the plaintiff's bill, be denied in he answer; *Lindsay v. Etheridge,* 21 N. C., 36. The order dissolving the injunction must be reversed.

PER CURIAM. Decree accordingly.

---

(312)

S. D. BEVIS, Executor, against AUGUSTIN LANDIS.

A sheriff has a right to sell any property of the debtor that is subject to the lien of his execution, and the fact that one has bought part of such property at private sale, *bona fide*, and paid the full value, and that enough of other property remained to satisfy the execution, and that the sheriff and purchaser had knowledge of this purchase, but were benefited in the sale of this particular property, and made it from such motive, could raise no equity against the sheriff or purchaser.

CAUSE removed from the Court of Equity of GRANVILLE.

The slave in question, a man named Anderson, was sold by the sheriff, Joseph H. Gooch, at public auction to the defendant, Landis, by virtue of an execution against one D. A. Paschall. The intestate of the plaintiff had purchased Anderson at private sale on 12 September, 1857, and took a bill of sale for him from Paschall. The consideration expressed in this bill of sale is $1,000. The sheriff's sale took place after the date of the bill of sale, but under an execution having a lien prior to the date thereof. At the sale the agent of the plaintiff's testator attended and exhibited his title and forbade the sale, pointing out to the sheriff divers other slaves and other property in the hands of Paschall out of which the execution could be satisfied; the sheriff, nevertheless, proceeded to cry the sale, and the defendant, Landis, having become the last and highest bidder, the slave was cried off to him and delivered to him by the sheriff with his bill of sale.

The bill charges that both the sheriff and Landis, the purchaser, knew of Morris' purchase, but were involved on account of Paschall, and the sale of this slave, Anderson, was made to relieve them as to these liabilities. The bill was filed by Morris in his lifetime, and his death being suggested, his executor, the present plaintiff, was made a party. The prayer is that Landis shall convey the legal title of Anderson to the plaintiff (then Morris) and deliver possession, and account for the slaves's services and profits since he purchased him, and in default thereof that Gooch may account, etc. The answer of the defendant alleges various matters in the way of explanation, which are not deemed necessary to be set forth—it states, however, that executions of (313) a test junior to this sale to Morris came into the hands of the sheriff, and without selling Anderson under the former lien there was not enough property to satisfy them all.

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

B. F. Moore, for the plaintiff.

No counsel appeared for the defendant in this Court.

PEARSON, C. J. The bill is filed on the assumption that one who purchases, at a fair price, a slave or other articles of a debtor, whose property is subject to the lien of an execution, but who has other slaves and property besides the one sold sufficient to satisfy the execution, is entitled to the protection of a Court of Equity, so that provided he gives notice to the sheriff of the fact of his being a purchaser of one of the slaves, and forbids the sheriff from selling that particular slave, and requires him to make the amount of the execution by selling some

one of the other slaves, and the sheriff, nevertheless, proceeds to sell the particular slave, equity will, in favor of the purchaser at private sale, convert the purchaser at the execution sale into a trustee, if he is fixed with notice of the facts, and require him to convey the slave to the purchaser a private sale.

The bill is of "the first impression." No case or dictum was cited to support it, and we are not able to see any principle upon which such an equity can be based.

It is true the title of a debtor is not divested by the execution. If he sells, the purchaser acquires the property subject to the lien of the execution. If that be removed his title is good, but if it be not removed, his title will be divested by a sale under it, and neither a Court of law or equity can control the power of the sheriff to make sale under the execution. Indeed, such an interference would give rise to much inconvenience, and greatly embarrass officers in the discharge of their duties. One man will say, "I have bought this negro and forbid
(314) you from selling him, because the other property is sufficient out of which you can make your money." A second says, "I have bought *this* negro and you must not sell him." So a third and a fourth; and the sheriff may properly reply, "the law has not made it my duty to take care of your rights, or to settle priorities between you; I have power to sell any one or all of these negroes in order to satisfy the execution; it was your folly to buy property subject to my lien, without taking care to provide for the payment of the executions." This position of the sheriff is unanswerable. The courts could not interfere with the action of the sheriff under this general power given by the execution, even in behalf of a surety whose property was sold, or was about to be sold, to pay the debt in the first instance, although it was known to the sheriff that the principal had property out of which the debt could be made; see *Eason v. Petway,* 21 N. C., 44. It was necessary to pass an express statute for the protection of the surety against the capricious and wanton exercise of this power by sheriffs and other officers; Rev. Code, ch. 31, sec. 124. It has not been deemed expedient by the Legislature to pass a statute for the protection of those who choose to buy property subject to the lien of an execution, and who fail to provide for its satisfaction.

The only case cited on the argument was *Smith v. McLeod,* 38 N. C., 390, and the counsel of the plaintiff contended there was a direct analogy between the relation of a surety and that of a purchaser at a private sale, from a debtor, of property subject to the lien of an execution. We are not able to perceive the supposed analogy. In the case cited the Court agree there is no ground on which to control the action of the sheriff and relieve the surety, on the ground of a privity between him and

the creditor, by reason of which the creditor is bound to let the surety have the benefit of any security or lien, which he has acquired as against the principal, and decide that the active interference of the creditor in withdrawing from the hands of the sheriff an execution, under which a lien had attached to the property of the principal, was (315) a discharge of the liability of the surety by matter *in pais*. But where is the analogy? There is no privity of relation between the creditor in the execution and one who chooses to purchase a part of the property which is subject to the lien of his execution. On the contrary, such a purchaser at private sale is a stranger, and, in fact, an intermeddling stranger, who had no business to buy any part of the debtor's property, without taking care to see that the prior lien was satisfied.

If the purchaser at private sale is not entitled to relief against the sheriff, or a purchaser under the execution sale, when the sale of the particular slave is made capriciously or wantonly by the sheriff, when the debtor has other property liable to execution, the case is much stronger against him when the sheriff having received other executions junior to the private sale thinks it to be his duty to sell the particular negro, under the older execution, in order so to conduct the business as to satisfy as many of the executions in his hands as the property of the debtor can be made to reach. For the sheriff acts as the agent of all the creditors who have executions put into his hands, and his conduct then is not capricious or wanton, but in pursuance of a duty to the creditors imposed on him by having the executions in his hands.

Nor is the case altered by the fact that the sheriff and the purchaser at execution sale had an interest on account of their liability, as the surety or otherwise, of the debtor in the execution. The sheriff had the power, under the older execution, to sell this particular negro. It was his duty so to make the sales as to cause the property of the debtor to go as far as possible towards discharging all the executions in his hands, and neither his power or duty could be affected by the fact that he had a collateral interest which was subserved by the exercise of a power in the performance of his duty, and this can furnish no ground on which a stranger who chose to interfere can base any rights to have relief in equity.

The view we have taken of the case makes it unnecessary to decide whether the plaintiff was a *bona fide purchaser* or one who had taken a bill of sale, absolute on its face, which was intended as a (316) mere security, that fact not being expressed on the face of the bill of sale, in order to avoid the necessity of giving notoriety to it by registration, so as to enable the debtor to conceal for a time the fact of his insolvency.

PER CURIAM. Bill dismissed.

HENRY S. LLOYD against JOHN B. WHITLEY.

Where A sued B, on a contract about the getting of shingles, and a compromise was made in writing, to the effect that B should confess judgment for $500, to be discharged within twelve months by the delivery of so many shingles at given prices, and a judgment was entered accordingly, it being admitted that the shingles were to be paid for when delivered, at the prices agreed on, it was *Held*, that the writing and the judgment were but an obligation to pay a penal sum, and the court directed that the judgment should stand as a security for the damages actually sustained.

CAUSE removed from the Court of Equity of MARTIN.

The plaintiff and defendant having had a controversy at law about the getting of shingles, the following covenant was entered into between them, viz.:

"STATE OF NORTH CAROLINA—Edgecombe County.

"Whereas, there is a suit pending in the Superior Court of law of said county, wherein Henry S. Lloyd is plaintiff, and John B. Whitley and Newsom Allsbrook are defendants, and the said parties are anxious to compromise the said suit; now these articles witness, that the said Whitley, for and in consideration of the obligation hereinafter undertaken by the said Lloyd, will at the next term of the Superior Court of law of said county, to be held on the 2d Monday of this month, suffer the said Lloyd to enter a judgment against the said Whitley for the sum of $500 and the costs of the suit, and will, within twelve months from the
(317) date of these presents, obtain and manufacture upon the lands of the said Lloyd, situated in the county of Martin, 250,000 cypress shingles (two-feet and thirty-inch shingles), at the price of three dollars per thousand for the thirty-inch shingles, and two dollars per thousand for the twenty-four inch shingles.

"And the said Lloyd, in consideration of the above obligations, does bind himself not to sue out execution upon the said judgment within the term of twelve months, and that when the said Whitley shall obtain and manufacture the shingles which he has contracted to do, the said judgment shall be considered as satisfied, and an entry to that effect shall be made upon the records of the said court." Signed and sealed by the parties, 8 March, 1856. Allsbrook having become insolvent was left out.

In pursuance of this covenant and compromise, Whitley on the 2d Monday in March, 1856, in the Superior Court of Edgecombe, allowed the following entry to be made, viz.: Judgment confessed by the defendant, J. B. Whitley, for $500 and costs of suit. Execution in this case to be stayed for twelve months, and it is agreed between the parties that the judgment is to be discharged upon the performance of the condition set forth in the written agreement between them.

The plaintiff alleges that he faithfully endeavored to make the shingles he agreed to make, but on account of the high water in the swamp pointed out to him by Lloyd and his obstinate refusal to let him work in drier swamps which he (Lloyd) owned in Martin County, he (Whitley) only procured about 40,620 thirty-inch shingles and 13,070 two-feet shingles, which were accepted by one Ray, the agent of defendant Lloyd. The defendant took out execution on this judgment returnable to March term, 1857, but directed the sheriff not to make the money. After that term he took out an alias execution, and gave orders for its enforcement. The bill is for an injunction, insisting that the said judgment is only a penalty, and that no execution can issue upon it. He states as a reason for not having applied for an injunction in proper time, that the defendant assured him that he did not intend to collect the money (318) within two years, and that he meant to give him every opportunity to make the shingles in pursuance of the condition. The plaintiff alleges that besides the price of the shingles, he did twenty days work with one hand, in boating shingles, for which he received no pay. The plaintiff also prays that the defendant shall pay him for the shingles he obtained and delivered to the defendant, and for payment for boating; asks for an account for the purpose of ascertaining what is due to him and also what damages are due the defendant for his failure to perform the contract, which he is willing to pay, and for general relief.

The defendant in his answer insists that this entry of $500 is not a penalty, but was agreed upon and entered as liquidated damages in case the contract should not be performed by Whitley. He denies that he made any promise or otherwise deluded the plaintiff as to the issuing of the execution, but he admits that he is bound to pay the prices agreed upon for the shingles delivered, and as to that, he says that the plaintiff is largely indebted to him on other accounts, and proposes to set off the amount thus due with such, his counter claims.

The bill was filed at Spring Term, 1858. Was continued at Fall Term, 1858. Was set for hearing on bill and answer at Spring Term, 1859, and by consent was sent to this Court. Motion below to dissolve the injunction. The transcript says, "sent by consent to the Supreme Court."

Winston, Jr., for the plaintiff.
B. F. Moore, for the defendant.

PEARSON, C. J. The jurisdiction of the Court of Equity to prevent the enforcement of penalties on payment of the damages sustained by reason of a breach of the condition was so obviously necessary to the ends of justice, that in most cases relief is now given at law by statutes,

which require the plaintiff to suggest breaches, and provides for
(319) the ascertainment of the damages, whereupon judgment is to be entered for the penalty, but the execution which may issue thereon is to be satisfied by the payment of the damages assessed, together with the costs.

The plaintiff insists that by a proper construction of the judgment and the covenant referred to, the sum of $500 is a penalty to be discharged upon the performance of the condition set forth in the covenant, to wit, that the plaintiff shall in twelve months make for the defendant 250,000 shingles (two-feet and thirty-inch shingles) at the price of $2 per thousand for the two-feet, $3 per thousand for the thirty-inch shingles, alleges a part performance of the condition, and submits to pay the damages sustained by the defendant by reason of his failure in respect to the number of the shingles which he has failed to make, and prays that the defendant may be enjoined from enforcing the collection of the $500.

The defendant insists that the $500 is not a penalty, but liquidated damages, and claims the right (the plaintiff having failed to discharge the judgment in the manner by which he was allowed to do it under the covenant) to enforce its collection, subject to a credit for the shingles got by the plaintiff, which the defendant admits he is bound to pay for at the agreed prices, and on his part claims a deduction for certain credits.

The question is one of construction, and it seems to us, a very plain one. The judgment, on its face, is to be discharged upon the *performance of the condition* set forth in the written agreement between them. That is, the judgment is to be void, provided the plaintiff makes for the defendant 250,000 shingles at the prices agreed on. So it is neither more nor less than a penalty by which to enforce the performance of an agreement on the part of the plaintiff to make for the defendant a certain number of shingles at certain prices for the several descriptions. Had the $500, for which the judgment is entered, been liquidated damages, that is, an amount which it was agreed the plaintiff *owed* the defendant, but which he was willing to allow the plaintiff to pay in shin-
gles, it would have been set out in the covenant and judgment
(320) that the $500 was to be paid in shingles to be got on the defendant's land, for which the plaintiff was to be allowed certain prices per thousand. This is not the language used, and it is perfectly certain that the shingles were to be *paid for* by the defendant, and were not to be *accepted* by him in payment of the judgment. Indeed, the defendant admits by his answer that he "is bound to pay the plaintiff for the shingles got at the agreed prices." The fact of his being bound to pay for the shingles got is wholly inconsistent with the suggestion that the plaintiff was indebted to him to the amount of $500; for if so, of course

the shingles ought to be applied in payment of the debt, whereas, from the face of the judgment and of the covenant, and by the admission of the defendant, he was to pay for the shingles, and they were not to go in payment of the judgment; in other words, the judgment was to be held *in terrorem,* in order to force the plaintiff to make for the defendant 250,000 shingles, for which, when made, the defendant was to pay the plaintiff the prices agreed on.

The mode of argument *reductio ad absurdum,* will demonstrate, by figures, that the $500 was not a debt to be paid by 250,000 shingles, of the two descriptions, at the prices fixed on:

250,000 at $2 per thousand, is		$500
250,000 at $3 per thousand, is		750
125,000 at $2 per thousand, is	$250	
125,000 at $3 per thousand, is	375——	625
166,000 at $3 per thousand, is		500

So the matter can not be worked out by figures, unless all the shingles are of one description, that is, two feet, leaving no room for a single thirty-inch shingle.

We are satisfied that the $500 was a penalty, and the judgment was taken as a security for the making of an agreed number of shingles at the prices agreed on for the several descriptions.

The plaintiff having failed to perform the conditions, became liable, at law, for the penalty, but is entitled in equity to be relieved of the penalty by making satisfaction for the damages which the (321) defendant has sustained by reason of the breach of the condition.

There will be a decree accordingly, and a reference to ascertain the amount of damages, allowing the plaintiff for the number of shingles got, and for his labor in "boating the shingles," if that allegation is proved, and allowing the defendant for the payments alleged to have been made to the hands of the plaintiff for the work done by them upon, and in respect to the shingles, but no item of charge or discharge which did not grow out of and concern the making of the shingles will be taken into the account.

The motion to dissolve the injunction on the ground that it was improvidently granted, not having been appealed from within the time prescribed by the statute, is not allowed, for the case is now before us on the final hearing, being set for hearing on the "bill and answer" in the Court below, and removed to this Court for hearing. No disposition having been made of the motion to dissolve the injunction, the reasoning of the Court in *Smith v. McLeod,* 38 N. C., 400, applies with full force; for, although that case had reference to the provisions of the Revised Statutes, and this depends upon the Rev. Code, yet, here is the

fact, we decree for the plaintiff "on the equity, confessed by the answer," and make the injunction perpetual, except as to the damages. So, of course, the motion to dissolve on the ground that the injunction was improvidently granted in the first instance is out of time.

This view makes it unnecessary to express an opinion on the point as to whether the fiat, made by the Judge below on the averments of the bill, was not a matter of discretion, and, of course, not the subject of review.

PER CURIAM. Reference ordered.

---

(322)

JOYNER against JOYNER.

There are circumstances under which the striking of his wife with a horse-whip, or switch, by a husband, and inflicting bruises, would not be the ground of a divorce. Where, therefore, such violence was made the ground of an application for a divorce, it was *Held*, to be necessary that the bill, or petition, should set forth *particularly and specially* what she did and said immediately prior to and during such use of force.

THIS is an appeal from an interlocutory order of *Osborne, J.*, in the Court of Equity of NORTHAMPTON, allowing to the petitioner for a divorce alimony *pendente lite*.

The petitioner states that she was the widow of one David Futrell, and intermarried with the defendant in November, 1860; that she had a reasonable prospect of happiness from the marriage, herself well bred and of a respectable family, and her husband not less than a fair match for her; that in this she was greatly disappointed; that her husband manifested great coarseness and brutality, "and even inflicted the most severe corporal punishment. This he did on two different occasions, once with a horse-whip and once with a switch, leaving several bruises on her person." "He used towards her abusive and insulting language, accused her of carrying away articles of property from his premises to her daughter by a former husband; refused to let said child live with her; has frequently at night, after she had retired, driven her from bed, saying that it was not hers, and that she should not sleep upon it. He has also forbade her sitting down to his table in company with his family," and that "by such like acts of violence and indignity has forced her to leave his house, and that she is now residing with her friends and relatives, having no means of support for herself and an infant son born within the four past weeks." These facts, the ground of this her complaint, have existed at least six months prior to the filing of this bill. "Your petitioner, during the whole time of her intermarriage with

the defendant, saith that she has been a dutiful, faithful and affectionate wife, and desired so to continue during life, but the outrages upon her person and rights have made it her desire, as well as duty to seek a perpetual separation from his bed, his board, and from the bonds (323) of matrimony." The bill prays accordingly and for alimony.

At the term to which the process was returnable the plaintiff's counsel moved for alimony *pendente lite,* when the following order was made: "This cause coming on to be heard, it is ordered upon hearing of the cause and upon affidavits as to the estate of the defendant, that the clerk and master give notice to the defendant to pay into the office of the clerk and master for Northampton County the sum of $350, as alimony, for the subsistence of the said plaintiff and her child until the next term of the Court, and that the payment of the above sum be made on or before 15 December, 1861."

From this order the defendant prayed an appeal to the Supreme Court, which was granted.

Barnes, for the plaintiff.
W. N. H. Smith, for the defendant.

PEARSON, C. J. The Legislature has deemed it expedient to enlarge the grounds upon which divorces may be obtained; but as a check or restraint on applications for divorces, and to guard against abuses, it is provided that the cause or ground on which the divorce is asked for shall be set forth in the petition "particularly and specially." It is settled by the decisions of this Court that this provision of the statute must be strictly observed, and the cause or causes for which the divorce is prayed must be set forth so "particularly and especially" as to enable the Court to see on the face of the petition that if the facts alleged are true the divorce ought to be granted: *Everton, v. Everton,* 50 N. C., 202. The correctness of this construction is demonstrated by the fact that upon appeals from an order allowing alimony pending the suit, like the present, this Court is confined expressly to an examination of the cause or causes of divorce, as set out on the face of the petition, and can look at nothing else in making up the decision; Rev. Code, ch. 40, sec. 15.

By the rules of pleading in actions at the common law every allegation of fact must be accompanied by an allegation of "time (324) and place." This rule was adopted in order to insure proper certainty in pleading, but a variance in the *allegata* and *probata,* that is, a failure to prove the precise time and place as alleged in the pleading, was held not to be fatal, unless time or place entered into the essence and made a material part of the fact relied on in the pleading.

There is nothing on the face of this petition to show us that time

was material, or a part of the essence of the alleged cause of divorce; that is, that the blows were inflicted at a time when the wife was in a state of pregnancy, with an intent to cause a miscarriage, and put her life in danger, and there is nothing to show us that the place was a part of the essence of the cause of divorce, that is, that the blows were inflicted in a *public* place, with an intent to disgrace her and make her life insupportable, so we are inclined to the opinion that it was not absolutely necessary to state the time and place, or if stated, that a variance in the proof, in respect to time and place, would not be held fatal.

But we are of opinion that it was necessary to state the circumstances under which the blow with the horse-whip and the blows with the switch were given; for instance, what was the conduct of the petitioner; what had she done or said to induce such violence on the part of the husband? We are informed by the petitioner that she was a woman "well-bred and of respectable family, and that her husband was not less than a fair match for her." There is no allegation that he was drunk, nor was there any imputation of unfaithfulness on either side (which is the most common ingredient of applications for divorce), so there was an obvious necessity for some explanation, and the cause of divorce could not be set forth "particularly and specially," without stating the circumstances which gave rise to the alleged grievances.

It is said on the argument that the fact that a husband, on one occasion, "struck his wife with a horse-whip, and on another occasion with a switch, leaving several bruises on her person," is, *of itself*, a (325) sufficient cause of divorce, and consequently the circumstances which attended the infliction of these injuries are immaterial, and need not be set forth. This presents the question in the case:

The wife must be subject to the husband. Every man must govern his household, and if by reason of an unruly temper, or an unbridled tongue, the wife persistently treats her husband with disrespect, and he submits to it, he not only loses all sense of self-respect, but loses the respect of the other members of his family, without which he cannot expect to govern them, and forfeits the respect of his neighbors. Such have been the incidents of the marriage relation from the beginning of the human race. Unto the woman it is said, "Thy desire shall be to thy husband, and he shall rule over thee," Genesis, ch. 3, v. 16. It follows that the law gives the husband power to use such a degree of force as is necessary to make the wife behave herself and know her place. Why is it that by the principles of the common law if a wife slanders or assaults and beats a neighbor the husband is made to pay for it? Or if the wife commits a criminal offense, less than felony, in the presence of her husband, she is not held responsible? Why is it that the wife cannot

make a will disposing of her land? and cannot sell her land without a privy examination, "separate and apart from her husband," in order to see that she did so voluntarily, and without compulsion on the part of her husband? It is for the reason that the law gives this power to the husband over the person of the wife, and has adopted proper safeguards to prevent an abuse of it.

We will not pursue the discussion further. It is not an agreeable subject, and we are not inclined, unnecessarily, to draw upon ourselves the charge of a want of proper respect for the weaker sex. It is sufficient for our purpose to state that there may be circumstances which will mitigate, excuse and so far justify the husband in striking the wife "with a horse-whip on one occasion and with a switch on another, leaving several bruises on the person," so as not to give her a right to abandon him and claim to be divorced. For instance, suppose a husband comes home and his wife abuses him in the strongest (326) terms—calls him a scoundrel, and repeatedly expresses a wish that he was dead and in torment! and being thus provoked in the *furor brevis,* he strikes her with the horse-whip, which he happens to have in his hands, but is afterwards willing to apologize, and expresses regret for having struck her: or suppose a man and his wife get into a discussion and have a difference of opinion as to a matter of fact, she becomes furious and gives way to her temper, so far as to tell him he *lies,* and upon being admonished not to repeat the word, nevertheless does so, and the husband taking up a switch, tells her if she repeat it again he will strike her, and after this notice she again repeats the insulting words, and he thereupon strikes her several blows; these are cases in which, in our opinion, the circumstances attending the act, and giving rise to it, so far justify the conduct of the husband as to take from the wife any ground of divorce for that cause, and authorize the Court to dismiss her petition with the admonition, "if you will amend your manners, you may expect better treatment"; see Shelford on Divorce. So that there are circumstances under which a husband may strike his wife with a horse-whip, or may strike her several times with a switch, so hard as to leave marks on her person, and these acts do not furnish sufficient ground for a divorce. It follows that when such acts are alleged as the causes for a divorce, it is necessary in order to comply with the provisions of the statute, to state the circumstances attending the acts and which gave rise to them.

It was suggested that the averment at the conclusion of the petition, which is made after the averment, "that the facts which are made the ground of this complaint have existed at least six months prior to the filing of this bill"; "your petitioner during the whole time of her intermarriage with defendant, saith that she has been a dutiful, faithful

and affectionate wife, and desired so to continue during life, but the outrages upon her person and rights have made it her desire (327) as well as duty to seek a perpetual separation from him," is sufficient to apply the defect in not setting out "particularly and specifically" the circumstances under which the blows were inflicted on her person.

We do not think a general averment of this kind, unconnected as it is with the allegations of fact, can be allowed to have the effect of the *particular and special* statement, which the statute requires. It is not traversable, and we cannot say, as a conclusion of law, what may, in her opinion, be such conduct as is consistent with the character of a dutiful, faithful and affectionate wife. It is unnecessary to notice the other matters of complaint set out in the petition, because they are admitted not to be, of themselves, sufficient, and are put in as *makeweights* or *props* of the main causes, which we have fully adverted to.

Nor is it necessary to notice the objections, because of the fact that the bill had not been exhibited to a Judge and his fiat for process obtained.

There is error; the decretal order will be

PER CURIAM. Reversed.

Cited: S. v. Black, 60 N. C., 264; *White v. White,* 84 N. C., 342; *Jackson v. Jackson,* 105 N. C., 438; *O'Connor v. O'Connor,* 109 N. C., 143; *Ladd v. Ladd,* 121 N. C., 121; *Vann v. Edwards,* 128 N. C., 428; *Dowdy v. Dowdy,* 154 N. C., 559; *Alexander v. Alexander,* 165 N. C., 46.

Dist.: Taylor v. Taylor, 76 N. C., 435.

---

(328)

MATURIN HERNDON and others against WILLIAM N. PRATT and others.

1. An administrator *durante minoritate* is liable for a *devastavit* to the executor, who qualifies after coming of age, and if such executor abstain for ten years from bringing suit, his cause of action is presumed to have been satisfied, released or abandoned. So that persons having a contingent interest in remainder, which is injured by such devastavit, must look to the executor and not to the administrator *durante minoritate*, or the sureties on his administration bond.
2. No suit, in equity, can be brought to follow slaves, limited in contingent remainder, in the hands of one claiming a present defeasible interest, after the slaves have died; they having died in the lifetime of the first taker.
3. Where slaves, limited in remainder on a contingency, were sold under an execution against one claiming a present, absolute interest, it was *Held*, that the purchaser under such execution, who took possession and held them for more than three years got a title by the statute of limitations.
4. Where the statute of limitations is a bar to a trustee, it is also a bar to the *cestui que trust*, for whom he holds the title.

CAUSE removed from the Court of Equity of ORANGE.

Joseph Dickson, of the county of Orange, died in 1834, having made his last will and testament; among the bequests, in which will, is the following: "I give and bequeath to my respective friends, Hugh Waddell, Robert W. Dickson, and Priestly H. Mangum, attorneys at law, and to the survivors of them, the executors and administrators of the survivor, in trust, one negro woman, named Coelia, one negro woman, Milly, one negro boy, named Harry, one boy, named Jackson, one negro fellow, named Davie, one negro boy, named Prince, the land and premises where I now live, with all my stock, etc., to be applied to the maintenance and support of my daughter, Julia Neville Dickson, and my grandson, Robert William Dickson, until he arrives at mature age, in such manner and in such way as they, in their discretion, may deem most suitable to their circumstances, and it is my will and desire, that on the death of my daughter, Julia N. Dickson, the said trustee, or survivor of them, or the executors or administrators of the survivor of them, do give all my estate, hereby given to them, in trust, for the maintenance and support of my said daughter Julia N. Dickson, to my grandson, Robert Wm. Dickson, hereinbefore mentioned." And by a codicil to said will, he bequeathed as follows: "If Robert Wm. Dickson should die before my daughter, Julia N. Dickson, then the property I will him to go to my daughter, Mary M. Herndon, and at her death, to be equally divided between her children and Mary Ann Dickson and Caroline Dickson, now the wife of Joseph B. Marcom." Hugh Waddell, P. H. Mangum, and the said Robert Wm. Dickson were appointed executors as well as trustees to this will, of whom,
the last mentioned, was under age at the time of the death of (329)
the testator, and the other two, Messrs. Waddell and Mangum,
renounced the office of executor, formally, and refused entirely to act as trustee; whereupon, at May Term, 1834, of Orange County Court, the said Julia N. Dickson was appointed administratrix, with the will annexed, during the minority of Robert W. Dickson; but at February Term, 1836, of that county court, the latter having become of age, came into court and qualified as executor, under the will. The said Julia N. Dickson, on being appointed, instead of giving a bond, conditioned to discharge the office of administratrix *cum testamento annexo durante minoritate,* gave a bond as administratrix generally, and a printed form, applicable to the latter office, was filled up by the clerk, through a mistake, and executed by her with the defendants, William N. Pratt and Anderson Clements, as her sureties, in the penal sum of $6,000. The said Pratt and Clements, at the time of becoming such sureties, took a deed of trust from Julia Dickson, embracing most of the slaves, bequeathed as above, for their indemnity. The said Julia took posses-

sion of the land, negroes and other property, amounting, in value, to $3,000. Shortly afterwards, she married one Samuel Merritt, a very dissolute and wasteful man, and although he entered into marriage articles not to sell any of the property of his wife, without her consent and that of R. W. Dickson, he and she together sold and wasted most of the personal estate; several of the slaves and the land were levied on by executions against Merritt, and sold to divers persons, among which, a slave, by the name of Madison or Bob, was, in 1836, sold to the defendant, David George, who took the slave into possession and has held him adversely ever since. Two other slaves, Coelia and her child, Jim, and another slave, were sold about the same time, under an execution in like manner issuing against the said Samuel Merritt, and bought by the defendant, John Hayes, who took the sheriff's title to the same, and has held the possession ever since. Two other slaves, named Harry and Prince, were sold by Robert W. Dickson, the executor, after he qualified, to the defendant, William N. Pratt, who took the same
(330) into his possession and held them for several years, but both these slaves died in the lifetime of the said Robert W. Dickson.

The bill is filed by the administrator of Mary M. Herndon and her children, and the administrator of Robert W. Dickson, and the administrator *de bonis non* of Joseph Dickson and Mary Ann Dickson and Caroline Dickson, alleging that Robert William Dickson died in 1853, leaving the said Julia N. Dickson (now Merritt) surviving, and that by the said codicil, they are entitled to the whole of the said property, with its increase and profits, reserving to the said Julia N. Dickson a subsistence out of the same. They allege that Robert W. Dickson was a weak, drunken, stupid person, entirely incapable of managing property, and that he was a mere instrument in the hands of Merritt and his wife and William N. Pratt; that Pratt encouraged these prodigal habits and dissipated courses in young Dickson, by furnishing him with ardent spirits, and he combined with the others to squander the property while it was in the hands of the administratrix *cum. tes. an.* and encouraged and stimulated Robert, the executor, to do the same after he qualified; that in fact, Robert W. Dickson never interfered with the property after he qualified, but permitted the said Julia and her husband, Merritt, with the concurrence of the two sureties, Pratt and Clements, to go on and sell and waste the property as they had been doing. The bill alleges that Hayes and George were cognizant of all these doings, and that they purchased the slaves, above stated, with full notice of plaintiffs' equity. They allege that the processes under which these sales took place, were merely pretended, in order to enable these purchasers to get the property in this way. They show that all the said property has gone out of the hands of the said Julia N. Merritt, and that her husband

has left her, and both are insolvent; that Robert W. Dickson died without any of the estate in his hands, and utterly insolvent. The prayer is to subject Pratt and Clements, the sureties of Julia N. Dickson, as if the bond had been taken as it was intended; and (331) to make them liable for all the property wasted by Merritt and his wife; also to follow the slaves, Harry and Prince, in the hands of Pratt, and the slave, Madison or Bob, in the hands of David George, and Coelia and Jim and Coelia's increase since the sale, in the hands of Hayes.

Also, that an account may be taken under the direction of this Court, of the whole of the trust fund, with the rents, hires and interest accrued, and that the same may be placed in the hands of a trustee, or in the hands of plaintiffs, on giving bond to support Julia N. Merritt, during her life, and for general relief.

The answers of the defendants, deny all fraud and combination, and insist upon the statute of presumption of satisfaction, and Hayes and George plead and insist upon the statute of limitations.

The clause was set for hearing on bill, and amended bill, and answers, and proofs, and exhibits, and sent to this Court by consent.

Graham and *Norwood,* for the plaintiff.
J. H. Bryan and *Winston, Sr.,* for the defendants.

PEARSON, C. J. 1st. The perishable property and the negro which was sold by the administratrix, with the will annexed, *durante minoritate:*

The bill seeks to charge Pratt and Clements, who were the sureties of the administratrix, on the ground, that the bond which they executed, was, by mistake of the clerk, drawn in a way so as to be inoperative, but in equity, they are held liable to the same extent as they would have been liable at law on the bond, had it been properly filled up, and the administratrix *de bonis non cum testamento* of the testator charges the sureties of the administratrix with a devastavit, and asks for an account of her administration.

Admit, under the authority of *Armstead v. Boseman,* 36 N. C., 117, the liability of Pratt and Clements to the same extent as if the bond had been properly filled up, the administrator *de bonis non* (332) of the testator meets with this difficulty: In 1836, Robert Dickson, one of the executors, attained his age of twenty-one, and qualified. This cause of action in equity, to hold the sureties of the administratrix to an account for any devastavits during his minority, then accrued to him. He lived until 1853, seventeen years, during all of which time it was his duty, and interest, to assert this equity. Pratt and Clements were aware of their liabilities, as is proven by the fact of the deed of

trust, which they took for their indemnity, and yet they permit the slaves included in the trust to be otherwise disposed of. These facts, taken in connection with the article of agreement executed between Merritt and his wife, and Robert Dickson, the executor and trustee of Joseph Dickson, seem sufficient to prove, as an open matter of fact, that the cause of action or equity of the executor against the administratrix *cum tes. durante minoritate,* was satisfied. But suppose the proof should fall short, as an open question of fact, a presumption is raised by the statute law, after the lapse of ten years, that this equity, or cause of action in equity, has been satisfied, released or abandoned.

The reply made on the part of the plaintiffs is not tenable, either as a matter of law or by the proofs on the question of fact. The testator appointed Robert Dickson one of his executors; on arriving at age, he was entitled, and did qualify as executor of his grandfather's will. There was no ground on which the County Court could have refused to permit him to qualify. He was a drunken, trifling young man, but there is no proof tending to show that he was an *idiot;* in fact, there is no allegation to that effect in the bill; and his being a weak-minded, imbecile young man, addicted to drink, did not authorize the County Court to refuse to permit him to qualify, or at all events does not authorize this Court to treat his appointment as a *nullity,* and on that ground to grant relief as if the estate of Joseph Dickson had been without a representative, or person capable of suing in its behalf, from 1836 up to the death of Robert Dickson in 1853.

2d. The two negroes sold by the executor, Robert Dickson, to (333) the defendant Pratt:

The equity is put upon the ground of following the trust fund in the hands of a purchaser with notice. Admit the equity, and waive any reference to the difference between a sale by an executor and a sale by a trustee, it has so happened that in point of fact this part of the trust fund has become extinct by the act of God, both of the negroes having died in the lifetime of Robert Dickson. So the contingent limitation over did not vest at his death, because the subject matter of the bequest was not, at that time, *in esse.* So this equity must fail; there being no allegation or proof that the death of these slaves was caused, or in any way hastened by the fact of their having been sold, and put into the possession of Pratt, by the executor. On the contrary, the proof is, that Pratt treated them as his own property, and took very good care of them. The claim of the plaintiffs to the *profits and hires* of the two negroes sold to Pratt, accrued while the negroes lived, can not be supported. The negroes belonged to Robert Dickson, absolutely, subject to a limitation over, after his death, to the plaintiffs; so Pratt had a good title during the life of Robert Dickson, and consequently, was

entitled to the profits and hires accruing before his title was defeated by the happening of the contingency on which the negroes were limited over; which limitation over, as we have seen, was prevented by the deaths of the negroes, before the happening of the contingency, and so the limitation over failed to take effect by the extinction of the subject of the bequest.

3. The negroes sold under an execution against Merritt and purchased by Hays and George:

This sale was made in 1836, since which time Hays and George have been in the adverse possession of the negroes purchased by them respectively. Under the statute of limitations, this adverse possession gave them the title, not only against Robert Dickson, but also against the persons entitled to the limitation over, for whom he held the title as trustee. The principle, that when the statute of limitations is a bar to the trustee, it is also a bar to the *cestui que trust* for whom he holds the title, and whose right it is his duty to protect, is settled; (334) *Wellborn v. Finley,* 52 N. C., 228. In delivering the opinion in that case, the principle was considered so plain that it was deemed unnecessary to cite authorities, and the Court was content to leave the question on the manifest *reason of the thing.* For statutes of limitation and statutes giving title by adverse possession would be of little or no effect if their operation did not extend to *cestuis que trustent,* as well as trustees who hold the title for them, and whose duty it is to protect their rights. If, by reason of neglect on the part of the trustees, *cestuis que trustent* lose the trust fund, their remedy is against the trustees, and if they are irresponsible, it is the misfortune of the *cestuis que trustent* growing out of the want of forethought on the part of the maker of the trust under whom they claim. The question, however, having been discussed at the bar, we will now refer to Lewin on Trusts, 24 Law Lib., 306, and the cases there cited, which will warrant the conclusion that the doctrine is settled.

On the whole, we have arrived at the conclusion that the persons entitled under the limitation over have no remedy, except against the executor and trustee, Robert Dickson, who is dead—insolvent—and against whose representative no relief is prayed, and they must ascribe their disappointment in losing the benefit which they expected to have realized under the limitation to the fact that the two respectable and competent gentlemen who were named by the testator as executors and trustees, in connection with his grandson, Robert Dickson, refused to qualify as executors or act as trustees, in consequence of which Robert Dickson, on arriving at age, became the only executor and trustee, and proved to be incompetent and faithless.

The allegation of fraud and collusion on the part of Hays and George,

with the executor and trustee, Robert Dickson, which is made in order to prevent the application of that statute in respect to the plaintiffs claiming as *cestuis que trustent* under the limitation over, is not supported by the proofs.

PER CURIAM. Bill dismissed with costs.

Cited: Clayton v. Rose, 87 N. C., 110; *Cheatham v. Rowland,* 92 N. C., 344; *Clayton v. Cagle,* 97 N. C., 303; *King v. Rhew,* 108 N. C., 701, 703; *Culp v. Lee,* 109 N. C., 679.

Dist.: Academy v. Bank, 101 N. C., 489.

---

(335)

COTESWORTH H. RHYNE and another against JONAS HOFFMAN, Adm'r, and others.

1. A child is, in law, legitimate, if born within matrimony, though born a week or a day after marriage.
2. A child begotten while the parties were man and wife, but not born until six months after the husband had obtained a divorce from the bonds of matrimony on account of the wife's adultery, will be taken to be legitimate, unless it be proved, by irresistible evidence, that the husband was impotent or did not have sexual intercourse with his wife.

CAUSE removed from the Court of Equity of GASTON.

About February, 1834, the defendants' intestate, Simon Rhyne, married a woman by the name of Nancy Lay, and about six months after this marriage she had a child, the present plaintiff, Cotesworth H. Rhyne. After the marriage, she went home with her husband and remained with him for about three months, when he drove her off, and she returned to her former place of abode, about a mile distant from the home of her husband. The said Simon filed a petition for a divorce in the Superior Court of Lincoln, at the Spring Term, 1835. At Spring Term, 1836, of that Court, he obtained a decree for a divorce from the bonds of matrimony (on account of adultery), but in less than nine months after this decree the said Nancy was delivered of another child, the plaintiff Isaac T. Rhyne. The mother, during all this time, lived within a mile of the said Simon Rhyne, but under the influence and control of one Elisha Jones, to whom she had prostituted herself before her marriage with Mr. Rhyne. The evidence of Elisha Jones, testifying to his opinion that the plaintiffs were his children, also the declarations of the mother to the effect the plaintiffs were not the children of Simon Rhyne, were filed in the case, subject to exceptions. The cause was set down for hearing on the bill, answers, exhibits and proofs, and sent to this Court.

Fowle, for the plaintiff.

No counsel for the defendant appeared in this Court.

BATTLE, J. The right of the plaintiffs to distributive shares in the estate of the intestate of the defendant, Jonas Hoffman, depends upon their legitimacy. The question in relation to the plaintiff Cotesworth H. Rhyne has been long settled. In 2 Com. Dig., 117, (336) it is stated that a child is legitimate if born within matrimony, though born within a week or a day after the marriage. So, if the woman be big with child by A, and marry B, and then the child is born, it is the legitimate child of B; 1 Rolle's Abr., 358; 2 Bac. Abr., 84. It is admitted in the pleadings that this plaintiff was born within five or six months after the marriage of his mother with the intestate, which brings him within the rule established by these authorities.

The claim of the other plaintiff stands upon a principle somewhat different. He was begotten while the parties were man and wife, but was not born until six months after the husband had obtained a divorce *a vinculo matrimonii,* on account of adultery. During the time when the child was begotten, the husband and wife lived separately, but in the same neighborhood, near enough for the husband to visit her, and it is proved that, occasionally, he did go to the house where she was staying. There was, then, an opportunity for sexual intercourse between the parties, and from that the law presumes that, in fact, there was sexual intercourse between them. This plaintiff must, therefore, be taken to be legitimate, unless it be proven by irresistible evidence that the husband was impotent or did not have any sexual intercourse with his wife; but the former is not pretended, and the latter is a fact which neither the wife nor the declarations of the wife is admissible to prove; *Rex v. Luffe,* 8 East, 193. Here, independent of the declarations of the wife, which must be rejected as incompetent, there is no testimony sufficient to rebut the presumption of access.

Such being the case, the proof that the plaintiffs' mother lived in adultery with a man, who testified that he was the father of her children, makes no difference. As was said in the case of *Morris v. Davies,* 14 Eng. C. L., 275: "It matters not that the general camp, pioneers and all, had tasted her sweet body, because the law fixes the child to be the child of the husband."

It must be declared that the plaintiffs are the legitimate children of Simon Rhyne, deceased, and as such are entitled to distributive shares of his estate.

PER CURIAM. Decree accordingly.

Cited: Ewell v. Ewell, 163 N. C., 236.

(337)

ELIJAH FUTRILL against LITTLEBERRY FUTRILL.

Where one, having considerable influence over an old man, feeble in body and mind from a long course of intemperance, procured from the latter a deed for his land when he was without counsel, and in no condition to understand it, wherein was recited a large debt, which had no existence, and about which the grantee answered vaguely and evasively, it was *Held*, that although no confidential relation was proved then to exist between the parties, yet, that such deed, on the score of fraud and imposition, should be held only as a security for sums actually due.

CAUSE transmitted from the Court of Equity of NORTHAMPTON.

This cause was heard in this Court at December Term, 1859, on a motion to dissolve the injunction, and is reported in 58 N. C., 61. The main facts of the case are herein set forth as derived from the bill and answer, and wherever these are modified by the proofs on file, it is clearly noted in the opinion of the Court; so that it seems to the reporter unnecessary to restate the case in this connection.

Batchelor and *Conigland,* for the plaintiff.
Barnes, for the defendant.

BATTLE, J. This cause has now come on for a final hearing, and after a full consideration, we have arrived at the same conclusion with regard to the judgment obtained by the defendant on the bond mentioned in the pleadings, which we expressed when we decided to sustain the injunction, which had been obtained against that judgment. The decision was made at December Term, 1859, upon a motion, founded on the answer to the bill, for a dissolution, and is reported in 58 N. C., 61. The judgment at law is allowed to stand as a security to the defendant for whatever may be found, upon taking an account between the parties, to be justly and fairly due from the plaintiff, as the consideration of the bond on which the judgment was obtained.

In taking such account, however, the master will not allow the defendant a credit for any article, or articles, sold to the plaintiff, unless, under the circumstances, it was proper and necessary, for the latter to have it or them. As, for instance, the master will be at liberty to enquire whether the defendant ought to have furnished the plain-
(338) tiff with spirituous liquors to the value of $404.25, during nine months of the year 1859; and if not, he will refuse a credit for whatever he may find to have been an excessive quantity of that article.

Having disposed of the question raised with respect to the judgment on the bond, we come now to the consideration of that which relates to the deed executed by the plaintiff to the defendant for his land, and all

his other property, with the reservation of a life estate, founded upon the expressed consideration of $2,500, in a debt due from the former to the latter, and a covenant by the latter to support the wife of the former, should she become his widow, and so long as she should continue such. The first enquiry that is presented in this part of the case is, whether before, and at the time when the deed was executed, to wit, 23 March, 1857, the confidential relation of principal and agent existed between the parties?

From an examination of the pleadings and proofs, we are satisfied that it did not. The bill alleges that the relation commenced in the early part of the year 1857, without specifying the precise time, and the answer admits the allegation in the same terms. The proofs are equally indefinite as to the time, and from the whole, we conclude that the defendant became the general manager and agent of the plaintiff immediately after the execution of the deed, and no doubt in consequence of it. It follows that the force and effect which this Court may give to the deed can not be governed by the principle which we hold to be applicable to the judgment on the bond; and that if the deed can be impeached, it must be on the ground of fraud, circumvention or undue influence; *Deaton v. Monroe,* 57 N. C., 39. The allegations of the plaintiff with respect to the execution of the deed are, in substance, that the defendant, being his kinsman and neighbor, and professing to be his friend, had acquired great influence over him; that he, the plaintiff, by a long and habitual course of intemperance, had become very much enfeebled, both in body and mind, and that the defendant, availing himself of his influence, procured from him the execution (339) of the deed when he was in no condition to understand, and did not understand, its contents, and under circumstances which precluded him from seeking and obtaining the counsel and advice of a disinterested friend. The plaintiff then avers expressly that the consideration expressed of a debt of $2,500, due from him to the defendant, was false; for that he was then not indebted to him at all, or, at most, was indebted only for a very small store account. He also avers that the other part of the consideration, to wit, the maintenance of his wife, should she become his widow, was scarcely appreciable, for that she was in very low health, and was not expected to live, and, in fact, did not live but a few months. The property conveyed is alleged to have been of much greater value than the amount of the consideration set forth in the deed, supposing it to have been truly recited.

These allegations are expressly denied by the defendant, who avers that the deed was drawn according to the wishes of the plaintiff, who executed it willingly, and with a full knowledge of its contents, and who, though old and intemperate, had sufficient capacity to understand and

transact the business. As to the money part of the consideration, the defendant states that the plaintiff was "justly indebted to him in a large amount."

The parties being thus at issue, with respect to the mental imbecility of the plaintiff, and the exercise of undue influence over him by the defendant, as well as to the consideration mentioned in the deed, we have examined the proofs on file which relate to those subjects. We shall not attempt to state, in detail, the result of our examination, but shall merely say that we are satisfied that at the time when the deed bears date, and for some months before, the plaintiff had capacity sufficient to enable him to understand and to transact ordinary business, but he was old and in feeble health, and his mind had been so much weakened by long continued and habitual intemperance that he could be easily influenced to do anything which a person in whom he had confidence desired; that the defendant was his kinsman and
(340) neighbor, had been kind to him, and had acquired great influence over him, and that he, through the means of that influence, unduly exercised, procured the execution of the deed in question. Among the circumstances of suspicion against the defendant is that of the recital of the pecuniary consideration of $2,500, in a debt due from the plaintiff to him, which he does not attempt to explain in his answer, and of the existence of which he furnishes us no evidence. To the positive allegation of the plaintiff that he at that time owed him nothing at all, or if anything, only a very small store account, the defendant merely answers that the plaintiff was "justly indebted to him in a large amount," without explaining how the indebtedness arose, or how it was evidenced, whether by bond, note or open account; and among all his proofs we do not find any evidence of it. The vagueness of the answer as to the amount, and the absence of any explanation as to how it arose, prevent us from coming to any other conclusion than that there was either no indebtedness at all, or a debt of a very trifling sum. We are not to be understood as holding that a consideration was necessary to sustain the deed, as between the parties, had the conveyance been fairly obtained. The plaintiff was, we think, capable of executing a conveyance of his property, and if, without any fraud, circumvention or undue influence practiced upon or exercised over him, he had made a voluntary deed in favor of the defendant, we should have upheld it, and in doing so we should have been sustained by the authority of adjudications, both in England and in this State; *Hunter v. Atkins,* 3 Myl. and Keen, 113; *Taylor v. Taylor,* 41 N. C., 26. But when we find that the defendant resorted to the expedient of pretending a debt which had no existence, for the purpose of obtaining a conveyance of all the plaintiff's property, subject to his life-estate therein, we are not at liberty to give it any

greater effect than to permit it to stand as a security for any sum which may have been really due to him from the plaintiff. There must be a decree for an account between the parties upon the principles herein expressed.

PER CURIAM. Account ordered.

Cited: *Bellamy v. Andrews,* 151 N. C., 258; *Pritchard v. Smith,* 160 N. C., 84.

JUNE TERM, 1863.

(AT RALEIGH.)

(341)

W. H. PARTIN and another against T. S. LUTERLOH and others.

1. That a note had been obtained by fraud in the *factum*, is a good defense at law, and cannot afterwards be brought forward for the purposes of an injunction.
2. It is no ground for a bill for an injunction, that the complainant was not a party to the suit at law, because that process had not been served on him. His proper remedy is to have the judgment set aside, on motion, in the court granting it.

CAUSE transmitted from the Court of Equity of CUMBERLAND.

This was a bill for an injunction, filed in the names of William H. Partin and Norman G. McLeod against T. S. Luterloh, Charles Luterloh, W. H. Lambert and Thomas Lambert. The object of the (342) bill is to restrain the collection of a judgment and execution, which was obtained in the County Court of Cumberland, on a note for $416.52, dated 16 June, 1852, payable to T. Luterloh & Co., and endorsed to Charles Luterloh. Signed by W. H. & T. Lambert and W. H. Partin and N. G. McLeod.

W. H. Partin was engaged in the business of getting turpentine in the county of Johnston, where W. H. and Thomas Lambert were engaged in the same business as partners, and where the two latter resided. The bill alleges, in behalf of Partin, that he had consigned spirits of turpentine to T. S. Luterloh, who owed him a balance on that account, and that Thomas Lambert, being about to visit Fayetteville, where Luterloh resided, he requested him to settle with Luterloh, and bring him the money that was due him, and to enable him to do so, he signed his name on a blank piece of paper, in order that it might be filled up as a receipt for the money when it might be paid; that Thomas Lambert, pretending that Partin wished to get money to the amount of $200 from a bank in Fayetteville, applied to the plaintiff, N. G. McLeod, to join in the note with Partin and the firm to which he belonged, and as an inducement for McLeod to sign the note, he offered to draw it for four hundred dollars, and out of the proceeds to pay a debt of $125 which Lambert's father owed McLeod, and with the understanding that the note was to be thus filled up and offered for discount at a bank, he also signed it in blank. The bill then states that McLeod proceeded with Thomas Lambert to Fayetteville, and the blank paper, then having the names of W. H. and

T. Lambert on it, was handed to T. S. Luterloh, who had promised to assist them in getting the paper discounted, and he departed for the purpose of going to the bank on the business; that in a short time he returned and announced that he had failed in procuring the discount, on which McLeod, in the presence of T. S. Luterloh, asked for the paper that had his name on it; to which T. Lambert said it did not matter, as the paper was still in blank and could not hurt him; that he then instructed T. Lambert to erase his name from the paper; that (343) without the consent of either Partin or McLeod, the note in question was filled up, payable to T. S. Luterloh. Partin further says that he was not served with the writ in the suit at law, and had no knowledge of its pendency against him, or of the existence of the judgment until after its rendition. It is further alleged that the endorsement was made to Charles Luterloh without consideration, but to give jurisdiction to the County Court of Cumberland. The prayer is for an injunction. T. S. Luterloh denies, in his answer, that he owed Partin anything, or that there was any open account between him and this defendant, or the firm; he admits that there had been some dealings, but says that these had been closed before the transaction in question. He states that the true history of the transaction is this: Thomas Lambert and plaintiff, N. G. McLeod, came to Fayetteville, and asked his assistance to have a note discounted in a bank at that place, and they produced to him a paper, subscribed in blank by W. H. and T. Lambert, W. H. Partin and N. G. McLeod. It was stated by them that they wished to get $1,000 from the bank, and out of that sum, a debt, which the firm of W. H. & T. Lambert owed his firm, should be paid; that he endeavored to procure the bank accommodation, but found it could not be obtained, and so informed the other party—thereupon, it was agreed by Thomas Lambert and N. G. McLeod that the blank paper should be filled up for the debt due his firm, and this was done accordingly. Charles Luterloh answers, that the note was endorsed to him *bona fide* for a debt due him by T. G. Luterloh & Co.

Graham, for the plaintiffs.
Gorrell, for the defendants.

BATTLE, J. We are unable to discover any equity in the transactions disclosed by the pleadings and proof that entitles the plaintiffs to the injunctive relief which they seek. The allegation that the plaintiff at law, Charles Luterloh, took the endorsement of the note in question without consideration, and merely for the purpose of giving (344) jurisdiction to the Court of Pleas and Quarter Sessions for Cumberland County, is positively denied in his answer, and, on the contrary,

he avers that he took it *bona fide* and for a valuable consideration. His right to recover on it at law is fully sustained by the recent case of *McArthur v. McLeod,* 51 N. C., 476.

The authority of Thomas Lambert to bind his partner by signing the note in the name of the firm, for a debt of the firm, is unquestionable. The partners would be bound in such a case, even though the particular note was signed by one partner without the consent and against the wishes of the other; *Wharton v. Woodburn,* 20 N. C., 647; *Dickson v. Alexander,* 29 N. C., 4.

Had the note been obtained by fraud in *the factum,* that would have been a good defense at law, and could not afterwards be brought forward for the purposes of an injunction in equity; *Tysor v. Luterloh,* 57 N. C., 247.

The objection to the validity of the judgment as to Partin, urged by him on the ground that he was not a party to the suit at law, because no process had been served on him, is very clearly one to be used at law, and cannot be made available in equity. The proper course to be pursued in such case is to apply to the Court in which the judgment was rendered for the purpose of having it set aside on motion. Whenever that, or any other complete remedy can be given at law, a court of equity will not interfere; *Parker v. Jones,* 58 N. C., 276. The injunction must be dissolved and the bill

PER CURIAM. Dismissed.

(345)

NEILL MALLOY against CHARLES B. MALLETT and others.

1. Upon the dissolution of a corporation by the expiration of the time for which it was chartered, its debts become extinct.
2. Under a provision in an act of incorporation, "that the private property of the individual stockholders shall be liable for the debts, contracts and liabilities of the corporation," it was *Held,* that the responsibility on the individual stockholders is a secondary one, and that when the debts against the corporation became extinct by the expiration of its charter, the liability of the individual stockholders became extinct also.

CAUSE sent from the Court of Equity of CUMBERLAND.

All the facts necessary to the understanding of this cause are stated in the opinion of the Court.

Buxton, for the plaintiff.

C. G. Wright and *Bryan,* for the defendants.

BATTLE, J. Several interesting questions are presented by the pleadings, and have been discussed in the argument, but in the view which

we feel constrained to take of the case, it is only necessary for us to notice one of them. The bill was filed after the expiration of the charter of the company, for whose debts private property of the defendants, as individual stockholders, is sought to be made liable. It is a well settled principle of the common law that, upon the dissolution of a corporation, its debts become extinct. This principle was held in *Fox v. Horah,* 36 N. C., 358, to be in full force in this State. Hence, when the "Phenix Company" expired by the limitation of its charter on 1 January, 1860, it ceased to owe any debts, because it no longer had any existence by which it could be a debtor. The question, then, is, could the private property of the persons who were the individual stockholders of the company at the time of its dissolution, be made liable under the tenth section of the act of incorporation, for such of its debts as were then unpaid? The proper answer to this question depends upon an- (346) other enquiry, that is, whether the responsibility imposed by the act upon the individual stockholders is a primary or only a secondary liability. The language of the charter, after creating the corporation, with the usual powers and privileges for the purpose of manufacturing wool and cotton goods, and after prescribing various regulations ordinarily found in charters of the like kind, declares in the tenth section "that the private property of the individual stockholders shall be liable for all the debts, contracts and liabilities of the corporation in proportion to the stock subscribed by each individual." The responsibility thus imposed upon the individual stockholders is, we think, manifestly a secondary one, because it makes them liable for the debts of another person, to-wit, the corporation. Such a liability was amply sufficient for the security of the creditors of the company, should they be diligent in enforcing it, during the existence of the corporation, while, to have made it greater, would, in a considerable degree, have tended to defeat the purposes for which the company was created. The liability of the individual stockholders being thus a secondary one for the debts of the company, it follows that when the corporation expired and its debts became thereby *extinct,* their liability became *extinct* also. As long as there were debts of the company to be paid, the stockholders were bound to pay them, if necessary, out of their private means; but when the debts of the corporation ceased to exist, as such, there remained nothing upon which to attach a responsibility on those who had been members of the defunct company.

This view of the subject is sustained, as we think, by the analogy which it bears to the remedy, which is given by the Act of 1806 (Rev. Code, chap. 50, sec. 7), to creditors against the persons to whom debtors have made a fraudulent conveyance of their property. The remedy given is a *scire facias* upon the judgment obtained by the creditor against

his debtor, against the person to whom the property of the debtor has been fraudulently conveyed for the purpose of defeating the (347) debt. In *Wintry v. Webb,* 14 N. C., 27, it was decided that the proceeding depended upon the original action of the creditor, and to sustain it, the judgment in that action must be in force. Hence, when it appeared in the case that the defendant in the judgment in the original suit was dead, and no person had administered upon his estate, *it was held* that the *scire facias* against the alleged fraudulent grantee could not be sustained. In that case, the secondary proceeding depended upon the existence of a valid judgment, in the first, while in the case now before us the proceeding against the individual stockholders depends upon the existence of a debt of a corporation, of which they are members. The dormancy of the judgment in the one case, and the extinction of the debt in the other, alike deprive the creditor of his remedy. The demurrer must be sustained, and the bill

PER CURIAM. Dismissed.

Cited: *Von Glahn v. DeRosset,* 81 N. C., 472.

BENJAMIN Y. SIMS, Adm'r, against BENJAMIN SMITH and others.

The word "when," like the words "at" and "if," applied to a legacy of personalty, makes the gift contingent; but the superaddition of the words, "equally to be divided" (when there are several legatees), shows that the words, *when,* etc., were only used to designate the time when the enjoyment of the legacy was to commence, and would not prevent it from vesting.

CAUSE removed from the Court of Equity of FRANKLIN.

The bill was filed by the plaintiff Sims as administrator of his late wife, Sally Ann (formerly) Smith, for partition of slaves bequeathed to her, with the other defendants, by the will of Joseph Smith; and the only question in the cause depends upon the construction of the following clauses in said will: "I give to my son Joseph Smith's children, (348) now living, that is, Benjamin Smith and Adam Smith, the land whereon I now live, on the east side of Mill Creek, to be equally divided between them and their heirs forever," reserving a life-estate therein to Joseph Smith, their father. * * * "And I also give the following negroes, to my son Jos. N. M. Smith's five children now living, viz., Sally Ann Smith, Martha Smith, Benjamin Smith, Abner Smith and Joseph Moseby Smith, when the youngest arrives to lawful age, the following negroes and their increase, Harriet, etc. (twelve in number, naming them), to be equally divided between them and their heirs for-

ever, reserving, as aforesaid, to my son, Joseph N. M. Smith, in the land, including the mill and negroes, during his natural life." The bill alleges, that all the above grandchildren were living at the testator's death, and that Sally Ann Smith intermarried with the plaintiff, and died about seven years after the death of the testator, in the lifetime of her father, and before Joseph Moseby Smith, who was the youngest child of the testator, arrived at the age of twenty-one. The bill alleges, that on the death of Joseph N. M. Smith, his son, the defendant, Benjamin, became his representative, and took charge of the slaves, and held them for himself and the other children of Joseph N. M. Smith, exclusively of the plaintiff, as representative of the said Sally Ann, his late wife, and that he denied the plaintiff's right, upon the ground, that Joseph Moseby Smith, the youngest, was not of age when said Sally Ann died. This fact is admitted in the bill, but the plaintiff insists that the legacy was vested on the death of the testator, and that the age of the youngest was fixed for division between them, subject to the life-estate of their father.

The prayer is for a partition of the slaves. The defendants demurred to the bill, and there being a joinder in demurrer, the cause was set down for argument and sent to this Court.

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

BATTLE, J. The only question presented for our consideration, depends upon the proper construction of the following clause of the will of Joseph M. Smith: "I give the following negroes to (349) my son, Joseph N. M. Smith's five children, now living, viz.: Sally Ann Smith, Martha Smith, Benjamin Smith, Abner Smith and Joseph Moseby Smith, when the youngest arrives to lawful age, the following negroes and their increase, to-wit: Harriet," etc., "to be equally divided between them and their heirs forever, reserving, as aforsaid, to my son, Joseph N. M. Smith, in the land, including the mill and negroes, during his natural life." The testator, in a previous clause of his will, had given to his two grandsons, Benjamin and Abner Smith, a tract of land, equally to be divided between them, reserving a life estate therein to their father, Joseph N. M. Smith. Sallie Ann Smith, after the death of the testator, married, but died before the youngest of the five children of Joseph N. M. Smith arrived at full age, and the question is presented on the claim of her husband, as her administrator, whether the legacy of the slaves is vested, or contingent.

It is conceded that the word, "when," like the words "at" or "if," applied to a legacy of personalty ordinarily makes the gift contingent.

Thus, if a negro were given to A, when he arrives at age, with nothing to explain or control the expression, it would be the same as if the legacy were given to him "at" his arrival of age, or "if" he arrived at age, and should, consequently, be construed to be conditional upon his arrival at age. But when it appears from the context, or from the general scope of the will, that the testator intended to designate only the time when the enjoyment of the legacy is to commence, there the legacy will be held to be vested. Among other expressions, to which this effect will be given, is that of "equally to be divided between them," where there are several legatees. The law, it is said, always leans in favor of holding legacies vested, rather than contingent, where the clauses, in which they are given, are ambiguous, and the intention doubtful; *Stuart v. Bruar,* 6 Ves. Jun'r., 529; *Litwell v. Bernard, Ibid.,* 522. In most cases this expression of "equally to be divided between them," will apply, as
(350) well to the time of enjoyment, as to the gift itself, and hence, in such cases the legacy will be taken to be vested. In the case now before us, there is nothing to forbid the application of this rule, and the legacy of the slaves must be considered as having vested at the death of the testator, the division among the legatees not to take place until the arrival of the youngest at full age—the whole legacy having been subject to the life of their father; see *Guyther v. Taylor,* 38 N. C., 329.

PER CURIAM. Demurrer overruled and cause remanded.

STANFORD LONG against JOHN H. CLAY, Adm'r.

Where a bill was filed for the settlement of copartnership dealings, and there is a prayer for an injunction against a bond given on a partial settlement of the business between the partners, but no injunction was issued, it was *Held,* that the obligor, in said bond, was not in contempt of the court of equity in refusing to submit to a judgment on the bond in a court of law.

APPEAL from the Court of Equity of PERSON, *Osborne, J.*

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

No counsel appeared for the plaintiff in this Court.

Graham, for the defendant.

BATTLE, J. John H. Clay, administrator of William Long, brought debt on a bond for $1,292.75, payable to his intestate against Stanford Long, as the obligor thereto. The suit was brought in the Superior Court of Law for Person County, and defendant appeared and pleaded payment and set off. While the suit was pending, the defendant filed a bill in the Court of Equity for the same county in which he

alleged that he and the plaintiff's intestate had, some time before, (351) been engaged as partners in the manufacture of tobacco; that they dissolved the co-partnership by consent, and had a partial settlement, upon which he gave the bond sued upon at law. He then alleged that there were many outstanding debts against the firm, of which he was not aware, when he gave the bond in question; that upon a settlement of the accounts of the firm, very little, if anything would be due the plaintiff; that he had no defense against the suit at law; and he prayed for an account of the partnership business and for an injunction against the suit until that account should be taken. The plaintiff, at law, filed an answer to the bill. It did not appear that any injunction had been issued. When the suit at law was called for trial, the plaintiff's counsel announced his readiness to proceed, and, informing the Court of the pendency of the proceeding in the court of equity, demanded that the defendant should submit to a judgment, threatening that if he did not, he, the counsel, would move for an attachment against him in the court of equity. The defendant refused to comply with the demand; on the contrary, he applied for, and on cause shown, obtained a continuance of the suit. When the equity docket was taken up, the defendant in the suit in that Court, filed an affidavit, in which he stated the proceedings above mentioned, and moved for an attachment against the plaintiff in equity, for his refusal to submit to a judgment in the court of law. His Honor declined to make the order, but allowed an appeal from his order of refusal to the Supreme Court.

We approve the course adopted by his Honor. The plaintiff, in equity, did not press his application for an injunction against the suit at law, and there was nothing to hinder the plaintiff from obtaining his judgment as soon as the course and practice of the court would allow him. Had the plaintiff in equity applied for a *fiat* for an injunction, the Judge or Court, to whom the application was made, might well have refused to grant it, except upon the terms of submitting to a judgment in the suit at law. The authorities, referred to by the counsel for the defendant in equity, to wit, Adams Eq., 194-195, and 2 Star, Eq., pages 174, 175, do not embrace a case like the present. (352)

Upon another ground, we think, the correctness of his Honor's course, may be sustained. When the cause in the court of law was called for trial, no order in the court of equity had been obtained, or even applied for. The counsel only threatened what he intended to do, when the court of equity should sit for the despatch of business. The defendant at law could not then, be guilty of a contempt of Court for not obeying an order which had no existence.

The order from which the appeal was taken, must be

PER CURIAM. Affirmed.

CALVIN ROUSE against JOHN L. LEE and others.

Money arising by the sale of the wife's land by a deed executed by the husband and wife has none of the characteristics of real estate, and after the death of the wife, goes to the husband *jure mariti*.

CAUSE removed from the Court of Equity of LENOIR.

A tract of land having descended to Rebecca Lee, wife of the defendant, John L. Lee, from her father, it was agreed between them that they would make sale of the same, and as Lee was much in debt, and there was danger that the proceeds of such sale might be taken for his debts, it was agreed by parol that the proceeds should be paid into the hands of a trustee for her benefit. Accordingly, the land was sold by a joint deed of Lee and his wife to one Wiley Rouse, she being privily examined and said Wiley Rouse paid the purchase-money, $1,900, to one Christopher L. Davis, who agreed to hold it for the benefit of the wife, but af-
(353) terwards agreeing to borrow the money for himself, he made his note for the residue not used by Mrs. Lee, to-wit, $1,400, to the plaintiff, who agreed that he would hold the money on the like trust, but no writen memorial was ever made of this trust. Mrs. Lee having died, the plaintiff administered on her estate, and filed this bill against J. L. Lee, and the children of Lee and his wife, who are the heirs-at-law of Mrs. Lee, alleging that Lee claims the fund as husband of his late wife, and that the other defendants, the children, claim it as having the impress of realty, and he calls upon the parties to interplead and have their rights settled by a decree of the Court of Equity, so that he may be indemnified in paying it to the one party or the other.

The said John L. Lee and the children each answered the bill, claiming, as suggested above, and submitting that the Court should do what was right and equitable between them. The cause was set down for hearing on bill and answers, and sent to this Court.

J. W. Bryan, for the plaintiff.
G. Washington, for the defendants.

MANLY, J. The question presented by the pleadings in this case, is, whether a fund in the hands of the complainant, as administrator of Rebecca Lee, should be paid to the husband as her legal representative, or (as it arose originally from the sale of real estate) to her children, as heirs-at-law.

There is no ground for holding that this fund retained any of the characteristics of real property. It was competent for the parties, by a proper settlement, to have impressed this character upon it, but they have not done so, and it must, therefore, be transmitted according to the rules which govern the distribution of chattel property.

The agreement, by which the fund was subjected to a trust, seems to have had for its object the benefit of the wife alone, and, therefore, according to a well established principle of equity, upon her death, the fund passed to her husband. This was recently declared in this Court, in *Little v. McLendon,* 58 N. C., 216, where the authori- (354) ties will be found cited.

The parties interested may have a reference to the clerk of this Court, to take an account of the fund and report the residue after deducting the costs of administration (the costs of this bill included), which residue should be paid to the husband.

PER CURIAM. Decree accordingly.

Cited: Black v. Justice, 86 N. C., 511.

WILLIAM FRIZZLE and others against JOEL PATRICK.

1. It is the general course of the court of equity, on applications to restrain private nuisances by an injunction, to order an issue at law to ascertain the fact of the existence of such nuisance before the court will act.
2. Where a party has no particular interest in an alleged nuisance from the ponding back of water, he cannot sustain a bill for an injunction, but must rely on the remedy by information in the name of the Attorney-General.

THIS was an appeal from the Court of Equity of PITT.

The plaintiffs, William Frizzle, Warren Frizzle, Charles Rogers and Jesse Hart, set forth in their bill, that the plaintiffs, William and Jesse Frizzle, conveyed each a small tract of land to the defendant and one Lewis B. Pugh, to enable them to erect a mill on little Contentnea Creek, and that they did so about 1850, and that, at the same time, the parties agreed, by parol, as a part of the equivalent for this agreement, the said Patrick and Pugh were to keep a flat in their mill-pond to transport produce for the neighborhood, and to pay them; that the said grantees did erect a mill-dam, and by that means, ponded back the water so as to injure the plaintiffs, W. and W. Frizzle, in a very great degree by overflowing their tillable land, and to injure all the plaintiffs and their neighbors by causing an uncommon amount of sickness; that the said mill, was, shortly before filing the bill, burned down, and that against their earnest remonstrances, and in disregard of large (355) pecuniary offers on their part, the defendant, Patrick, who had purchased out Pugh, was preparing to rebuild the mill, and they apprehended the same injurious consequences to their health. They further

allege, that the defendant totally disregarded his promise to put a flat in his mill-pond while the dam was up, and refused to make compensation to the Messrs. Frizzle for damage done to their lands by ponding back the water on them. The prayer is for an injunction to restrain the defendant from rebuilding his mill-dam and for general relief.

The answer of the defendant, denies that any extraordinary amount of sickness was produced by his mill-pond. He admits that a very fatal disease prevailed during a part of the time his pond was in existence, but he says this was a disease, called diphtheria, and as he is advised by medical men, was, in no degree, produced or aggravated by standing water; that it prevailed as much in neighborhoods where there was no watercourse as in that of his mill-pond, and has, in no degree, abated since his mill has been burned and the water off. He admits, that he said in conversing about establishing a mill, that he intended to keep a flat in his mill-pond, but he denies that he made any deliberate contract to that effect, or that this consideration entered, in a material degree, into their bargain, and that no one has ever desired such a flat, or called on him to put one in his pond and insists that, even if this was as alleged by plaintiffs, that they have an adequate remedy, at law, for the breach of this contract. He sets forth, specifically, the deeds made to him by the plaintiffs, William and Warren Frizzle, which, in the former parts thereof, are in the usual form, and then contain this clause (in the deed from William), "and I, the said William R. Frizzle, in the bargain, have bargained and sold unto the said Lewis Pugh and Joel Patrick, the full and lawful privilege of ponding the water back upon my creek low ground, above the said Lewis Pugh and Joel Patrick's mill-seat, to a sufficient head of water to run the mill, or any machinery whatever, provided the water does not back upon any of my high or tenable
(356) lands; if so, we, the said Lewis Pugh and Joel Patrick, do bind ourselves and assigns to the said William R. Frizzle, a fair price for all the high or tenable land the mill may cover," and the deed from Warren Frizzle, conveyed his tract of land, by a deed, containing the like provisions. He further alleges, in his answer, that before this bill was filed, he offered to leave it to men, mutually chosen by them, to say what, if any, damages had been sustained by the plaintiff William's high or tillable lands, and to pay whatever might be assessed by them, and that he refused to agree to these terms, or in any way to settle amicably this question of damages. He insists that, according to the written contract between them, if either of the Messrs. Frizzle has any claim of this kind, he has a full and adequate remedy at law. He admits that he is about to rebuild his mill, but says that neither of these parties has any equitable ground to prevent him from so doing; that as to the Messrs. Frizzle, they are concluded by the terms of their deeds, from interfering

through the Court, and as to the other plaintiffs, they have no interest or ground of complaint whatever.

On the coming in of the answer, the defendant moved to dissolve the injunction, which his Honor refused, but ordered it to be continued to the hearing, from which order the defendant appealed to this Court.

Fowle and *Phillips,* for the plaintiffs.
Donnell and *J. W. Bryan,* for the defendant.

PEARSON, C J. Treating the bill as a proceeding for an injunction against a private nuisance, we are of opinion that the plaintiffs, William Frizzle and Warren Frizzle, are concluded by the deeds which they executed to Joel Patrick and Lewis Pugh, for the parcels of land on the north and south sides of the creek, for the express purpose of enabling them to erect a dam, and pond back the water in order to get a head of water sufficient to run a mill; so they cannot be heard to complain against their own deed. In regard to the flat, if there has (357) been a breach of contract on the part of the defendants, the remedy at law is adequate, and certainly a breach of contract, in that particular, is not a sufficient ground to induce a Court of Equity to interfere by its writ of injunction.

In the case of a private nuisance, the rule in this Court is, that the fact of nuisance should be established by an action at law before an injunction will issue, with certain exceptions as in *Clark v. Lawrence, ante,* 83, where an issue was ordered on the fact of nuisance or no nuisance. This comes within the general rule, and we can see no ground on which to make it an exception and direct an issue, unless the rule is to be disregarded altogether. They have been paid for the privilege of erecting a mill at the site set out in the proceeding, and are concluded in respect to a *private nuisance.* The other plaintiffs, Jesse Hart and Charles Rogers, show no particular interest in this matter, and must stand like any other citizens who are objecting to the erection of a public nuisance. In other words, they must file an information in the name of the Attorney-General, setting forth their reasons for believing that the defendant, Patrick, is about to commit a *public nuisance,* and making that the ground for asking the interference of this Court by its writ of injunction. Decretal order of the Court below reversed and injunction dissolved.

PER CURIAM. Decree accordingly.

Cited: R. R. v. R. R., 88 N. C., 82.

(358)

ROBERT FALLS against JAMES DICKEY.

1. Where a plaintiff has a remedy at law on a covenant of quiet enjoyment, and brings a bill in equity against the covenantor on account of his non-residence in the State, it is necessary for him to aver also, that the defendant has no property or effects in this State, out of which satisfaction could be had upon his recovery at law.
2. Where such a suit is brought, and it appears that the plaintiff, in obtaining his deed and covenant, practiced to get an unfair advantage of the defendant, the court of equity will not grant him relief, but will leave him to his remedy at law.

CAUSE removed from the Court of Equity of CLEVELAND.

The bill alleges, that the plaintiff purchased a tract of land lying in the county of Gaston, and took a deed in fee for two hundred acres, for which he gave his notes for $400; that said deed contained a covenant for quiet enjoyment of that estate; that about eighty acres of the best of this land was covered by the dower of widow Mrs. Mary Falls, and that he had utterly failed to get possession of that much of the land he had purchased; that the defendant is a citizen of the State of Arkansas. He states that he has been sued, at law, on the bonds given for the purchase-money, and that judgment has been obtained against him in the county court of Gaston, and execution threatened to be issued against him for the amount. The prayer is for an injunction.

The defendant, in his answer, says, that being about to remove to the State of Arkansas, he made a public vendue of the land in question, and his other property; that at the time this land was offered for sale, the crier distinctly made known that it was sold subject to the dower of Mrs. Falls; that the land was bid off by the plaintiff, but that no deed was then executed by him, but that he furnished him with the deed, which he, defendant, had taken when he bought the land, and desired him to have a deed prepared; that in the deed, thus furnished, the dower was excepted; that the plaintiff was a relation of Mrs. Falls, and lived near to her, and well knew that she had a dower in the said tract of land; that for fifteen years Mrs. Falls lived on this dower land, and was so living at the time of the sale; that shortly after this auction, the plaintiff came to where he lived, while he was loading his wagons to removed from the State, and when everything was in confusion around him, and presented him for execution, a deed, which he, plaintiff, had prepared, and told him that it was all correct and drawn according to the deed furnished him at the sale as a guide; that having confidence
(359) in plaintiff's integrity, and being thus in confusion, he executed the deed, in question, which he now finds, to his surprise, is an absolute conveyance of the whole estate in the land, without any excep-

tion of Mrs. Falls' dower, and in this he was grossly deceived and defrauded by the plaintiff.

The defendant further says, that the plaintiff had no occasion to go into a Court of Equity on account of his residence in another State, for that at the time of filing this bill, defendant had property, in this State, to the amount, at least, of $5,000.

There was evidence taken in the cause, the material part of which, is alluded to by the Court and the cause was set down for hearing on the bill, answers, proofs and exhibits, and sent to this Court.

No counsel for the plaintiff.
Fowle, for the defendant.

BATTLE, J. We have no hesitation in denying to the plaintiff the relief which he seeks. It is clearly proved, that at the time he purchased the tract of land, mentioned in the pleadings, he had full knowledge of the incumbrance of which he complains, and we very much suspect, that when he prepared the deed for an absolute conveyance, he intended, if he could get the bargainor to execute it, to take an unfair advantage of him. His remarks made at various times, to different persons, show that he thought he had got a bargain of the defendant, and that he was determined to make the most of it. If the covenants contained in his deed can avail him at law, let him seek a remedy there. This Court will certainly not aid him in his intended sharp practice.

But independently of his failure upon the merits of his case, the plaintiff has not, by his own bill, shown himself entitled to relief in a court of equity. He has alleged, indeed, in his bill that the defendant is a resident of the State of Arkansas, but he has altogether omitted to aver that he had no property or effects in this State, out of which (360) to make good the damages which might be recovered in an action on the covenant for quiet enjoyment. This omission we deem fatal to his right to come into this Court for relief. See *Green v. Campbell,* 55 N. C., 477; *Richardson v. Williams,* 56 N. C., 116.

PER CURIAM. Bill dismissed with costs.

MARY ANN SMITH against JAMES T. MOREHEAD.

1. As a general rule, an objection to the jurisdiction of the court of equity may be taken on demurrer when the facts appear upon the record.
2. Impotency in a husband does not render a marriage by him void *ab initio*, but only voidable by sentence of separation, and until such sentence, it is deemed valid and subsisting.
3. The domicil of the husband draws to it the domicil of the wife; *therefore*, according to Rule 14, Sec. 3, Chap. 32, Rev. Code, where both parties are residing in this State, a bill, by the wife, for a divorce, for the cause of impotency, must be brought in the county where the husband resides.

CAUSE removed from the Court of Equity of WAKE.

The facts are sufficiently stated in the opinion of the Court.

Moore, for the plaintiff.

Graham, for the defendant.

BATTLE, J. The plaintiff, in her bill, which was filed in the Court of Equity for the county of Wake, alleged that on 30 April, 1861, the marriage ceremony was performed in the city of Raleigh between her and the defendant, James T. Morehead; that she had been, ever since her birth, and was still, a resident of the city of Raleigh, in the county of Wake, and the defendant was a resident of the county of Guil-
(361) ford; that after cohabiting with the defendant some two or three weeks, she found him to be, and she averred that he was, utterly and incurably impotent; that in consequence of such impotency, the pretended marriage between her and the defendant was null and void; and she prayed that it might, by a decree of the Court, be declared null and void; and further, that she might have a decree divorcing her from the bonds of matrimony.

The defendant demurred to the bill, for the want of jurisdiction in the Court of Equity for the county of Wake. The cause was set for hearing on the demurrer, and by consent was removed to the Supreme Court.

Our opinion being in favor of the defendant upon the question of jurisdiction, we have deemed it proper to state only the facts which are necessary to raise it.

That, as a general rule, an objection to the jurisdiction of the Court of Equity may be taken on a demurrer, when the facts appear upon the record, is settled. Indeed, it is said by Mr. Adams that want of jurisdiction is one of the most ordinary grounds of a demurrer in equity; Adams' Eq., 333. The principle of the defence by demurrer is, that on the plaintiff's own showing, his claim can not be supported, and that therefore it is needless for the defendant to answer the bill. If the

plaintiff show that the Court can not entertain jurisdiction of his cause, there seems to us as much reason for permitting the defendant to urge that objection, as to insist upon any other, which is disclosed by the facts stated in the bill. The plaintiff's counsel does not deny this; but insists that when the want of jurisdiction arises from the fact that the suit is brought in the wrong county, the objection can only be taken by a plea in abatement, under an express provision to that effect in the Revised Code, chapter 32, section 3, rule 14. The last clause of that rule does say, indeed, that if the suit be brought in any other county than is therein prescribed, it "may be abated on plea"; so it may, and so it must, if the fact that the suit is in the wrong county do not appear on the record; but if the objection appear in the bill itself, a plea is unnecessary, and a demurrer is proper to be used. It is well known that in (362) equity the statute of limitations is generally used as a defence by a plea, but it is now held that if, by the plaintiff's own showing, his equity is barred by the statute of limitation, no plea is necessary; see *Whitfield v. Hill,* 58 N. C., 321; *Robinson v. Lewis,* 45 N. C., 58.

We come now to the question whether the suit was brought in the wrong county, and the solution of that depends upon the enquiry whether a valid marriage was contracted by the performance of the marriage ceremony between the plaintiff and defendant, and if it were, what effect did it have upon the domicil of the parties. The counsel for the plaintiff contends that there was no marriage; that by reason of the defendant's impotency, the performance of the marriage ceremony between the parties had no legal effect, and that therefore what passed between them was a mere nullity. This, we think, is a great mistake. Impotency is a good cause for a divorce *a vinculo matrimonii,* but it does not, like the idiocy or lunacy in one or both parties, make the alleged marriage a nullity *ab initio.* Mr. Blackstone, after stating that marriage is regarded by the law as a civil contract, and that to be valid it must be between parties willing and able to contract, and who do contract in proper forms and solemnities, says that, in general, all persons are able to contract themselves in marriage unless they labor under some particular disabilities and incapacities. These disabilities are of two sorts; first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but these, in our law, only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are precontract, consanguinity or relation by blood and affinity, or relation by marriage, and some particular corporal infirmities; 1 Bla. Com., 434. After some other remarks about the nature of these disabilities, the great commentator adds: "But such marriages not being void *ab initio,* but voidable only by sentence of separation, they are deemed valid to all civil purposes, unless such separation

is actually made during the life of the parties." See, also, *Elliott*
(363) *v. Gurr,* 2 Phil. Ec. Cases, 16; 1 Moore, 223; Noy, 29; Cro. Car., 352; 1 Roper on H. and W., 333. Among these disabilities it is seen that "some particular corporal infirmities" are mentioned. Thus, the impotency of the husband at the time of the marriage, to consummate it, and still continuing, is a good ground for annulling it; 2 Phil. Ec. Ca., 10. But until a sentence of divorce is obtained, the marriage is regarded as valid and subsisting. *Mr. Shelford* says expressly that "canonical disabilities, such as consanguinity, affinity, and certain corporal infirmities, only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained, and for this he cites 2 Phil. Ecc. Cases, 19, 25." If this were not so, the triennial cohabitation required by the ecclesiastical courts (and which we presume our Courts would be bound to insist upon), before they will entertain a suit for divorce on account of impotency, would seem to be a strange requisition; see Shelf. on Mar. and Div., 203 (33 Law Lib., 171).

The second kind of disabilities mentioned by Mr. Blackstone are what he calls civil, that is, such as are enforced by the municipal laws. Among these are incapacities of a former subsisting marriage, and that of a want of reason. These make the marriage absolutely null and void *ab initio,* and the pretended marriage may be so treated without any sentence pronounced by a court; though in the case of a want of reason in one of the parties when the marriage was contracted, the Court will entertain a suit for a nullity of the marriage. This was done in *Johnson v. Kincaid,* 37 N. C., 470, and *Crump v. Morgan,* 38 N. C., 91, referred to by plaintiff's counsel. In the former of these cases, the pretended husband was an idiot, and in the latter the wife was a lunatic at the time of the celebration of the marriage. In both cases, the alleged marriages were pronounced to have been nullities from the beginning, and the Court pronounced sentence, not of divorce, but of nullity. From what we have said it is clear that the performance of the marriage ceremony between the parties now before the Court made them, to all
(364) intents and purposes, man and wife, and they must so remain until death or a divorce shall separate them.

This being so, the only remaining enquiry is, what effect the marriage had upon the domicil of the parties. Upon this question we think the law is well settled; in *Warrender v. Warrender,* 9 Bligh., 89, before the House of Lords, it was laid down in the strongest terms that the domicil of the husband drew to it, in law, that of the wife. That was the case of a suit for a divorce, and it was followed by another suit of the same kind, before the Consistory Court of London, in which Dr. Lushington held the same doctrine, 22 Curtis' 35, (7 Eng. Ecc., 139). It is unnecessary to multiply authorities upon this point, for the general

rule seems to have been assumed to be as we now state it in the very case of *Schonwald v. Schonwald,* 55 N. C., 367, relied upon by plaintiff's counsel to disprove it. In that case we decided, indeed, that upon the construction of the seventh section of thirty-ninth chapter of Revised Code, a wife residing in another State could not be considered as a resident of this State, for the purpose of suing her husband for a divorce in our Courts. The language of the act upon which the construction was placed is as follows: "Nor shall any person be entitled to sue, unless he or she shall have resided within the State three years *immediately* preceding the exhibition of the petition." It was undoubtedly competent for the Legislature to enact that the actual residence of the wife out of the State should not be considered as a legal residence with her husband in the State, for the purpose of enabling her to sue him in the Courts of this State. That was the intent of the Legislature in the act to which reference is made, and the effect of the decision of *Schonwald v. Schonwald* is to carry out that intent. In other respects, the rule remains unchanged, and where the parties reside in the State, the residence of the husband still remains the residence of the wife.

It follows that as soon as the parties in this case were married, the plaintiff became, in law, a resident of the county of Guilford, and according to the fourteenth rule of the third section of the thirty-second chapter of the Revised Code, her suit ought to have been (365) instituted in the Court of Equity of that county.

The demurrer to the bill, for the want of jurisdiction in the Court of Equity of Wake, is sustained, and the bill

PER CURIAM. Dismissed.

Cited: Hicks v. Skinner, 71 N. C., 543, 555; *Moore v. Moore,* 130 N. C., 335, 339; *Oldham v. Rieger,* 145 N. C., 258; *Cook v. Cook,* 159 N. C., 52; *Walters v. Walters,* 168 N. C., 414.

GEORGE W. MORDECAI against WILLIAM M. BOYLAN and others.

1. Where a testator, having estates in this and two other States, appointed an executor here and another residing in one of the other States, and provided that they should not be required to give security, and it appeared that the money in the hands of the executor, in this State, was not sufficient to pay the pecuniary legacies, it was *Held,* to be the intention of the testator that such executor was not required to prove the will abroad and collect money in the other States to pay the legacies in full, and that he must pay the money in his hands to the legatees *pro rata,* and that the testator intended the executor abroad to administer the assets there.

2. Where the legatees were children and grandchildren of testator's wife, and the assets, out of which the pecuniary legacies were to be paid, were bearing interest, it was *Held*, that such legacies were entitled to draw interest from the testator's death.
3. *Grandchildren* and *great-grandchildren* cannot be included in the division of a residue directed to be made among *children*.
4. The act of 1860, chap. 37, preventing the emancipation of slaves by will, applies to the case of a will made before its passage, where a testator died subsequently thereto.
5. By the act of 1860, chap. 37, slaves, attempted to be emancipated by will, go to the next of kin, and not to the residuary legatee.
6. Where a testator, in a codicil, gave as a reason for a legacy to a grandson, that *he had disinherited such grandson*, but the fact was, that he had not disinherited him, but had given him a large legacy in a clause of his will, it was *Held*, that the bequest, in the will, was not revoked by that of the codicil, but that the latter, itself, was void on account of the mistake; and,
7. *Held further*, that parol evidence, as to testator's feelings towards the legatee, was admissible, in the question of fact, as to the mistake.

(366) THIS cause was sent up from the Court of Equity of WAKE by consent.

The facts of the case are sufficiently stated in the opinion of the Court, filed by *Judge Battle* in this Court.

Moore, for the executor.
Graham, for Catharine Boylan.
K. P. and *R. H. Battle,* for the residuary legatees.
G. W. Haywood, for W. M. Boylan.
Winston, Sr., and *Fowle,* for J. S. Boylan.

BATTLE, J. The bill is filed for the purpose of obtaining the advice and directions of the Court as to how the plaintiff shall act in certain matters of difficulty, which have arisen in executing the will of his testator, the late William Boylan.

1. It appears from the will that the plaintiff and three other gentlemen, all of whom are residents of this State, and Henry Vaughan, of the State of Mississippi, are appointed executors, and it is provided that no security shall be required of them, and that they shall not be liable for the acts, negligences and omissions of each other. The plaintiff alone has qualified as executor in this State, and it is understood that Henry Vaughan has qualified as such in the State of Mississippi. The testator left a large estate of both real and personal property, consisting of lands, slaves and live stock, situate in both of the above named States—large amounts of bank and railroad stocks in this State, and also a large amount of bonds, notes and other evidences of debt due from persons residing in this State and the States of Louisiana and Mississippi. The pecuniary legacies given in the will amount to about the aggregate sum of $125,000, and the legatees, who are numerous, reside some in this

State and others out of it. The executor in this State will not have assets in his hands sufficient to satisfy all the pecuniary legacies, without collecting the mounts due from debtors residing abroad, and he desires the instruction of the Court as to whether it is his duty to prove the will and take out letters testamentary in any other than this State, for the purpose of collecting the debts which may be due (367) from debtors residing there.

Our opinion is, that he is not. The testator has settled that question himself by appointing an executor residing abroad; for such executor must be supposed to have been nominated for the express purpose of attending to the collection of debts due there. And it aids this supposition that we find the executors excused from all responsibility for the acts, negligences and omissions of each other.

2. The second inquiry is whether, if the plaintiff can not collect money enough to pay off all the pecuniary legacies, he must pay out what he has *pro rata* among all the legatees, or may he select and pay whomsoever he pleases.

We can not discover anything in the will which gives one legatee any preference over another. All have equal claims upon the executor, and in case of a deficiency of assets in his hands, he must scale the legatees *pro rata.*

3. Interest in this case is, we think, to be calculated on all the pecuniary legacies, from the testator's death. All the legatees are his wife's children, grandchildren and a great-grandchild, and the assets, or nearly all the assets, out of which they are to be paid consists of debts due the estate, which are bearing interest; see *Williams v. Falcon, ante,* 235.

4. The testator clearly shows by his will that he understood the distinction between children and grandchildren. The general rule, therefore, must prevail, that in the division of the residue, directed to be made among his children, the testator's grandchildren and great-grandchild can not be included; *Ward v. Sutton,* 40 N. C., 421.

5. Laws 1860, chapter 37 (see Laws 1860, first session), forbids the emancipation of David Matthews, his wife and daughter Adelaide. The will was made before the passage of the act, but the testator did not die until after that time. The act declares that no slaves shall hereafter be emancipated by will, deed, or any other writing which is not to take effect in the lifetime of the owner. The object of the law being to prevent the emancipation of slaves by will, or any other instrument which is to operate in the nature of a will, (368) we can see no reason why it may not operate upon a will made before its passage, where the testator dies afterwards, as well as one made subsequent to the time of the enactment. In this respect, it differs from a statute made for the purpose of changing the construction

of a will, such as the Act of 1844, chapter 88 (see Rev. Code, ch. 119, sec. 6), which declared that a will should be construed to speak, with respect to the real and personal estate comprised in it, as if it had been executed immediately before the death of the testator. Such a statute shall not operate upon a will made before its passage, because the testator, when he made it, is supposed to have used language with reference to that law as it then stood, and the Legislature will not give to such language a different meaning. This seems to have been the ground upon which *Battle v. Speight,* 31 N. C., 288, was decided. It is manifest that the principle of the decision does not apply to the present case.

6. The executor asks what is to be done with the slaves in case they can not be emancipated. The act itself answers the question. It says, expressly, that they shall go to the next of kin, and shall not pass under any residuary clause of the will.

7. The most difficult enquiry propounded by the executor is that which relates to the devise and bequests, in trust, for the testator's grandson, John S. Boylan, contained in the eighth clause of the will, taken in connection with the bequest, in trust, for him to be found in the first codicil. The gift in the will is to the testator's daughter Catharine, of one-half of a tract of land in the State of Mississippi, many slaves, and ten thousand dollars in money, in trust for the said grandson during his life, with certain limitations over. The codicil is as follows: "I hereby revoke so much of my will as disinherits my grandson, John S. Boylan, and do hereby give and bequeath to my son John H. Boylan, ten thousand dollars, in trust for my said grandson, John S. Boylan, the interest to be paid to him annually during his life," with a limitation to his children, should he leavy any, and if not, then to fall into the residue
(369) of the estate. John S. Boylan claims under both the will and the codicil, while the other devisees and legatees contend that the bequest in the codicil is a substitution for what is given in the will, or that at all events it can not be cumulative.

This question has been argued with much zeal and ability by the counsel on both sides, and after much reflection and some hesitation, we have come to the conclusion that the bequest in the codicil is not a revocation of the devise and legacy given in the will, but is itself void as having been made under an entire mistake of facts. In coming to this conclusion, we have felt ourselves at liberty to take into consideration the parol testimony, so far as it tends to show the state of the testator's family, the condition of his estate, and his feelings towards his grandson, J. S. Boylan, at the time when the will and codicil were respectively executed; see *Bivens v. Phifer,* 47 N. C., 436. The will bears date 18 June, 1858, while the codicil appears to have been made on 2 July, 1860. In the interval between those dates, the grandson, John

S. Boylan, had, by his evil and dissipated conduct, so seriously incurred the displeasure of his grandfather that he declared his intention to disinherit him. The counsel for John S. Boylan contends that the devise and bequest in the will is not revoked by the codicil, because, though it may appear that the testator intended, at one time, to revoke the gift to his grandson, and thereby disinherit him, yet such intention had never been carried out in any manner recognized by the law as sufficient for that purpose. He then insists that the legacy in the codicil is a plain bequest of the sum therein mentioned, and there is nothing to prevent its taking effect. On the other hand, the counsel for the other defendants argue that the codicil shows a plain intention in the testator to disinherit his grandson, and the great rule which governs in the construction of wills, to wit, that the intent must prevail, no matter in what language it may be expressed, requires the Court to give full effect to it. In support of this argument, besides the other cases, *Postmaster-General v. Early,* 17 Curtis, 86, decided by the Supreme (370) Court of the United States, was referred to, wherein it was held that an act of Congress which gave jurisdiction to a certain Court over certain subjects, concurrent with another Court, thereby conferred a jurisdiction upon the latter Court, which it had never had before. That may be so, but the cases are not parallel. If a testator were, by a codicil, to bequeath to A a thousand dollars, that being the sum which he had by his will given to his brother B, then B might claim a legacy of that sum, though it had not been given to him in the will. The language here supposed would be very much like that in the case cited by the counsel. But the words of the codicil in the case now before us are very different. The testator says, "I revoke so much of my will as disinherits my grandson, John S. Boylan," and we do not see how this can mean the direct reverse of the plain import of the language. If a previous codicil had been found, in which the testator had disinherited his grandson, a revocation of that by a second codicil must have had the effect to restore the gift of the real and personal estate contained in the will. We are of opinion, then, that the devise and bequest in the will must stand, but are satisfied that the testator labored under a mistake of fact in supposing that he had disinherited his grandson, and that the legacy given by the codicil was the consequence of that mistake; considering the state of alienated feelings in which the parties stood towards each other at the time, and the cause which had produced it, we can not for a moment suppose that the testator intended to give his grandson an additional legacy. That legacies given under a false impression as to the existence or non-existence of a fact will be null and void, is shown by many cases; see Wms. on Ex'rs, 141, *et seq.*

PER CURIAM. Decree accordingly.

PEARSON, C. J. I concur in the opinion filed by Judge Battle, with the exception of that part in reference to the $10,000 given by the
(371) codicil to John H. Boylan, in trust for John S. Boylan. I am of opinion that, according to the rules of construction adopted by the Court, see *Millsaps v. McLean* (at this term), 60 N. C., 80, wills must be construed by what a testator does, and not what we suppose he intended to do. But, as Judge Battle is clear in his opinion that the language in the codicil does not take effect, and as Judge Manly, who heard the argument, is of the same opinion, I do not insist on my opinion so far as to dissent; particularly, as the matter will not be made a precedent; for no other case of the kind will, in all human probability, occur again, and I am satisfied the conclusion of Judge Battle and Judge Manly is more in accordance with the actual intention of the testator than that to which I have come by a consideration of the will and codicil and such evidence as the Court is allowed to hear.

Cited: Boylan v. Boylan, 62 N. C., 160; *Hayley v. Hayley, Ib.,* 187; *Lee v. Baird,* 132 N. C., 760; *Thompson v. Batts,* 168 N. C., 531.

Dist.: Powell v. Morisey, 98 N. C., 430.

JOHN P. COOK and another against JOHN F. ELLINGTON, Adm'r.

Whether the word "wish," in a will, was intended to create a trust, discussed. This case was decided upon the peculiar phraseology of the will.

CAUSE removed from the Court of Equity of WAKE.

Joseph F. Cook, in March, 1862, by his last will and testament, bequeathed and devised as follows: "Fourthly, I give and bequeath to my beloved wife, Tranquilla Cook, the following property and money: First, I give her all my negroes and their increase, few or many, and all the money I may have at my death, and also all that may be due me on bonds and notes, and my wish is that at her death she will give the one-half of all I give her, and the increase of my negroes, to my brother, John P. Cook, and Mary A. Terrill.

"Fifth. I lend to my said wife, Tranquilla Cook, during her life-time, all of my lands, containing eighteen hundred and ninety-
(372) one acres, more or less, and at her death I give said land to my brother, John P. Cook.

"Sixth. I give all my stock of horses, mules, cattle, hogs, sheep, corn, fodder, wheat and oats that I may have at the time of my death, to my said wife, Tranquilla Cook; also, my household and kitchen furniture, farming tools, carriage, blacksmith's tools, wagons and carts."

On the next day he added to his said will this codicil: "I desire that

my wife, Tranquilla Cook, shall have all the crop of cotton that I may have on hand at the time of my death, and also I desire that the increase of the slaves, mentioned in the fourth clause of the above will and testament, shall be construed to mean one-half of the increase as well as the other property named in the said clause of said will and testament, which I wish my wife, Tranquilla Cook, to give to my brother, John P. Cook, and my sister, Mary A. Terrill, and I have to this codicil, which I wish to be taken and construed as a part of my will, set my hand," etc. The executor named in the said will having renounced the trust, the defendant, Ellington, was appointed administrator, with the will annexed, and Mrs. Tranquilla Cook, having lately died intestate, the defendant also administered on her estate, and took into his possession the whole of the property lately in her possession, including the whole of that embraced in the fourth clause of the said will.

This bill was filed against him, praying for a decree that he may be declared a trustee for the plaintiffs of one-half of the property and one-half of the increase mentioned in the said fourth clause of the said will, and that he account and pay over to them their said share. To this bill the defendant demurred, and the cause was set down for argument on the demurrer and sent to this Court by consent.

Moore, for the plaintiffs.
K. P. Battle and *R. H. Battle, Jr.,* for defendant.

PEARSON, C. J. In cases of this kind, very little aid is to be (373) derived from "the books," except in regard to the general principles which have been established, for all depends upon intention, and no two wills are ever precisely alike; although the meaning may be the same, there will be a difference in the words used, and a difference in the relations of the members of the family, or other circumstances having a material bearing on the question.

This case fulfills in as complete a manner as any case can do, all the conditions required by the general principles which have been established. If a trust is not created in this case, the whole doctrine must be ignored. In support of this position, I refer to *Ford v. Fowler,* 3 Beame, 146; see also *Alston v. Lea, ante,* 27. That is considered as a case decided on two principles, where, as was remarked by *Mr. Moore* with much force and beauty, "the pendulum which had been vibrating first on one extreme and then on the other, had gradually assumed its right position."

In this case, the subject matter of the trust is certain; the objects of the testator's bounty are plainly described, and *his wish* that one-half of the property embraced in that clause of the will should be given to John P. Cook and Mary A. Terrill by his widow at her death, is as plainly

expressed as can be done by the English language. Here, then, we have certainty as to the subject matter, certainty as to the objects of the bounty, and certainty as to the intention of the testator; for *the wish* is expressed directly and unequivocally; nothing is left to conjecture; so, to use a common expression, "there can be no two ways about it." The husband did intend and *wish* and express that intention and wish in his last will and testament, that his wife, at her death, should give one-half of the negroes and other property given to her by the fourth clause of the will to his brother and sister. The wish of her husband, so clearly expressed, imposes an obligation on *her conscience*—in other words, creates a trust which a court of equity will enforce.

The general frame of the will tends to confirm the correctness of this conclusion. The testator divides his property into three (374) classes, although he gives all of it to his widow. 1. His land he gives to her for life, with a remainder at her death to his brother John. 2. His perishable property he gives to her absolutely. 3. His negroes and bonds, etc., he gives to her subject *to a wish* that at her death she will give one-half thereof to his brother John and sister Mary, showing clearly that he intended the negroes and bonds to be in a middle state, not given for life, and still not given absolutely, but given *subject to a trust,* in favor of his brother and sister, as to one-half, after her death, in respect to which nothing was left to her discretion, or her inclinations, or her wishes; which disposition he evidently makes under the impression that, by having the *legal* estate subject to a trust, her control of the negroes, in respect to the disposal of such as she chose to sell, and in respect to the division in regard to giving them in families, would be less restricted than if he had given her only a life estate, with remainder as to one-half to his brother and sister.

But all doubt as to his intention is removed by the codicil. By it he gives the crop of cotton on hand at his death absolutely to his wife, classing it with the horses, mules, etc., and he then takes particular pains to remove a difficulty which he supposes might arise as to the increase of the negroes, and says he does not mean that his wife shall give all of the increase of the negroes to his brother and sister, but only the one-half of the increase of the negroes; treating it not as a matter left to her discretion or inclination, but as the subject of a trust which he had created in favor of his brother and sister, and which, consequently, he chose to relieve from all doubt and obscurity. His particularity in thus explaining his true meaning relieves the subject of all doubt, and makes this much stronger than any case to which we have been referred in the books.

PER CURIAM. Demurrer overruled.

Cited: Young v. Young, 68 N. C., 315.

(375)

DANIEL McLAURIN and others against JOHN FAIRLY and wife.

1. A limitation by deed "to her and *her representatives*," can only mean to her executors and administrators.
2. Where a bill set forth that certain slaves were sold at auction by an administratrix, and a bill of sale made to B, the purchaser, but it was agreed that he should hold the property, in trust, to indemnify himself against certain debts, in which he was surety for the intestate, and he paid no money; that the debts remained unpaid for nine years, and that in the meantime B married the administratrix, and took with her the slaves in question, it was *Held*, that these allegations were sufficient to make out a case against B as succeeding to the trust his wife was under to distribute, and having the legal estate by the bill of sale, the property could be followed in his hands, and *Held further*, that the statute of limitations did not run against the distributees.

CAUSE removed from the Court of Equity of RICHMOND.

Lauchlin McLaurin, the father of the plaintiff, was indebted to James Patterson in the sum of $700, and to J. C. McEachin in $1,400, for which he gave his notes with the defendant and his brother, J. C. McLaurin, as his sureties; said Lauchlin died intestate in the year 1843, and his widow, the defendant Nancy (now) Fairly, the mother of the plaintiffs, administered on his estate. After their father's death a new note was given to Patterson, with defendant John Fairly as principal, and John C. McLaurin and defendant Nancy as his sureties, and to McEachin with defendant Nancy as principal, and John Fairly and J. C. McLaurin as sureties. An order of Court was obtained by the administratrix to sell the slaves belonging to the estate for the payment of the debts, and an agreement was entered into between plaintiffs' mother, the administratrix, and said Fairly, that he should bid off the slaves for the benefit of the widow and children of the said Lauchlin, and should hold them, as plaintiffs say, to indemnify himself for and on account of his liabilities in the two notes aforesaid, and after these were paid off, he would reconvey the said slaves to the widow and children of the said Lauchlin. He did bid off the slaves, six in number, for the sum of $1,459, and having received a bill of sale from the administratrix, he at the same time executed a deed as follows: "Whereas, I did, on 12 February, 1844, receive from Nancy McLaurin, administra- (376) trix of Lauchlin McLaurin, deceased, the following negroes (naming them), for the sum of $1,459; now, if the said Nancy, or her representatives, shall pay two certain notes, one due James Patterson, where I am maker, and J. C. McLaurin and Nancy McLaurin surety; the other note payable to James C. McEachin, Nancy McLaurin maker, and J. C. McLaurin and myself securities, with all interest, costs and damages that may be accumulated on said notes, I, the said John Fairly, bind myself, my heirs and assigns, to make to her, or her representa-

tives, a title to the above mentioned negroes." Fairly paid no money on the executing of the bill of sale to him, and did not take the slaves into his possession, but left them with the said Nancy until he married her, the said Nancy, in 1852, when she, with the slaves, removed to his house, where they have been ever since. The bill alleges that these two notes were not paid off by the defendant Fairly until after he married the widow in 1852, to wit, in 1853, and that at this time the slaves had increased to the number of fourteen, and were worth three times as much as the defendant paid on the two notes, which was $3,200.

When the said notes were paid off, none of the plaintiffs were of age; the plaintiff Daniel arrived at full age April, 1853, Mary Ann in 1858, and the other two plaintiffs, Catharine and Margaret, are still under age. They aver that they never were informed by the defendant John, or their mother, the other defendant, that Fairly intended to insist on an absolute estate in said slaves until a few weeks before this bill was filed. The prayer is for a distribution of the slaves and an account of hires, etc.

The answer of defendant John Fairly says that at the time he bid off the slaves in question, there was no contract between him and the administratrix as to bidding them off in trust for her and her children, but that, knowing his liability on the two notes, and being the only responsible person, he run up the property to make it bring its utmost value, and that he thinks it did bring its full value; that after (377) the sale, for the ease and accommodation of the family, he entered into the deed set out in the plaintiffs' bill. He admits that he paid no money at the time of the execution of the bill of sale, but he says he interposed with his credit and procured for the estate a long indulgence, which it otherwise could not have obtained; that afterwards, having been urged by the creditors, he paid the debts, and then considered the negroes his. He also relies upon the statute of limitations.

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

Strange and *Buxton,* for the plaintiffs.
Ashe and *Shepherd,* for the defendants.

PEARSON, C. J. The words, "her representatives," in the deed executed by the defendant Fairly to Nancy McLaurin, the other defendant (now his wife), dated 12 February, 1844, can not be made to mean *her children,* and can have no other meaning than "her executors or administrators." It is true, by this construction, the words have no legal effect, and must be treated as surplusage. So that the deed will operate precisely as if these words had not been inserted, but the Court is bound

by the words used in the instrument, and can not substitute other words, although it may be highly probable that the latter would express the actual intention of the parties; for the province of the Court is to construe the deed made by the parties, and not to make a deed for them. From the relation of Mrs. Fairly to the plaintiffs, and her duty to them as distributees of the intestate, it is probable, nay, almost certain, that her intention would have been expressed by these words: "Now, if the said Nancy McLaurin, or *those she represents,* shall pay two certain notes," etc.; but the words used are "her representatives," and the former can not be substituted in their stead. Where the words used are susceptible of two meanings, and from the relation of the parties—the object in view, and other matters which the Court is at liberty to call to its aid in the construction of instruments, the sense in which the parties intended to use the words is shown, the (378) Court will adopt the construction which will give effect to the intention, although it may not be the most obvious one, or that which, apart from the intention, would have naturally suggested itself; indeed, so solicitous are the Courts to carry out the intention whenever the words used will allow it, that in many instances sentences will be transposed, rules of grammar violated, and the ordinary import of words departed from; many illustrations will suggest themselves to every one familiar with "the books." This will occur to anyone who has read Blackstone; A makes a feoffment to B, for life. Who's life? It may be for the life of A or B; the ordinary construction is that it is for the life of B, as it is most beneficial to him, and deeds are to be taken most strongly against the maker, but if it appear by the deed itself, or by the conveyance under which he derives title, that A had only an estate for his own life, then B will take an estate for the life of A, for otherwise the conveyance would be wrongful, and the estate would be forfeited, if A should make a different estate from that which he holds, hence there is a presumption that the intention was to make an estate for the life of A, and the Court will adopt that construction. If the feoffment had been to B for his *own life,* there would have been no room for construction; on the same principle, in our case, there is no room for construction.

There is, however, another view of the case made by the allegations of the bill, on which the plaintiffs are entitled to a decree: *i. e.,* as administratrix, Mrs. McLaurin held the slaves in trust for herself and her children, the distributees of her intestate, subject to the payment of debts; by the arrangement which she made with the defendant Fairly, for the purpose of indemnifying him as security on the two notes, and saving to her the right to redeem the slaves, which was carried into effect by offering them for sale, and Fairly bidding them off and taking a

bill of sale, *without paying any consideration,* and executing the deed to Mrs. McLaurin, the legal title vested in Fairly, but he took
(379) subject to the same trusts that attached to the property in the hands of Mrs. McLaurin, of which he had full notice, as appears on the face of the deed; consequently, the *cestuis que trustent* have a right to follow the fund in his hands, and convert him into a trustee, subject only to his right to be indemnified as the surety of their father, which they offer to do. The suggestion that this arrangement was made between Fairly and Mrs. McLaurin with an intent to defraud the other creditors of her intestate, and therefore a court of equity ought not to carry it out, comes with an ill grace from them, and is no bar to the equity of the plaintiffs, because there is no proof of any debt of the intestate remaining unsatisfied, and there is no ground on which the plaintiffs can lose their equitable interest because of a supposed fraud on the part of their trustee in which they did not participate.

There is no bar by the statute of limitations or lapse of time. No time is fixed for the payment of the two notes; Fairly married the trustee, whose duty it was to act for and take care of the interests of the plaintiffs before he paid the notes, to say nothing of the fact that all of the infants were under the disability of infancy at the first of the transaction, and some of them remain so still.

The plaintiffs are entitled to partition, and for an account of the hires, subject to the expenses and other proper allowances.

PER CURIAM. Decree accordingly.

(380)

JONATHAN WORTH, Adm'r, against ALEX. GRAY and others.

Where certain matters have been set forth in the answer, by the way of plea, and there has been replication to the answer, it is too late to except to the answer for insufficiency.

APPEAL from the Court of Equity of RANDOLPH.

The plaintiff excepted to the defendants' answer an account of insufficiency. The exceptions were overruled, and plaintiff appealed to this Court.

Graham, for the plaintiff.
Morehead, for the defendants.

PEARSON, C. J. If replication be taken to a plea in a suit in equity, the sufficiency of the plea, in respect to the law, is admitted. To take issue on the matters of law presented by a plea, it should be *set down for argument.* In this case, the plaintiff having taken replication,

the only matter open is the truth of the allegations of the plea. It follows that no exception can be sustained in respect to those parts of the bill which are covered by the plea.

We have considered the exceptions in respect to the other parts of the bill, and are of opinion that the answer is sufficiently responsive, and as full as could be expected or required in regard to transactions of such long standing. The irregularity of filing two answers, we think, is fully explained. The first answer is incorporated as a part of the second, and the plaintiff may have the benefit of both.

PER CURIAM. Affirmed.

(381)

JOSHUA HACKNEY against CHARLES GRIFFIN, Adm'r.*

1. A testator, in contemplation of a certain contingency, provided that, thereupon an estate, consisting of realty and personalty, should be divided into four parts, and distributed as follows, "One each to a brother and a sister, and their heirs"; "One part to my other lawful heirs, and the fourth part to foreign missions, to be paid over to the treasurer of that board, to be appropriated to that purpose." By another clause, he provided that, "If there should be any property, either real or personal, not given away heretofore, it is to be equally divided between all my lawful heirs."
2. The brother and sister survived the testator, but died before the happening of the event contemplated. Upon the happening of that event:
3. *Held*, that the two shares, first mentioned, descended—the realty to the *heirs*, and the personalty to the *personal representatives* of the brother and sister respectively.
4. That the third share belonged to such as were heirs of the testator *as to realty*, excluding the heirs of the brother and sister first mentioned.
5. That the share devised to foreign missions, having lapsed on account of the ambiguity of the clause which contained it, fell into the residue, and descended upon all those who were heirs of the testator *as to realty*.

CAUSE removed from the Court of Equity of CHATHAM.

This bill was brought for a partition of real and personal estate, of which the plaintiffs allege they, with the defendants, were jointly seized under the will of Joshua Williams, of which the following is the material clause:

"3d. I give unto my beloved daughter, Sarah Ann E. Williams, all the residue of my property, both real and personal (not given to my wife), to have and to hold to her and her heirs forever. Nevertheless, if my daughter should die leaving no legal heirs of her body, then and in that case my will is that her estate, both real and personal, shall be divided into four parts. One-fourth part to my beloved sister Elizabeth Hackney, and her heirs forever. One-fourth part to my beloved brother,

*This cause was decided at a former term, but was not reported at the time on account of a mistake in the facts, which required a rehearing.

Anderson Williams, and his heirs forever. One-fourth part to my other lawful heirs. One-fourth part to foreign missions, to be paid over to the treasurer of that board, to be appropriated to that purpose. If there should be any property, either real or personal, not given
(382) away heretofore in this will, it is then to be equally divided between all my legal heirs."

The will was dated and the testator died in 1848.

Sarah Ann E. Williams died in July, 1851, without issue, and Sims Upchurch administered on her estate.

Anderson Williams having survived the testator, died in the lifetime of Sarah Ann E. Williams and John Hackney, his administrator and his children are plaintiffs. Elizabeth Hackney survived the testator, but died in the lifetime of said Sarah Ann E. Williams. Her administrator and children and grandchildren are plaintiffs.

Besides the sister and brother mentioned in the will, Joshua Williams left two sisters, Dolly Bynum and Dorcas Neville, and a brother, Nimrod Williams, who are plaintiffs. He had also two brothers, Joseph and Henry, and a sister, Sarah, who died in his lifetime, and whose children are plaintiffs. The children and grandchildren of the brothers and sisters deceased being his sole heirs at law, claim to have divided among them so much of his real and personal estate as is named in the third article of the said will. The children of brothers and sisters, together with the widow of the testator, claim to be entitled, under the expressions "lawful heirs" and "legal heirs," to whatever of the personal estate of the deceased is contained in the said article, and that they are also entitled to so much of the property as was intended to be conveyed to foreign missions.

Phillips, for the plaintiffs.
Manly, for the defendant.

PEARSON, C. J. Joshua Williams died in 1848, leaving a will by which, after providing for his wife, he gives to his daughter, Ann (who was their only child), all the residue of his property, both *real* and *personal;* but if she should die leaving no child living at her death, "then her estate, both real and personal, to be divided into four parts.
(383) I give one part to my sister, Elizabeth Hackney, and her heirs forever; one part to my brother Anderson, and his heirs forever; one part to my *other* lawful heirs, and the *other fourth part to foreign missions, to be paid over to the treasurer of that board, to be appropriated to that purpose.*" "If there should be any property, either real or personal, not given away heretofore, it is to be equally divided between *all* my legal heirs."

Anne, the only child of the testator, died intestate, and without leaving a child, in the year 1851. Elizabeth Hackney and Anderson Williams outlived the testator, but died before his daughter Anne. Dolly Bynum, Dorcas Neville and Nimrod Williams are the sisters and brother of the testator, and the several other plaintiffs and defendants are the children of deceased brothers and sisters who died in his lifetime.

Elizabeth Hackney and Anderson Williams were each entitled to one-fourth of the real and personal property given to Anne, upon the contingency of her death "without leaving legal heirs of her body."

It is settled that when the person is known, but the event is uncertain, a contingent remainder, conditional limitation or executory devise is transmissible by descent and such an interest in personal property passes by succession to the personal representative. (*See Fearne.*) So, although Elizabeth Hackney and Anderson Williams died before the contingency happened, the interest of each, respectively, in the real estate was transmitted by descent to their heirs, and their interest in the personal estate passed to their respective personal representatives.

One other fourth part of the real and personal estate is given to the testator's *"other lawful heirs."*

When used in a limitation over of personal estate, the word "heirs," unexplained and standing by itself, is held to mean "distributees," or the persons entitled under the statute of distributions; but where a fund, composed of both real and personal estate, is given over to the testator's "heirs," and it is apparent that he intends the same persons to take both estates, it is settled that inasmuch as by force (384) of the word "heirs," in its appropriate and technical sense, the heir at law is entitled to the real estate, he is also entitled to the personal estate, because of the intention that both should go together; 2 Jarman on Wills, 22, 23, and notes; 4 Kent, 537, note; *Gwyn v. Murdock,* 14 Vesey, 488; *McCabe v. Spruill,* 16 N. C., 189. It follows that this fourth part, both of the personal and real estate, upon the death of the testator's daughter, vested in those persons who were then his heirs at law, to wit, his sisters and brother, and the children of his deceased brothers and sisters, who bring themselves up by the right of representation, and take the shares their parents, if alive, would have taken. But inasmuch as by the word "other," in direct reference to Elizabeth Hackney and Anderson Williams, the testator expresses his intention that they (to each of whom he had given one-fourth part) should be excluded from this fourth part, it follows that their children, who can only bring themselves up to an equality with their aunts and uncle by representing their parents, have no right to any part of this fourth.

The other fourth part of the real and personal estate is given over to "foreign missions, to be paid to the treasurer of that board, and to be

appropriated to that purpose." It is conceded that these words are too vague and uncertain to vest any interest in any person or corporation. So this fourth part falls into the residuum, and passes to the "legal heirs" of the testator. The persons entitled to take under the word heirs have been already indicated. There being no word of exclusion, the children of Elizabeth Hackney and of Anderson Williams represent their parents, and take a share of this fourth part. It is settled that the effect of the word "equally" is to require the distribution to be made per capita; *Freeman v. Knight,* 37 N. C., 76, and, as is said in that case, "whatever might be thought of these distinctions were the matter now a new one, to disregard them at this day would be *quieta movere.*"

PER CURIAM. Decree accordingly.

Cited: Clark v. Cox, 115 N. C., 98.

INDEX